

BETWEEN

**PETER HARDIE MCNAMARA
AND PATRICK STURGEON MCNAMARA
AS TRUSTEES OF THE
P H MCNAMARA FAMILY TRUST**
Appellant

AND

AUCKLAND CITY COUNCIL
Respondent

Hearing: 19 April 2011

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
William Young J

Appearances: B O'Callahan and G S G Erskine for the Appellant
D J Goddard QC and M A Cavanaugh for the
Respondent

CIVIL APPEAL

5

MR O'CALLAHAN:

May it please Your Honours, O'Callaghan with Erskine for the appellants.

10 **ELIAS CJ:**

Thank you Mr O'Callaghan. Mr Erskine.

MR GODDARD:

May it please the Court I appear with my learned friend Mr Cavanaugh for the respondent counsel.

ELIAS CJ:

5 Thank you Mr Goddard, Mr Cavanaugh. Yes, Mr O'Callaghan.

MR O'CALLAHAN:

May it please Your Honours the Council's evidence in Mr de Leur's affidavit, which was in support of the application for summary judgment which can be
10 found at tab 21 of the yellow bundle at paragraph 27, 28 and 29, accepts that at the time ABC applied on behalf of the owner of the property for a consent, it was Council's practise to firstly review the information that was supplied and secondly and this is important for this appeal, to check the building certifier's scope of engagement against the Building Industry Authority's register of
15 Approved Building certifiers and he says, "If the building certifier making application was acting within the scope of any limitations as shown, presumably on the register, at that time, the Council would accept and rely upon the document that had been submitted."

20 He goes on to give, what I say, the non controversial proposition, that it was the Council's understanding that it had no ability to question the authority of the building certifier in those circumstances. So it accepts at the time of building consent, that there was a practice of checking that the building certifier was certified. When it comes to – the nub of the issue in this case is
25 this building certifier's authority changed during the course of the building works and that came to the attention of Council in one or other of a number of ways and the Council never checked again the scope of the building certifier's authority against the building work that it was supposed to be certifying.

30 Mr de Leur in his reply affidavit after it having been pointed out in the plaintiff's affidavits in opposition that there was an opportunity at several points for the Council to have undertaken that cross-check and done one of a number of things. He says, at paragraph 43 of his second affidavit, which is tab 25,

“That I wish to articulate more clearly some of the statements I made in my previous affidavit –

5 **YOUNG J:**

Where are we looking, sorry, I missed this?

MR O’CALLAHAN:

Para 43 of tab 25.

10

YOUNG J:

Yes. Oh, I’m sorry.

MR O’CALLAHAN:

15 Now I’ve started quoting from the second sentence. “I wish to articulate more clearly some of the statements I made in my previous affidavits. The building division would check to ensure that the certificates complied with the criteria required under section 56(1) of the Act.” Now section 56(1) includes section 56(1)(b).

20

ELIAS CJ:

Where do we find it?

MR O’CALLAHAN:

25 And Your Honours can find that in the appellants’ bundle of authorities volume 3, at tab 20. So section 56(1) says, “A building certificate issued by a building certifier under this section shall, (a) be in writing and (b) identify the specific item or items that are the subject of the certificate, being items not excluded by any limitation on the building certifier’s approval.” So Mr de Leur
30 again accepts by cross-reference that the building division would check in that sense but we know in this case that they didn’t actually and it says –

YOUNG J:

What do you mean by that?

MR O'CALLAHAN:

Well, the point I'm coming to is that Mr de Leur explains in his affidavit that the Council had a way of keeping their records and that the building, one building
5 which he uses the Auckland City Environments, ACE, Ace, held the plans and the building team that he was supervising responsible for the collation, processing, or undertaking this, what he's talking in paragraph 43, didn't have those plans in their office, I'm not sure of the –

10 **YOUNG J:**

Were the plans there to review compliance with planning requirements?

MR O'CALLAHAN:

Well the plans are held by the Council because of the requirement to hold
15 them –

YOUNG J:

Yes I know but in practical terms, were they with the environmental sector because they were held there so they could make sure comply with
20 concession plans and things like that?

MR O'CALLAHAN:

Yes, yes, they came to be there because this, in respect of this building consent application, it got started by a PIM, an application for a PIM and a
25 PIM was a procedure whereby somebody –

ELIAS CJ:

What's a PIM?

30 **MR O'CALLAHAN:**

It's a Project Information Memorandum.

ELIAS CJ:

Thank you.

MR O'CALLAHAN:

In contemplation of a building project, there's a scheme under the Act for, in certain circumstances, it's a requirement to apply for a Project Information Memorandum, in other circumstances it's an option and when a person proposing to undertake a building project applies for a Project Information Memorandum, they tell the Council what it is they intend to do and the Council can indicate that there are various features of the planning or other regulatory controls that must be borne in mind when submitting a building consent application and that drives a number of features of the building consent application process and also performs the function of indicating whether that particular project might require a resource consent if that indicated a noncompliant use or something of that nature.

So in this case a PIM was applied for and a set of plans submitted with that. When the applicant, the developer, applied for a building consent, the building consent application didn't contain another copy of the plans because the plans that they were proposing under the building consent were exactly the same as the ones that had been submitted for the purpose of the Project Information Memorandum, so the building consent document simply says, or application, simply says, "Plans and specifications in accordance with project information XYZ" and so that's how the plans ended up, in a particular part of Council's records.

So when I say that, well Mr de Leur at paragraph 43 says, "The building division were checked to ensure that the certificates complied with the criteria under section 56(1) of the Act", his own evidence elsewhere in his affidavit is that the Council had, well his team, had no way of understanding whether this limitation applied to these building works because his team didn't have a copy of the plans.

ELIAS CJ:

Do you say the plans were cross-referred to in the application for building consent?

MR O'CALLAHAN:

Yes and I can show –

5 **ELIAS CJ:**

You'd better take us to that document.

MR O'CALLAHAN:

Yes. It's tab 34 of the blue bundle

10

TIPPING J:

Are we talking at the moment Mr O'Callahan about the building consent?

We're not talking about the compliance. I understood there was a course of action raised as to the consent but eh course of action raised was as to the

15 compliance certificate. Why are we looking at consent? Is this just narrative, or what is it?

MR O'CALLAHAN:

It is narrative. Because what Mr de Leur is accepting in these affidavits is the process under which he says his team check for compliance with – check for
20 authorities against the project. Now –

YOUNG J:

Is the point you're trying to make, that if, by reference to the Project
25 Information Memorandum there was a possibility for someone at code compliance certificate stage, to check with the plans, even though held in another division?

MR O'CALLAHAN:

30 Yes.

YOUNG J:

But this is really a point that's very much addressed to negligence and fact, rather than duty as a matter of law isn't it? But if their duty was to ensure that

code compliance certificates which they received and then acted on by responding to LIMs or otherwise, were properly issued, then it would be their practical obligation to have a system which enabled them to do that?

5 **MR O'CALLAHAN:**

Yes.

YOUNG J:

Showing that they had a system which, with a bit of a stretch, might have enabled them to do it, doesn't really show there was a duty?
10

MR O'CALLAHAN:

Well it does beg the question of whether there's a duty in law and I just wanted to spend a couple of minutes –
15

TIPPING J:

Would it not be helpful if you told us in a sentence or two, what the scheme of your oral argument is going to be, so that we know where you are?

20 **MR O'CALLAHAN:**

All right thank you. I was just about to conclude an introductory remark about why there's a problem here, which is saying –

TIPPING J:

25 Well there may be all sorts of problems here Mr O'Callahan but if we don't know what they're addressed to, it's not very easy to follow.

MR O'CALLAHAN:

And then, I have a one page summary of what I say the issues are, that are identified by the exchange of the written submissions and I've got essentially a work order of 1 through to 9 and I want to take the Court through those and I have a one pager that I would, I think would serve as a useful guide.
30

ELIAS CJ:

What's the point of the prefatory remarks you've been addressing to us? Is it that there was sufficient cross-reference in the material before the Council, for them to be on notice, is that the –

5 **MR O'CALLAHAN:**

Yes, it's identifying the – firstly, it's identifying that the Council has accepted an obligation and a practice, to undertake that checking procedure at building consent stage.

10 **ELIAS CJ:**

Yes.

MR O'CALLAHAN:

15 That they don't necessarily accept that's – there's any sort of ongoing duty in that respect. The problem in this case is that the authorisation changed and the Council knew that it changed and the Council, at no stage made any attempt to check whether that authorisation was relevant to these building works.

20 **ELIAS CJ:**

At what points?

MR O'CALLAHAN:

25 Well had had an opportunity to do so at any point from when it became aware of the change in ABCs authorisation and it would seem by at least April in the year following the change in the authorisations, as April 2003, that they were specifically on notice that the limitation had changed.

30 For the appellant to succeed, I don't, in my submission, have to do anything other than to say that at any time before the McNamaras confirmed an unconditional sale, or settled an – settled the sale, the Council had an opportunity to do something, so the next obvious point at which they had an opportunity to do something, was when they received a code compliance certificate and that of course begs the question first of all whether a code

compliance certificate can be issued by somebody who doesn't have authority in respect of all of the works and that's really issue number one.

5 **YOUNG J:**

Can I just – the LIM that your firm obtained, didn't say – didn't refer to the code compliance certificates, except wrongly by saying there was no code compliance certificates?

10 **MR O'CALLAHAN:**

That's right.

YOUNG J:

15 Then the vendor's solicitor sent the ABC code compliance certificate to your firm, that's right?

MR O'CALLAHAN:

20 Well the exact timing appears to be that the purchaser's solicitors, that is my firm, enquired orally of Council over the telephone on the 28th of April and Council said that – Council said that a code compliance certificate had been issued and then the vendors send it through on the 28th of April at some point of the day.

YOUNG J:

25 All right.

MR O'CALLAHAN:

So that's the –

30 **YOUNG J:**

So there's a LIM-like process, although not –

MR O'CALLAHAN:

Yes.

YOUNG J:

All right. I would've thought your best argument here is that the City Council, was in effect, required to keep a register.

5

MR O'CALLAHAN:

Yes.

YOUNG J:

10 And that it might have an obligation to take reasonable care to ensure that the register is broadly speaking, correct?

MR O'CALLAHAN:

When Your Honour refers to a register, which I –

15

YOUNG J:

Well the register is the list – it has to provide a LIM under the local government, the golf mark, as I heard it referred to before –

20 **MR O'CALLAHAN:**

Yes.

YOUNG J:

– and the obligation to provide information as to building certificates issued by building certifiers, might carry with it an obligation to take reasonable care to ensure that the information supplied as to those certificates was correct and that might enable you to say well, they should have had a system that enabled them to tell whether the certifiers were, broadly anyway, certifying within the scope of their authority.

30

MR O'CALLAHAN:

Yes.

YOUNG J:

Is that your argument, or not?

MR O'CALLAHAN:

Yes.

5

YOUNG J:

Okay. So there is a public register component to your argument?

MR O'CALLAHAN:

10 Well I hadn't – in terms of public register component, I'm not so sure that I'd thought of it exactly in those terms but I – it is our argument that the Council should have had proper procedures to enable them to determine whether a code compliance certificate that they were given by a building certifier, was within the scope of that –

15

YOUNG J:

All right, well one reason for having those procedures, is that they have to respond to LIMs.

20

MR O'CALLAHAN:

Yes.

BLANCHARD J:

There wouldn't be any requirement to have a public register?

25

YOUNG J:

No. I'm using that by analogy, I'm saying that there's a right to get information.

30

BLANCHARD J:

You're suggesting that the Council should have had its own internal register?

YOUNG J:

Yes, to which they could refer when issuing Land Information Memorandum.

MR O'CALLAHAN:

Yes, yes.

5 **ELIAS CJ:**

Do you want to hand in your outline, would that help?

MR O'CALLAHAN:

Yes please. Thank you. Now just developing the register idea –

10

ELIAS CJ:

How is that idea reflected in the statement of claim?

MR O'CALLAHAN:

15 Well, it's reflected –

ELIAS CJ:

What paragraph do we look at for that?

20 **MR O'CALLAHAN:**

Well the duties are pleaded at paragraph 5.9.

BLANCHARD J:

Which page are we?

25

MR O'CALLAHAN:

Which is at page 56 under tab 4. And it's encapsulated in the broad proposition, really like if you skip down to 5.9(e) for example. "Where ABC as a building certifier did not have, or no longer had approval because of the limitations imposed on its approval to certify items of the building works, as complying with provisions of the Building Code, or where ABC issued any building certificate or code compliance certificate without such approval to refuse such certificates as establishing compliance with the provisions of the Building Code and/or advise or warn, or to take such steps as necessary to –

30

TIPPING J:

To take reasonable care to refuse.

5 **MR O'CALLAHAN:**

Well you could say the duty is to refuse but then the duty's actually to take reasonable care, we are pleading a negligence.

TIPPING J:

10 To take reasonable care so that you don't approve when it's outside the authority is that how you would wish it to be?

MR O'CALLAHAN:

Well –

15

ELIAS CJ:

Well it has to be that doesn't it?

MR O'CALLAHAN:

20 Yes. Yes.

YOUNG J:

Well (e)2 at page 47 is perhaps the closest isn't it? Implying when an owner seeks a LIM or otherwise makes enquiries to the status of the building in terms of the Building Act, to advise that such Building Code compliance certificate is available, in fact doesn't cover it.

25

MR O'CALLAHAN:

Yes. The public register idea, oh the internal register idea, is just one way of suggesting how Council might perform the duties which we say exist.

30

YOUNG J:

Well it is point 6 on your one page list, it's far more fairly hit on that, although with the note in blue that Mr Goddard reckons it's not pleaded.

MR O'CALLAHAN:

Yes. And there's a distinction to be made from –

5 **ELIAS CJ:**

And is it a *Hedley Byrne* duty this –

MR O'CALLAHAN:

Well the distinction is about to pick up on that with Justice Young's comment.

10 It's a *Hedley Byrne* duty if we are specifically suggesting that advice was given which we relied upon, so it was negligent misstatement. That is one way of looking at it. The other way of looking at it, which is really what has been pleaded, is that underlying this, is that Council has to perform a duty of not – of doing something about a certificate that isn't given by somebody

15 authorised and there's a number of ways in which they could in practice, perform that duty and one of them is, Justice Young's suggestion, that they might keep an internal register and the reasons for that duty might be numerous and one of them, which is the one that Justice Young I perceive has hit upon, is the fact that at some point the Council is going to have to

20 provide information through LIM reports and so one would expect that if the Council had an obligation to do that, it might do something like the internal register that might assist it in performing that function and that's to be thought of in the entire scheme of the legislation and the Council's functions and informs the duty.

25

TIPPING J:

Would you settle for a duty not negligently to accept a CCC issued without authority?

30 **MR O'CALLAHAN:**

Yes.

TIPPING J:

That's that side of it.

MR O'CALLAHAN:

Yes.

5 **TIPPING J:**

Then there's this rather interesting *Hedley Byrne* of duty to warn but is the duty to warn necessary, if this duty, the first one, were accepted?

MR O'CALLAHAN:

10 No and quite often a duty to warn is simply – as seen in *Couch v AG* [2008] 3 NZLR 725, a duty to warn is simply no more than a duty accepting the underlying obligation. A duty to warn is simply accepting the underlying obligation to do the first –

15 **TIPPING J:**

So really what we should focus on, is whether there's a duty not negligently to accept a CCC issued without authority?

MR O'CALLAHAN:

20 Yes.

TIPPING J:

In whole or in part.

25 **BLANCHARD J:**

And if we get that far, the *Hedley Byrne* duty wouldn't arise separately would it?

MR O'CALLAHAN:

30 No and to be fair, that's really why it hasn't been pleaded.

BLANCHARD J:

So *Hedley Byrne* is just a distraction.

MR O'CALLAHAN:

Probably.

5 **TIPPING J:**

That was the way I was thinking Mr O'Callahan.

MR O'CALLAHAN:

10 Yes, I think – I accept that's fair and I think that's reflected actually in the tactic of the pleadings.

TIPPING J:

15 The real issue is what duty, if any, does a Council have to go behind a document that ex facie appears regular?

MR O'CALLAHAN:

Yes, the whole concept of what appears regular is an issue in itself but a document that is put up.

20 **TIPPING J:**

Put up as regular?

MR O'CALLAHAN:

Yes, put up as regular.

25

ELIAS CJ:

Against a statutory background, in which you can have flickering certification?

MR O'CALLAHAN:

30 Yes. When Your Honour says "flickering certification", before I accept that I'd better understand what it means.

ELIAS CJ:

Well, "now you're certified, now you're not".

MR O'CALLAHAN:

Yes, that's right and I thought it might be – before getting into this one page order, batting order so to speak, I thought it might be useful to take
5 Your Honours to the three forms of authority which ABC had over time. They are to be found in the blue volume at tab 27, 38 and 39. Now tab 27, I must say, isn't operative in this case, it never – it was a form of approval that ABC had prior to the application for building consent being lodged in this case but I thought it gives useful for Your Honours to see, the kind of changing, changes
10 that obviously could occur in this area of statutory control.

ELIAS CJ:

Well, what are you taking –

15 **MR O'CALLAHAN:**

The first is tab 27.

ELIAS CJ:

Yes, no but what are you taking us to it for – sorry, I'm just –
20

MR O'CALLAHAN:

Your Honour's comment was that there's a background of changing authority and just to see how quite considerably this authority might change, there is, on the facts, three different forms of authority that ABC had over a course of
25 time, either during the relevant period or immediately prior to it and those three forms of authority are at tabs 27, 38 and 39.

BLANCHARD J:

And what does that tell us?
30

MR O'CALLAHAN:

Well, it tells you that there might be some quite considerable changes in the scope of a building certifiers authority from time to time and that at least in this period it happened, two considerable changes over a short period of time and

the Council was notified of these each time so it reinforces this or supports the proposition that there is a changing authority background and also to give Your Honours some comfort, that when Mr de Leur says the practice was to check, at consent change, against these registers because on the face of it they appear complicated to the untrained eye and there is a whole list of limitations but Council accepts that they would undertake the task of checking against them for the building certifiers authority at the building consent stage.

BLANCHARD J:

10 So they're checking against a register at the Building Industry Authority, are they?

MR O'CALLAHAN:

That's right. They have access to it, they have online access to it and they are notified of changes to it in various ways.

TIPPING J:

Well presumably it is updated.

20 **MR O'CALLAHAN:**

It is.

TIPPING J:

So when you go into it, on day two, with a change on day 1, you will see the change.

MR O'CALLAHAN:

That's right and all changes were notified in a thing called *The Bulletin* and the Council got that and in respect of ABC because ABC had some significant issues with its performance, the BIA actually wrote specifically to territorial authorities with emphasis on the Auckland and North Shore areas where there was a greater incident of ABCs involvement and that letter is, well we don't have the letter itself where they wrote but the BIA have written a letter to us saying that they did that specifically which is at tab 60 of that bundle. So –

ELIAS CJ:

So the Council did, in fact, review a number of files relating to ABC ?

5 **MR O'CALLAHAN:**

Yes. When –

ELIAS CJ:

But not this file?

10

MR O'CALLAHAN:

That's right. To be fair to Mr de Leur's evidence, he says that the Building Industry Authority worked with them to identify approximately 1100 files in which were relevant to the change that occurred on the 15 4th of December 2002 and we don't have evidence as to why or how those 1100 were chosen. I could speculate, for example, it might be speculation that they were identifying types of buildings, for example but because the change that occurred on 4th December 2002, was quite significant in terms of the type of building that ABC was authorised to certify. In addition to the 20 specific code limitations that were put on it in respect of E2 compliance, so we simply don't know.

ELIAS CJ:

I am really getting very confused, I am sorry, it is almost certainly my fault 25 about the timing of all this and we don't have anything like a chronology but I also don't understand from the pleading, what action it is of the Council that you say caused loss to your client and what the timing of that was because a lot of these events occurred earlier, or these opportunities for not accepting certificates, isn't that so?

30

MR O'CALLAHAN:

Well in terms of – the building consent was granted or we don't know when it was granted but it was applied for on the 10th of August 2001. ABCs approval

was changed on the 4th of December 2002 and ABC carried out cladding inspections during the period from there until April 2004.

ELIAS CJ:

5 Wrongly?

MR O'CALLAHAN:

Wrongly – and issued but they didn't produce any certificates to the Council because they didn't have to under the scheme of the Act until it came to code
10 of compliance, they didn't actually have to produce any documentation for Council because they had told Council that they were going to certify everything and so at code compliance stage which was the 15th of April, ABC issued a code of compliance certificate and during that period – we say somewhere –

15

ELIAS CJ:

Well is it that certificate that you say the Council was negligent in accepting?

MR O'CALLAHAN:

20 Yes.

YOUNG J:

So if we take this line of argument on, the Council shouldn't have told in unrestricted, given as it were a complete tick-off as to whether there had been
25 a code of compliance certificate issued, it should have said yes we have got a document that pretends to be one but in fact ABC don't have the ability to certify this. You say then, well if we had known that we wouldn't have confirmed or settled the contract and therefore, we bought a lemon, that we wouldn't otherwise have bought?

30

MR O'CALLAHAN:

Yes.

YOUNG J:

That's the line of argument?

MR O'CALLAHAN:

Yes.

5

YOUNG J:

It's not perhaps particularly well picked up in the way the damages are claimed because probably on that basis, you would say, we paid \$3.65 million for a house that was worth one million or something, rather than we have spent two million fixing it up.

10

MR O'CALLAHAN:

Well that is a major damages issue, rectification versus loss of value but yes, that's a fair point.

15

TIPPING J:

But the key point is that they are accepting the CCC negligence?

MR O'CALLAHAN:

20 Yes, that's it.

YOUNG J:

Well they don't actually accept it do they.

25 **TIPPING J:**

Acting on it.

YOUNG J:

Treating it as –

30

MR O'CALLAHAN:

Treating it, yes thank you.

ELIAS CJ:

And what does the Council do as a result?

MR O'CALLAHAN:

Well the Council does nothing as a result, other than put it on their file and
5 then subsequently, well they did advise the plaintiff's solicitors that a code of
compliance certificate had been issued, in the unqualified way that
Justice Young has just extrapolated and they did nothing else, whereas
we say –

10 **ELIAS CJ:**

What did they have to do under the statute?

MR O'CALLAHAN:

Well we say that given that they – given that ABC wasn't authorised in respect
15 of all of the works, then it fell to Council to bear the responsibility for certifying
those parts, or for inspecting those parts of the works that ABC wasn't
authorised to certify.

ELIAS CJ:

20 Even though it didn't know. Well that is almost absolute liability in the
circumstances isn't it?

MR O'CALLAHAN:

Well we say, okay, let's talk about what they did know.

25

ELIAS CJ:

Well, no, no I am trying to understand the bones of your claim so you don't
really need to get into the facts to do it.

30 **YOUNG J:**

Isn't the better case that they had an obligation under section 44(a) of the
Local Government Official Information Meetings Act to respond to requests for
information concerning any certificate issued by a building certifier pursuant to
the Building Act 1991 and again in terms of what your best argument might

be, they therefore had an obligation to put in a system which meant that they could respond to such requests for information in an accurate way.

MR O'CALLAHAN:

5 Yes.

YOUNG J:

But that is the only statutory obligation they had in relation to this code compliance certificate, isn't it, did they have any other obligations?

10

MR O'CALLAHAN:

Well not expressly. Well section 27 my learned friend keeps bringing to my attention which is a public record section, bundle of authorities, volume 3.

15 **YOUNG J:**

Okay, well this is the other side of the coin to the local government provision?

MR O'CALLAHAN:

Yes. So that's a public record section.

20

TIPPING J:

Maybe the operative negligence actually is complying at least to the purchaser's solicitors that there was a valid CCC when there wasn't.

25 **MR O'CALLAHAN:**

Well that's the *Hedley Byrne* type duty which –

TIPPING J:

I'm just thinking aloud because this case is not very sharply –

30

ELIAS CJ:

It's not very sharp.

TIPPING J:

No.

MR O'CALLAHAN:

Well –

5

TIPPING J:

The loss derived from that action didn't it? Because it induced the purchaser's solicitors to act as if the CCC had been properly issued.

10 **MR O'CALLAHAN:**

Yes.

TIPPING J:

15 And if it had been properly issued, well you see this is where it starts to get difficult, it implies that the person who issued it, had at least had authority to issue it, from which one could infer as a purchaser, that it was likely to be sound.

MR O'CALLAHAN:

20 Yes, there's a reliance there –

TIPPING J:

Yes.

25 **MR O'CALLAHAN:**

– for somebody with the appropriate expertise or authority hasn't had a look at this.

TIPPING J:

30 From which a purchaser's solicitor and hence the purchaser, will infer that they can act, they can rely on it safely. It's not so much a duty to – well, I suppose it's –

MR O'CALLAHAN:

Well the –

ELIAS CJ:

5 There's a statutory obligation to keep records, there's a statutory obligation to respond to requests for information and the course of action must be on the failure, well on supplying incorrect information in breach of a duty to keep its records carefully, is that right?

MR O'CALLAHAN:

10 Well their supplying of wrong information is a *Hedley Byrne* type argument as in *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104 which – and this Court's heard argument and the subsequent appeal from that.

ELIAS CJ:

15 I don't know why we label these things. Really, it's not *Hedley Byrne* because that's – you've got a statutory background here, so if it's not fulfilled with reasonable care, you're straight into a duty of care relationship arguably.

MR O'CALLAHAN:

20 Yes. Well, yes that is the – it's an available course of action in that sense but whether it takes one any further than the underlying proposition that Council because it has duties that are of the type described in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and now in *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] 3 NZLR 486 (CA), that this
25 particular statutory context carves out some exceptions to that and really our point is that once you've finished carving out the exceptions, in this case you're left with something which is a position where there is in fact an area of the works where this building certifier wasn't authorised to certify.

30 Council, we say, knew of that, or could have made appropriate enquiries of its records and had no proper system or procedure to enable it to do so, to determine that and just went on ahead as if it wasn't obliged to do anything, when in fact it was, in the circumstances. So –

ELIAS CJ:

Well is your claim for nonfeasance or misfeasance I thought we had established for giving the wrong information, giving information that was wrong.

5

MR O'CALLAHAN:

Well I say it can be for both. To be fair to the way it's pleaded, it's pleaded as a nonfeasance. It's pleaded as if the Council had these duties to do the inspections, or to somehow warn the people who might enquire, or to warn the world on their records, that –

10

ELIAS CJ:

So it's a Stovin and Wise sort of case, your –

15

MR O'CALLAHAN:

All right, I'm not familiar with the Stovin and Wise authority.

ELIAS CJ:

All right.

20

MR O'CALLAHAN:

So and it can be put as a positive duty to do certain things or as a duty to warn people that those things haven't been done but whichever way one looks at it, the nonfeasance idea is prevalent throughout all of that. Then there's the separate proposition which I must say isn't expressly pleaded, my learned friend's right about that, that there is specific advice given on the 28th of April.

25

BLANCHARD J:

30

Duty to warn is again misleading. What you're saying is, "They shouldn't have received the CCC and treated it as a valid CCC".

MR O'CALLAHAN:

That's right.

BLANCHARD J:

That's really the guts of it.

5

MR O'CALLAHAN:

Yes.

BLANCHARD J:

10 And they shouldn't then have told anyone that they had got a CCC.

MR O'CALLAHAN:

That's right.

15 **BLANCHARD J:**

It's not a duty to warn.

MR O'CALLAHAN:

20 Well, yes, in terms of a – it's not a duty to positively go out there and warn people but it is saying, if we didn't accept this triple C then our records would show that there's no triple C and it's – how you then categorise it as –

BLANCHARD J:

25 Well they shouldn't have said they had one when they didn't have one, is the argument.

MR O'CALLAHAN:

Yes.

30 **TIPPING J:**

Because everything else flows inevitably from their accepting it or treating it –

MR O'CALLAHAN:

Yes.

TIPPING J:

– as a valid CCC, isn't it? All else flows from that.

5

MR O'CALLAHAN:

Yes, yes because if they hadn't treated it as a valid code compliance certificate, their records would have shown that there was no –

10 **TIPPING J:**

Then they wouldn't have told the purchasers' solicitors, in effect that it was a valid CCC.

MR O'CALLAHAN:

15 And their records would have shown that there was no code compliance certificate and the purchasers would've relied on that position.

TIPPING J:

Well they'd have acted differently if they'd been told there was no valid CCC.

20

MR O'CALLAHAN:

Yes. So the idea of whether it's the nonfeasance or the malfeasance in terms of whether it's failing to do anything, or whether it's doing something positively, I think gets confused in this case because of the statutory background of an organisation that has statutory obligations to keep the records, so when you've got that obligation, your records will show something and it is an absence or positive step, so if there's confusion about the true nature of the duty, it perhaps arises because of that difficulty or that context.

25 **TIPPING J:**

30 And is the source of the duty not negligently to treat it as valid, the proposition in due course, they may have to give information to members of the public and they have a duty not negligently to give out erroneous information. So you relate that back if you like –

MR O'CALLAHAN:

That is one source. I also say that the other source is starting from the front end of what are the Council's duties under the cases such as *Hamlin* and
5 *Sunset Terraces* and have, you know, they – the Council have approached us as if when there's a building certifier who's indicated they're going to do a code compliance certificate, they are off the hook entirely, they don't do anything and we say, "Well look that's not actually the case because it depends on the scope of that certifier's authority and it may change from time
10 to time".

So there's a situation where the Council need to be vigilant about the authority of the people who are going to be put up to get the certificates and it may be a moot point as to when they need to do something about it but the very final
15 stage where they most definitely can do something about it and should, in my submission, is that when that person finally comes up with a code compliance certificate or a certificate that purports to be one. And so –

TIPPING J:

20 All these are tricky points but in the end you're going to have to get round this good faith –

MR O'CALLAHAN:

Yes.

25

TIPPING J:

– issue, aren't you?

MR O'CALLAHAN:

30 Yes, yes, I am. So, I wonder if I can just work through this order that I have on the issues. I've given some importance to issue one because it actually underlies all that we've been discussing already and you'll see – and the proposition is that, or the issue is whether the Act permits a code compliance certificate to be issued by a building certifier who is not authorised in respect

of the whole of the works other than in respect of energy works. I've said that because it's a particular carving out in the section.

Now, you'll see on the left-hand side on the red, throughout this I've said,
5 given a summary of what we say and then on the blue a summary of what the respondent says. This issue is really important because if we're wrong about this, if it's possible for a code compliance certificate, a certifier to give a code compliance certificate for works that he's not authorise to certify, then the underlying issues in this case end up falling away, we fall at one or other of
10 the hurdles and if not at some of the duty points, then we may, we must fall, eventually at good faith stage.

It's also important because, as I've said in issue two, which is what follows from resolving it, the rest of the discussion has to be in light of the answer, so
15 what the Court of Appeal never did in my submission is determine the issue and then when discussing duty et cetera, they inform a lot of the argument by some lack of precision about whether the Act permits a code compliance certificate to be given by anybody that happens to be on the register, or somebody who's actually authorised in respect of all of the work that
20 certificate relates to. I also, as we see, if we go down a bit further on the right-hand side in the blue columns, I've indicated that, in my submission, my learned friend's submissions at some points start to circle back on that point as well. So, I say that a clear interpretation must be given to the Act one way or other, in relation to whether a code compliance certificate can be issued by
25 any building certifier who happens to be on the register.

TIPPING J:

You make the concession in the blue 2?

30 **MR O'CALLAHAN:**

Yes.

TIPPING J:

Because the Council could well have assumed that the unauthorised work was covered by a certificate from someone who was authorised?

MR O'CALLAHAN:

5 That's right, yes.

TIPPING J:

I'm sure that's probably right?

10 **MR O'CALLAHAN:**

Yes. So it's a critical issue and it's first up and it informs the rest of the argument. I have actually addressed it in the written submissions at paragraph, at paragraph 1(a) and the Roman numerals that follow. I give seven reasons why under this legislation it's not contemplated that a – as
15 anybody on a register can issue a code compliance certificate it has to be someone who is authorised in respect of all of the works, except for energy works.

TIPPING J:

20 So you can't aggregate individual compliance certificates and have a head certifier if you like, who may never have done anything, theoretically –

MR O'CALLAHAN:

That's what I say, I say, at least ultimately to the – this is one of the points –
25 ultimately to the absurdity that you can have someone that actually has potentially no expertise at all in relation to the works in question because you'll see in those authorisations, it's all limited down to certain types of buildings and things and so it could be someone who has no authority at all in respect of any and therefore no expertise, no ability to exercise judgement and who
30 has in fact not actually inspected anything and I –

TIPPING J:

But if they've got certificates from the authorised people apropos of say the six ingredients if you like –

MR O'CALLAHAN:

Yes.

5

TIPPING J:

All of which are perfectly sound in themselves, you say there can't be a head one certifying the whole lot in reliance on those six?

10

MR O'CALLAHAN:

Yes I do. And just on that one point about why that might be in terms of policy reasons, the issuing of a code compliance certificate isn't just a simple arithmetical aggregation of components at work, it's actually judgement, exercised independently that all of the work as a whole and put together, complies with the code and it is a, it's quite distinctly a separate judgement in that respect.

15

So, I say that as from a matter from what's intended by policy of the scheme of the Act, is that somebody needs to have the acknowledge expertise, i.e. authorised, in respect of something that would enable them to exercise that judgement and territorial authorities are the backstop and territorial authorities are assumed to have the expertise across the whole range but a building certifier doesn't necessarily. I don't know if there is anyone who does but not necessarily and in this case they didn't.

20

25

BLANCHARD J:

So a territorial authority cannot rely on the certificate but you're saying that a building certifier can't, with the exception of energy works?

30

MR O'CALLAHAN:

That's right. Because they in fact have to, everybody has to rely on energy work certificates from energy work certifiers, special carved out provision in the Act.

YOUNG J:

But your argument presumably is that in relation to the weather-tightness of the property, there should've been a separate certificate from someone who
5 was permitted to certify where the approved solution hadn't been invoked?

MR O'CALLAHAN:

That's right.

10 **YOUNG J:**

So there would've been two building certificates, one from ABC and one from the external moisture person.

MR O'CALLAHAN:

15 Yes. And that in this case the only person who could then issue the code compliance certificate would be the territorial authority.

TIPPING J:

So if they'd got the appropriate certificate from the moisture people –
20

MR O'CALLAHAN:

Yes.

TIPPING J:

25 ABC couldn't have as it were, adopted that for the purpose of a composite whole certificate?

MR O'CALLAHAN:

That's what we say. And as I say, there's seven reasons. Just going through
30 them in order. Roman 1 on my submissions, section 50(2) gives a list of documents that a building certifier should accept as establishing compliance with the code. This list excludes building certificates and I'll take Your Honours to that. It's again in tab 20 of the volume 3.

ELIAS CJ:

What section?

MR O'CALLAHAN:

5 Fifty.

ELIAS CJ:

Okay.

10 **MR O'CALLAHAN:**

The style of this, there's a section headed, "Establishing compliance with the Building Code" and it starts by talking about what the territorial authority shall accept as establishing compliance with the provisions of the Building Code and the first thing mentioned is a building certificate and it's got the all code
15 compliance certificate but that's for other reasons, it's for the present purposes, read a building certificate to that effect, issued by a building certifier.

ELIAS CJ:

20 Sorry, which provision?

MR O'CALLAHAN:

One (a).

25 **ELIAS CJ:**

Yes, I was looking at the wrong –

MR O'CALLAHAN:

A building certificate to that effect issued by a building certifier under
30 section 43 or 50, it's 56 the section, of this Act. The second thing is a determination and the second thing is a accreditation certificate and there's other things there. Then subsection (2) does the same in respect of a building certifier. It says, "A building certifier shall accept the documents set out in paragraphs (b), (c), (d) and (f) above." So what it misses out is (a).

BLANCHARD J:

But isn't that just saying that it doesn't have to accept a building certificate?

5

MR O'CALLAHAN:

Yes, my learned friend has made that point, so it's not conclusive, so I'm not saying that answers it, it's conclusive, I'm saying it's a point, this is about
10 "shall accept". The question is, can they accept? So we look a bit further. The second point I make is that the Act defines building certifiers by reference to their authorisation and accordingly its inherent in the use of the term building certifier throughout the Act, that the certifier is authorised in respect to the particular work in question. There's no – the best way to put it perhaps is
15 to say, there's no such thing as just a building certifier. Somebody is only a building certifier in respect of the matters that they are authorised to certify and that is according to their entry on the BIAs register of building certifiers.

TIPPING J:

20 Does this mean that if you're very, very busy, you can't get someone else to do something as part of the whole exercise, who is certified for that particular work, you can't rely on that, you've got to do it personally in other words.

MR O'CALLAHAN:

25 That would be the effect.

TIPPING J:

That's the effect of it.

30 **BLANCHARD J:**

The definition of building certifier is a person approved by a building certifier by the authority under part 7 of the Act.

MR O'CALLAHAN:

Yes.

BLANCHARD J:

ABC was at all times approved as a building certifier.

5

MR O'CALLAHAN:

10 But under part 7, you – section 53 says and it's under part 7, says, "That whenever the authority approves a person as a building certifier it shall cause to be entered on a register" various personal details and then the specific provisions, yes.

BLANCHARD J:

15 But the fact it may have had limitations didn't mean it wasn't a building certifier.

MR O'CALLAHAN:

20 Well it's not a building certifier for the things that are limited, that within the limitation. It's just –

BLANCHARD J:

Well maybe but it's still a building certifier. This is all very subtle.

YOUNG J:

25 Section 43 permits a code compliance certificate be issued on the basis of certificates from more than one building certifier.

TIPPING J:

Forty-three?

30

YOUNG J:

Section 43(2), "Where applicable the owners shall include with the advice that the building has been finished, any building certificates issued by building certifiers under section 56 of the Act." So that envisages that if there's

limitations on authority then those gaps will be filled by getting another building certifier.

MR O'CALLAHAN:

5 Yes but then the TA would do the code compliance certificate.

YOUNG J:

And then the TA would issue the code compliance certificate?

10 **MR O'CALLAHAN:**

Yes.

YOUNG J:

15 And (b) a code compliance certificate issued by a building certifier as I recall under section 56(3) has to be within the constraints of the authority, or is that not right?

MR O'CALLAHAN:

Well that's the question, under section 56(3).

20

ELIAS CJ:

So –

YOUNG J:

25 Oh I see, so you say, it is implicit in the scheme of the legislation that a building certifier can only certify within the limitations that have been imposed?

MR O'CALLAHAN:

30 Yes.

ELIAS CJ:

But only a certifier who can certify as to the whole work, can issue a code of compliance?

MR O'CALLAHAN:

Yes.

5 **ELIAS CJ:**

And otherwise it's the –

YOUNG J:

It would be an odd system otherwise.

10

ELIAS CJ:

What?

YOUNG J:

15 It would be an odd system otherwise.

ELIAS CJ:

And otherwise it has to be the territorial authority. Is there any other option in the scheme of the Act?

20

MR O'CALLAHAN:

No. And of course, I have to say it's implicit because it's not expressed and as His Honour Justice Blanchard said, it's not the only interpretation that could possibly be derived from the actual text but all of these points put together in my submission, support the implication of meaning. And then the third point –

25

TIPPING J:

Fifty-six (3) –

30 **MR O'CALLAHAN:**

Sorry Your Honour?

TIPPING J:

Fifty-six (3) which is the authority to issue code compliance certificates vested in building certifiers –

MR O'CALLAHAN:

5 Yes.

TIPPING J:

10 I know the singular can sometimes include the plural but the natural reading of it, is it is a single building certifier, may issue a code compliance certificate. So you –

MR O'CALLAHAN:

15 Yes, well it would always be –

TIPPING J:

That seems to conflict at 43, oh then it's the TA of course that issues the –

MR O'CALLAHAN:

20 Yes, that's right.

TIPPING J:

Yes I see.

25 **MR O'CALLAHAN:**

Well –

TIPPING J:

30 But that doesn't necessarily mean that that building certifier can't rely on a sub certificate from another building certifier?

MR O'CALLAHAN:

It doesn't necessarily mean that but I'm saying it's the implication from the scheme that that's what's intended.

TIPPING J:

Well why should that be so as a matter of policy, it's the little boxes argument is it? The policy is not to have different people certifying little boxes of a building, there has to be some overall judgement as to the building as a whole.

YOUNG J:

I think your argument might be that if there are little boxes, that if the certifiers authority doesn't cover the whole thing, another certifier has to certify that and then the local authority issues the code compliance certificate.

MR O'CALLAHAN:

Yes, I suppose there is a – yes, yes that's right.

TIPPING J:

I'm looking at the reasons why Parliament might have wanted to have just a single mind, if you like.

MR O'CALLAHAN:

Well I've got seven of them. Some of them textual and some of them are more like what Your Honour's indicating, so Roman 3, which is really, I discussed it earlier and I think it's the point Your Honour is enquiring about at the moment. "It is inherent in the scheme of the Act that this building certifier will be competent to make judgements about whether work complies or does not comply with the Act, which obliges a building certifier to notify the TA that a notice to rectify should be issued where the certifier considers any particular building work does not comply. It is a natural inference that where a building certifier is not authorised, the certifier does not have acknowledged competence in that respect, so have been unable to make such a judgement."

TIPPING J:

But that doesn't address the point that why they are entitled to rely on the judgement of someone else.

MR O'CALLAHAN:

Well because it's the over – the thing about the code compliance certificate is it's the overall judgement.

5

TIPPING J:

Well it's the little boxes argument. You're not certifying individual little boxes, you're certifying a composite whole.

10

MR O'CALLAHAN:

That's right. Yes. So –

15 **YOUNG J:**

But unless the other thing, there would be no record of who had certified aspects of the work, if one certifier can issue an unqualified code compliance certificate without referring to what another certifier has certified.

20 **MR O'CALLAHAN:**

That's right, you would be relying on the private record keeping of a building certifier with no public – an obligation to keep public record but Council would. So with a territorial authority doing certification, where the little boxes are ticked off by more than one person, each of the certificates in relation to each part of the building works, has to be put up onto the Council file and then the Council makes its judgement about code compliance and issues a certificate. That whole record keeping wouldn't be present if the certifier, the private certifier did it and you just wouldn't never know whether that private certifier has done part of it, some of it, all of it, none of it.

25

30

ELIAS CJ:

Is there any comparable record keeping obligation imposed under the Act on certifiers? You don't need to take time to go through it, I was just asking you if –

MR O'CALLAHAN:

Well the record keeping obligations appeared to be in 26 and 27 and they apply only to territorial authorities. I'm not aware of any similar provisions or, you know, components of that applying to building certifiers.

BLANCHARD J:

You'd think there would be such a provision, which you'd want to have even where one person was fully competent and was issuing the CCC.

MR O'CALLAHAN:

Well perhaps Parliament decided that where there is one person, then you know who it is and you can go to them. And it's not – and if it's not contemplated that that one person might then have relied on a whole bunch of other people, then that perhaps is a fair legislative judgement but if the legislature was told, or had contemplated that there would be, you know, several, or more than one people certifying underneath the certifier who appears on the record, you might have expected some provisions around that for the purposes of public information.

BLANCHARD J:

That's a stronger argument, if you can point to a requirement for the issue of a CCC to keep records. It's rather odd if there is no such requirement.

YOUNG J:

Was (g), was there a need – did this work engage part (g) of the Building Code, so was there a separate certificate for energy?

MR O'CALLAHAN:

Yes, there was. There's a specific legislative provision for that and one might understand why because of the special nature of electrical and gas work.

YOUNG J:

Gas fitters and plumbers or whatever?

MR O'CALLAHAN:

Yes. And that is a very special field of expertise and people who do that, tend
5 to only do that as a matter of practice, so –

YOUNG J:

Is that addressed in the Building Act, or is it –
10

MR O'CALLAHAN:

It's in the Act that – well the Energy and Gas Works Certificate, carving out of,
in terms of what people can rely upon, that's specifically in section 50. Like a
building certifier shall accept the documents set out in those subsections, (b)
15 through to (f) and one of them is (e), which is, "Insofar as compliance and any
requirements imposed by any regulations made under the Electricity Act or
the Gas Act, is compliant with any particular provision of the Building Code, a
certificate issued pursuant to either of those Acts or the Electrical Registration
Act, or pursuant to any such regulations and to the effect that any energy work
20 complies with any such requirements." So it specifically contemplated that
both the territorial authority and a building certifier can rely on those
certificates and therefore the scheme is that only those authorised energy
works certifiers can do that and they are not certified under the Building Act,
they are certified under the Electricity Act and the Gas Act, or the other Acts
25 that go with them such as the Electrical Registration Act.

TIPPING J:

Mr O'Callahan, have you considered, you may be coming to it and I'm sorry if
I'm jumping ahead but the requirement of insurance, these building certifiers
30 have to have appropriate insurance don't they?

MR O'CALLAHAN:

Yes they do.

TIPPING J:

As to whether or not that rather suggests that a degree of probability that they're required to do everything that they're authorised to do, if you like because it would be a bit odd, if you were, in effect, insuring a sub certifier.

5

MR O'CALLAHAN:

Yes, well how would that work? The sub certifier – every person who is on the register has to sign up to an approved scheme of insurance, so the person who actually did certification would have their own insurance, covered for them.

TIPPING J:

15 They would be covered for issuing a certificate.

MR O'CALLAHAN:

Yes.

20 TIPPING J:

And that presumably is on the premise that they themselves are going to do the work, that they're not going to engage someone else to do it for them. That was just a thought running through my mind, it may not be all that strong.

25 MR O'CALLAHAN:

Yes. I have another point about insurance and how it forms the policies of this but I'm not sure that that one –

TIPPING J:

30 No, it may have no traction at all. It just struck me that – it may be a bit odd.

MR O'CALLAHAN:

As a building certifier who wasn't going to do all the work –

TIPPING J:

It's going to be insured for all the work.

MR O'CALLAHAN:

5 Well it's going to be insured for giving code compliance certificates.

TIPPING J:

Mmm.

10

MR O'CALLAHAN:

And I suppose if it was allowed to, it would have insurance.

TIPPING J:

15 It's hardly envisaged, well I suppose if the sub-person was also an insured certifier, then they would be covered for their part in it I suppose.

MR O'CALLAHAN:

Yes.

20

TIPPING J:

It doesn't seem to quite fit to my mind.

MR O'CALLAHAN:

25 No well I – it's an odd thing, the whole issue of insurance is interesting because one could contemplate two things and that is that the insurance would be, well in fact we know it was only available on a "claims made" basis which is probably not an unreasonable assumption, so that if these certifiers go out of business or stop undertaking certification work, they no longer have
30 any insurance that people can subsequently rely upon and of course the claims usually arise well after the work is done.

So there's no protection, well there's not adequate protection for home owners in that context. The next point is that one might contemplate that the

operative insuring clause of policies would only insure work that somebody's authorised for. So if you do work outside your authorisation you may not be insured for it at all but that would depend on the exact wording of the policy and I –

5

TIPPING J:

I'm sorry, I may have raised something that –

MR O'CALLAHAN:

10 Yes.

TIPPING J:

– gets us nowhere.

15 **MR O'CALLAHAN:**

Yes, well, that – well, no, it's – on that particular point I'm not sure that I – you would still have to – it would raise interesting insurance issues if you had a code compliant certifier who was underlyingly relying on other people and, although you could rely on the insurance policies down the track, what place
20 would the overarching insurance policy have in the context and there might be conflicting insurance policies and there might be – I say that could be a reason, there are these others that I've also referred to.

So, at 4, I've said that it's, "Inherent in the scheme of the Act that persons who
25 might rely on a building certifier's work have the security of an applicable insurance policy and, in this respect, section 56(5) prohibits a building certifier from issuing a triple C unless an approved scheme of insurance applies in respect of any insurable civil liability of the building certifier that might arise out of the issuing of the certification. It can be expected that a building
30 certifier will not be able to obtain insurance in respect of building work for which it's not authorised." So that – look, I'm sorry, I've, may not be being very sharp on this point. But Your Honour has indicated that if there was underlying – whether it would fit with a scheme of insurance to have a code compliance certifier who didn't certify all of the work –

TIPPING J:

Look, I think I may have –

5 **MR O'CALLAHAN:**

– applies in respect of his, his work.

TIPPING J:

I wouldn't worry about this, Mr O'Callahan. If it's sort of distracted you, I'm
10 sorry.

MR O'CALLAHAN:

Yes, right. Well, anyway, the point I make about it there is at 4. And then
at 5, section 56 includes, which includes the power for a building certifier to
15 issue code compliance certificate is headed, "Issue of Building Certificates,"
which suggests that, despite the lack of a statutory definition, a code
compliance certificate is intended as a form of building certificate. Now, there
are other indications to the contrary in the sense that, my learned friend's
quite rightly pointed out that there is talk of compliance certificates and
20 building certificates in the same sentence sometimes. But it is interesting that
section 56 is headed with that marginal note, "Issue of Building Certificates,"
and we don't actually have – you know, is this idea of a building certificate
being one or other of a partial one or a complete one.

25 **BLANCHARD J:**

Code compliance certificate is defined –

MR O'CALLAHAN:

Yes.

30

BLANCHARD J:

– as, "A certificate issued by a territorial authority or a building certifier,"
there's no definition of "building certificate", oddly enough.

MR O'CALLAHAN:

So, whether this use of the concept of a building certificate is all types, which might include a code compliance certificate, is a possible interpretation.

5 **ELIAS CJ:**

Sorry, say that again?

MR O'CALLAHAN:

10 The proposition is that the term "building certificate" is, unless the context specifically means otherwise, can be, is used, perhaps loosely, in the Act as referring to encompassing a building certificate that is for part of a work and a code compliance certificate, which is a species of building certificate and –

ELIAS CJ:

15 Well, it is, it's a species of building certificate which certifies that all of the building work complies with the relevant provisions of the Building Code.

MR O'CALLAHAN:

20 Well, that's my proposition and, if that's the case, then the interpretation ought, when one looks at what, that a building certifier, in order to give a building certificate, must be certified in respect of, must be authorised in respect of the work that's the subject matter of the building certificate, that that applies to code compliance certificates as well as the partial building certificates. So, in section 56, when it says that it must identify the specific
25 provisions of the Building Code with respect to which those items are certified, being specific provisions in respect of which the building certifier is approved, that that is meant to include code compliance certificates.

TIPPING J:

30 I wonder, Mr O'Callahan, whether the tenor of 57(3) assists you too because if a building certifier becomes unable for any reason to do what it was originally intended he should do, it's not suggested he can get someone else in, it's suggested he's got to notify the territorial authority and the territorial authority then –

MR O'CALLAHAN:

Yes.

5 **TIPPING J:**

– does whatever is missing, so to speak.

MR O'CALLAHAN:

Yes and that's the point I think I've made at III, I think I've made –

10

TIPPING J:

Is it? I'm sorry, I didn't appreciate the force of it at III. I think it's 57 rather than 56.

15 **MR O'CALLAHAN:**

Oh, well, I've used 56(4) but there's also, yes, there is also 57.

TIPPING J:

I think 57(3) is rather more direct.

20

MR O'CALLAHAN:

Yes, there is.

TIPPING J:

25 Because when you couple subsection (3) with subsection (4) and it does say, "Unable for any reason"...

MR O'CALLAHAN:

Yes.

30

TIPPING J:

– it doesn't envisage at all that you'd get someone who is able to come in and do it under you.

MR O'CALLAHAN:

No.

TIPPING J:

5 I would have thought that's probably the most striking –

MR O'CALLAHAN:

I just, I think perhaps I've –

10

TIPPING J:

– point in your favour.

MR O'CALLAHAN:

15 Yes, I should have referred to that in III as well, 57, the whole concept, the whole scheme of notifying so that somebody else, the territorial authority, can come in.

TIPPING J:

20 Well, the whole scheme of it is that if you can't do it the TA comes in.

MR O'CALLAHAN:

The territorial must do it, yes. And then my VI. I now have, in VI I'm having a look at the passage of the Bill and I elaborate on that later in the written submissions and it's probably apposite to do that now. Well, it's quite simple. The Bill, which is at page, sorry, tab 24 of the bundle, includes clause – I'm just wondering if I've got the right section there – clause 37 – I'm sorry, I've referred you to the wrong tab, I believe, it's tab 25. Yes, the equivalent clause in the Bill is to be found in tab 25 and if Your Honours go to the third leaf of that tab, which is two pages photocopied together, so you've got pages 4 and 5 on the third leaf and then there is clause 37 and sub (2) of it says – well, hang on. I'm very sorry, I have, there was a – that clause 37 that's there is the equivalent of what the Bill was actually passed as. There was an immediately prior clause, 37, which I have referred to at para 42 of the

25

30

written submissions and it's from the second reading of the Bill on the 20th of November 1991 –

YOUNG J:

5 Well, it's at page 53 of tab 54, isn't it?

MR O'CALLAHAN:

Thank you.

10

ELIAS CJ:

Tab –

YOUNG J:

15 Tab 24, page 53.

MR O'CALLAHAN:

Thank you. Yes, thank you.

20 **YOUNG J:**

It was clause 37(2).

MR O'CALLAHAN:

Yes, which is that, "The owner shall include with the advice any certificates
25 from a building certifier that the building work complies with the Building Code
and shall, where a building certifier has had full responsibility for supervision
of the building work, also include a code compliance certificate from that
building certifier." So at the second reading of the Bill there was express
reference to the concept of having full responsibility for supervision and, as I
30 say in –

YOUNG J:

There's a change because it, another change, that the original refers to certificates from a building certifier, it now refers to certificates from building certifiers.

5 **MR O'CALLAHAN:**

Yes. In addressing Parliament, the Minister of Internal Affairs said and this is at page 15 of the submissions, "The building certifier will also be able to carry out an inspection role during construction in place of the territorial authority. If the building certifier is involved with an inspection that is relevant to all aspects of the Building Code, the certifier will be able to issue a code compliance certificate that states that the completed building work now complied with the code. When a building certifier does not have that degree of involvement, the territorial authority will have the responsibility for issuing the code compliance certificate. In doing so, the territorial authority will be able to rely on relevant certificates from a building certifier to the effect that the provisions relating to particular aspects of the Building Code have been met."

So the point at issue there was – well, the point that I'm using that to demonstrate, is that there was an understanding through the process that, as drafter in that clause 37, the building certifier had to have responsibility for all of the work in order to issue a code compliance certificate.

Clause 37 got changed up a bit but there's no, in terms of what we now finally have and which has been passed as section 43 but there's no debate or commentary on the changes and therefore the submission I'm making is that the drafting changes that were made were in order to change some of the terminology and wasn't intended to affect any substantive change to what was being provided for in the section and what we've ended up with is, although they've saved some loose language in other respects, we've ended up with this now not being obvious, if section 43 is the only thing you've ever read but it may have been obvious, or may have been thought to have been obvious to the people who effected the changes, that the underlying concept of having to have full supervision was not being obliterated, it was the context in which the

final form of drafting was settled. So, I say that's another reason why one might favour the interpretation we contend for.

ELIAS CJ:

5 Is that a convenient time to take the adjournment now?

COURT ADJOURNS: 11:30 AM

COURT RESUMES: 11:50 AM

10 **MR O'CALLAHAN:**

I was at page 3 of the written submissions. I'd just finished developing the point at Roman 6 which relates to the passage of the Bill as an interpretative tool and the final reason for the interpretation I contend for at Roman 7. "Allowing the certifier to issue code compliance certificates where they're not
15 authorised in respect of the whole of the works, would give some strange and obviously unintended results. Would mean that a person who is not authorised in respect of any of the work could issue a code compliance certificate in reliance on certificates issued by other certifiers. Whoever gives a code compliance certificate must answer the separate question of whether
20 that person is satisfied that the building works as a whole comply with the code and territorial authorities are required to have that expertise. Someone who has no expertise relevant to any aspect of the work cannot be expected to exercise that judgement." That's that point that we've – I think we've touched on that several times through the discussion of those sections.

25

Unless the Court has any questions about that interpretation topic, I propose to move down the order.

ELIAS CJ:

30 Yes, thank you.

MR O'CALLAHAN:

So I've addressed with you what follows from resolving this and so then we move into issue 3 which is whether the Act expressly overrides the Council's *Hamlin* duties and just before I start directly on issues 3 and 4, which, 4 being
5 whether the Act by necessary implication overrides the Council's *Hamlin* duties, I think I need to revert back, to some extent, to the discussion that I had earlier with the Bench concerning what is the duty here.

I have argued for it to be – what's left over from the *Hamlin* duty and I've just
10 used *Hamlin* duty as a shorthand, given the change that has affected to the legislation by virtue of the scheme for building certifiers, so and the theory of the argument that I've developed in the written submissions is that the Council has duties, unless, has duties to inspect to a formal inspection role and that's defined in the Act widely in this Court and *Sunset Terraces* accepted that it
15 was the wide definition applied to the tortious obligations as well, which is to do all those things reasonably necessary to put it in a position to be able to eventually decide on compliance.

So, if – it doesn't matter if you haven't actually done it, if you're supposed to
20 do it and don't do it, then there's scope for tortious obligations. And while I've developed it as saying that the Council would be excused from any of those duties, where there is an authorised certifier doing certification work in respect of parts of the work that they authorised to do and as noted in *Sunset*, obviously if that's the case, there is no scope for liability in respect of the
25 Council because the Council has to accept the certificates and then it becomes the contestable regime that's set up under the Act for the certifier to be responsible for that subject to BIA, et cetera.

Of course if the Council actually knows that this – the certifiers are doing
30 something which isn't right, i.e. they're negligently inspecting work, you know inspecting work that doesn't comply, then there's scope for the Council to engage those contestable provisions and perform it's – you know invoke the procedure that's provided for in the Act. But this isn't about that, it's about where the Council, where the certifier doesn't have the authority in respect of

aspects of the work and so where it doesn't – so where the certifier doesn't have the authority we say the Council is the one that becomes responsible for those aspects and the scheme that's provided for is one that allows for, as in this case, the certifiers at the outset to say, "Well we're going to be responsible for all the certifications on this building but as in this case there's a possibility that that authorisation might change".

So we say the Council has to be, will ultimately become responsible for those undertaking that work and therefore needs to be alive to that possibility and as I said earlier, it's moot as to whether the Council should have done something immediately upon becoming aware of the limitation, i.e. here's a building that ABC is certifying, we know their limitation – there's now been a new limitation put on their authority and also their scope of authority in respect of types of buildings reduced, should we have a look at our files and see whether ABC can continue to certify these buildings.

TIPPING J:

You're not directly pleading the duty to inspect as I understand you, you are simply pleading a duty to have proper procedures, putting it in shorthand along the lines we discussed earlier in the morning.

MR O'CALLAHAN:

Yes, the background to that though is because one of the strands that gives you informs that, is this eventual responsibility for Council to become involved and so –

TIPPING J:

But the duty not negligently to rely on, if you like, a document which purports to be a CCC but isn't. It's quite different isn't it, conceptually from a duty to inspect, which is all that we had in issue in *Sunset Terraces*.

MR O'CALLAHAN:

Well –

TIPPING J:

I know there are linkages but conceptually it's quite different. I don't know why you're worrying about *Hamlin*.

5 **MR O'CALLAHAN:**

Well all right; But let's address that directly, I – *Hamlin* is useful to this argument for me because it cuts across a lot of the questions about proximity and the Stovin and Wise problem. Because it's established that in this area, Councils have these responsibilities and we say that logically, once you've
10 done the subtraction, from that is the areas that are carved out, they're still left with some responsibility and all of those policy concerns remain invoked.

If you were to look at it afresh and say, "Well we're not actually talking about inspection, we're talking about something around this certification issue and
15 accepting the code compliance certificate, one still approaches it, still approaches the question of whether a public body should be responsible in tort for exercise and non-exercise of statutory powers, from the established background of the New Zealand authorities on building legislation. The Council is the statutory player who will eventually be responsible for this work
20 and the question is whether it is or isn't."

TIPPING J:

Isn't your argument that they have a duty to have a proper system and to administer it carefully, whereby they don't give misleading information to
25 purchaser's solicitors?

MR O'CALLAHAN:

Well the duty is to not give them misleading information, or the duty is to have records that are appropriate.
30

MR YOUNG:

Well the duty is to take reasonable care, actually. It's to take reasonable care in respect of the establishment and operational system which facilitates the

statutory scheme, which is that people can get information from Councils as to whether there are building certificates.

MR O'CALLAHAN:

5 Yes. And how one then performs that duty is –

TIPPING J:

What the Courts have been prepared to do in the inspection role, can be relied on as an indirect indicator that in this particular context, a similar,
10 broadly similar, duty is owed to those who seek information from Council.

MR O'CALLAHAN:

Yes.

15 **ELIAS CJ:**

Or perhaps as also who purchase subsequent purchases, that dimension of *Hamlin*.

BLANCHARD J:

20 Have you pleaded this in terms of a failure to inspect?

MR O'CALLAHAN:

Page 47 of the pleadings says, "To take such steps as reasonably necessary in respect of enforcing compliance of the Building Code or establish that items
25 of the building complied, including steps in respect of amending the building consent and inspecting the building works itself issuing any building certificate or code compliance certificate."

TIPPING J:

30 What page are you on, 47?

MR O'CALLAHAN:

Yes, 47 of the pleading which is page 57 of the case and over onto 58, tab 4. Because it depends when one is prepared to accept on the facts, that the

Council should have become involved because of course we continue to assert that the Council knew relatively shortly after the limitation went on the register, the Council actually knew about it and that the Council had the information available to it that would enable it to determine that ABC was no longer authorised in respect of parts of this work.

BLANCHARD J:

To put it simply, I think what you're arguing here is that there's a carve out from the *Hamlin* duty that would have otherwise applied, the statute has carved something out.

MR O'CALLAHAN:

Yes.

BLANCHARD J:

But where the Council becomes aware or should become aware that that carve out can't operate –

MR O'CALLAHAN:

Yes.

BLANCHARD J:

– then you're back to *Hamlin*.

MR O'CALLAHAN:

That's right.

TIPPING J:

But indirectly you are pleading, in these circumstances, a duty to inspect.

MR O'CALLAHAN:

Yes. Well, actually we expressly pleaded.

TIPPING J:

Well, that's in page 47.

MR O'CALLAHAN:

47 and 48, III.

5

TIPPING J:

Yes, I see.

ELIAS CJ:

10 Sorry, what paragraph is it?

MR O'CALLAHAN:

It's 5.9, sorry, 5.9(e) –

15 **TIPPING J:**

B.

MR O'CALLAHAN:

– IIIB.

20

ELIAS CJ:

Sorry, I can't remember which volume it is.

TIPPING J:

25 Page 57.

MR O'CALLAHAN:

Okay, it's the first volume, the white case on appeal.

30 **ELIAS CJ:**

Yes, thank you.

MR O'CALLAHAN:

Tab 4.

ELIAS CJ:

Thank you.

5 **TIPPING J:**

And all you'd have to have for strike out purposes is an arguable case for such event.

10

MR O'CALLAHAN:

Yes, yes. That's why I've referred to this point being moot about when they would have, should have actively begun doing something in respect of this building because that'll be a –

15

TIPPING J:

Well, I have to say personally I see your problem in this case, at this stage of it, as being the good faith against it, that's my – it may not be the views of other members of the Court but that's where I think you've got your, where you've got your work to do.

20

MR O'CALLAHAN:

Well, I – yes, well, of course, that's up to the Court as to whether they accept the other points that get there but I'm very –

25

TIPPING J:

Well, if you can't over that hurdle –

MR O'CALLAHAN:

30 Of course.

TIPPING J:

– nothing much else matters.

MR O'CALLAHAN:

I'm getting there.

ELIAS CJ:

5 You can always reply on those points, Mr O'Callahan.

MR O'CALLAHAN:

Well, the good faith aspect is actually part of my argument, so we're actually,
on the issues we come back down, we're coming down to, once we've
10 skipped over the duty aspects –

ELIAS CJ:

Yes.

15 **MR O'CALLAHAN:**

– we get into what is meant by good faith and in fact, in my written
submissions, I've said, "Look, in my submission, this is actually quite simple,
it's about the carve out and the invoking of the *Hamlin* principles." It also has
the *Hedley Byrne* element although, I suppose, in my written submissions I
20 didn't articulate it in the way that Justice Young has developed the argument
this morning, in terms of considering, you know, the duty underlying you to
keep an internal – well, performing a duty by keeping an internal register,
keeping accurate records. That is probably a better – well, it's another
available part of what, of what's occurring here but I've said the statute sort of
25 resolves a lot of this and makes it easy for us by saying that, pushing the
difficulty into the good faith. So, the Council, the Council relies on things that
are put up as code compliance certificates or other certificates and the
question is whether they have acted in good faith and the –

30 **YOUNG J:**

Well, isn't the first question whether this is a code compliance certificate?

ELIAS CJ:

Yes.

YOUNG J:

I mean, if it's not a code – I mean –

5 **MR O'CALLAHAN:**

Well –

YOUNG J:

– you can take a narrow approach to this section –

10

MR O'CALLAHAN:

You can.

YOUNG J:

15 – which I thought you would want to take but the section 53 is only engaged where the code compliance certificate in issue is one that was issued under section 53 and 56. This wasn't, end of story.

MR O'CALLAHAN:

20 Yes.

YOUNG J:

And the other argument is that you really have to read words into section 53 to get it to work, you have to argue that it applies to, in good faith in reliance of
25 the document set out in subsection (1) or subsection (2) of the section, or purporting to be such a document.

MR O'CALLAHAN:

Yes.

30

YOUNG J:

So there's a semantic argument.

MR O'CALLAHAN:

Yes. Well, if you take the narrow – and I haven't taken in the written submissions but if – and I did in the Court of Appeal argue that section 50 sub (3) just simply isn't invoked, where the code compliance certificate is invalid and then my learned friend had –

5

YOUNG J:

But that – I mean the semantic issue only takes you so far, would section 50 subsection (3) have anything to bite on if you took a narrow approach?

10

MR O'CALLAHAN:

Well that's – I'm not going to argue the narrow approach, I haven't argued in the written submissions because that – it raises all sorts of difficult questions about what is the purpose of section 59 sub (3) because section 50 sub (3) bites potentially in all sorts of different ways. It bites – it could bite where Council know that the underlying work is negligent, I'd say Council actually came to know that the building work itself didn't comply, yet there is a valid code compliance certificate which says that it is.

15

20

YOUNG J:

Say they have grounds to suspect -

ELIAS CJ:

But if it knew that.

25

YOUNG J:

– I mean that's probably not going to be the case, it might be where they have grounds to believe there might be a problem but is it their responsibility to go over or behind a certificate?

30

TIPPING J:

Do you accept then, that it covers a purported certificate? I put that to you absolutely direct?

MR O'CALLAHAN:

Yes, yes I do.

TIPPING J:

5 You do?

MR O'CALLAHAN:

Yes.

10

OUNG J:

I suspect that might be end of story Mr –

ELIAS CJ:

15 Yes, it might well be Mr O'Callahan.

BLANCHARD J:

I think that's game set and match.

20 **MR O'CALLAHAN:**

Well maybe then I – it's not – perhaps I need to clarify what I mean by the response to that. What we say is that if a certificate is put up to Council that appears to be valid in the sense that – the question is "What does Council know that could –

25

YOUNG J:

No it's not. I would've thought the question, the first question, which you may have sold the pass on, is, is this a certificate which applies to which section 53 applies. Doesn't really matter what the Council knows if you answer that in a particular way.

30

ELIAS CJ:

Because on your argument, one would have thought that this was a case where the certificate carried to borrow from another area of law, it's death wounds in its head.

5 **TIPPING J:**

Inside its head, not on its face.

ELIAS CJ:

10 Because this is not – this is not a certifier who could have given, on your argument, the code compliance certificate.

MR O'CALLAHAN:

15 Yes. Yes, what I've – the argument that I've developed in the written submissions, is that where Council – a defence might be available where Council had no way of telling that the certificate that's been put up to them is invalid. So if they relied upon it in a way that was in good faith, then the section might bite. What we say is that the Council in these circumstances, had every way of telling –

20

YOUNG J:

But that's going to the facts.

TIPPING J:

25 Could we just step back a bit Mr O'Callahan and say subsection (3) of section 50 would not be necessary, unless there was something wrong with the certificate. Because if there's nothing wrong with the certificate then there's no possibility of civil proceedings being taken for reliance on it.

30 **MR O'CALLAHAN:**

That's right.

TIPPING J:

Do you accept or not that far?

ELIAS CJ:

I would be careful.

5 **YOUNG J:**

Well it might have to be something wrong in behind the certificate.

TIPPING J:

Yes, yes.

10

YOUNG J:

15 So if you could construe it broadly, I think what Justice Tipping says must be right.

ELIAS CJ:

Well that's right and that's why but if it is that on its face, it is invalid, it might be different.

20

MR O'CALLAHAN:

Well this whole question of "on its face or not on its face" the – if – I'm struggling to work out as we're debating, what the difference is between my formulation and the Court's formulation.

25

YOUNG J:

Well your formulation is you've got to get to say the Council didn't act in good faith, the alternative formulation is that section 53 doesn't apply, good faith doesn't come into it. There's quite a bit difference.

30

MR O'CALLAHAN:

Yes.

YOUNG J:

Particularly when you probably can't show absence of good faith.

MR O'CALLAHAN:

Well, all right, well I – and this is perhaps not – it's not ideal.

5

McGRATH J:

Can you offer your perception Mr O'Callahan as to what the purpose of section 50(3) is?

10 **MR O'CALLAHAN:**

The purpose of section 50 sub (3) in my submission, is where a territorial authority has before it, documents – which are given, I suppose this actually raises the difficulty being read, that Justice Young has pointed to and perhaps I do need to do a little bit of backtracking and I know it's not ideal but in the Court of Appeal I made the submission that section 50 sub (3) doesn't bite at all in this case because it simply doesn't apply. It was an invalid certificate and –

15

BLANCHARD J:

20 But why aren't you making that argument here?

MR O'CALLAHAN:

I think the reason why I haven't done is because I developed an argument that the good faith provisions are there to resolve difficulties where it might be said that, how could Council – where Council, how was it that Council could know about this. In terms of the *Hamlin* duties where you carve out the exceptions and you say that Council might still be under the obligation to undertake inspection role, when it's been shown a – given a building consent certification application which says that a certifier is going to be involved all the way through.

25

30

That, it seems on the face of it, a little unfair that Council might suddenly have these duties sprung upon it when it was acting under the assumption that those duties weren't alive. So and the answer to that in terms of making a

comprehensible scheme, it seemed to me, was that Council are excused from the non-performance of those *Hamlin* type obligations, where they'd acted in good faith and reliance on one of the documents and what that lead me into and what I say in written submissions is that they've actually, really the
5 reliance in that sense is on the document that they were given, the building consent application document and the building certificate that went with it, which said that we are going to be certifying for the rest of this building. So that's when I say –

10 **ELIAS CJ:**

Well I really don't think it's necessary for you to give an explanation. The important thing is for us to understand what your argument is here. I mean the fact of the matter is surely that this statute sets up both a certification process in terms of the substance of compliance and an accreditation
15 process. If the Council and it could apply in its section 43(2)(a) mode as well in section 43(4)(b) mode, if a Council receives a certificate from someone who is not approved to give it.

MR O'CALLAHAN:

20 Yes.

ELIAS CJ:

Against the background of registration and public notification, why should that, whether it's itself then relying on it to give a code of compliance, or it's
25 accepting a code of compliance that isn't provided by somebody who is approved to give it. Why shouldn't that be end of story, that section 50(3) doesn't apply?

MR O'CALLAHAN:

30 Yes.

ELIAS CJ:

Section 50(3), on that view, would apply to the substance of what is certified.

MR O'CALLAHAN:

Yes. Look, I think where I've been lead into – I got myself – the difficulty in this I suppose is the starting that I've taken which is the *Hamlin* duties because when you're looking at the scheme of the Act from a perspective of
 5 when should Council recognise that they're now back on in terms of the *Hamlin* duties, perhaps there's scope there for section 50 sub (3) to bite in respect of that first document that Council relied upon where ABC said we're going to be doing the inspections but the –

10 **YOUNG J:**

But don't just look – this is the fairness of the duty just come into whether, whether the point immediately above section 50 subsection (3) that is whether there is a duty. If it's appropriate in accordance with policy in the scheme of the Act to impose a duty, well, then you don't get the section 50 subsection (3)
 15 anyway.

MR O'CALLAHAN:

Okay, so when, yes, so when we get, yes, that's probably the answer with respect. When we get to the other aspect of it though which is the reliance
 20 and the code of compliance certificate, I think I do have to do some backtracking from what I said, the approach I've taken and say that it's, yes, is simply a duty of, a question of whether there's a duty or not sections 50 sub (3) the good faith section can't apply in respect of a certificate that is not valid under the Act.

25

McGRATH J:

Mr O'Callaghan, isn't it that the purpose of section 50(3) at least to some extent to avoid the necessity for the Council to have to go behind the document that's given to it?

30

MR O'CALLAHAN:

Well, in part and I say in part because when we say go behind the document, what is it that we're going behind it for? One is and there's two areas, one is going behind it for the purposes of establish - of second guessing whether the

certification that the building is in accordance with the Building Code is, is a, is correct or not. The other is the authorisation point which is a building certifier says I'm giving you a building certificate but that person isn't actually authorised, so we say that it's at that point where the Council does need to go
5 behind.

YOUNG J:

Well, it's –

10 **McGRATH J:**

I accept that there will be cases, one can contemplate cases where a certifier has no authority to give certificates of that kind at all but let's assume that we're dealing in this area with cases where someone's authorised to certify as to compliance to a certain extent, wouldn't the purpose of subsection (3) be
15 that the Council didn't have to go beyond the document to look into whether it was within the extent of its authority? Isn't that – well, that's just if we're looking at this in a purposive way –

YOUNG J:

20 Well, there are two approach – I mean, there are two approaches and they can be put in a number of ways. One is the Council obviously has to accept the substance of what an authorised certifier says –

MR O'CALLAHAN:

25 Yes.

YOUNG J:

– does the Council have to accept the certifier's claim to be accredited?

30 **MR O'CALLAHAN:**

That's right and it's that point where I say no, yes.

YOUNG J:

So if I had gone along and purported to be a building certifier and the Council didn't bother to check me against the BIA list, would it be entitled to say, "Well, we were jolly negligent but we didn't act in bad faith and therefore it was purported to be a build – issued by a building certifier and there we're off the
5 hook," and that's an extreme position. The intermediate one we're dealing with is someone who is a building certifier but not on this postulated situation authorised to certify this work.

MR O'CALLAHAN:

10 Yes, yes. So the answer that I would put, I say there's two possible answers to the question, one is that section 50 sub (3) simply isn't invoked in that situation because it's an invalid certificate. The other possible answer is that if you do want to interpret section 50 sub (3) to bite in some circumstances in respect of that question, it's then a matter of understanding or interpreting
15 what good faith requires in the statutory context and the –

ELIAS CJ:

Yes, that's your fallback argument –

20 **MR O'CALLAHAN:**

I suppose it has to be the fallback, yes.

ELIAS CJ:

– that's the further one, that' the next stage which we haven't really engaged
25 with you on yet but you really should finish this part of the argument before you go onto that.

MR O'CALLAHAN:

Yes, well, recognising that it's not how I've put it in the written submissions.
30 I say that section 50 sub (3) might bite in, if the argument is that Council is actually relying upon the earlier building certificate where ABC said we're doing it. It doesn't bite where, where the question is about the, the acceptance of the code compliance certificate because it's an invalid certificate and it can't be one that section 50 sub (3) refers to and –

TIPPING J:

Can I suggest to you a possible intermediate solution which is that if you look at section 50 subsection (1) you'll see that the Council must accept the following documents et cetera, et cetera, et cetera, provided that, in our case, 5 the document is issued by a building certifier, ergo, if it's not issued by someone who is, if it's issued by someone who is not a building certifier at all, then the document is a nullity, if you like, for present purposes, it's invalid but if it is issued by a building certifier then both it's – both in qualitative terms and 10 in authority terms, the Council is obliged to act upon it and we are here dealing with that intermediate position.

MR O'CALLAHAN:

15 Well, I answer that by saying, no because –

TIPPING J:

Well, you have to but why? But why in terms of the language and purpose of this section.

20

MR O'CALLAHAN:

Because –

ELIAS CJ:

25 Like a little bit pregnant, isn't it? Don't you have to take a purposive approach to, that you're certified for particular purposes.

MR O'CALLAHAN:

Yes.

30

YOUNG J:

And say the Council knew that ABC wasn't certified to do this, would it still have had to accept the certificate?

TIPPING J:

Well, it would clearly arguably not be in good faith if it knew. That's why I say it is –

5 **YOUNG J:**

Well, that's section 53, well, what is the other section you're –

TIPPING J:

10 – I know it's section 53 but I'm looking at section 50 sub (1) as the lead-in, if you like, for subsection 3.

YOUNG J:

Yes, mhm.

15 **MR O'CALLAHAN:**

Yes, okay, well, section 50 subsection (1) says the territorial authority shall accept and the first thing is a building certificate or code compliance certificate to that effect issued by a building certifier under section 43 and that –

20 **TIPPING J:**

Well it is –

MR O'CALLAHAN:

Yes but that but that depends, yes,

25

TIPPING J:

– to that effect by a building certifier and then we come onto the protection that if it's not in good faith –

30

YOUNG J:

But it has to be issued under section 43 –

MR O'CALLAHAN:

Forty-three, yes, so –

YOUNG J:

Say the City Council's ACE division said to Carmel Properties or whatever but
5 hey, this doesn't actually cut the mustard because ABC has lost its ability to
certify for this. Could Carmel say well, you just, we just don't get there
because this is by a building certifier, it purports to be under section 43 and
you can't raise that question because there's no good faith issue here.

10 **TIPPING J:**

Well, I accept there are two, I mean, there are really two views of this open.
The question I think, as my brother McGrath put it, is really what best suits the
whole purpose in the regime as a whole? How much looking behind the face
of certificates does this section envisage?

15

MR O'CALLAHAN:

Yes, the scheme in purpose includes this register, right, so the register sets
the authorisation and all of these terms and that's why partly I reminded the
Court in paragraph 2 of the importance of resolving the first issue because as
20 soon as you interpret this in, consistently with the concept of the register and
that people are authorised only in respect of the register so that a
code compliance certificate can only be given by somebody who is authorised
in respect of the register and a building certifier is only somebody who is as
good as the authorisation, then the interpretation that a territorial authority is
25 not obliged to accept something that doesn't qualify is open.

TIPPING J:

It's pretty unsatisfactory, you know, that your written submissions were in a
certain form and you've now – because frankly I haven't really thought about
30 this much, this particular point because I didn't think you were taking it.

MR O'CALLAHAN:

Now, look, I accept that.

TIPPING J:

I mean it's really the only point that is going to get you home and you didn't take it.

5 **BLANCHARD J:**

What work will there be for subsection (3) if you read everything from section 50 subsection 1(a) into it? In other words, that it has to be a certificate issued by a building certifier who has all the necessary authority and it's issued in compliance with section 43 or section 56. Would there in fact be any
10 work for subsection (3) if it's read that way?

ELIAS CJ:

The substance of what is certified.
15

BLANCHARD J:

But the substance isn't a problem for the Council.

YOUNG J:

20 Well perhaps can I put this proposition. Say there are two building certifiers. The Council perhaps has reservations whether one of the certifiers has given a good certificate. At the end of the day it will issue a certificate saying, the code compliance certificate is satisfied on reasonable grounds that the building complies. And it's entitled to say, "Well this certificate, even though
25 we had reservations about it, was one we will required to accept under section, subsection (1) and we-re not liable and negligent for issuing the code compliance certificate on the basis of it because of section 50 –

BLANCHARD J:

30 But if they were required to accept it, that's the end of it.

MR O'CALLAHAN:

Well section 50 sub (3) begins with the words, "For the avoidance of doubt".

BLANCHARD J:

That's the argument that I thought Mr Goddard was hinting at in his submissions which I must say, also lacked some clarity on this point.

5 **TIPPING J:**

It means doesn't it that they're not liable if – it must at least mean that they're not, subsection (3) that they're not liable if the building certifier was negligent.

ELIAS CJ:

10 Yes.

BLANCHARD J:

15 And they had no reason to. Well how could they possibly be negligent in those circumstances?

MR O'CALLAHAN:

Well I suppose it –

20 **BLANCHARD J:**

So subsection 50 subsection (3) doesn't have any work to do.

ELIAS CJ:

25 Because under section 43 they don't have to accept, is that it?

BLANCHARD J:

Well they have to accept it under section 50 subsection (1) that's the problem.

MR O'CALLAHAN:

30 What I would accept is the only way this can bite in the situation we're talking about, is if – first of all it's for the avoidance of doubt, so something that's put up as for the avoidance of doubt, might be there just to cover off a possibility just in case you thought this wasn't clear enough.

YOUNG J:

A belt to the section 50 subsection (1) braces?

MR O'CALLAHAN:

5 Yes. So it's said that they shall accept these things as compliance. But what if there was a situation where they just knew that that it didn't comply. They knew there wasn't reasonable grounds.

TIPPING J:

10 Well then they wouldn't be in good faith I guess.

MR O'CALLAHAN:

Well, that's where it bites.

15

YOUNG J:

Maybe they would have to.

MR O'CALLAHAN:

20 Maybe they would because this is only for the avoidance of doubt.

YOUNG J:

Well say they just had a different opinion.

25 **TIPPING J:**

Well if they know someone isn't certified, either in whole or in part, then I would've thought that they could hardly rely on it but they've got to accept it. But it's a really, it's a conundrum here, it's circular in a sense.

30 **MR O'CALLAHAN:**

Yes, well if section 50 sub (3) wasn't there and the – and it was suggested that a territorial authority was negligent for accepting a certificate that was directed to accept under section 50 sub (1) when it – there was compelling evidence that the Council was subjectively convinced of that the work didn't

comply with the Building Code and somebody said, “Well you’re negligent for accepting it” and they would say, “Well I refer to this” and then the legislature perhaps has thought, “Well maybe that’s moot, we can’t predict what a Court would say to that necessarily, so we’re going to put in a “for the avoidance of
5 doubt” provision.” And like a lot of things that are for the avoidance of doubt, they maybe create more doubt because –

TIPPING J:

That’s your best line all morning.

10

MR O’CALLAHAN:

I have to have one Your Honour, I’ve got a lot of making up to do. Because
15 then it seems to suggest that in the absence of good faith, well the question is that in the absence of good faith, would someone, would the Council be liable and it maybe said perhaps that in a circumstance where they you know, really were, had compelling evidence and they were subjectively convinced it to be compliant with the Building Code, it would not be in good faith to have relied
20 upon it.

YOUNG J:

Well it might, the cases tend not to be that extreme. For instance, they may have a particular view that a building system doesn’t apply with the Building
25 Code and they themselves may make a practice of not approving it, whereas they know that ABC has a different view and does approve it.

MR O’CALLAHAN:

Yes.

30

YOUNG J:

Now, I would’ve thought it was consistent with the scheme of the Act for them to have to defer to ABCs opinion –

MR O'CALLAHAN:

Yes.

YOUNG J:

5 Or on an issue of that nature.

MR O'CALLAHAN:

Yes.

10 **YOUNG J:**

So, it's hardly likely to be a situation where they know –

MR O'CALLAHAN:

Unless they invoke the contestability.

15

YOUNG J:

– that there weren't any nails put in or something, it's not going to be that situation that would've been in the mind of the legislature.

20 **MR O'CALLAHAN:**

Well, there are contestability provisions which the territorial authority can invoke.

TIPPING J:

25 I would've thought the purpose of the legislature within the whole scheme of having these independent certifiers and getting the TA out of it, is that unless the TA is dishonest it's protected from acting under the – what purports to be a certificate. Frankly, that's my current thinking.

30 **MR O'CALLAHAN:**

All right, well okay. If responding to that proposition, that proposition firstly accepts that section 50 sub (3) might apply to a purported certificate.

TIPPING J:

Mmm.

MR O'CALLAHAN:

If one is to accept that, then we have, in my submission, a completely different
5 playing field and it's at that point that I would say that with reference to the
cases on good faith, that your understanding in good faith needs to be quite
different to the understanding – no because there are two, there were two
lines of – two distinct lines that are referred to in *Mid Density Developments*
10 *Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 (FCA) and not
overturned by the High Court of Australia in *Bankstown City Council v*
Alamdo Holdings Pty Ltd (2005) 223 CLR 660 (HCA) and one of them is about
subjective dishonesty, malice, ulterior motive, et cetera and the other and I'll
get the words precisely.

15 **McGRATH J:**

And you've referred to this in your submissions, haven't you?

MR O'CALLAHAN:

I have, yes.

20

ELIAS CJ:

Now do you want to expand upon your written submissions because we
have –

25 **BLANCHARD J:**

Well I think we probably do need to get taken to these cases at least, or to the
paragraphs.

TIPPING J:

30 Your first stance is we don't get to good faith. Your second stance is if we do,
there is here arguably lack of good faith.

MR O'CALLAHAN:

Yes. And that does, to a large degree, well there were two questions there. One is what is good faith? And the other then is applying whatever test you adopt to the facts and so we've got it – that's the final thing.

5 **TIPPING J:**

You do have a pleading of knowing don't you?

MR O'CALLAHAN:

Yes.

10

TIPPING J:

That they knew?

MR O'CALLAHAN:

15 Yes.

TIPPING J:

It's not very specific pleading, it doesn't specify who knew in the Council –

20 **MR O'CALLAHAN:**

No.

YOUNG J:

It's sort of, lots of people knew lots of different things and put them together.

25

TIPPING J:

Yes and you aggregate them.

MR O'CALLAHAN:

30 Yes, can I take these points one by one? Because the first one is the two strands of good faith and that is *Mid Density*.

ELIAS CJ:

Where do we find that?

MR O'CALLAHAN:

Mid Density is –

5 **TIPPING J:**

Eighty-two?

MR O'CALLAHAN:

Yes, volume 1, tab 11, it's the final case.

10

BLANCHARD J:

Eleven?

MR O'CALLAHAN:

15 Yes.

BLANCHARD J:

Of volume 1.

20 **MR O'CALLAHAN:**

On page 298, about two-thirds of the way down, there's the paragraph beginning, "Good faith". "Good faith in some context identifies an actual state of mind, irrespective of the quality or character of its inducing causes, something will be done and remitted in good faith if the party was honest albeit careless." And it notes, "That in that context, abstinence from enquiry which amounts to wilful shutting the eyes, maybe circumstances from which dishonesty may be inferred. On the other hand good faith may require that exercise of caution and diligence to be expected of an honest person of ordinary prudence."

30

This, the City Council urged, was what was required by the present statutory context. The appellant submitted, there's a plain absence of good faith. So, then they discussed the authorities and referred to *Siano v Helvering* [1996] 13 F Supp 776, with what the Judge there described as two divergent

meanings. The first was the broad or subjective view which defines him as describing an actual state of mind irrespective of it producing causes and the other construed the words objectively by the introduction of concepts such as absence of reasonable caution and diligence.

5

TIPPING J:

Well, that's closely equivalent to without negligence.

MR O'CALLAHAN:

10 Well, no, no, it's, it's not. It's that one could expect – it's probably helpful to work in how I say this applies to the facts of this case because with the exercise of – in a situation where Council has all of this information at its fingertips, what it hasn't done is it simply hasn't made an enquiry of its own records. It hasn't gone to the plans to look at them to perform the function
15 that Mr O'Sullivan says can be easily performed, in which my learned friend for the purpose of this hearing, is, had to accept and does accept that when you look at the plans and I put the colour coded highlighting appendices onto the written submissions, when somebody with a knowledgeable eye looks at those, it's immediately apparent that the limitation on this certifies authority is
20 invoked by these building works and in terms of that limitation on the register, the only way you could ever work it out is to look at the plans because it's about whether or not the work is contemplated to be in accordance with the acceptable solution or not isn't, you're not going to get there by understanding the usual information that Council might collect, such as, whether it's a
25 detached dwelling or whether it's a multi-level unit or multiple units, or whether it's got a body corporate or not, which are some of the other constraints on ABC authority.

You could only ever work that out by looking at the plans. Council has a duty
30 to keep the plans and did, in fact, have them. So it could have worked that out in a jiffy, we say. That's going to be the case at trial and like in the *Mid Density* case itself, where the Council officer simply didn't make the proper enquiry of its records in order to answer the request for information, we say here, when considering whether to accept this document, i.e. turning

one's mind to the question of whether this is a validly issued document or not and whether the person is authorised, that leads immediately to, given the type of limitation on ABC, it leads immediately to needing to look at the plans to establish whether it is or not and they simply didn't do it and there's an explanation as to why not in the affidavit and the explanation is because it was held by another division. Now, that's just the Council's own choice as to how to –

ELIAS CJ:

10 Is your argument really that this isn't negligence, this is a failure to act faithfully –

MR O'CALLAHAN:

Yes.

15

ELIAS CJ:

– in terms of its statutory obligations or statutory responsibilities?

MR O'CALLAHAN:

20 Well, once we get to this quest – if we're needing to invoke the good faith, well, if the Council has the good faith –

ELIAS CJ:

I thought we were, I thought that's where we were?

25

MR O'CALLAHAN:

– yes, yes, so in this part of the discussion, yes, yes. It's something other than negligence, it's what Your Honour's just describing.

30 **YOUNG J:**

Pretty similar though. It's sort of a gross negligence.

ELIAS CJ:

Oh.

YOUNG J:

Yes, didn't even try to put in place a system?

5 **MR O'CALLAHAN:**

No, it's, yes, it's a lack of good faith. That's what it is, on the, on the second strand as enunciated and developed and explained in *Mid Density*.

ELIAS CJ:

10 Well, it's a shrug?

MR O'CALLAHAN:

Yes.

15

TIPPING J:

If we're passed your first point, in other words, we're against you on your first point, this is the hypothesis, then it must be seen in the context of a duty to accept and the question then is what is it that makes it lacking good faith to accept this purported certificate? It's not a question of whether they should have done various things, unless it was, it's got to bear on the duty to accept, I would have thought.

20

MR O'CALLAHAN:

25 Well, you're in the, in interpreting the good faith, what's meant by good faith in this statutory context, you have to look at the statutory context and I say the statutory context if you are importing the purported certificate into it, then you're opening us to, well, some form of responsibility for Council to – although on the face, it doesn't actually, it isn't actually a valid certificate.

30 Has, is it, you're allowing a defence in good faith.

TIPPING J:

See, I think your best argument here is that you plead and it must be taken as capable of proof that they knew of the limitation, therefore, the argument is

that it was not acting in good faith against that knowledge to rely on it. That seems to me about your only – that should have known I think is very problematical. Your pleading, however, as well as that is that they knew.

5 **BLANCHARD J:**

And then there's a question of who they is.

TIPPING J:

Yes.

10

BLANCHARD J:

I'd have to say I've got some doubt about the argument that says that you can
15 aggregate pieces of knowledge within a body corporate and attributed all to
the body corporate and then say you're acting in bad faith.

MR O'CALLAHAN:

Well, the cases that do that rely on the duty to communicate and receive the
20 information and the expectation that one could, i.e. one line is duty to
communicate and receive and the other is an expectation of communication.

YOUNG J:

But often these sort of arguments tend to arise where someone is acting in a
25 way which is to their advantage and where they have every motive to, as it
were, turn a blind eye to something and the Courts are doubtful about allowing
that sort of claim of ignorance to succeed and I think *The Bell Group Ltd
(in liq) v Westpac Banking Corporation (No9)* [2008] 239 case is like that. I
agree *Mid City* isn't like this but *Mid City* is in some ways similar to this. This
30 is a local authority that is effectively required to answer a question and does.

BLANCHARD J:

But there's no, there's no question here of somebody having had a duty to
communicate which hasn't been carried out. This all goes one way,

doesn't it? Whoever got this certificate failed to make an enquiry that they perhaps should have made but I don't know that anyone else had a duty to communicate that information to them.

5 **MR O'CALLAHAN:**

Well, the expectation of enquiry is one of the strands of the aggregation of knowledge. The, I – to take another example where it's found that you can't, that no such situation exists is to say the insurance case is where somebody applies for a, I can't remember the exact facts but it's very much like this
10 one way or the other, somebody applies in a North Island office for a motor vehicle, for an insurance policy and makes a disclosure of criminal activity or something, then they go to Invercargill and they apply for a home and contents policy and they don't make that disclosure and it's argued that the insurance company knew, it's not a material non-disclosure because
15 they knew because it was disclosed to the Auckland office on the, on the other policy and the, the Courts there might say, well, there's no expectation on the insurance company enquiring into its records in that way because they're different branches, different types of policies, different timing, all the rest of it.

20 **BLANCHARD J:**

That's the *Re Chisum Services Pty Ltd* (1982) 1 ACLC 292 case, isn't it, from memory?

MR O'CALLAHAN:

25 Yes, I think that's right. So just as in the opposite – so, this is actually a sort of a nice opposite to that where a Council has the obligation to keep these records. It has an obligation to keep the building consent documents and it's not exactly irrelevant to the building consent team what the building consent plans are and, in fact, it's very relevant to the performance of their functions
30 what the building consent plans are. How else are the people in the building team really going to perform their functions? So, just because Auckland City had this – the peculiarity of this case was and I imagine it's repeated across a number, where the because the plans came under the PIMMS application it

got put in a particular place and then they knew they had it but they just didn't, didn't bother looking at it. As Her Honour the Chief Justice said, it's a shrug.

TIPPING J:

5 I would have thought most people, whether versed in the intricacies of the law or not, would say that the Council made a good faith mistake.

MR O'CALLAHAN:

Well, the Council – knowing that these certificates are always going to be valid
10 or invalid against the scope of authorisation, what did this Council do to work that out? Well, we don't know what it actually did. It potentially did nothing, or it might have done something partial, like looking at whether it was a multiple-unit development or something of that nature, I'm not sure, there's no evidence about what they actually did. But what we know is that they had,
15 these records and it's just the peculiar nature of their own organisation, where they'd chosen to put them in another office, it meant that the person looking at the building consent, the code compliance certificate, wasn't, did have them in front of him or her so didn't look at it and that's like a systematic system failure and if they didn't have adequate systems that's not good faith.

20

ELIAS CJ:

I suppose that if the statute assumes that the territorial authority is capable of good faith and bad faith, it must have some, the statute must have some notion of aggregation.

25

MR O'CALLAHAN:

Well, yes because the territorial authority can't, it can only act through its various players and the they'll, either they'll be officers of the territorial authority assigned to this task and that task and the whole idea is that there's
30 record keeping and that there are files and that the files can be accessed and the records can be accessed.

ELIAS CJ:

I wonder whether in fact good faith, although it is a term that one finds across the law but I wonder whether perhaps good faith should be looked at in terms of the Act, for responsibilities of the territorial authority under the Act?

5 **MR O'CALLAHAN:**

Yes.

TIPPING J:

I think that was part of the motivation of the Court in *Mid Density*.

10

ELIAS CJ:

Yes, yes.

15 **TIPPING J:**

To view it in the context, the very precise statutory context. I see Justice Gummow's hand actually in this piece of work.

ELIAS CJ:

20 Well it's hidden, isn't it.

MR O'CALLAHAN:

Yes, so the –

25 **McGRATH J:**

That's reflected in the passage at 84 of your submissions, I think?

ELIAS CJ:

Yes.

30

MR O'CALLAHAN:

Yes.

McGRATH J:

It's very much a contextual, a term which takes its meaning from its context.

MR O'CALLAHAN:

That's right. So, if you are in the position of potentially having –

5

ELIAS CJ:

Is there a similar exoneration for someone giving a code of compliance on the basis of building certificates?

10 **MR O'CALLAHAN:**

No, no.

YOUNG J:

This is it.

15

ELIAS CJ:

This is it?

YOUNG J:

20 Yes because it can – this covers both, on the face of both building certificates and code of compliance.

ELIAS CJ:

I see, it sort of sweeps them all up.

25

YOUNG J:

Rolls them in.

ELIAS CJ:

30 Yes.

MR O'CALLAHAN:

Well, there's no similar thing for a building certifier giving a code compliance certificate,

McGRATH J:

Yes.

5 **ELIAS CJ:**

That's what I mean.

TIPPING J:

Well, it covers that, it covers both.

10

ELIAS CJ:

Oh, this is it, I see.

15 **TIPPING J:**

Yes, this is it, it covers both.

ELIAS CJ:

I see, I'm sorry, yes, yes, of course.

20

McGRATH J:

And of course building certifiers can't contract out of their responsibilities.

MR O'CALLAHAN:

25 No and they can't be sued in contract either, they can only be sued in tort, there's a provision to that effect.

ELIAS CJ:

Section 53 applies to both –

30

TIPPING J:

It applies to both territorial authorities –

ELIAS CJ:

Yes, yes, yes.

TIPPING J:

– and in relation to building certificates and code compliance.

5

ELIAS CJ:

Yes, I'm sorry, I'd overlooked that.

MR O'CALLAHAN:

10 Yes, well, that – oh, that's – it is strange drafting in that sense and is loose
because it, I can, one can immediately understand B through to F because
those are a determination given by the Authority, an accreditation certificate,
energy works certificates, et cetera but, in terms of A, a building, certainly a –
there's not possibility of a building certifier ever relying on a code compliance
15 certificate. So, it's –

TIPPING J:

No, it's disjunctive in a sense –

20 **MR O'CALLAHAN:**

Yes.

TIPPING J:

– but it's perfectly plain what they're trying to get at, I would have thought,
25 they're trying to give some protection.

MR O'CALLAHAN:

Oh, for a building certifier in respect of –

30 **TIPPING J:**

The question is how much.

MR O'CALLAHAN:

Yes. So – anyway, I –

TIPPING J:

And we've also got to bear in mind that this also protects building certifiers accepting various documents which, which is subsection (2).

5

MR O'CALLAHAN:

Yes but the kind of documents that they would be accepting would be really those (b) through to (f) documents.

10 **TIPPING J:**

Well, what I'm saying is, are expected to double guess something in that context, that appears regular on its face? I would rather suspect not. Otherwise you're really putting the acid on.

15 **MR O'CALLAHAN:**

Okay, well, to take them, okay, in (b). A determination by the building, by the BIA –

ELIAS CJ:

20 Sorry, where are we?

MR O'CALLAHAN:

The kind of things that a building certifier might rely on in good faith, 50 sub (1)(b), a determination by the Building Industry Authority.

25

TIPPING J:

A current and relevant accreditation certificate.

MR O'CALLAHAN:

30 To that effect, issued by the Building Industry Authority.

YOUNG J:

Well, what's that?

MR O'CALLAHAN:

There is a scheme for –

TIPPING J:

5 And then we've got, "Certificates issued under –

MR O'CALLAHAN:

10 It's 50 – it's, "Building Products and Processes," so you can get certain building products and processes accredited by the BIA, which mean there's a shortcut to showing compliance with the Building Code and so if there's an accreditation certificate given by the Building Industry Authority in respect of some building product or process, then that's something that you can rely upon when issuing a building certificate.

15 **TIPPING J:**

What about (f)? I mean, the breadth of it, the onerous nature that you're setting up of double guessing authority, if you like, it worries me. I can understand if authority was completely absent but in the case of all these examples, where you're putting an onus, if you like, if you say it's not covered by the Act – I know I'm back now to your first point – if it's not covered by the Act you're putting a huge onus on building certifiers and Councils to look behind the face of something that may appear regular.

MR O'CALLAHAN:

25 Well, I say that really the only one where that actually might pose any difficulty in working it out, is this question that we're currently considering, which is the issuing of building certificates or code compliance certificates when the territorial authority is accepting them because these other things mentioned, (b) through to (f), are all, well –

30

TIPPING J:

Take (f) –

MR O'CALLAHAN:

Okay, (b) –

TIPPING J:

– “A certificate issued pursuant to any such regulations.” If you’ve got to go
5 back and trace the provenance of the certificate and the authority of the issuer
of it to issue it –

MR O’CALLAHAN:

Well, perhaps you do. You need to understand that this person actually is
10 registered as, well, whatever the regime for being able to give those
certificates, you’ve got –

TIPPING J:

15 Well, maybe at that extreme level of – simply the person doesn’t have any
authority at all. I’m giving you that as a possible but it’s this intermediate
position that we’re faced with here.

MR O’CALLAHAN:

20 Well, yes, the – any authority at all versus some authority. In this case, the
building comprises various components. Some of those components this
certifier was authorised in respect of and other components it just wasn’t. And
in respect of authorisation, it’s either authorised or it’s not authorised. It’s and
what has happened here – the feature of the Council’s argument in response
25 is that, well, this is in, some acceptance that if it’s the type of building that’s an
issue, then that could be clear and obvious but here it’s not just the type of
building, it’s the fact that you’ve got a limitation in respect of one aspect of the
code and –

30 **YOUNG J:**

All right, we’ll say – well, one limitation that might happen is, was ABC entitled
to certify for commercial buildings?

MR O’CALLAHAN:

No.

YOUNG J:

Right, say it had.

5

MR O'CALLAHAN:

Well, it had to some extent to begin with and then that got taken off, yes. Look at the authority in the two documents, tab 38 and 39. 38 was the one that was operative when – so it's 38 and 39.

10

ELIAS CJ:

These aren't on the face of any register?

MR O'CALLAHAN:

15 Yes, they are.

ELIAS CJ:

Are they?

20 **MR O'CALLAHAN:**

Yes.

ELIAS CJ:

Right.

25

MR O'CALLAHAN:

These are the register, extract from the register.

ELIAS CJ:

30 It's in this form?

MR O'CALLAHAN:

Ah, look, I assume so, I, yes.

ELIAS CJ:

Oh, right.

MR O'CALLAHAN:

5 So tab 38 of the blue volume is the one that was operative at the time the
code compliance, sorry, the building consent, was applied for. So it's
approved in respect of ordinary residential community and commercial
buildings having not more than five stories, so it's a range of types of buildings
but only up to five stories and ordinary industrial buildings having not more
10 than two stories and outbuilding and ancillary buildings associated with
those. But it's not approved in respect of buildings for unusual uses or
involving unusual use of materials or involving unusually methods of design
or construction.

15 **BLANCHARD J:**

How is anyone going to know what's unusual?

MR O'CALLAHAN:

Well, that – on this argument about good faith, it may be that when looking at
20 it a Council isn't in a position to make an obvious judgement about those
things, perhaps. What we say on the issue in our, in this case, is that there
was a very clear limitation when you go over to 39 and you'll see that (a) and
(b) have changed a bit, they've much reduced in scope, so now they're only
authorising effective stand-alone structures and then, intended as a home or
25 residence, not more than two households, if a duplex two adjoining dwellings
and not to include any unit that's a unit title or any –

BLANCHARD J:

But if approvals are potentially going to be quite, in quite vague terms, such as
30 the one in 38, it seems to me that it's going to be difficult to say that, if it
happened, that the certificate was unauthorised in terms of the approval, the
Council is stuck with that because section 59 subsection (3) doesn't apply. It
seems to me the control's got to be the good faith rather than the fact that the
certificate was beyond power.

MR O'CALLAHAN:

Well, the control on that might be, if – if it didn't – the control would be the negligence, were Council negligent.

5

TIPPING J:

Well, to support my brother's point, look at 56, (5) and (6), which disentitles building certifier to issue certificates without insurance and if they have a financial interest.

10

MR O'CALLAHAN:

Yes.

TIPPING J:

15 Now, surely you're not going to have to get into all that and examine that to see whether it's within power? Fifty-six, subsections (5) and (6).

MR O'CALLAHAN:

20 Yes, well that could be, if the allegation is that Council negligently accepted a certificate that was not valid because the building certifier had a financial interest, then it would simply be a question of whether the Council behaved reasonably in respect of that.

TIPPING J:

25 Well –

ELIAS CJ:

Well, you're entitled to expect that things will be done as they require to be done under the legislation, that does seem –

30

MR O'CALLAHAN:

As a – yes.

ELIAS CJ:

– to be a mile away from a register as to –

MR O'CALLAHAN:

Yes.

5

ELIAS CJ:

– what you're certified to undertake.

TIPPING J:

10 Well, that may be a view but another view is that you're then looking at distinguishing between species of without power.

MR O'CALLAHAN:

15 Well, I say it's controlled in either, either in and the question of whether one is negligent and I've had one behave reasonably, that's the first level of control. Or, if you are into the good faith provision –

TIPPING J:

20 Well –

MR O'CALLAHAN:

– it's controlled by applying good faith to the circumstances.

25 **TIPPING J:**

Well, this is just, this is to tentatively suggest that to have a threshold of, if it's without power you don't get to good faith, that's the thing I'm hesitating about.

BLANCHARD J:

30 I think that's very difficult, when you look at the certificate at number 38 because the Council might take a wrong view about what is a building for an unusual use or involving unusual use of materials and on the argument which, I appreciate, you're somewhat being forced to advance, you don't get to section 50 subsection (3).

MR O'CALLAHAN:

Well, the control is in respect of whether one – the Council has behaved reasonably. So, if it's a difficult question –

5

BLANCHARD J:

Well, you're coming back then to 50, subsection (3) and the words "in good faith" and what they mean which is where you wanted to argue it in the first place.

10

MR O'CALLAHAN:

Well, yes, to be fair.

ELIAS CJ:

15 All right, shall we return to that after lunch?

MR O'CALLAHAN:

Now, I, I'm conscious that I'm taking up my learned friend's time.

20 **ELIAS CJ:**

Yes. Would you expect to complete within the next half hour, would you think, Mr O'Callahan?

MR O'CALLAHAN:

25 Well, I, in fact – if the Court doesn't require me, if the Court can take my written submissions as they are in respect of the development of the argument of knowledge and the development of the two strands of the good faith position, I haven't anything substantially more to add. I might have some tidying up remarks but if the Court can give me some indication as to whether
30 they want to hear from me further in detail on those, on those two topics, aggregation of knowledge or the meaning of good faith, then –

ELIAS CJ:

All right, we'll come back to that after lunch.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 14:17 PM

ELIAS CJ:

5 Yes, Mr O'Callahan.

MR O'CALLAHAN:

10 I have some brief comments to make about the propositions which are to some extent, related concerning the meaning of, or the content of the obligation of good faith and the concept of aggregating knowledge and distinctly as they might apply to this particular case, I just want to make this logical progression.

15 Firstly, the conceptual proposition is that someone who is giving the code compliance certificate has to be a building certifier, so the only way for the Council to know that when assessing whether this is a code compliance certificate they must accept, is to check that. And the way that they check it is by going to the building register, the building certifier register and the – when you go there, you'll see that somebody's registration comes with all of these
20 limitations and scope et cetera and so in order to see whether they, whether the certificate is within their scope because that's what you see, the Council would look at the scope of the authority set out in the building register which is at tab 39 and would be expected to enquire of, "Well does this appear to fit?"

25 So in respect of this certification relevant questions would be things such as, "Is this a standalone structure intended as a home or residence?" If it's not then it's a duplex, et cetera. So yes it is under number 1, so that yes, it's an ordinary residential building under number 1 and then, "Is it one of these things in (b) that it's not approved for?" and then, there's a limitation on it in
30 respect of E2, external moisture, where it's – the limit is – they can certify compliance only where compliance is through this acceptable solution document, E2/AS1. And in looking at that, they must, or could be expected to assess that in the context of the information they have to hand, so what

information does the Council hold? Well the Council holds the building consent application, which has plans and specifications, that may include some statement about intended use and it obviously includes the features, the physical features of the building, i.e. that's how you work out it's a standalone structure. That's how you work out whether there is compliance with E2 through E2/AS1 or not.

So when – then the next stage is actually the assessment, sort of what I would call a judgement or the exercise of the reasonable care and skill, in working out whether having made that enquiry of your records and compared it to the register that's in front of you, you make some judgement about whether this appears to comply or not and that's a distinct conceptual difference because when I say there's a difference and a lot of these cases can be resolved in terms of their assessment of good faith with the distinction between what it is reasonable to expect someone to do and then the second concept of the exercise of reasonable care and skill.

So often cases talking about, for example, at the top end, about honesty and say the knowing systems cases, one talks about what an honest and reasonable person would be expected to do, what enquiry they'd be expected to make. If they make the enquiry and then make an honest but mistaken decision about it, that it negligence but it's not dishonesty in that context.

In the good faith context, if you – if the proposition is that the Council could be reasonably expected to make enquiry of its own records and the register, then if it makes those enquiries but does so in an – in a honest but negligent way, so makes an honest attempt at it, then perhaps that's good faith but in this case they didn't make the enquiries, so that's where it falls short of good faith we say. And that automatically, that structure of it that I've just taken you through, incorporates the, really it shows the necessity of incorporating in the facts of this case, the ability to access the records that are part of the Council's records, i.e. the plans because you can't form any view about any of this, without going to those plans.

TIPPING J:

Are you saying they didn't make such enquiry as a reasonable Council would have made in their state of knowledge, is that the proposition?

5 **MR O'CALLAHAN:**

Yes, well a – the proposition is that you could expect.

TIPPING J:

10 You don't need to elaborate, it does need to know whether that is the proposition or I misunderstood it.

MR O'CALLAHAN:

15 One would expect, would reasonable expect the Council to make those enquiries and they didn't.

TIPPING J:

Against the state of knowledge, if it's arrived at by this aggregation process.

MR O'CALLAHAN:

20 Well against knowing that the register of certifiers has a limitation on it, for this certifier, that you know the only way you can form any view about that, is to look at the plans and arguably in respect of whether it's a standalone structure, so it's not the only feature of it and you know that you have the plans.

25

YOUNG J:

It's not – you were taken this morning, or took the Court this morning to the restrictions on ABC but even the approved solution itself is rather open textured in its language.

30

MR O'CALLAHAN:

Well that is something which – that's the distinction to be drawn between what enquiries could you reasonably expect the Council to make in exercise of statutory function here and then having made those enquiries was it negligent

or not. You see if it had – if what had happened was it made the enquiries and formed an honest but mistaken view, that compliance for this building was to be in accordance with E2/AS1 then arguably that's good faith.

5 **YOUNG J:**

See, one of my problems is I don't really understand how obvious it is, if it is the case, that this building wasn't built within accordance with the approved solution.

10 **MR O'CALLAHAN:**

Well the expert evidence says it's very obvious.

YOUNG J:

15 Yes, just let me go a little bit further. And secondly, I don't understand how significant this exclusion was because would it be the case that a building certifier could generally certify most residential houses, using E/AS1, or did most residential houses, not comply with E/AS1, in which case it would've been a very silly thing indeed for the council not to be scrutinising what was happening with ABCs business.

20

MR O'CALLAHAN:

25 There is some evidence about some of that and no evidence about other aspects. The bit about there's no evidence about it, I can't help you with evidence, is to what extent was it prevalent in building practice, to build houses outside E2/AS1, I simply can't answer that with statistics. That would have to be a matter of factual exploration if it was thought to be important. But I can help you with the first bit, at least for the purposes of the summary judgment context of this hearing and that is Mr O'Sullivan says it's plainly obvious as soon as you look at the plans that you've got, that you're outside
30 E2/AS1. And if you need some help with that, it's a matter really of going to this appendix 2 that I've put on the written submissions and as far as Mr O'Sullivan's explained it, just as a first feature, E2/AS1 contemplates sloping roofs with eaves as one requirement of E2/AS1 and he says that –

YOUNG J:

All roofs as approved by manufacturer wasn't it? Sloped to an extent approved by the manufacturer? Is that –

5 **MR O'CALLAHAN:**

I think Your Honour's right. But what he says is that there's a clear and obvious departure here from that because this roof, although it's got a very and you can see it on one of the sections, it's got a very slight curve in it, on the second page, the top drawing shows a very slight bow in the roof on the
10 end section. It employs flat or almost flat roofs with parapets and he says, plainly and obviously that's an immediate departure from E2/AS1. Doesn't mean to say you can't do it, it just means you can't do it through E2/AS1 you have to do it outside E2/AS1.

15 **YOUNG J:**

Well I'm just looking at E2/AS1 which is tab 32, see if we can track that through.

ELIAS CJ:

20 What page?

YOUNG J:

Okay, page 324.

25 **MR O'CALLAHAN:**

Yes.

YOUNG J:

It says, "Roofs to have weatherproof cladding with adequate pitch." Is that the
30 point that Mr O'Sullivan's relying on?

MR O'CALLAHAN:

Yes, he said, of course – understanding what adequate is understood but he says, "This is plainly obvious that this has virtually no pitch –

YOUNG J:

But virtually no pitch might be adequate.

5 **MR O'CALLAHAN:**

Well –

YOUNG J:

Look, I mean, I just don't know, I'm just putting it to you.

10

MR O'CALLAHAN:

Yes, this is the kind of thing which is the subject of expert evidence, he says, he says that's obvious and for the purposes of this hearing, I understand my learned friends have accepted the proposition.

15

YOUNG J:

I think he accepts is arguably the case or we should proceed with the case hearing on the basis that this wasn't with any E2/AS1?

20

MR O'CALLAHAN:

Yes, yes he does.

YOUNG J:

25 But I know the industry agrees that it's perfectly obvious.

MR O'CALLAHAN:

Right. Well Mr –

30 **BLANCHARD J:**

If you go further down the page you've got, "The roof pitch should be no less than the greater of that given in table 1, or that recommended by the manufacturer".

YOUNG J:

So what's tables 1?

BLANCHARD J:

5 Next page.

MR O'CALLAHAN:

Yes, you see you've got different types of section on the – you've got corrugated, long-run steel, or aluminium, eight degrees and end lap steel or
10 aluminium 10 degrees.

YOUNG J:

Do we know what the roof pitch was here?

15 **MR O'CALLAHAN:**

Well, no we don't but looking at – some of it appears dead flat and that one that you can see the end section of, in the appendix –

YOUNG J:

20 Right.

MR O'CALLAHAN:

– appears to, to my eye, I'd have to hazard a guess but it would seem to be very, very flat indeed. Also, the concept of the parapets, he says, is not
25 contemplated by this document because they contain – and they – because they have internal guttering and they contain the water within the external walls, with –

YOUNG J:

30 Whereabouts in E2/AS1 is the reference to guttering?

MR O'CALLAHAN:

To be honest I'm not sure, I could look at it how.

YOUNG J:

Oh no, don't worry.

MR O'CALLAHAN:

5 So, could Your Honour remind me of the tab reference?

YOUNG J:

It's tab 32.

10 **ELIAS CJ:**

I'm lost, what are we looking for?

MR O'CALLAHAN:

We're looking to see whether there's anything obvious to us in this document that supports what Mr O'Sullivan said in his affidavit essentially and I'm sorry
15 I'm just – oh here we are, "Flashings and stop ends for metal profile roofing", page 326 and I presume, although you'd have to ask the expert but I presume that because it doesn't there show the roofing draining to anything other than a runoff, it's outside the document. And he would say, "Well anybody with knowledge of working knowledge of this document with an eye to
20 building elements, would understand immediately that this has got departure from E2/AS1".

So but if the difficulty was the question of whether having made the enquiry the Council exercised reasonable care and skill, there is scope for that to be
25 still in good faith but mistaken. But where the enquiry isn't made I say that's outside good faith and you have the authorities and you have the rest of the submissions on that, I just wanted to make that distinction clearly because I think it's important in resolving this case.

30 The final point about good faith is the onus issue. The onus in *Mid Density* and *Bankstown* both say clearly in their – in this type of situation, the onus is on the Council to prove good faith and that has an implication in terms of approaching this on a summary judgment context with the propositions and counter-propositions that there are. It's not that we have to get over there

needing to be an absence of good faith, it's that they have to prove good faith and by – and in my submission they haven't done enough by referring to the things I've referred to by saying that we kept the building consent documents in another place, doesn't in my submission get them over an onus of
5 good faith. The – and –

ELIAS CJ:

I can't now remember, why do you say that there is anything like an onus on the defendant?
10

MR O'CALLAHAN:

Because in, where this type of defence operates where you say that the Council can be excused if they act in good faith, *Bankstown* and *Mid Density*
15 both confirm and their references are in the submissions –

ELIAS CJ:

Yes.

20 **MR O'CALLAHAN:**

That the onus in those circumstances on like provisions, is on the Council to establish it as a defence. So the Council would have to show that the Council acted in good faith. And one final observation which I want to emphasise from the written submissions, just to make sure it's not overlooked, is that when
25 thinking about what good faith means, it's not fair to say that good faith equals absence of bad faith, I say that's a logical difficulty.

The positive requirement is to show good faith rather than simply an absence of bad faith. And I've drawn an analogy with the way the Court of Appeal
30 dealt with the concept of honesty versus dishonesty, in the *US International Marketing Ltd v National Bank of New Zealand Ltd* [2004] NZLR 589 case in the context of bankers' duties and Your Honour Justice Tipping made the observation there that the good faith – it's at footnote on page 28 of my written submission, Your Honour Justice Tipping said, "The issue was not whether

Mr Lithgow had acted reasonably and honestly, rather it was whether it would have been dishonest for him to have allowed the customer reasonable access to its funds. The one question is not the obverse of the other.” So it’s in the reverse in the sense that there the question was whether the behaviour had
5 been dishonest. But it’s the same logic in my submission that applies.

TIPPING J:

Don’t overlook the fact that reasonably.

10 **BLANCHARD J:**

Otherwise it wouldn’t make sense without the word “reasonably”.

TIPPING J:

Anyway, I think I know what I was trying to say, I may not have said it very
15 well.

MR O’CALLAHAN:

Well the one is not the obvious of the other, what I’m trying to apply that reasoning –
20

BLANCHARD J:

Well it is with the word “reasonably” in there, it patently isn’t the obverse of the other because it’s got an extra criterion.

25 **MR O’CALLAHAN:**

All right.

TIPPING J:

It was to do with the fact that the Judge had put it in that case, correctly in one
30 place and not correctly in the other, I think that was the context as I recall. But although I’m flattered that you should think your proposition takes some force from that observation, I’m inclined to wonder whether it does. This is the old argument of whether there’s something in between good faith and bad faith.

MR O'CALLAHAN:

I suppose that's – it ultimately what we resolve it.

TIPPING J:

5 Yes.

MR O'CALLAHAN:

Well, whether there's something in between – well it's really that interpretation issue of whether the good faith in the statutory context is the one that includes
10 the element of what we would reasonably expect someone – how we would reasonably expect someone to behave as opposed to, did they behave dishonestly.

TIPPING J:

15 Mmm.

MR O'CALLAHAN:

And I won't repeat what I've said there on that.

20 **TIPPING J:**

I think you were in that International Marketing Mr O'Callahan, weren't you?

MR O'CALLAHAN:

Yes, I was.

25

TIPPING J:

Yes.

MR O'CALLAHAN:

30 So in terms of my outline, that actually deals with each of those elements down at 7, 8 and 9. So unless Your Honours have any further questions that's my submissions.

ELIAS CJ:

Thank you Mr O'Callahan. Yes, Mr Goddard.

MR GODDARD QC:

Your Honour, I think that what I should probably do is respond to Your Honour
5 Justice Blanchard's formulation of my learned friend's case which I think he
adopted at the end of the day and since it's customary for me to begin my
submissions in this Court by apologising for something after the last appeal, I
should perhaps apologise for any lack of clarity in the way in which my
submissions, in this case, are expressed but say that I have, to some extent,
10 been aiming my arrows at a moving target and one that has kept moving
today and that does make it slightly trickier but I do apologise so fitted an
apology in.

Now, the formulation put forward by Your Honour, as I understand it, was, had
15 two main elements, first, the Council should not have received the code of
compliance certificate issued by ABC and treated it as a valid CCC and,
second, the Council should not have told anyone that they had received a
valid CCC and there was a possible third LIM a little later this morning, where
Your Honour suggested to my learned friend that the argument was that
20 where certifiers are involved, there's a carve out from *Hamlin* but if the Council
is aware or should be aware that the carve out is not operative, then we're
back to *Hamlin*. So that, I think, is the argument as it has eventually been put
to the Court today, those three LIMs.

25 Let me deal first with the second one that the Council should not have told
anyone that they had received a valid code of compliance certificate. In my
submission, that's a red herring, essentially, for the reasons touched on in my
written submissions at paragraph 3.1, the first is that no representation by the
Council to the plaintiffs about any CCC is pleaded anywhere in this case. It's
30 simply not presented as a representation-based case –

BLANCHARD J:

But presumably they could reformulate their pleadings?

MR GODDARD QC:

Yes, I think if that was the problem but that was arguable then the right approach in my submission would be to strike out this pleading but leave them free to file an amended one rather than entering some re-judgment but there
5 are other problems with such an argument which mean that, in fact, summary judgment as ordered by the Court of Appeal would remain appropriate and that's really that an argument of this kind has already been rejected by the Court of Appeal and by this Court in its leave decision on *Sunset Terraces*.

10 If we look at that decision, the Court of Appeal decision is in volume 2 of my learned friend's authorities under tab 12 and one of the arguments that Blue Sky, the Court may remember was running, was that the LIM said that a CCC had been issued by the Council and that was a repetition of the view that the buildings in question complied with the Building Code and what the
15 Court of Appeal said, if we go first of all to His Honour Baragwanath J, at paragraphs 85 and 86, is Council issued to Blue Sky LIMs which correctly stated that a code compliance certificate had been issued. Blue Sky asserted the LIMs were issued negligently because the code compliance certificate should never have been issued.

20

YOUNG J:

I guess it's a slightly different issue, isn't it?

MR GODDARD QC:

25 Well, no, that's what my learned friend says that a code compliance certificate should not have been issued by this certifier –

YOUNG J:

No, I think in this case the contention was that the code of compliance
30 certificate shouldn't have been issued because the inspections hadn't been carried out properly.

MR GODDARD QC:

Yes but the fact remained, could the Council be expected when it issued a LIM to go back and check the validity of the appropriateness of the CCC and that's an issue which the Supreme Court picks up rather neatly in it's lead submission, so what was said at 86 by Justice Baragwanath was the LIMs were accurate, they stated what was the case and cannot give rise to liability. His Honour agreed and then referred to the section 41 issue, I'll come back to that.

Your Honour Justice Young, at paragraph 179 said, Blue Sky which acquired 12 units, sued the Council for negligent misrepresentation based on the LIMs which confirmed that code compliance certificates had been issued. The Judge rejected that claim on the basis the LIMs were accurate. They said code compliance certificates had been issued. They had and I agree with that conclusion and this Court, when leave was sought to appeal from that finding and this is in my supplementary bundle of authorities under tab 9, declined leave and what the Court said in paragraph 1 was, "We decline leave for the proposed cross appeal by Blue Sky Holdings Limited."

It's proposed argument that the Council was negligent in issuing a LIM, notwithstanding concurrent findings below the LIM was accurate on it's face, i.e. there was a CCC has no merit. It would be expecting far too much of a territorial authority if on every occasion on which it issued a LIM which referred back to a document which it had issued on a previous occasion, the territorial authority was obliged to consider whether the earlier document had been properly issued and that must apply a fortiori to a document issued by someone else. The idea that it would have to review that every time it issued a LIM would be oppressive and the second point, extremely important point, moreover if we were to hold to the contrary a fresh limitation period would begin to run from the date of issue of the LIM. Perhaps many years after the right to claim in respect of the original document had become statute barred, that would be quite contrary to the obvious intention behind the inclusion in the building legislation of a limitation period.

Those considerations apply precisely to any suggestion that there's an implicit representation of validity when the fact that a CCC held by a certifier is held in the Council's records is disclosed in a LIM but there's more. This and this is the third reason why this claim cannot succeed, the statement identified in my
5 learned friend's submissions and in the evidence but not referred to in the pleadings, is not a statement in the LIM. The LIM said there was no CCC. What happened was that external to a LIM, a statement was made that a CCC had been received but section 41 Local Government Official Information and Meetings Act provides a defence for official information provided by a
10 territorial authority and the only possible exclusion that anyone has suggested from that is the section 44(a) LIM provision and I've troubled the Court on that issue in another matter but if there were to be such a claim brought here, the response from the Council would be but it was provided in good faith and section 41 precludes a claim. Finally, it seems to me that –

15

BLANCHARD J:

Just remind me, the section 41, use the in good faith formula –

MR GODDARD QC:

20 Yes Sir.

TIPPING J:

No liability otherwise than if you're not in good faith –

25

MR GODDARD QC:

If you don't provide the information in good faith and that's the same as –

TIPPING J:

Yes, yes.

30

YOUNG J:

But there's the overlay here, however, that this probably should, was, had been requested under the LIM process, this information, hadn't it?

MR GODDARD QC:

Which serves to illustrate really the –

YOUNG J:

5 Some of the problems.

MR GODDARD QC:

– close inter-relationship between the provision of information in LIMs and the provision of information in other contexts and why there would be difficulties if liability rules were to be different but that's not this case.

10

BLANCHARD J:

Nice try, Mr Goddard.

15 **MR GODDARD QC:**

I felt that was a bit of an uphill battle at the time, Sir, one last feeble scramble at the cliff seemed appropriate. Be that as it may this was a statement made outside a LIM to which in my submissions section 41 apply. The Court has not received submissions on that, of course because it just doesn't arise on the pleadings and wasn't argued in the Courts below but that would be fatal to any attempt to introduce this by way of an amendment here and finally, there could only be a duty to provide information other than that a CCC was held if (a) was established, if the Council had a duty to take care in reviewing the validity of the CCC when it first came in so if (a) can't succeed, I can't see how argument (b) could succeed. It must –

20

25

YOUNG J:

But the duty would have – his duty is not to do anything in particular, the duty is to take.

30

MR GODDARD QC:

Mmm.

YOUNG J:

It's to take care, in this case, I think on the plaintiff's argument, in terms of the way in which it runs its filing systems so that it can meet its obligations both under the Local Government Act and I suppose, as a backstop in relation – it would be a backstop in relation to the Building Act.

5

MR GODDARD QC:

Yes Sir but that's really why I say that must cut in at the time the document is received. If there's any duty, that must be when it's operative and if there's no duty to go behind a certificate then –

10

YOUNG J:

Well the duty would apply at all times. It would be breached at a particular time. I mean, the breach might be failing to set up a system which enables it to detect what might be a pretty obvious problem.

15

MR GODDARD QC:

But then the breach, I think, would occur at the time of receipt of the document –

20

YOUNG J:

Well it might occur –

YOUNG J:

25

– and failure to –

YOUNG J:

– earlier because they just haven't got a system. I mean, aren't we – isn't it all semantics?

30

MR GODDARD QC:

I'm just attempting to respond to the possibility that this can be presented in an alternative way, based on a negligent statement at a later than my submission. First of all, it's not pleaded but secondly, in response to the

possibility of amendment which is often open in the context of strike out, I'm anticipating the question of whether that could survive if the basic argument that Your Honour has outlined, a duty in respect of receiving information and recording it doesn't exist and it can, in my submission. If there's no duty in
5 respect of receiving and recording information, there couldn't be a duty in respect of what was said later.

TIPPING J:

Your point is premised on the absence of a duty at step one?

10

MR GODDARD QC:

Yes, if I –

15 **TIPPING J:**

If we're against you on that, then the point –

MR GODDARD QC:

Then I've lost anyway –

20

TIPPING J:

– is a live one, yes –

MR GODDARD QC:

25 – so it doesn't matter what the position is on (b). Yes, that's what I was trying to say Sir. So, there are many problems with LIM (b) and that means that the focus should be, I think on (a) and possibly (c). (a) was that the Council should not have received the certificate and treated it as a valid code compliance certificate or should have exercised reasonable care in devising a
30 system that sifted valid from invalid certificates at the time they were received. Something of that kind.

To the question, or to the proposition the Council shouldn't have received this and treated it as a valid CCC, I think the answer for that one would be flippant

as well. Why not? In my submission, the Council acted in a way that was completely consistent for the statutory scheme and didn't fail to do anything that could be expected of it, in terms of that statutory scheme.

5 **YOUNG J:**

There was a failure of the scheme though, wasn't there?

MR GODDARD QC:

10 There was a failure of the scheme and that failure was a failure by the building certifier to comply with the limits on its approval, coupled with a failure by the BIA arguably, to exercise proper regulatory supervision of the building certifier. I'll come back to the scheme and go through a few provisions of the Act in a bit more detail but I think it's very important to bare in mind that building certifiers were appointed under the legislation, to perform statutory
15 functions. They had to demonstrate qualifications and that they were fit and proper persons. They were then appointed by the BIA as building certifiers and they were supervised by the BIA which determined the scope of their approval, modified it from time to time, received complaints and resolved matters of doubt or dispute about the decisions that they made.

20

The Council was not the regulator of certifiers. Rather, it was a direct competitor of certifiers in relation to a service provision model of inspection and certification which had important implications for the way the legislation was designed in terms of what councils were and were not permitted to do
25 when it came to second guessing what certifiers had done.

TIPPING J:

30 It seemed to me Mr Goddard and this may or may not be consistent with what you've just said, that the legislation was designed to create some sort of barrier, if you like, between the Council and the certifier so that the Council didn't have any role, if you like, in second guessing the certifiers.

MR GODDARD QC:

That's exactly right Sir. For many decades councils had had the exclusive role of inspecting and certifying and there was real concern that the certifier model would not work if councils continued to second guess them and to stick their beaks into matters that the legislation was allocating to others and –

5

YOUNG J:

Well engaged in, went seeking behaviour by making life difficult for building certifiers, yes.

10

MR GODDARD QC:

Exactly Sir. By increasing the costs to owners, of using building certifiers because the process was slower, more difficult, involved having to jump over two sets of hurdles, first satisfy your certifier, then satisfy the Council, so –

YOUNG J:

That's dealt with in the report of the Building Industry Commission, I think –

MR GODDARD QC:

Exactly and Your Honour –

YOUNG J:

– quite specifically.

MR GODDARD QC:

– discussed that in *Sacramento* in some detail, in the decision of the Court of Appeal in *Attorney-General v Body Corporate 20020 [Sacramento]* [2007] 1 NZLR 95 (CA) –

BLANCHARD J:

That shows how economics can drive you completely off the rails.

MR GODDARD QC:

That could be said of many features of this legislation but as the Courts have also observed, I think of this very legislation, in fact I think in *Sacramento*, the fact that the Court might not be enamoured of the policy doesn't mean that
5 one shouldn't attempt to give it the effect that it was intended to have at the time. So –

McGRATH J:

It comes down really to the purpose of the legislation is to have the job
10 done once.

MR GODDARD QC:

Yes.
15

McGRATH J:

By one of two competing entities.

MR GODDARD QC:

20 Yes and to impose necessary controls on building –

YOUNG J:

Instead of nonce.

25 **MR GODDARD QC:**

Not nonce and not twice –

YOUNG J:

Yes and so –
30

MR GODDARD QC:

Yes.

YOUNG J:

– here our problem isn't that it's been done twice but that it hasn't been done at all.

MR GODDARD QC:

5 No, it's been done once but it's done by someone whose authority to do it would be a matter of debate –

YOUNG J:

Well, let's put it –

10

MR GODDARD QC:

– at a trial –

YOUNG J:

15 – the idea is that it would be done by someone who is qualified to do it once –

MR GODDARD QC:

Yes.

20 **YOUNG J:**

– and on the plaintiff's case it hasn't been done at all in that sense.

MR GODDARD QC:

25 And the question is whether the Council was required to enquire into that and take a view on it. Really, in terms of – before I come back to trekking through why the Council acted consistently with the statutory scheme and didn't fail to do anything expected of it under that scheme. It seems to me that the fact that certifiers were exercising a statutory power, preparing a statutory document under the Act, is of no small importance here and that
30 public law principles in relation to validity and the operation of such documents are relevant. It seemed to me that perhaps that was best captured by Your Honour the Chief Justice's formulation in *Murray v Whakatane District Council* [1999] 3 NZLR 276, where –

ELIAS CJ:

Gosh, that's a long time ago.

MR GODDARD QC:

5 It's still frequently cited on this point of relative invalidity Your Honour.

TIPPING J:

I missed the case, sorry, what was –

10 **MR GODDARD QC:**

Murray v Whakatane District Council, Your Honour sat –

TIPPING J:

Oh, oh –

15

MR GODDARD QC:

– on it on appeal I think and upheld –

TIPPING J:

20 – oh it had –

MR GODDARD QC:

– Her Honour at first instance –

25 **TIPPING J:**

Ah, right, yes.

MR GODDARD QC:

30 The case, in both the High Court and Court of Appeal – yes, Your Honour was on it, is in the supplementary bundle under tab 8 and the very, if I may say so, helpful formulation of –

TIPPING J:

At first instance, I'm sure.

MR GODDARD QC:

At first instance, not disturbed on appeal, was – on page 320 under the heading, “The consequences,” after Your Honour had found that the Council
5 misunderstood the law and misunderstood the nature of the decision it was expected to make in relation to notification of a resource consent. Your Honour said, “It is settled law that every unlawful administrative act, except the haste in perhaps in extreme cases of clear usurpation of power, is operative until set aside by a Court.”

10

In my submission, that’s directly applicable to certificates issued by a building certifier under the statute here and there’s a statutory scheme for challenging such certificates before the BIA which was what would need to happen before the Council could be entitled to disregard a certificate issued by a building
15 certifier. I’ll come back to –

TIPPING J:

Can I just – without wishing to sound uncharitable, can I just – wonder whether the word unlawful, it was intended to cover without power?

20

MR GODDARD QC:

Well, I think that’s –

ELIAS CJ:

25 That’s the way I use it.

TIPPING J:

Is that the way –

MR GODDARD QC:

30 It is the way Her Honour uses it –

ELIAS CJ:

Oh yes, always, yes.

MR GODDARD QC:

– and I think that’s clear –

5 **ELIAS CJ:**

Breaches of the Bill of Rights Act –

MR GODDARD QC:

– Sir from the next LIM –

10

ELIAS CJ:

– conduct is unlawful –

MR GODDARD QC:

15 – except perhaps in extreme cases of clear usurpation of power. So in other words, if they’re not extreme, or they’re not clear, then it’s an unlawful act that is still operative and that really picks up – writing about *Ridge v Baldwin* [1964] AC 40, the dismissal of the chief constable that was invalid, Sir William Wade, many years ago, developing this theory said well, plainly you could disregard
20 a decision by the neighbouring watch committee purporting to dismiss the chief constable of a different district completely but short of that, decision shouldn’t be treated as a nullity or invalid.

YOUNG J:

25 That doesn’t necessarily answer the point though because one could set it aside retrospectively which –

MR GODDARD QC:

But unless and until –

30

YOUNG J:

– effectively is what happened in employment cases like *Ridge v Baldwin*.

MR GODDARD QC:

But unless and until that happens, the Council is required to proceed on the basis that it's a decision by a certifier into the affairs of which the Council is not supposed to stick its beak. I'll come to the statutory scheme but that, in my submission, is entirely – that approach is entirely consistent with the
5 statutory scheme here.

So, I think it's helpful, especially in light of Your Honour's question before lunch about whether the CCC bore death wounds on its face and I think that's
10 from –

TIPPING J:

No, in its head –

MR GODDARD QC:

15 – on its head, on its head –

TIPPING J:

– not in its face.

20 **MR GODDARD QC:**

– death wounds on its head. That's the legislation and validity issue, I think, that Your Honour's referring to, it's one of those wonderful old cases picked up in the foxhunting –

25 **ELIAS CJ:**

It's *Esteem v East Allo* is it?

MR GODDARD QC:

Jackson –

30

ELIAS CJ:

I don't mean to –

MR GODDARD QC:

Jackson v Attorney-General (Foxhunting Case) [2005] 3 WLR 733 most recently but it refers back to the Queen and the Countess of Arundel in the 1617 which is where the phrase was first used. It refers to a record of an Act, “Itself carry its death wound in itself,” the enacting words being invalid but we
5 stray, Your Honour, fascinating though that is. So how does this thing look? Is it carrying death wounds on its face or is it alive and well? At tab 4 of the case on appeal, volume 4 tab 48, I think it’s quite important to look at it and realise what –

10 **ELIAS CJ:**

Sorry, what are we going to, tab –

MR GODDARD QC:

Case on appeal, volume 4 tab 48. This is the code compliance certificate and,
15 given the centrality of it to the case, it seems to me it’s worth having a look at it. And there are a few things that need to be observed about it, I think. The first is that it says, in really big letters at the top, “Code Compliance Certificate Number tum-te-tum-te-tum –

20 **TIPPING J:**

The size of the letters is material, is it not?

MR GODDARD QC:

It is, Your Honour, that’s its face and – but coming on down, in slightly smaller
25 but also very important type, “issued by Approved Building Certifiers Limited, currently approved and registered as a building certifier in New Zealand,” as indeed it was and that ties into Your Honour Justice Blanchard’s question earlier today, “Well, doesn’t this fall within the definition of a code compliance certificate?” It’s a code compliance certificate issued by a building certifier.
30 And then we see a reference to the two building consents.

ELIAS CJ:

Well, the definition is under section 43 though, isn’t it, so it’s a little circular?

MR GODDARD QC:

It doesn't – not in section 2 it's not, it's as bald as that.

ELIAS CJ:

5 I thought it was. All right, thank you.

BLANCHARD J:

No, I don't think it is.

10 **MR GODDARD QC:**

I think.

ELIAS CJ:

No, I'm sure Justice Blanchard is right.

15

BLANCHARD J:

Under part 7, which I suppose includes – does it include 43?

MR GODDARD QC:

20 Oh, no, pursuant – “The code compliance certificate means a certificate to that effect issued by a territorial – pursuant to –

ELIAS CJ:

Yes, “Pursuant to section 43.”

25

MR GODDARD QC:

– section 43,” so it refers to section 43.

ELIAS CJ:

30 Yes.

MR GODDARD QC:

But section 43 contains no limitations at all on the circumstances in which one can be issued. If we go –

ELIAS CJ:

No but it does, it does – well, it buys back into the argument about whether –

5 **MR GODDARD QC:**

It's issued under –

ELIAS CJ:

Yes.

10

MR GODDARD QC:

Yes, perhaps that's right. But on it – so, anyway, coming back to the
15 certificate, compliance certificate, issued by a registered building certifier.
There's information about the project, it's a type of, the type is a dwelling and
a garage, intended use residential and then coming down, after the note
about normal maintenance, "This is a final code compliance certificate issued
in respect of all the building work under the above building consent," signed
20 by Mr Neil Bowler, director.

If we then compare that with the applicable entry on the register at that time
which is what my learned friend says the Council should have done, that's
under tab 39 of the same bundle. So, "ABCs approved by the BIA under
25 part 7 in respect of the provisions of the Building Code listed below," and then
the first of the general limitations, "Approval shall be in respect of all of the
provisions of the Building Code without limitation, except as details in (a) and
(b) below," and (a), "Approve in respect of ordinary residential buildings, stand
alone structures," and so on and so forth. Anyway, nothing in there that's
30 problematic. (b), "Not approved in respect of buildings for unusual uses or
involving unusual use of materials."

Well, there's nothing in the code compliance certificate that sheds any light at
all on that. One would have to go off and do an external enquiry of some kind.

And then, coming down under (b), “Provided that the building certifier may apply to the Authority for specific approval in respect of any particular building.” So even though the register didn’t include the approval, there could have been a building specific approval, even though it was unusually complex and to find that out one would have to go to the BIA and enquire and indeed, the plaintiff’s expert, Mr O’Sullivan, records in his affidavit – which I won’t go to but perhaps just note is at case volume 3 tab 24 – that he made that enquiry of the BIA or the Department of Building and Housing, which now holds its records and said, “Well, was there any specific approval here?” and they wrote back and said, “No.” But again, on my learned friend’s case, every time something like this came in you’d have to check to see if it was unusual or complex.

If it seemed like it might be unusual or complex you’d have to write off to the Authority and ask if there was a special approval nonetheless. There are certain requirements about who must sign it and that is something which can be checked on its face, so you can cross-check that Mr Bowler signed it and he did. There are some requirements that, “The signatories and ABC as a corporate entity must comply with the Approved Building Certifiers Limited quality manual approved by the Authority.” So, on the face of it, in order to know whether it had been properly given in accordance with this you’d have to get the quality manual and check that that had been complied with.

That seems to me, with respect, completely unrealistic. And then we come to the exclusion that my learned friends rely on – because, as I say, there’s no problem with anything else – and that’s provision E2, external moisture and compliance with that can be certified only if it’s achieved via E2/AS1. Now, Your Honour Justice Young went to E2/AS1 a moment ago but that’s a document which includes information of a reasonably detailed and complex kind, different alternative pitches, depending on the material with which the roof was made, including if it’s a membrane roof a pitch of 1.5 degrees, which is pretty much flat, so what you could tell from plans on that I’m not sure, you’d have to look at specifications as well, to check the materials, you’d have to have enough information to know whether it was 1.5 or one or two degrees

pitch, which would be pretty hard to tell from ordinary plans, unless you also read into the detail behind them.

The short point is that there's nothing on the face of the code compliance certificate that's a problem here. There might be a problem but that would require someone to make enquires of the BIA, form a view of whether the building was, involved an unusual use of material, if it was unusually complex, review E2/AS1 and compare the materials and style of design against the requirements of E2/AS1, form an expert view on whether or not these requirements were complied with, check the quality manual and make sure that that had been complied with –

TIPPING J:

Could I just take you back to above the box, where it says, "Approved by the Authority under part 7," et cetera, "in respect of the provisions of the Building Code listed below." So, it's approved in relation to E2, external moisture.

MR GODDARD QC:

Yes, immediately inside the box, "Approval in respect of all of the provisions of the Building Code without limitation, except as detailed in A and B." So it's explicitly all provisions of the code, except as detailed in A and B.

TIPPING J:

But word "provisions", is that –

25

MR GODDARD QC:

Yes, that includes E2, yes.

TIPPING J:

Is that not picked up by the word "provision" at the bottom?

MR GODDARD QC:

That's a specific limitation on E2. So, for other provisions of the code there's no –

TIPPING J:

There's no limits on anything other than E2.

5 **MR GODDARD QC:**

Yes and that depends on how you achieve compliance with E2. Your Honour will remember that the code is a performance code, so it's that you must achieve certain outcomes. E2 helpfully basically says it must be watertight and –

10

TIPPING J:

Well, that's the way they did it.

MR GODDARD QC:

15 That's the way they did it. And E2/AS1 was an approved solution issued by the BIA under section 49 of the Act. It said one way a safe harbour for complying with this performance-based obligation is to use these specific techniques and, so if you did that you were home. There were other ways, as my learned friend said, of doing it but you would have to then meet the
20 performance standard.

The short point I'm making here is that, in order to assess whether or not the way in which compliance with E2 had been achieved was, within the scope of ABCs approval, you would need to consider the various methods of
25 compliance provided for in E2/AS1, you would need to get the plans and it can't matter where they've been filed, my learned friend's right on that, it can't matter whether you have to walk one metre or 10 metres or a hundred metres to get those out of a drawer, the question is, do you have to get them out and does someone with building expertise have to pause and consider every time
30 a CCC comes in or a building certificate comes in, whether –

YOUNG J:

We're at a slight disadvantage here because it's not entirely clear to me how important this limitation is. If this limitation in practice meant that ABC

shouldn't have been certifying houses because you basically couldn't build a house using E2/AS1 and this meant that really they were out of the residential business, which meant out of business all together, then that might put one complexion on the case. If it is, as you say and as I rather suspect it may be,
5 a whole series of rather diffuse judgements or difficult judgements, then that's another complexion on the case.

MR GODDARD QC:

In my submission it is the second and that's apparent even from my learned
10 friend's acknowledgment that he can't explain what the problems are but that expert evidence is required to establish that and the rather complicated coloured drawings attached to his submissions, I think somewhere in his submissions he explains and I think this is very fair that basically E2/AS1 was intended to apply to a range of fairly traditional ways of going about
15 building houses.

TIPPING J:

Is this redolent with value judgements?

20 **MR GODDARD QC:**

Yes Sir. And expertise. It goes to the question of who should be doing this comparison. Is this a job for an administrative assistant? The sort of person who one could expect to have sitting in a company's registry for example, checking that an appropriate person had signed a notice and that all the
25 boxes in the form were filled in, or is this a decision, a review that should be carried out by someone with substantial expertise in building matters, who can be expected to call for the plans consider the scope of limitations and take a view on these matters.

30 In my submission the idea that someone with that sort of expertise was supposed to be performing the function of receiving code compliance certificates and putting them on the section 27 record, is inconsistent with the statutory scheme and really fails to reflect the allocation of responsibility for identifying what was and was not within their scope two building certifiers, the

obligation it imposed on them to tell the territorial authority if they couldn't continue with a certification process. And the regulatory responsibility allocated to the BIA, not Councils, in respect of whether certifiers were doing these things.

5

As Mr de Leur explains and this perhaps might respond in part to Your Honour's question, in his second affidavit, after 4 December 2002, when this limitation was imposed on ABC and nationwide and a couple of other cert but not all certifiers, there were still some who could do all phases of E2, what happened was that the BIA attended at the offices of those certifiers and with them, worked through the files that the certifier and its regulator considered the certifier could no longer handle and sent those to the relevant Councils, so the Auckland Council for example, received from ABC and a couple of affected certifiers, some 1100 files, where it was told, under section 57, "This is now your baby."

10
15

YOUNG J:

Wonder how many of those turn out happily.

20

MR GODDARD QC:

Well Your Honour asked that because it's a good question because of course quite a few of them may have progressed to the point that the key things had been covered in –

25

YOUNG J:

Yes.

MR GODDARD QC:

And one thing, let me make sure I don't forget this given time constraints, if I could just give the court a set of the building regulations that includes the regulations that were in force at the relevant time because my learned friend's authorities exclude some important regulations that are relevant to understanding the legislative scheme.

30

ELIAS CJ:

Madam Registrar.

MR GODDARD QC:

5 Madam Registrar if I could. Just because I'm conscious of the time and it's not clear to me that I will cover everything I had once imagined I might cover, perhaps if I could just draw the Court's attention to a couple of provisions in here. In terms of, although this is mostly relevant to C, switching *Hamlin* duties back on, importantly, a body responsible for inspections needs to know
10 when to inspect before critical work is covered in, so if we go to regulation 7, notice that building works ready for inspection.

For the purposes of section 76, which is the Council's power of inspection and unless otherwise provided building consent, "The owner or the person
15 undertaking the building work shall give the territorial authority at least two working days' notice of the intended commencement of construction and then at least one working day's notice of the covering up or closing in of certain things, including at 4, timber required to have a specified moisture content." Subclause (2), subclause (1) of the regulations shall not apply in respect of (a)
20 no building consent conceded but (b), over the page, "Any building work which a building certifier is engaged to inspect". So what you have as a statutory scheme consistent with this, "Go away Councils a building certifier's engaged here arrangement", under which the critical notice needed in order to carry out effective inspections, was required in most cases, by the regs but specifically
25 excluded where a certifier was engaged to inspect.

Then we have 8, "Inspection reports by building certifiers" and this I think might answer some of the Court's questions about record keeping by certifiers.; They were required to provide inspection reports to territorial
30 authorities from the date of engagement until they finished their task. And under subclause (2), "If a building certifier believes there's a contravention of the provisions of the Building Code in respect of items of building work, that the building certifier's been engaged to inspect and has directed the person carrying out the work to rectify the contravention but that person has not done

so within a reasonable time, the building certifier shall notify the territorial authority accordingly in form 6.” And then there’s a form prescribed.

5 So the idea again was, the building certifier’s on the job, we won’t even tell the Council two days beforehand that construction’s going to commence, or one day before covering things in but the Council will receive periodic reports and if there’s a problem, it’s the building certifier who will first attempt to get it sort out and only if that fails, tell the Council which will then exercise its regulatory powers, as opposed to its service provision function, to compel the
10 remediation of that.

The other reason I’ve provided this is that there are various forms that were prescribed and in relation to my learned friend’s argument that building, that code compliance certificates are a form of building certificate, I’ve identified in
15 my submissions a number of many, many places in the body of the Act where those are dealt with disjunctively as quite separate animals and there are separate powers to issue them with, separate conditions, I will come to that. But just while we have the regulations here, it’s perhaps worth noticing that different prescribed forms exist for building certificates and code compliance
20 certificates, so form 7 is the form of a building certificate in relation to specified items and then form 10 is the code compliance certificate, which is issued at the end of the work covered by a consent.

Perhaps I should have mentioned the other quite fundamental issue when it
25 comes to who should be checking a code compliance certificate, that of course building consent aren’t necessarily for complete dwellings, they may just be for additions or alterations. And so different provisions of the code will be engaged. If you receive a code compliance certificate in the form of the one that the Court just sought, all work done under the consent, done in
30 accordance with the code, then again it would require expertise to go to the plans and identify which provisions of the code were engaged and review for those and in my submission, that’s just not what’s contemplated by the legislation.

So, a value judgement in relation to which provisions are engaged, whether the decision on those is or is not within scope, whether any of the qualifications or limitations apply, all matters that would require considerable time and expertise to assess on my learned friend's case about what's
5 involved, in a way that in my submission, is completely inconsistent with the basic scheme of this legislation.

Coming back to that code compliance certificate, my learned friend says, "Well this wasn't, which was in volume 4, in tab 39, this wasn't a value", sorry
10 no tab 48, this wasn't a valid code compliance certificate but in my submission there are a whole range of circumstances in which it could've been which were – would've required substantial investigation by the Council to test. The first of course is if the building had been within E2/AS1 which my learned friend accepts you could only ascertain by reviewing the plans and
15 considering against the various criteria in that approved solution. Second, it would have been within the scope if any elements outside ABCs authority had been the subject of a positive determination by the BIA, or fell within the scope of an accreditation.

20 This really brings up the whole question of whether there has to be one person with over-arching expertise, who makes the code compliance certificate decision. It's quite clear I think from the statutory scheme, that that's not the case. If we go to section 50 and look at the matters that a territorial authority or a building certifier is required to accept as establishing
25 compliance with the provisions of the Building Code. First of all, consider the situation of a territorial authority receiving a number of building certificates, in relation to different aspects of the code. The territorial authority is required to accept those as decisive in respect of compliance with those provisions of the code. If there's a certificate that all the plumbing requirements are met, the
30 territorial authority can't second guess that. The building certifier – I'll come back to that.

So that's, to that extent, subdivided. Indeed, it's common ground that decisions by building certifiers could be subdivided, at least to some extent, if

a building certifier was required to accept an energy work certificate. So in relation to all electricity related matters, that's 1(e), or gas related matters, 1(f), that statutory scheme expressly contemplates that a building certifier must accept those certificates as establishing compliance with the code and a
5 certifier who hasn't got the faintest idea about electrical installations, or gas, can still grant a code compliance certificate because they've checked off everything else and they hold a certificate referred to in (e) or (f) in relation to those other matters.

10 If we come to (c), a current and relevant accreditation certificate to that effect issued by the authority. So if a particular building produce or process has been accredited under section 59, a certifier can't second guess that, a territorial authority can't second guess that. They have to accept that as determining that issue of compliance. (b) is interesting, a determination to
15 that effect giving by the authority under section 20 of this Act. If a matter of doubt or dispute has arisen in relation to compliance with the code and the authority has determined that, then the building certifier, or the authority, whoever is exercising any power, such as to issue a CCC, must accept that as decisive.

20

Now, my learned friend is quite right to notice that there is no obligation imposed on a building certifier to accept a building certificate, other than the type of building certificate referred to in (e) and (f) and the question – two things. First, that of itself, the obligation to accept the building certificates
25 issued under (e) and (f), shows that there is no requirement to have a single over-arching mind that has expertise on every issue and can certify it. There is clearly an acceptance of subdivision. Second, there is no limit on the subject area of that subdivision because any issue is the subject of a determination by the authority, or an accreditation certificate by the authority
30 must be accepted.

So it's not the energy that's different from everything else. If the authority has decided that the plumbing work is fine, or has issued an accreditation certificate in respect of a particular form of –

TIPPING J:

I think the argument you have to meet is that there's an implication that this is an exhaustive list.

5

MR GODDARD QC:

And the – it's clearly an exhaustive list of the matters in respect of which an obligation to accept –

10

TIPPING J:

Yes but although it's not very well constructed for that purpose, it could be thought that otherwise it had to be the single mind.

15

MR GODDARD QC:

The question then really is whether that reading is consistent with the scheme of the legislation. Whether it makes sense in terms of the policy of the Act. I've already addressed the suggestion that there needs to be an over-arching understanding and it's clear that that's not required because if we consider for example, the territorial authority, that must accept building certificates on anything and it only forms a judgement as to the rest. It can't second guess those other matters.

20

25 Secondly, I've pointed out that there's no subject area subdivision. A determination could be given by the authority on any aspect of compliance and a building certifier would have to accept that. So then the question becomes, why would one restrict things in that way? Why would one say for example, to a building certifier, if you're very busy you can't get another
30 certifier in to look at specific aspects of this and rely on their building certificate. Or if your approval is narrowed, why can't you ask someone else who has the relevant authority, why can't the owner because it's the owner's freedom to retain building certifiers we're concerned with, instruct another building certifier to do it. In this case –

TIPPING J:

But you would normally expect that there would be certificates, in the hands of the Council, by everyone who was directly involved in the process rather than
5 a composite certificate covering some work done by another certifier. That would be ones general expectation.

MR GODDARD QC:

The legislative scheme is clearly a little bit messy in terms of that flow of
10 records because it's not obvious that some of the other matters referred to in 51 would necessarily be held on that file by the Council either. It seems that common sense has been relied on –

TIPPING J:

15 You'd have thought Mr Goddard, that if that's really what they meant in 50 subsection (2), they'd say a building certifier shall accept in those instances – and may otherwise accept. I mean, it seems to me –

MR GODDARD QC:

20 I think, you know, that's a possible inference. It seems to me that, at least as likely, is that when referring to what a building certifier shall accept, someone looked back at (a) and said oh, building certificates and code compliance certificates issued by building certifiers, that's a bit circular, we don't need to refer to that as something that must be accepted.

25

It's also possible that a view was taken that arrangements with building certifiers are contractual arrangements and whether a building certifier would accept and rely on a certificate from someone else, wouldn't be a matter of statutory obligation but rather a matter of permission and whether or not they
30 would do that was to be left to contract but otherwise you'd end up in the strange position that a building certifier – that someone who retained a building certifier to carry out the certification of their house, who was qualified to do it when they embarked on the task, as here but who was subsequently restricted in some small aspect relevant to the construction couldn't effectively

subcontract to another certifier and get a building certificate from them and on the basis of that give a code compliance certificate but rather that it was necessary to then involve the local authority and pay them a fee for satisfying themselves of that matter.

5

TIPPING J:

Well, I think that's clearly envisaged by section 57(3).

10

MR GODDARD QC:

I was going to come that. Certainly if a certifier who embarked on a task is no longer able to do so, then the territorial authority must be advised of that but what –

15

TIPPING J:

Well not only must they be advised but the territorial authority then has to do things –

20

MR GODDARD QC:

What it has –

TIPPING J:

– shall make inspections –

25

MR GODDARD QC:

– no Your Honour. Shall make such inspections and issue such notice directed by, as it considers necessary and, in my submission, if the advice is that another certifier as been appointed to that, then although the Council knows it should expect a certificate from someone else, it can nonetheless decide that no inspections by it are necessary. Like notices to rectify, there may well be no need for a notice to rectify. It maybe that someone can't complete the task but there's nothing wrong with what's being done. So there's no implicit obligation, assumption here, that inspections will

30

necessarily happen and notice this is directed by will necessarily issue, rather those are possible outcomes, depending on all the circumstances of the notice.

5 **TIPPING J:**

Your client can't claim in this case that that's what it thought because it wasn't notified.

MR GODDARD QC:

10 No, that's right. So that's not the –

TIPPING J:

That's not the issue –

15 **MR GODDARD QC:**

– issue here –

TIPPING J:

– no, it's the more generic issue, is it, as to what the scheme of the Act
20 envisages?

MR GODDARD QC:

Yes, that's all I'm going to this for. There are a number of alternative arguments about the scheme of the legislation available to the Council, either
25 of which is sufficient to preclude this claim completely. One and my learned friend accepts this precludes the claim, is that a building certifier authorised in respect of some matters only, could nonetheless issue a code compliance certificate. Not a building certificate but a code compliance certificate, that applied to all the work, provided they were relying on building certificates or
30 decisions by the BIA, or other sources of confirmation, so that validity was a matter of enquiry behind the certificate and was not something that Council could be expected to undertake.

The alternative argument, in terms of the scheme of the legislation, is that even if that's not the case, nonetheless the Council – no occasion for the Council to exercise any powers arose, unless and until the notice contemplated by the legislation was given to it, that the building certifier was
5 no longer acting and that the Council was therefore required to step in and that's consistent with the structure of section 57, it's consistent with the structure of the regulation, regulation 7 for example, the fact that so long as a certifier is on the case, the Council won't be given notice.

10 There's no legal obligation on the owner or the builder to give notice to the Council of key steps being taken in the construction process, that the carve out has a temporal operation and the step that brings that carve out to an end is the notice that the legislation requires the certifier to give and that the BIA is responsible for ensuring certifier compliance with. So, to look to the Council is
15 to look to completely the wrong statutory body.

TIPPING J:

So you're saying that unless and until a certifier gives notice, there can be no possibility of reviving the *Hamlin* duty?

20

MR GODDARD QC:

Yes, no occasion for the exercise of any function by the Council arose. I could also refer, for example, to section 28 in relation to Council charges, which says that the Council can charge for fees in connection with
25 building consents such as inspections and section 28 subsection (4), which says that the Council can decline to perform any function until its charge has been paid. So, not only did the Council have to be told but before carrying out any inspections here the Council should have said, "Well, if you want us to inspect now, this is our fee, you pay the fee, then we'll come and inspect."
30 And there's no allegation of any notice, let alone a payment of a fee.

So again, the whole statutory scheme is that once a certifier is engaged to do the whole of the work, the Council is out of it, they don't carry out inspections, they're not told of the key times at which inspection would be needed, the

certifier trundles on and does its thing. Unless and until the certifier says, "I'm terribly sorry but, for reason A or B or C or whatever, I can no longer complete this," and then the Council can say, "Okay, well, if we're back on the job," and there's a possibility identified here of saying some other certifier comes in but
5 even if that's not right, "We're back on the job but, before we do any inspections, this is our fee, you pay us and then we are engaged to provide the services which our competitor was previously providing and we will of course be subject to the *Hamlin* responsibilities in performing those functions, recognising that in some cases matters may have proceeded to the point
10 where we can't complete the task."

TIPPING J:

I was just going to ask you about that. What happens if, at the time it's being done the certifier is okay but the Authority has then withdrawn, so they have to
15 give this notice, the Council then says, the Council have to say, "You've got to uncover all this work"?

MR GODDARD QC:

The Council can simply – if the Council is advised that work is completed and is asked whether it can form the view required under section 43, if we go back
20 to section 43 subsection (3) and it says, "Except where a code compliance certificate's already been provided from a building certifier, the territorial authority shall issue to the applicant in the prescribed form the code compliance," if it's satisfied on reasonable grounds that the building work to
25 which the certificate relates complies with the code.

So if it says, "Well, I can't be satisfied on reasonable grounds because I have never had an opportunity to inspect work that has been covered in," then either work has to be uncovered in order to enable it to be inspected or,
30 alternatively, no CCC will issue and if the owner is unhappy with the Council's refusal to issue a CCC it can refer that to the BIA under sections 17 to 20 and if the BIA upholds the decision – and this I think happened in either *Sunset* or *Byron* but I can't remember which now – then the short answer is that no CCC

ever issues in respect of that work and LIMs will for all time look forward, say, “No CCC in respect of this.”

5 If particular defects in the work are identified, if insanitary buildings or dangers to health are identified, then a notice to rectify can be issued but I’ve, think I’ve suggested to the Court before in my submission, this is exactly the sort of context where it arises, that you can end up in a middle space where you can’t be satisfied on reasonable grounds that compliance has been achieved but nor are you aware of any specific defects in respect of which a notice to rectify
10 could properly be given.

That, I must say, flags another unsatisfactory aspect of this pleading, although it’s one that, if it was the only problem, could probably be dealt with by amendment and that’s is that the particular loss and damage complained of
15 can’t possibly have been caused by anything done after ABC issued the CCC. It kind of caused the defects because the building had been built, it had been finished, the defects were already present. It would have to be a claim for a quite different loss, of the kind identified by Your Honour Justice Young earlier today.

20

YOUNG J:

A minus B, where A is what was paid and –

MR GODDARD QC:

25 And B was value.

YOUNG J:

– B is what it’s worth.

30 **MR GODDARD QC:**

Subject to all the problems with that sort of negligent misrepresentation claim, like the fact that you need to plead it and that it’s barred by section 41 and so on and so forth. In terms of the statutory scheme, just one more thing perhaps I will highlight – sorry, I’m just trying to work out what the time is

because the clock that used to be here for counsel seems to have disappeared but I've got a timepiece hiding up here. I'm a little concerned that someone may have souvenired it, Your Honour.

5 **ELIAS CJ:**

Where do you think we're going with the hearing, are we going to conclude today?

MR GODDARD QC:

10 I'm very much in the Court's hands.

ELIAS CJ:

How much longer do you want to be, Mr Goddard?

15 **MR GODDARD QC:**

I could provide a condensed version of the things I have to say which add to my written submissions, in about 10 minutes and leave my learned friend 15 minutes to reply or, if the Court wanted to sit late, I can talk longer. That's a dangerous invitation, I know. Or, if the Court wants to hear from me more
20 fully on some of these issues, then I think it's unrealistic to finish today. So perhaps I should seek Your Honour's guidance at this point about whether it's headlines or –

ELIAS CJ:

25 Well, I'll check but perhaps we should continue until four and if we are not going to finish then we should adjourn and resume tomorrow morning.

TIPPING J:

I, for myself, would be happy with headlines but I don't want Mr Goddard to
30 feel in any sense rushed.

ELIAS CJ:

No, I meant by suggesting that we would continue until four, that we'd see how your headlines went Mr Goddard and if we feel we need to explore them with you –

5 **MR GODDARD QC:**

Drill down.

ELIAS CJ:

– then we'll take the adjournment at four.

10

MR GODDARD QC:

That's a very helpful indication, Your Honour. So, I was addressing the three propositions of Justice Blanchard, adopted by my learned friend, the formulation of the case. I dealt with B in as much detail – the legend at my statement 1, in as much detail as I want to, A, the point that the Council should not have received the certificate issued by ABC and treated as valid. I've gone to the certificate, I've said there's nothing –

15

TIPPING J:

20 Does the "received" there add anything, or is it just, "Should not have treated it as valid"?

MR GODDARD QC:

It must be "treated it as valid" because you can't really prevent yourself from receiving something.

25

TIPPING J:

Well, without wanting to sound pedantic Mr Goddard, I'd have thought there might be –

30

MR GODDARD QC:

No, no, Your Honour – far be it from me to intervene in a review of Justice Blanchard's formulation of the case by Your Honour but I can't for myself see that "and received" –

BLANCHARD J:

I was only trying to help.

5 MR GODDARD QC:

– adds anything, should not have treated it as valid, “when received” is perhaps the way to bridge that possible difference.

TIPPING J:

10 I’m sure we’d both settle for that.

MR GODDARD QC:

15 I’ve noted that it carries no death wounds or even, in my submission, blemishes on its face. On its face it looks just fine. In order to understand the particular defect complained of, or the various other defects potentially going to whether or not it was a proper exercise of powers by ABC to issue the certificate, I have identified that there are quite complex matter of expert
20 judgement that would be involved and that, on my friend’s approach, the process of looking at it, once received and deciding whether to put it on the section 27 record or take some further action, would be one that required substantive building expertise, not simply clerical competence. And yet, in my submission, it’s a register function, essentially a filing function, that’s what’s
25 contemplated by section 27.

There is no statutory decision, no exercise of statutory power, required of a Council that receives a code compliance certificate from a building certifier, I think that’s very important to bear in mind. Except for putting it on the file to
30 be referred to later, no decision of any kind is contemplated by section 43. I’ve identified the possibility that, even if there were gaps between – well, that the certificate could have been fine if the building was with an E2/AS1, if there’d been other fillings of gaps, such as approvals from the BIA or, in my submission, although the Court has been somewhat more tentative about this,

gaps filled by certificates from other building certifiers, that certainly was always contemplated in respect of gas and electricity, that's common ground.

Conversely, I've pointed out that section 43 and 56 wouldn't be complied with,
5 it wouldn't be a code compliance certificate issued in accordance with section
43, if certain factors that couldn't possibly be investigated by the Council
under any sensible regime were present, such as an interest in the building,
the Court took my learned friend to that and I've made the point there was no
10 decision to make or power to exercise. It is perhaps worth noting the very
different pre-conditions specified in the legislation for issue of building
certificates and code of compliance certificates.

This is section 56 and what we have in sub-section 1 is that a building
certificate issued by a certifier shall be in writing, identify the specific item or
15 items that are in certificate being items not excluded by a limitation on the
building certifiers approval, identify specific provisions with respect to certified
approved, signed and accompanied by a relevant project information
memorandum and then sub-section 2 deals with the two types of building
certificate, the in-advance one granted to enable a building consent to issue.
20 It will comply if it is done in this way and (b) the after-the-event one, particular
items do comply.

Then we get 3, a building certified code compliance certificate in the
prescribed form, so it is a different certificate in a prescribed form pursuant to
25 section 43 "If the building certifier is satisfied on reasonable grounds that the
building work complied with the provisions of the Building Code on the date of
certification." None of those limitations must be items and provisions within
the approval listed in 3 and that must be the case because for example,
energy work certificates are not items within the building certifiers approval or
30 necessarily provisions but they still require to take them into account.

ELIAS CJ:

Well that is why the on "reasonable grounds" presumably is – well, one of the reasons.

MR GODDARD QC:

Yes but those reasonable grounds can be a certificate from someone else.

5 **ELIAS CJ:**

Yes, yes, I understand that.

MR GODDARD QC:

10 So my submission supports the idea that you can look to other building certificates. There is no, in the empowering provision, which is 56(3) there is none of the limitations for building certificates listed and it is implicit in this that you can look to at least some other building certificates in relation to energy work and, of course, to determinations by the BIA, so I didn't want to go to that. A critical issue is the question posed by Your Honour Justice Tipping, 15 how much looking behind the certificate does the Act envisage interpreted purposively.

That, in my submission, is the right question and it links very closely into who should be doing it, is it a building expert or is it an administrative assistant, a 20 clerical assistant and I have identified a number of features of the legislation that are relevant to that but critical to them is the competition between Councils and certifiers, the desire to exclude second-guessing or independent judgement by Councils where a certifier is involved. The fact that they are appointed to a statutory role, exercising statutory powers, regulated by the 25 BIA and also supervised by it in relation to matters of doubt and dispute.

It seems to me that in those circumstances the Council can and must proceed on the basis that these other statutory officers, performing their statutory functions, are performing them properly, subject only to that *Murray v* 30 *Whakatane District Council* qualification of an extreme case of usurpation of power, should be disregarded. Now obviously if the person is not on the register, you couldn't treat it as a basis. Your Honour Justice Young asked, "Well what if I signed one?" If the Council had received a building certificate signed by Justice William Young, then it would have been entitled, whatever

Your Honour's substantive expertise in building matters might be, to say well, you haven't yet been approved as a building certifier.

YOUNG J:

5 Well that is an extreme case which I postulated. What if I was certified for residential but not – accredited to give residential certificates but not commercial?

MR GODDARD QC:

10 Then the question would be whether it was apparent, from the particular certificate that you were clearly outside power.

YOUNG J:

15 Why wouldn't it be enough – would it be enough to show that I was certifying a commercial property because you would know from the BIA register that I was only certified for residential property.

MR GODDARD QC:

20 The difficulty with that is that the residential/commercial dividing line is not always entirely –

YOUNG J:

It's a bit smudgy.

25 **MR GODDARD QC:**

It's a bit smudgy Sir, so again what you would have to have, is someone who said well, hang on, let's have a look at the plans and specifications, let's see what category it is described as falling in there, let's understand all those matters so there would still be a matter of enquiry and whether it was so clear
30 that you are in usurpation of power; obvious it is out or not, it would be, I think, a question of fact and degree but not one that arises in this case, we are not in that sort of territory.

McGRATH J:

Would you stop, do I understand you saying, you would stop by saying it has to be a building certifier. Do you accept that?

MR GODDARD QC:

5 It must be a building certifier. Must be signed by one of the people identified as a required signatory.

ELIAS CJ:

10 But what is the basis on which you say it must be a building certifier because suppose, they are not even a building certifier but on the form they say, well whatever the form is here "I, being a building surveyor, I give this certificate"

MR GODDARD QC:

15 It really comes down to Justice Tipping's question of how much looking behind the certificate does the Act envisage paying attention to the statutory scheme and it seems to me that it is consistent with the statutory scheme, which involves identifying certain people as building certifiers and identifying required signatories to check that you have got a certifier under a required signatory.

20

ELIAS CJ:

Well if you are required to go so far.

MR GODDARD QC:

25 That doesn't involve any plans and it doesn't involve any building expertise.

ELIAS CJ:

30 No but what is bothering me is that the difficulties which it suits your argument to stress and you are doing so very effectively, are difficulties created by the way in which the BIA has accredited people. But there are the "bedrock" or simple basis such as whether you, in fact, are a building certifier at all, whether you are certifying a commercial building when you are only certified for residential buildings, leaving aside your argument about how fuzzy that is.

MR GODDARD QC:

Well there we are getting immediately into –

ELIAS CJ:

5 I just don't see that you always need to get plans and certificates.

MR GODDARD QC:

Sorry, that you don't?

10 **ELIAS CJ:**

That you need to go to plans and – sorry, plans and specifications.

MR GODDARD QC:

15 There is a difference between the matters that can be checked from the publicly available register.

ELIAS CJ:

Well what has to be on that register, can you just take me quickly to that.

20 **MR GODDARD QC:**

Yes that is in the Act which is in volume 3, tab 20 and building certifiers are set up, under part 7 and section 53 deals with the register and what has to be on the register is listed in sub-section 2 "Date of approval, name and address, provisions of the Building Code, limitations, date of expiry and such other
25 matters relating to the approval as the authority to direct" and if one looks back at the qualification provisions, "Applications for approval as a building certifier," Your Honour will see in sections 51 and 52, again reference to particular provisions and any limitations, so it is actually inherent in the scheme, Your Honour, that there will be this sort of quite sophisticated
30 approval and that understanding –

TIPPING J:

What about – which provision 4 Mr Goddard, is that helpful to you?

ELIAS CJ:

“Duly authorised by the authority.”

TIPPING J:

5 Purporting – “Certificate under this – purporting to be under the hand of a person duly authorised shall be –“

MR GODDARD QC:

10 I understood that to be a certificate about the scope of registration of a certifier, rather than about what certifiers could do. I am just –

BLANCHARD J:

It is under the same part.

15

ELIAS CJ:

You don’t have to check that the signature is the signature of the person.

MR GODDARD QC:

20 “A certificate under this part of the Act purporting to be under the hand.”

ELIAS CJ:

That is not an uncommon provision, is it?

25 **TIPPING J:**

I don’t think it is confined to the registration process, although it is in the section dealing with registration “because it is under the hand of a person” – oh, maybe it is –

30 **MR GODDARD QC:**

I think it’s duly authorised –

TIPPING J:

– it’s an authority –

MR GODDARD QC:

– by the authority –

5 **TIPPING J:**

– certificate, isn't it –

MR GODDARD QC:

– I think it is, Sir.

10

TIPPING J:

Yes, yes, I think it is.

MR GODDARD QC:

15 That was very alluring for a moment but I don't think –

TIPPING J:

No, I think, no, no.

20 **MR GODDARD QC:**

– I don't think I can –

TIPPING J:

Forget it, it's clearly an Authority certificate, not a –

25

MR GODDARD QC:

Yes, I think so. So it's saying someone is a building certifier.

TIPPING J:

30 Yes.

McGRATH J:

Mr Goddard, I suppose that the bedrock requirement that it is a building certifier who issues the certificate could be said to be derived from section 53,

in that it's a document set out in subsection (1) or (2) and certainly subsection (1) is looking at a building certificate issued by a building certifier.

MR GODDARD QC:

5 Section 56, Your Honour?

McGRATH J:

Section 50, subsection (3). Looking just, just saying, "What is it that in good faith –

10

MR GODDARD QC:

Yes.

McGRATH J:

15 – you rely on?" it's one of the documents in subsection (1) or (2) and if you're looking at (1), that is a building certificate issued by a building certifier. So that must be at least the bedrock requirement that has to be there.

MR GODDARD QC:

20 I think that's right, Sir and that was the approach suggested by His Honour Justice Tipping –

McGRATH J:

It was.

25

MR GODDARD QC:

– earlier today, that in order to bring yourself within 50, you need to have something which purports to be a building certificate or a code compliance certificate, which is in fact issued by someone who's a building certifier and I
30 accept that.

McGRATH J:

And that has none of the complexity of enquiry –

MR GODDARD QC:

That's right.

McGRATH J:

5 – given that there's the register to refer to.

MR GODDARD QC:

10 So if the person's a building certifier and you get something from them which purports to be a building certificate or a code compliance certificate, certifying compliance with the code, then, consistent with the statutory scheme, not doing things twice, not having territorial authorities engaging in rent-seeking behaviour or undermining the effectiveness of this important element of the scheme, they just can't go beyond that, they have to accept that. And if anyone is unhappy about it, the way that's raised is not by saying to the territorial authority, "You should ignore this," and then creating a great fight at 15 that level, it's by raising under sections 17 to 20 a matter of doubt or dispute with the BIA, which will then authoritatively determine whether or not the certificate's been properly issued.

20 **ELIAS CJ:**

Well, that presupposes that there is something that floats through this Act called a "building certifier" but the term's not really like that, people are certified for particular purposes.

25 **MR GODDARD QC:**

That's not how it's defined in section 2 and I think that's quite deliberate, Your Honour, with respect. "Building certifier" means a person approved as a building certifier by the Authority under part 7 of this Act. So if you've got yourself onto the register you are a building certifier. All the enquiries after 30 that are enquiries about whether you are or are not within scope and that enquiry is different for building certificates and for code compliance certificates, that's very clear. How different remains to be considered by the Court and I've addressed that. But that it's different could not be clearer because there are at least some matters on which a code compliance

certificate can be built, in respect of which the building certifier has no expertise.

TIPPING J:

5 If you're on the register, you're a building certifier, notwithstanding any limitations?

MR GODDARD QC:

10 Yes. And the sanction for giving code compliance certificates inappropriately is disciplinary action by the BIA. Ultimately, it raises questions about your competence, about whether you're a fit and proper person to be a building certifier, which is one of the criteria for continued registration under part 7.

TIPPING J:

15 Although I wouldn't want this to be taken too literally, I think the difference that you're drawing is between a ministerial consideration of the document and an evaluative consideration of the document.

MR GODDARD QC:

20 Yes, or between an administrative one and an expert.

TIPPING J:

Or a judgemental.

25 **MR GODDARD QC:**

And, in my submission, what is clearly intended to be excluded by the scheme of this legislation is any exercise of expert judgement by a Council where a certificate from a building certifier is presented to it. They are supposed to just act on that and, if there's a problem with the certificate, it's not for the Council
30 to take that issue, it's a competitor, not a regulator, not a supervisor, the issue is to be raised elsewhere.

TIPPING J:

For example, it is solely ministerial or administrative as to whether someone is a building certifier.

MR GODDARD QC:

5 Yes.

TIPPING J:

But whether it's within an E2 whatever it was, or not –

10 **MR GODDARD QC:**

AS1.

TIPPING J:

15 – is an evaluative issue.

MR GODDARD QC:

You should have seen counsel in the Court of Appeal when we were asked to explain why it wasn't, Sir. It became clear that not only was it not
20 administrative but that a law degree provides no assistance, in answering that. We were both completely stumped as Justice Baragwanath asked us probing questions about the details of non-compliance, yes.

TIPPING J:

25 One wouldn't want to push that too hard but I think that conceptually, that that is the kind of difference you're addressing.

MR GODDARD QC:

That's the kind of difference that I am addressing and that is consistent with
30 the focus of this scheme on having one or other responsible for this task, one or other given information to trigger inspections and so forth. And here again, in terms of how much looking behind should we do, the statutory role, the statutory division of functions is important. But we can't also ignore the

specific provision made for building certifiers to be the ones to put their hands up and say there's a problem.

5 Again, in my submission, Councils can properly rely on that. And in the absence of any flag of that kind, to receive a CCC is another indication that you can, in good faith, rely on what's being provided because you know that there's another person with statutory responsibilities who, if there was a problem, should have told you at an earlier stage that that problem existed, should have identified that under section 57 and under the regulations.
10 Perhaps also interesting, that under section 57 if the certifier doesn't advise the Council, the responsibility devolves on the owner or the person carrying on the work. So, again, a little odd for the Council to be facing a suit by the owner of the building, or someone standing in their shoes, in circumstances where it's the owner or the person carrying out the work who was supposed to
15 advise the Council if the certifier doesn't. So –

ELIAS CJ:

Sorry, just thinking about that. The owner, under section 57, has the obligation –
20

MR GODDARD QC:

It's, first of all, the certifier and also the owner. So, subsection (3), "Engagement subject to the following provisions." There's reporting in the prescribed manner and I took the Court to the regulations. Then (b), "The
25 building certifier shall notify the territorial authority if the building certifier becomes or expects to become unable to inspect any specified items or believes there's a contravention." Then –

ELIAS CJ:

30 What's the purpose of notification to the territorial authority, if you're right?

MR GODDARD QC:

Subsection –

ELIAS CJ:

I mean, you'd say you just go off to the BIA?

MR GODDARD QC:

5 No.

ELIAS CJ:

No?

10 **MR GODDARD QC:**

Not if – that's if after the event there's a dispute about a certificate that has been issued. This is where before a relevant certificate is issued –

ELIAS CJ:

15 Yes.

MR GODDARD QC:

– the certifier anticipates not being able to complete the task. It's common ground, I think, this is what the certifier should have done here. The certifier should have, if my learned friend's right and that's a matter which can't be
20 decided in the context of this application. If they're right that this building was outside E2/AS1, then the certifier which was working on the building should have formed a view on that and should have said to the territorial authority, "You were told previously that I was going to carry out all field inspections and
25 issue a CCC. I am now subject to a limitation which prevents me doing that," and I say that there were two options open: the certifier could either say, "We've got another certifier to cover it, so don't worry," or, "Please, territorial authority, come and do this." My learned friend says that first option didn't exist, you had to say to the territorial authority, "You come and do this." Either
30 way, what's clear is that the territorial authority could then say, "Fine, we understand that you want us to resume, of course we can only pick up from the state things are in now and before we carry out any more inspections or issue you a CCC here are our fees, which you must pay," and then once that notice had been received and the cheque had actually been received and

banked and cleared, the local authority would embark on performance of the functions to which a *Hamlin* duty attaches but that point was never reached in this case.

- 5 I was going to take the Court to the original building certificate and scope of engagement. Perhaps just note that they are under tabs –

ELIAS CJ:

- 10 Do you go so far though – I’m just thinking about what you’ve just said about the owner or the person undertaking the work. Do you go so far as to say that the scheme of the Act is that the owner is able to inspect the register and form the judgement, or is that, or equally?

MR GODDARD QC:

- 15 It would depend on the problem with the certifier. That’s why I think it’s formulated, both obligations are imposed. The building certifier has a positive statutory obligation to tell the territorial authority if they can’t continue. And that’s mainly what the territorial authority is going to expect to see occur. It’s a statutory office holder with statutory responsibilities, regulated by the BIA,
20 you’d expect them, consistent with the statutory scheme working properly, to tell you if, for some reason, they could no longer complete an inspection. But also I think it is important that if, for example, they just, suppose they go into liquidation, so that it’s not doing anything any more. Then, obviously, you’d expect the owner to say, “I’ve got a problem. I had a building certifier, I paid
25 them a fee, unfortunately it’s now clear I’m not going to get the services,” well, if they just don’t show up –

TIPPING J:

- 30 I think “unable” in this context means “physically unable” I would have thought, rather than “legally disentitled”.

MR GODDARD QC:

Well, (c) means –

TIPPING J:

Although that could be an issue.

MR GODDARD QC:

5 – “no longer willing or able”.

BLANCHARD J:

Well, I suppose you could have a situation in which somebody’s told the owner that the BIA register has changed –

10

MR GODDARD QC:

Yes.

BLANCHARD J:

15 – and the owner checks up on that and then would be under an obligation to tell the territorial authority.

MR GODDARD QC:

They wouldn’t even need to check up on it. If they were told by the certifier,
20 “I’m terribly sorry, I can no longer do your house because BIA has narrowed my scope,” then the owner has a positive obligation to do work in accordance with the consent to give notice of future steps taken under regulation 7, that would come back into existence. So they should go to the local authority and say, “We’ve lost our certifier, we now want you to do this,” and again the
25 Authority would say, “Yes, that’s fine, we understand we’re the final port of call, this is our fee for completing this, that’s, you know, half the \$6000 or whatever, not the 130 you originally paid us. Pay us these \$3000 and then we will provide the service and we will owe you the obligations attached to the provision of that service in accordance with *Hamlin* and the decision of the
30 Supreme Court in *Sunset* and *Byron*. So that’s the trigger.

ELIAS CJ:

How do you think you're going, are you going to deal with good faith because, if so, it may be that we should call a halt tonight.

MR GODDARD QC:

I thought I should deal with that –

5 **ELIAS CJ:**

Yes.

MR GODDARD QC:

– unless the Court didn't want to hear from me on it.

10

ELIAS CJ:

No, I think we should take the adjournment. Are counsel able –

MR GODDARD QC:

15 Absolutely, Your Honour.

ELIAS CJ:

Yes.

20 **MR GODDARD QC:**

My learned friend?

MR O'CALLAHAN:

I'll make arrangements.

25

ELIAS CJ:

Yes, thank you. All right, well, we'll take the adjournment now and we'll resume again tomorrow at 10 o'clock, thank you.

COURT ADJOURNS: 4.03 PM

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COURT RESUMES ON WEDNESDAY 20 APRIL 2011 AT 10.01 AM**ELIAS CJ:**

Yes, Mr Goddard.

5

MR GODDARD QC:

Your Honour, the Court should have – the inevitable consequences of an overnight adjournment, I prepared a two page note on the meaning of section 50 subsection (3) to attempt to deal more clearly with that issue than I had in my original submissions. Attached to that are three things: an extract from the Crown Entities Act which I'll be going to in relation to the usual legislative use of the term good faith in the context of exclusions of liability; another case on good faith, *Director of Human Rights Proceedings v Commissioner of Police* [2008] NZHC 1286; and the last page of *Huang v North Shore City Council* (2005) 7 NZCPR 64 (HC), a case that's in volume 1 under tab 8 and that had been copied without the last page and as it's a case, which we say is the most similar one, I thought the Court should have the whole case, so that perhaps should just be tucked into volume 1 of the authorities under tab 8. I won't go to it this morning but that seemed tidy.

20

Turning then to the issue that was left from yesterday, the meaning of subsection (3) of section 50 of the Act which is in volume 3 of the authorities under tab 20, the Court will remember the structure of this is that a territorial authority shall accept the following documents as establishing compliance. There's then a list of various types of document and the range is quite important. I'll come back to that in a moment but A is a building certificate or code compliance certificate to that effect, i.e. confirming compliance of the code, issued by a building certifier under section 43 or section 56 of this Act. And then in subsection (3), for the avoidance of doubt, no civil proceedings may be brought against a territorial authority or a building certifier for anything done in good faith in reliance on a document set out in subsection (1) or subsection (2).

30

As I say at the beginning of my note, the meaning of subsection (3) can't be considered in isolation from subsection (1) especially given the cross-reference back, the reference back to a document set out in subsection (1). That means that whatever type of document we're talking
5 about is the same in each of these subsections. Two approaches that are really, I think, serious contenders before the Court for the interpretation of 51A, first of all the plaintiff's latest approach since withdrawing the concession in my friend's written submissions, the approach that says, well, it's only a document within A if it's a building certificate or code compliance certificate
10 issued by a building certifier that complies with all the requirements of section 43 or section 56 as the case may be, including falling within any restrictions on the certifier's authority, or alternatively, Your Honour Justice Tipping suggested approach that it's a document which appears to be a building certificate or a code compliance certificate issued by someone who
15 is, in fact, a building certifier.

The plaintiff's approach which reads 51A as applying only to a building certificate or code compliance certificate that meets all the requirements of 43 or 56 would significantly narrow the scope of subsection (3) because the
20 reference back to a document set out in subsection (1) would then be a reference back to that narrow class of document. The way subsection (3) is structured, there's no room for – doesn't say a document which a territorial authority believes in good faith is a document set out in subsection (1), the good faith qualifier applies to the action that's taken in reliance on one of the
25 types of document identified in subsection (1). So the result of the narrow reading suggested by the plaintiffs now is that the protection provided by subsection (3) would be extremely narrow. It would be confined to action taken in reliance on a document that met all the requirements in –

30 **YOUNG J:**

Well, except that you wouldn't be – it's difficult to see how a local authority would be negligent about something it couldn't know about, so a local – it's difficult to see how a local authority could, would be negligent because unbeknown to him the, unbeknown to the local authority the building certifier

had a financial stake. It can perhaps be expected to be on notice of what's effectively on a public register on the BIAs website.

MR GODDARD QC:

5 That suggests a possible intermediate reading of some kind of 51A. It's very difficult –

YOUNG J:

10 No, it just means that you don't get to section 50 subsection (3) doesn't bite unless, doesn't need to apply unless there's been a breach of duty. I mean, if there's no negligence so there's not going to be a problem, so postulating a series of hypothesis in which section 50 subsection (3) wouldn't apply but in which the Council wouldn't be negligent in any way mightn't really engage with the policy.

15

MR GODDARD QC:

20 That really again turns on whether the protection was supposed to be a protection by reference to basic concept of negligence and duty of care, or whether this was intended to clearly authorise local authorities to act on certain types of document and to give them a very clear protection from negligence in those circumstances. Your Honour's approach would say, well, subsection (3) doesn't apply but you don't need it in those circumstances. The problem with that is that it leaves territorial authorities having to run the argument about whether or not they were negligent having to run the argument about what the scope of the duty was. In my submission, looking at
25 the scheme of the legislation, that's exactly what this combination of provisions was designed to avoid.

30 Now, coming back to Your Honour's point about what the purpose was here, the policy of section 50 –

ELIAS CJ:

Sorry, do you, does that mean you placed reliance on no civil proceedings may be brought?

MR GODDARD QC:

Yes, that's important that they just can't be commenced and if they were brought they could be struck out. The idea is that local authorities shouldn't
5 have to go to the trouble of defending them on the basis of negligence, no negligence and that's against the backdrop of a significant broadening of permissible methods of building construction performance-based code rather than a highly prescriptive code, a positive desire to see novel and most cost effective building techniques used and an anxiety that councils and others
10 who had been doing things the same way for many decades would be hostile to that, reluctant to change so, for example, provision for accreditation certificates to be issued by the authority permitting novel products and processes to be used. We've seen an approved, an acceptable solution document, that's another type of document referred to in 51C.

15

The policy of the legislation was that decision makers, territorial authorities and building certifiers should be encouraged and required to give full effect in good faith to documents of that kind which said – things that have never been done before in New Zealand are now acceptable and if another decision
20 maker under the statutory scheme has given its approval, you must and you can safely, without fear of civil proceedings, act on that. That was what this was intended to bring about. It was intended to discourage second guessing of the decisions of other decision makers to discourage a restrictive approach to documents that might require some interpretation.

25

I'll come back to that because it's important to bear in mind that although paragraph (a) refers to quite a simple type of document that will say this complies or this, you know, the code. Some of the other types of document referred to, like accreditation certificates, like acceptable solutions, are
30 inevitably going to be more generic and in deciding whether they establish compliance with the provisions of the Building Code in a particular case, judgement will have to be exercised by the territorial authority or the certifier and that is where acting in good faith and reliance on a document is going to be particularly important and what was sought to be encouraged here, was a

full faith and credit approach, an unquestioning acceptance of what, of the full breadth of approvals, be it in relation to a specific building or a more generic kind in relation to processes or solutions in the documents listed in sub-section 1.

5

So, it seems to me that the result of the plaintiff's approach would be that the protection that is contemplated and required to give effect to the policy of the legislation, would not be delivered by sub-section 3 because the type of document, on which sub-section would bite, would be that narrower class contended for. Rather, in my submissions at my 1.3 the better approach is that suggested by Your Honour Justice Tipping yesterday, that paragraph (a) applies to a document that is described as a building certificate or CCC and is issued by a person who is in fact a building supervisor, what that means, 1.4 is that my learned friend was quite right to concede yesterday, that sub-section 1 applies to a purported certificate and that although that concession I think was withdrawn, he was right the first time round.

10
15**TIPPING J:**

The protection it seems to me, at least arguably, derives from the fact that as long as it is signed by an actual building certifier then the legislation contemplates that the risk of that person having got it wrong, is not to be borne by the Council unless it has acted otherwise than in good faith.

20

MR GODDARD QC:

Yes Your Honour and that no proceedings can be brought in respect of that matter. The risk of having to defend them on the merits is taken away.

25

YOUNG J:

But they do have to, I mean that is just a form of words because I mean the proceedings have been brought here. It just means it is a good defence to proceedings if the Council has acted in good faith.

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MR GODDARD QC:

But critically it is a defence that can be raised in a preliminary way by way of strike out or summary judgment application, not one that has to go to trial which is why we are here.

5

YOUNG J:

But how, if there was a genuine issue as to good faith, could that be determined otherwise in a trial?

10 **MR GODDARD QC:**

Not if there is a genuine issue as to good faith but the point is, that in the vast majority of cases, no question as to good faith, is arguable, that is an extraordinary situation.

15 **YOUNG J:**

Well is it anything other than a strongly worded statement, that good faith is a defence.

MR GODDARD QC:

20 It is a statement of defence and a bar – yes a defence but also a bar to proceedings in the sense that the proceedings should not be entertained, should not be heard, if good faith is present and that actually is a very important issue in terms of the costs and risks associated with the defence. It is particularly important for – we see the same formulation – I will come to this
25 later – the good faith one, in section 89 of the Act. Maybe just go to that now and this is a very common -

ELIAS CJ:

Eighty nine?

30

MR GODDARD QC:

Eighty nine.

YOUNG J:

Sorry, of which Act?

MR GODDARD QC:

5 Of the Building Act, still Your Honour. The same concept of acts done in good
faith, turns up in the exclusion of civil proceedings against members of the BIA
territorial authorities and their committees and that is a very common
formulation, it is found in the Crown Entities Act and many other Acts in
10 relation to statutory bodies. Again, the idea is that members are not exposed
to proceedings and are not expected to incur the costs and risks of defending
them on the merits, provided that they act in good faith. Part of my
submission in relation to the meaning of good faith, which I will come to in a
moment, in sub-section 3, is that there is no reason for it to have any different
meaning in the liability exclusion provision in 53 and in 89.

15

TIPPING J:

So in 89, if a member say, relied on a document that was actually invalid but
lacked but was in good faith, they would be protected and therefore, they
don't have to go behind what something that appears, on its face, to be valid,
20 otherwise the protection that was given here would be illusionary in a sense.

YOUNG J:

This, of course, is another absolute belt and braces provision because it is
very hard to see how any of these people would, in fact, be liable for anything
25 other than malfeasance in public office because the duty of care would be
owned by the body to which they are a member. I mean you don't normally
sue an employee of a company, I know occasionally it happens.

MR GODDARD QC:

30 It does occasionally happen and it is sometimes done precisely to put
pressure on the relevant member or to create risks. It is very relevant to – I
digress slightly here but having been involved in the Crown Entities'
legislation, it is very relevant to the willingness of people to serve on public

sector boards where remuneration is not always as generous as it might be in the public sector and it is very relevant to the cost of insurance.

BLANCHARD J:

5 What is a building referee?

MR GODDARD QC:

A building referee is a person appointed by the authority, by the BIA, to conduct a section 20 hearing in relation to a matter of doubt or dispute. So if
10 a matter of doubt or dispute in relation to a building certificate or code of compliance certificate or certain local authority decisions is referred to the authority, one of the ways the authority can decide that is to appoint a building referee who conducts a hearing.

15 **YOUNG J:**

It is almost inconceivable that such a person would be liable for anything, other than at most, deliberate malfeasance.

MR GODDARD QC:

20 Well that is a quasi-judicial function so, of course, Your Honour.

YOUNG J:

That is what I am saying, it is a belt and braces.

25 **MR GODDARD QC:**

But remember, Sir, that this also applies to employees and the employees are doing hands-on decision making and hands-on inspecting so that is actually quite important. This goes to whether you can sue the individual inspector, for example, so it is non trivial in relation to such employees and what it says to
30 them, is go out and do your job in good faith, you personally will not be sued although your employer may be.

YOUNG J:

Are building inspectors ever sued?

MR GODDARD QC:

Well they can't be by virtue of this.

5 **YOUNG J:**

I know but were they ever sued, for instance, before the Building Act?

MR GODDARD QC:

I have a sense that some of the early cases –

10

BLANCHARD J:

It was probably never necessary because to sue the –

YOUNG J:

15 The breaking body was probably insured.

MR GODDARD QC:

And with deep pockets anyway because it can rate. I am not sure it has happened in New Zealand, I think it might have happened elsewhere, I think some of the Australian cases from memory but I can't be sure, I really can't.

20

BLANCHARD J:

But there are examples of people trying to get round bars on suing an employer, by suing the employee.

25

MR GODDARD QC:

I think it has cropped up in the context of, for example, some of the notice before action requirements, in relation to public bodies, in Australia possibly. There are those formal steps that had to be taken before you could sue a public authority in terms of writing to it and getting a response and having to do that, within tight time frames but I am not certain, so I don't want to put too much weight on that. Anyway, the point I was making was that this form of excluding liability for acts done in good faith is actually a very common one in the statute book in relation to members of employees of public bodies and

30

there is no reason to think that the way it is structured in sub-section 3 of section 50, in relation to the body, where there is a strong policy of giving full effect to this class of documents, differs in its scope from what is being done in section 89.

5

McGRATH J:

Mr Goddard, you are not, I take it, trying to suggest that sub-section 3 is really intended to prevent access to the Courts so that the Courts can decide whether or not it applies.

10

MR GODDARD QC:

No, no, no of course not, Sir.

McGRATH J:

15 So if you take that position, isn't it, do those opening words, really mean anything, "That you cannot bring the proceedings", when in fact you can.

MR GODDARD QC:

What it means is that you cannot succeed in the proceedings. It is really –

20

McGRATH J:

It brings you back to the defence that Justice Young –

MR GODDARD QC:

25 A strongly worded defence.

TIPPING J:

That's how the old Limitation Act was worded and everyone accepted you could bring a proceedings and then if it was fair enough, you would get struck out.

30

MR GODDARD QC:

But that is the point. The appropriate way of invoking this is in an application to strike out or for summary judgment for a defendant because the policy is

that the cost of a hearing on the merits and the uncertainty of a hearing on the merits, should not take place unless there is an arguable allegation of absence of good faith

5 **TIPPING J:**

And if there was absolutely none, you would probably be ordered to pay solicitor and client costs or at least you would if I was a trial Judge because the policy is so clear but if you are just doing it to try and extract some sort of nuisance settlement but anyway that's a red herring.

10

MR GODDARD QC:

I'll just bank that for future reference as a possible argument, Sir.

TIPPING J:

15 Well, it must follow.

MR GODDARD QC:

The proceedings ought not to have been brought –

20 **TIPPING J:**

Exactly –

MR GODDARD QC:

– in the absence of a plausible allegation.

25

TIPPING J:

– if it's as clear as that.

MR GODDARD QC:

30 Yes.

TIPPING J:

Yes.

MR GODDARD QC:

I think that's right as well and I'll just think about what that means for this case. Coming back to my note, what I say, that on this approach, the approach that makes subsection (3) do some work because it applies to documents which
5 are described as a building certificate or code compliance certificate issued by someone who is in fact a building certifier and to all the other, as well as to the other documents in subsection (1), the case can be decided under subsection (1) and subsection (3) really isn't reached.

10 The Council was obliged to treat the CCC issue by ABC as establishing compliance with the code. Now, one question the Court asked yesterday was, "Well, what's subsection (3) doing then, if its scope is co-extensive with subsection (1)?" and this is the issue to which I gave a little bit more thought overnight. It's doing two things, it seems to me – this is my paragraph 3.
15 First, where the document is very clear, like a building certificate or code compliance certificate, it's really braces to go with the subsection (1) belt, to pick up the Court's sartorial analogy and it just makes very clear that proceedings will fail in those circumstances and possibly underlines the sort of cost consequence that Your Honour Justice Tipping just mentioned a moment
20 ago. But, it does also serve a broader purpose because of the wider range of documents in subsection (1).

Naturally, we've been focused on paragraph (a) but it's important to bear in mind that some of these will be generic documents, like accreditation
25 certificates referred to in paragraph (c), accreditations of products or processes, like acceptable solutions, issued under section 49 paragraph (d). Applying those will require a measure of interpretation and exercise of judgement and what subsection (3) is doing there is saying, "Well, if you've got an accreditation certificate or an acceptable solution document and you
30 act in good faith on reliance on it, then you will not face liability." And what that ensures – my 3.2 – is that such documents are not read down but, rather, will be given full effect by both territorial authorities and certifiers and they can do so without fear of liability if their interpretation, their understanding, is later found to be wrong.

What does “good faith” mean here and in section 89? Well, in my submission, it means “absence of bad faith”, that is, acting without dishonesty or an ulterior motive and that's supported by a number of factors. First, normal usage in ordinary language. If you say someone has acted without good faith, that would normally be understood, I think, in modern New Zealand, as a pretty strong statement.

That's not saying they were negligent, that's saying that they've acted dishonestly. That's certainly the normal usage in New Zealand legislation. There are many liability exclusion provisions which invoke the concept of good faith and I have provided just one set of examples from the Crown Entities Act and, of course, the BIA was what we now call a Crown entity, although it went out of existence around the same time that the Crown Entities Act made its appearance on the scene. So, one would expect to see the same sort of policy in relation to liability turn up here. I've provided the initial parts and interpretation provision, just so the Court can see the scheme of the legislation but I want to go to two sets of provisions.

First, if the Court turns through past those initial provisions to page 34, what we have set out are the individual duties of members of Crown entities, every Crown entity which is a statutory entity. So there's a duty to comply with the Act and the Entities Act, duty to act with honesty and integrity. 55, duty to act in good faith and, separately from that, 56, a duty to act with reasonable care, diligence and skill, the care, diligence and skill that a reasonable person would exercise in the same circumstances. So, distinct concepts of good faith and reasonable care. And then when we turn over to the liability exclusion provisions, which begin on page 59, which is just a few pages in because I've only provided the necessary extracts.

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So, page 59, sub part 2, “Statutory entities, protections from liability,” section 121, “A member of a statutory entity is not liable in respect of an excluded act or omission to the entity, unless it's a breach of an individual duty, or to any other person,” so that's third party protection in respect of any excluded act or

omission and, similarly, subsection (2), “An office holder or employee is not liable to any person in respect of an excluded act or omission,” and what’s an excluded act or omission, one asks, not very attractive drafting technique. Over the page, section 126, “Excluded act or omission means an act or omission by the member, office holder or employee, in good faith and in performance or intended performance of the entity’s functions.”

So against the backdrop of an Act that clearly sets up those duties of good faith, distinct from a duty of reasonable care and then provides protection, where you act in good faith, it’s quite clear that there’s to be no liability to third parties in respect of that lack of reasonable care. That is plainly the way that good faith is used here –

ELIAS CJ:

Do you have any discussion of good faith in the context of a statute like this, which does, which provides a system of public, a public register and which does put territorial authorities in the position of accepting or not accepting a certificate?

MR GODDARD QC:

No. The –

ELIAS CJ:

And when you – sorry.

25

MR GODDARD QC:

The closest that the case law gets is the context of provision of information, including information on registers by a public body under the Official Information Act and there is a line of cases in the High Court in New Zealand on that, which I am going to go to in just a second.

30

ELIAS CJ:

All right, okay, thank you. And when you - I’m just wondering, in paragraph 4, when you say, “Without dishonesty or an ulterior motive,” and whether,

“Ulterior motive, improper purpose,” is sufficient against that statutory background, whether it may rather be without dishonesty or failure to faithfully fulfil –

5 **MR GODDARD QC:**

I just wonder what “faithfully fulfil” means, Your Honour.

ELIAS CJ:

Well, I’m not sure that “ulterior motive” is enough in this sort of context,
10 where –

MR GODDARD QC:

You need to –

15 **ELIAS CJ:**

– there is a framework around what it is that territorial authorities have to do and it does include a public register. Now, you say that the notification through this public register because BIA seeks performance standards which are very complex and which require judgement, means that it’s not feasible to
20 say that the territorial authority must ascertain whether the building certifier is certified in respect of particular work.

MR GODDARD QC:

It’s not that narrow. What I’m saying is that because the Act contemplates
25 that certifiers will be authorised in respect of some provisions of the code but not others –

ELIAS CJ:

Yes.

30

MR GODDARD QC:

– any time a CCC came in saying, “The building work under this consent complies with the code,” if the plaintiffs are right it would always be necessary, even on the simplest type of approval contemplated by this Act, to call for the

plans in order to know what sort of work was being done, in enough detail to know which provisions of the code were engaged. For example, if you're adding a bedroom to a house, you're not going to have any plumbing issues, so the fact that the certifier wasn't approved for plumbing matters wouldn't be
5 a problem. But if you're adding a bedroom with an en suite, you'd have plumbing work and you'd need a certifier, on the plaintiff's case, to issue a CCC, who had the plumbing approval as well.

So you could never just take a CCC at face value, you would always have to
10 call for the plans, read the plans and specifications, understand what the work encompassed, identify – and this requires expert judgement – what provisions of the code are engaged and then go and check that. So it's nothing to do with the way the BIA has done it, Your Honour, it's the basic statutory scheme which contemplates approval for some provisions of the code but not others
15 and subject to certain limitations.

ELIAS CJ:

And I suppose the enactment of the form, which doesn't provide for more information than the assertion?

20

MR GODDARD QC:

Yes. So unless there were to be an argument that the forms prescribed were ultra vires and inconsistent with the statutory scheme – and I'm not aware of my friend's –

25

ELIAS CJ:

Well, we don't have that.

MR GODDARD QC:

30 No, running that argument. What the Council was required to do was give effect to the scheme established by the primary and secondary legislation under which it was operating, reading that as a whole, this was how things were expected to work.

ELIAS CJ:

Yes, the area that bothers me is that if this was not a building certifier at all, I understand you to say that you wouldn't be maintaining the argument as far as you are pushing it here, or are you saying that, if it is a forgery.

5

MR GODDARD QC:

What I am saying is that I don't need to engage with that today.

ELIAS CJ:

10 No – although you do because –

MR GODDARD QC:

I need to make sense of the statutory.

15 **ELIAS CJ:**

Exactly and it is the point that I was making facetiously yesterday, about a little bit pregnant. Why do you stop with the naming of the certified -

MR GODDARD QC:

20 Because you are trying to check that what you have really is a decision by someone else who is authorised to play a role under the statutory scheme.

ELIAS CJ:

Play a role?

25

MR GODDARD QC:

Play a statutory role.

ELIAS CJ:

30 Yes.

MR GODDARD QC:

Under the statutory scheme, someone who has been given a measure of responsibility under the scheme and as soon as you have that, then ensuring

that they do their job properly, don't go beyond the scope of their responsibilities, don't make errors, is their responsibility and to the extent that they get it wrong, you then ask who is regulating that category of person and there is a whole regime of oversight built into this Act. You have got the BIA reviewing and dealing with complaints about and supervising and renewing the approvals of certifiers and also in Court we will hear more about this in November, the BIA sitting on top of, reviewing the operation of territorial authorities conducting audits of how they are managing their activities with the power to make recommendations on how they should improve it or ultimately to take the function away from them.

ELIAS CJ:

But leaving aside the detail for the moment. You do have a statutory scheme in which there is a publicly available register which authorises building inspectors, in respect of particular work.

MR GODDARD QC:

And the question is, who is supposed to police whether they are within that or not and when the territorial authority receives a CCC, is it supposed to be policing that or is it simply recording what that certifier has done in making it available for public information and it is the latter of those, in this statutory scheme. You learn no more about the appropriateness of a CCC, or whether the certifier was acting within its authority in issuing it by consulting the section 27 records, than you do by going to the Companies Office and finding a notice of a special resolution, adopting a new constitution for a company.

That is a record that it has happened but the registrar in receiving that and making that information available, is not required to turn his or her mind to whether the resolution was properly passed by the company. The register isn't intended as a register of validity, it is not a Torrens system, it is a record of documents issued and created and some of them are formal and some of them are informal, if Your Honour looks at what is required to be kept under section 27, it is a mix of formal documents and more informal materials, it is not a register of record.

TIPPING J:

Is another way of putting this point, that the Act doesn't envisage territorial authorities warranting either the accuracy or the validity of a CCC issued by a building certifier.

MR GODDARD QC:

Yes there is no stamp of approval, added to what the certifier has done. When you have, on the section 27 register, a certificate issued by a certifier, what the world is being told is that that certifier has confirmed compliance and that you can look to that certifier and the statutory scheme of insurance and the statutory liability regime, in respect of that certificate. There is no super added blessing.

McGRATH J:

Well there is no supervisory function.

MR GODDARD QC:

No supervisory function, no reason to get into that.

ELIAS CJ:

But there is an identity function and the building certifier, it really does rather beg the question because there is no building certifier people. Certifiers are certified in respect of certain work. There is no concept that, you know, you are a registered lawyer or something.

MR GODDARD QC:

Well I think there is Your Honour. I think there is the concept of being a building certifier.

ELIAS CJ:

But what are they certified for. They are not certified for everything.

YOUNG J:

No but they certify.

ELIAS CJ:

5 They certify, yes.

MR GODDARD QC:

They are not authorised necessarily for everything. They may be, they may not be but the key issue, when it comes to issuing for example, a code compliance certificate is that they are a building certifier and that they are satisfied on reasonable grounds, that the whole of the work encompassed in the consent, complies with the code, which is common ground that may be arrived at, as a result of building certificates on energy work, completely outside their competence, as a result of determinations by the authority completely outside their competence, a mix of things. So, the magic is being a building certifier and that enables you to act on reasonable grounds including matters outside your expertise to issue a CCC, that is our primary argument.

20 **TIPPING J:**

The definition of building certifier would only work if it meant a person approved as a building certifier in whole or in part and if you are only in part, you are still a building certifier.

25 **MR GODDARD QC:**

I don't think there is such a thing as a building certifier approved only in part, I think it is the same point as Your Honours. You are either one or you aren't.

TIPPING J:

30 That is what I am trying to say.

MR GODDARD QC:

And then the question is, what can you do and it is a bit like, if we introduced a system of you know formal accreditation of specialists for the practice of law,

so that you can only hold yourself out as a specialist in family law, as a family lawyer, if you had completed certain amounts of specific education, you would still be a lawyer, you would still be a solicitor, even though you couldn't properly hold yourself out as able to do certain work.

5

McGRATH J:

Mr Goddard, can I just come back to the Crown Entities Act and suggest to you, it doesn't really help us because good faith is very much a contextual question and it is, I suggest, as the High Court of Australia indicated in the
10 *Mid Density* case, capable of two meanings and the appropriate meaning has to be determined from the context of the statute. Now the Crown Entities Act has become very prescriptive in this respect and has probably excluded the first of the two definitions of good faith in *Mid Density* and accordingly, it is not a statute that helps us interpret the Building Act, which hasn't gone in to good
15 faith in that sort of way.

MR GODDARD QC:

The reason I provided it was two-fold Your Honour. Your Honour is absolutely right and, of course, the Australian Court is right to say that what is meant by
20 good faith in a particular statute must be derived from the context within which it is used but there is a prevailing usage in my submission in New Zealand statutory legislation. It is more normal to see it used in a sense which means dishonesty, absence of ulterior motive. The other meaning is a rather more –

25 **McGRATH J:**

But that is solely because it has been spelt out in such statutes.

MR GODDARD QC:

I think, if we look for example at the case law under the Official Information
30 Act, where it is not spelt out, that's the conclusion the Courts have reached and so cases like, they're referred to in my 4.3, *Ilich v ARCIC* [2000] 1 NZLR 380 (HC), *X v Attorney-General* [1994] NZFLR 433 (HC) at 435 and *Director of Human Rights Proceedings v Commissioner of Police* [2008] NZHC 1286 which doesn't separately discuss it but just follows *Ilich* and *X* to

come to the conclusion that the exclusion of liability for information provided under the Official Information Act in good faith applies unless the information is provided dishonestly or with an ulterior motive and there is no similar prescription to the Crown Entities Act. So it was – firstly, for that reason but
5 secondly, one of the things one asks when looking at the scheme of the legislation is well, what is the policy context, what is a sensible policy objective and it seems to me that the Crown Entities Act which is addressing in that exclusion provision, exactly the same issue as section 89 of the Building Act, in relation to exactly the same type of body, sheds real light on what a
10 sensible and likely policy setting is on these matters and there's no reason to think that that underwent any sort of radical shift in 2004.

There are good policy reasons for protecting members and employees of public bodies from civil proceedings, except where they act dishonestly or with
15 an ulterior motive. That is spelt out very clearly in the Crown Entities Act but that, in my submission, provides a helpful guide to what the policy is likely to have been for many decades before that because it is a sensible workable approach to ensuring that people can pursue public interest objectives, without being deterred from it, by the threat of liability.

20

McGRATH J:

The personal liability –

MR GODDARD QC:

25 Yes –

McGRATH J:

– is one thing but it's getting a little away from the context of section 53.

30

MR GODDARD QC:

That would require an argument that the context in section 53 required good faith to have a different meaning from section 89 in the same Act. Now it's not impossible for the same phrase to have a different meaning in two provisions of the same Act but it's a bit unusual. There would need to be –

McGRATH J:

Well not if the internal context differs for the two provisions –

5 **MR GODDARD QC:**

No, there's need to be a strong –

McGRATH J:

– it's entirely orthodox, orthodox interpretation.

10

MR GODDARD QC:

It's certainly orthodox that that's possible but the starting point is usually one of consistency of language within the same statute unless there's a good contextual reason to reach a different conclusion.

15

McGRATH J:

Just a matter of interest, do you accept the approach in *Mid Density*, where of course there was held to be a breach of a duty of good faith?

20 **MR GODDARD QC:**

No, I don't.

McGRATH J:

I thought you might not.

25

MR GODDARD QC:

I was going to come to that at the end of my fore.

McGRATH J:

30 Right.

MR GODDARD QC:

I think I've talked about 4.3 on the way past. I've talked – and (x) I think is a very helpful short decision of Master Hanson, as he then was, which just goes

to some of the standard dictionary definitions of good faith and some of the authorities in England. I've talked about the policy legislation.

One more thing, if I can back – the legislative history is also supportive of this.

5 If we go to volume 3 of my learned friend's authorities, under tab 24, we see the Bill as reported back, my learned friend took the Court to this yesterday and if we look at the predecessor of section 89, I think clause 73 which is on pages 93 to 94 of this report back.

10 **ELIAS CJ:**

Did you say 93, under 20?

MR GODDARD QC:

Twenty four, page 93 under tab 24. We look at the old clause 73 that was
15 struck out. The exclusion and this is the predecessor of 89, was an exclusion, unless it is shown the authority acted without reasonable care or in bad faith, in my submission. If we look over the page, protections to members of the authority and employees of consultants. Again, that's just bad faith. Then we look at subsection 3, no proceeding civil or criminal against the territorial
20 authority unless it's shown the territorial authority acted without reasonable care or in bad faith.

Now what we see in the Act as finally enacted, is no protection in respect of the authority or territorial authorities but a protection for members and
25 employees, providing they act in good faith. What this Bill shows is that the possibility of exclusions that carved out reasonable care was before Parliament but was expressly rejected. So it's some support – something that's just supported to know more than that.

30 The Australian cases. I accept from *Mid Density* the point that what good faith means must depend on context but, in my submission, it's a somewhat unusual decision. Against the backdrop – and this is most apparent, I won't go to it but I'll supply the reference. The legislative history and a speech by the Minister in *Hansard* is set out at some length on page 296 of the report

and what that shows is a legislative history saying that authorities would be protected from liability for responsible actions but would be liable for irresponsible ones and saying that the key was whether or not the local authority had complied with government policy statements on this issue and
5 that I think, that distinction, played quite an important role in the interpretation adopted there.

Also fair I think to say that, although the High Court of Australia, a Bench that also included Justice Gummow in *Bankstown*, formally distinguished
10 *Mid Density*. It's one of those distinctions that's redolent of a lack of enthusiasm for the decision being distinguished and the reasons given for why it was different are not enormously convincing. For example, in *Bankstown*, it is said well, it must exclude something more than negligence because you couldn't have liability in the absence of negligence, in this field anyway but
15 that was true of *Mid Density* as well which was a negligence mis-statement case.

So, a number of the distinctions that were pointed to, actually weren't relevant differences and I think the Court will want to read those, that pair of cases
20 carefully and it's not a good – I've already gone much longer than I said I wasn't going to this morning. I won't take –

McGRATH J:

That's enough, yes.

25

MR GODDARD QC:

But in my submission, *Mid Density* is a very unusual case, it's a hard case and there was some legislative history which provided support for reading down the reference to good faith and one then sees a real lack of enthusiasm and a
30 quite –

McGRATH J:

It's been confined, do you think, effectively?

MR GODDARD QC:

That would be the kindest thing to say to it, that it was in a very unusual context Their Honours said in the High Court and proceeded to identify what was different my references to features that seemed to me to be present in
5 *Mid Density* as well. So I don't think it has an exciting future, that case, in my submission.

TIPPING J:

It may have a very exciting future Mr Goddard.

10

MR GODDARD QC:

It's a bit like *Junior Books v Veitchi* which has never been formally overruled but it's a brave thing to do, to rely on it today and rather, I say here, the focus should be on New Zealand usage and the New Zealand statute book and it's
15 pretty clear how contemporary New Zealand legislation uses this phrase, especially in the context of liability exclusion.

Finally, having identified what I say good faith means, I say at paragraph 5,
20 "The allegation of absence of good faith in this case is – " I think it's important to be clear about this, " – founded on, first of all knowledge of the limit on ABCs scope of approval," and that's admitted, that at some time before the CCC came in, that had come to the attention of the Council. For one thing, 1100 files pitched up on its doorstep as a result of this process.

25 Second, the fact that the Council held plans of the building and a council officer could have reviewed the plans when the CCC was received but did not do so. That's admitted. That was a physical possibility and it didn't happen.

30 Third, the absence of any system for reviewing plans and making other enquiries when a CCC was received, to check the authority of the certifier to issue the CCC in question and that's also admitted because the Council says that no such system was contemplated or required by the legislation.

Fourth and this is the bit that is in dispute but for present purposes has to be treated as capable of proof at trial, the plaintiffs claim that the building did not fall with an E2/AS1 and this could be ascertained readily by a person with appropriate building expertise and familiarity with E2/AS1 by reference to the plans.

Council for the plaintiffs confirmed in the Court of Appeal that there's no allegation of knowledge of invalidity of the certificate, apart from this. That's the sole basis for the otherwise very general allegation that the Council knew or should have known and this is of course a case where discovery has taken place and there have been ample opportunities to refine the way it's put, this is how the plaintiffs put it and in the context of the summary of judgment, the defendant application, the Council explains why it couldn't be taken further than that.

So in summary really, at 6, the Council says it wasn't required by the legislation to review the plans on receipt of the CCC, to consider the authority of the certifier to issue it. So there's no breach of any duty or any negligence in refraining from doing so. But even if it would have been consistent with the statutory scheme to review the plans, there's no arguable case of the Council's failed to do so and its acceptance of the CCC is valid were dishonest or influenced by any ulterior motive. It was proceeding in good faith to give full faith and credit to a decision, to a document issued by another statutory decision maker under the Building Act scheme.

Unless there's anything specific I can help the Court with, I've talked roughly three times as long as I said I would yesterday already.

ELIAS CJ:

That's fine, thank you. It was easier to listen to this morning.

MR GODDARD QC:

I won't even ask why.

ELIAS CJ:

Well, just fresher.

MR GODDARD QC:

5 That's kind Your Honour.

ELIAS CJ:

Thank you Mr Goddard. Mr O'Callahan.

10 **MR O'CALLAHAN:**

On the matter of the purpose of the statute, this Act doesn't work in order to give protection to subsequent purchasers, or to other relevant people involved in the ownership of the buildings, without the territorial authority having the function of checking the authorisation of a certifier.

15

Now, the reason why it doesn't work unless the Council does that is there is no other way expressly contemplated that it would come to the attention of anybody, other than by accident and over time because the certifier gave building certificates, whether it be building certificate or code compliance certificates on matters outside their authority, they would, the work would just be done, the certificates would be put on file and only subsequently down the track and maybe many years hence, it might come to the attention of someone in the course of investigating an actual problem with the building that certificates had been given by people with no authorisation or, in terms of the Act, approval and, of course, it's inherent in the concept of lack of approval that they have been adjudged by the BIA not to have had the expertise in respect of the matters in question or have themselves accepted that when applying for approval by not applying for approval in respect of the relevant matters.

20
25
30

TIPPING J:

Just pause would you. Your proposition is that the Act doesn't work to protect purchasers? I think that's the way you put it –

MR O'CALLAHAN:

Well, yes, it gives absolutely no protection.

TIPPING J:

5 Now, that begs the question as to whether its purpose was to protect the purchaser.

MR O'CALLAHAN:

10 Well, if the Council isn't to check the authorisation, you end up in the situation where there is a key component of how this Act works which is –

TIPPING J:

15 Well, surely you have a right of action against the building certifier who's indemnified under the statutory scheme. That's how the Act is supposed to work, isn't it? If the building certifier gets something wrong, isn't that how the Act is supposed to work in broad terms?

MR O'CALLAHAN:

20 If, yes, that is one way in which there is a measure of protection but it's certainly a measure of protection which is a long way away from Council responsibility in terms of performing a function because it's common for and could be contemplated as common, for building certifiers to go out of business, to become insolvent for the insurance policies that are available to them under the approved scheme by the BIA to be on a claims made basis,
25 so by the time you come to sue, the insurance policy is gone and arguably the insurance policies wouldn't apply to –

ELIAS CJ:

Is that known to going outside their authorised function?

30

MR O'CALLAHAN:

What we do know is that the only policies that were available under the BIAs approved scheme were claims made policies and that, in the end, was what brought down this scheme of legislation because the –

TIPPING J:

Well, the insurers all went off risk.

5 MR O'CALLAHAN:

– the insurers all went off risk and moreover as building certifiers went out of business, the insurers were off risk and people didn't have adequate remedies.

10 BLANCHARD J:

But the fact that the insurance arrangements didn't work and that a number of other problems developed doesn't mean that we should construe the scheme of the Act in a different way. It may have been a faulty scheme –

15 MR O'CALLAHAN:

Yes.

BLANCHARD J:

– but that's not a reason to load responsibility onto the Council if it wasn't
20 intended by the scheme.

MR O'CALLAHAN:

Well, the scheme of the Act as one of its obvious purposes was to ensure that buildings and we're talking about residential homes, particularly in this case,
25 were built in accordance with the Building Code and just on that narrow purpose, achieving that isn't necessarily achieved by a scheme that allows an obvious lacuna to arise –

ELIAS CJ:

30 Is it fair to say that it is a gap though because I suppose it might be said that if this is a public register that the client also should be checking or obtaining advice in order to check whether the building certifier he or she's engaged is acting within scope?

MR O'CALLAHAN:

Well, that's essentially –

ELIAS CJ:

5 I mean why is it the Council?

MR O'CALLAHAN:

That's – in terms of the subsequent purchaser coming along to the building and enquiring about the building, that would, in that context, be essentially the
10 same point that has been made and rejected in respect of the role generally for councils to be liable to subsequent purchasers because it was said and rejected by this Court that a subsequent purchaser might be able to get a building report from an appropriate expert at the time of purchase and the ability to do that meant that there shouldn't be any role for Council liability
15 generally in respect of –

ELIAS CJ:

Well, that was, that's in the context of an obligation on the Council to inspect?

20 **MR O'CALLAHAN:**

Well, in a practical sense it doesn't change the difficulty. A subsequent purchaser – well, first of all, the subsequent purchaser doesn't themselves necessarily have the expertise so the question is whether in our society it's expected that this Act would have changed the underlying approach, that is,
25 of homeowners and the general reliance of the public, generally, in Council performing their functions in this area and –

ELIAS CJ:

Well, that's the issue whether it is a Council function.

30

MR O'CALLAHAN:

Yes.

TIPPING J:

What is the Council's function here? Is it just record keeping or is it warranting accuracy and validity?

5 **MR O'CALLAHAN:**

No, no.

TIPPING J:

Clearly, it's the former but, for me, it's by no means clear that it's the latter?

10

MR O'CALLAHAN:

Well, it's not warranting the underlying accuracy of the certificates but it is at least accuracy in terms of the certificates are certificates given by appropriately authorised or approved people, i.e. they are the certificates that are contemplated by the Act.

15

YOUNG J:

It's hard to distinguish between the two because say the certifier here thought that the building complied with E2/AS1, the certificate could be a certificate that the building as constructed is in conformity with E2/AS1 –

20

MR O'CALLAHAN:

Yes.

25 **YOUNG J:**

– a conclusion which couldn't be gainsay by the Council but what troubles me is that that's then turned around by saying "aha," because we say it doesn't comply with E2/AS1, therefore it was made without jurisdiction but it's just two ways of looking, or at the same thing, isn't it?

30

MR O'CALLAHAN:

Well, ordinarily the question of whether something complies with a provision such as E2, a document such as E2/AS1 would be a matter of, it's not a value judgement or assessment ordinarily, it's a, from a person with the appropriate

expertise, it's a fact. It's a yes or a no. A bit like is it a six cylinder car or an eight cylinder car? Is it a diesel engine, is it a petrol engine?

YOUNG J:

5 But people can get it wrong though?

MR O'CALLAHAN:

Yes they can get it wrong but if but all of that would come into – so if the building certifier themselves here thought that this was in accordance with
10 E2/AS1 and it wasn't, it doesn't change the fact that it wasn't. The question that poses the difficulty, in my submission, is how then or how do we judge the Council's performance of the obligation to check if there is an obligation to check and that would be judged in accordance with either a standard of reasonable care or if the good faith element is engaged as a defence, it would
15 be engaged in terms of whether the requirements of good faith are met, i.e. whether the right questions are asked et cetera.

YOUNG J:

So, say the Council had said to the building certifier, "Well, we've just done a
20 random check on this and we don't think that this does comply with E2/AS1 and your ability to certify this is confined to buildings that do," and then said, "Well, actually I disagree with you. I think it does comply –

MR O'CALLAHAN:

25 Right, in that case –

YOUNG J:

– and I certify, my certificate is in effect a certificate that does comply," now can't accept it.

30

MR O'CALLAHAN:

In that case, one of the matters open to a Council would be to apply for a determination in respect of the code compliance certificate. The –

TIPPING J:

But there's scope for –

MR O'CALLAHAN:

5 – but at this point, the first thing that's happened there, in Your Honour's postulation, is that the Council has at least done the process of going through a check and then the question is what – having done that, has it behaved in accordance with the standard, either of reasonable care or the standard of good faith, if that's engaged.

10

TIPPING J:

But aren't they going to have to check almost every one, if this situation is as you submit?

15 **MR O'CALLAHAN:**

All right, well in fact they do check every one at the building –

TIPPING J:

But only in a ministerial sense?

20

MR O'CALLAHAN:

No, no, at the building consent stage they do and the difficulty in this case is that the approval changed throughout. Now, Mr de Leur accepts in his evidence –

25

BLANCHARD J:

But what are they checking at that stage, are they checking –

MR O'CALLAHAN:

30 Oh, they're checking authorisation –

BLANCHARD J:

– do they check it against the authorisation then?

MR O'CALLAHAN:

Yes, well that's what Mr de Leur says in his affidavit. That's where I started yesterday, my very first sentences.

5 **TIPPING J:**

Are you saying that if they can do it that time, they should do it a second time?

MR O'CALLAHAN:

Well, there's just – I just want to develop the point about what Mr de Leur. So
10 he says, at the start, at the building consent stage, they check the
authorisation. In the working paper report, the Internal Affairs working paper
report, at tab 22 of the authority bundle, volume 3.

YOUNG J:

15 Twenty two?

TIPPING J:

Twenty two, was it?

20 **MR O'CALLAHAN:**

Yes, 22.

TIPPING J:

This came in, in evidence, did it?

25

MR O'CALLAHAN:

No, we've put it in as material admissible, in terms of the passage of the Bill
because it's the report to the Internal Affairs and Local Government Select
Committee, on the Building Bill 1990, by the Local Body Business Group,
30 Department of Internal Affairs, September 1991. So it's a –

BLANCHARD J:

What are we looking at?

MR O'CALLAHAN:

We're looking at page 109 and then onto 110.

ELIAS CJ:

5 I'm not sure that we received – we should be receiving this.

MR O'CALLAHAN:

Well, can I develop the point and then –

10 **BLANCHARD J:**

Well, what is it that you're giving to us?

ELIAS CJ:

It's a departmental report.

15

MR GODDARD QC:

This is precisely the same sort of document Your Honour, as the Court declined to look at in *Altimarloch* to construe –

20 **BLANCHARD J:**

And that wasn't the first time?

TIPPING J:

No.

25

MR GODDARD QC:

Despite a number of vigorous attempts to persuade the Court otherwise, so I think the point is the same.

30 **MR O'CALLAHAN:**

Well, the point of referring to it is that there's an assumption there by the working group –

BLANCHARD J:

You can't go into the point of referring to it if it's not admissible.

TIPPING J:

- 5 Everyone seems to think nowadays that you can just shovel everything in that preceded the passing of the legislation. There's got to be a line. We've drawn the line against this, clearly.

MR O'CALLAHAN:

- 10 There's another point that arises from it which isn't necessarily about the –

BLANCHARD J:

You can't raise that either.

- 15 **MR O'CALLAHAN:**

All right, okay, all right. Well Mr – I'll rely on Mr de Leur. Mr de Leur accepts that, at the outset, there's a checking of scope of authorisation against the intended building works –

- 20 **BLANCHARD J:**

Sorry, where are we looking now?

MR O'CALLAHAN:

It's in the yellow volume and that's at tab 21.

25

BLANCHARD J:

This is the piece on page 225?

MR O'CALLAHAN:

- 30 That's it, paragraph 27. "At the time ABC applied on behalf of the owner of the property for a consent, it was the Council's practise to firstly review the information that was supplied and secondly, to check the building certifier's scope of engagement against the Building Industry Authority's register of approved building certifiers. If the building certifier making the application was

acting within the scope of any limitations as shown on the register at the time, the Council would accept and rely upon the document that had been submitted.”

5 **TIPPING J:**

That means was not outside the scope of any limitations. It's not very well worded but I think it's clear enough.

MR O'CALLAHAN:

10 No, no but it's clear enough that at the outset that was the, first of all, the practise and I say, the expectation of the statute and a reasonable way of Council performing its role in this, to the extent it still had some, after the exceptions are carved out. That would ordinarily be enough because ordinarily the same certifier, when it certifies the code compliance certificate,
15 is doing so under the same scope of authorisation and no one ever, at Council, has to redo this task.

BLANCHARD J:

But when this stage was occurring, was the Council faced with a statutory
20 provision that said that it must accept something?

MR O'CALLAHAN:

Yes.

25 **BLANCHARD J:**

Well, can you refer us to that?

MR O'CALLAHAN:

Yes, I'll refer you to that. That is, it's about 33 or 34, it's 34, sub 3. “After
30 considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.”
Then it's the same section that requires – that we were looking at before, that

requires the Council to accept the certificates which is section 50. That is, "A territorial authority shall accept a building certificate to that effect, i.e. establishing compliance with the code from a building certifier under section 43 or section 56." Section 56 –

5

BLANCHARD J:

What did the building certifier – what function was the building certifier performing at this stage, when the application for the consent was being made?

10

MR O'CALLAHAN:

It was performing – it was giving a certificate that the building works, if done in accordance with the plans and specifications, would comply with the code.

15

BLANCHARD J:

Is that a statutory certificate?

MR O'CALLAHAN:

Yes, it is.

20

BLANCHARD J:

Whereabouts?

YOUNG J:

25

It's back in 34, isn't it?

MR O'CALLAHAN:

Yes. Well it's 56, that's it. "A building certifier may issue a building certificate on the prescribed form pursuant to the section that the building certifier is satisfied on reasonable grounds that (a), the proposed building work would comply with applicable provisions of the Building Code if –

30

BLANCHARD J:

Sorry, where –

MR O'CALLAHAN:

Section 56, sub 2, sub (a).

5 **ELIAS CJ:**

Where's the provision that says –

YOUNG J:

That's a certifier, is there a similar provision for the Council?

10

MR O'CALLAHAN:

Well, if you don't have a building certificate, then the Council has to make the underlying judgement about – has to do the work to work out whether the building work would comply with the code. So you can either submit the consent to Council for them to decide, or you can produce your application with a building certification from a certifier.

15

ELIAS CJ:

Where's the provision that says that the territorial authority can rely on the certificate, in respect of the building consent?

20

MR O'CALLAHAN:

Yes, it's section 50 because section 50 –

25 **TIPPING J:**

Subsection 1(a).

MR O'CALLAHAN:

– and it shall rely, not can, it shall.

30

BLANCHARD J:

Because it's a species of building certificate.

ELIAS CJ:

Oh, I see, yes. So the sequence is that, as to both building consents and code compliance certificates, in both cases the application is accompanied by a certification from a building certifier. The Council doesn't have to do
5 anything.

MR O'CALLAHAN:

Yes, in the, at the consent stage the Council actually has to produce a piece of paper which is a building consent and give it a number and a –
10

ELIAS CJ:

But it must accept the certification, yes?

MR O'CALLAHAN:

15 Yes, it must accept there's a certification so –

BLANCHARD J:

So you're saying the Council thought it was necessary to check the authorisation at that stage -
20

MR O'CALLAHAN:

Yes.

BLANCHARD J:

25 – that it's inconsistent for the Council to say that it didn't have to check the authorisation at the stage when it gets later certificates?

MR O'CALLAHAN:

That's right.
30

BLANCHARD J:

Or a CCC?

MR O'CALLAHAN:

Yes and trying to postulate where this went group with ABC in this case is that presumably ordinarily there was no need to revisit the question at code compliance stage so perhaps the Council got into a mode –

5

TIPPING J:

Was this the point you were trying to make at the very, very beginning and –

MR O'CALLAHAN:

10 Yes it was.

TIPPING J:

– I'm afraid it escaped me then, consistency point totally escaped me.

15 **BLANCHARD J:**

It escaped me too.

ELIAS CJ:

But this is inconsistency as a matter of fact.

20

MR O'CALLAHAN:

Yes.

ELIAS CJ:

25 There's no inconsistency you can point to in terms of the statutory obligation?

MR O'CALLAHAN:

Not, well, only that if the obligation or the function exists as a matter of law at the start, then it would exist –

30

ELIAS CJ:

Yes, yes.

MR O'CALLAHAN:

– at the later point as well and the question, the nub of the question is should the Court conclude that the and the whole question is, should the Court conclude that the territorial authority does have this function under the Act?

5 And I say the scheme is such that it almost, not that it goes without saying but it's a necessary component by implication in this scheme.

TIPPING J:

10 So the obligation to re-check is against there being some change in the meantime?

MR O'CALLAHAN:

15 Yes and that can be cut out in a practical sense. All sorts of systems could be put in place and one could devise all sorts of different ways of doing this but my –

TIPPING J:

20 Does it add anything to your good faith argument? It may strengthen your duty argument, possibly but does it add anything to your good faith argument?

MR O'CALLAHAN:

25 Well, that goes back to if good faith is engaged, then that's what I - when I came back after the luncheon adjournment yesterday, I took the Court through what I said was a distinction between what one could reasonably expect an organisation to do and then the actual performance of that within reasonable care and there should have been, in my submission, or you would have expected Council to have, to be asking the question either actually and deliberately or there be a process that accounts for it and where there isn't a failure to do either – where there's a failure to do either of those things, then
30 that isn't acting in good faith because it's not doing what would be reasonably expected of someone to do.

TIPPING J:

Are you really equating good faith with taking reasonable care?

MR O'CALLAHAN:

No, it's actually a distinction.

5 **TIPPING J:**

Well, I'm finding it very difficult to see what uplift there is from taking reasonable care.

ELIAS CJ:

10 It's good faith discharge of statutory obligations. It's whether you've squarely confronted your obligations –

MR O'CALLAHAN:

Yes, that's right.

15

ELIAS CJ:

– and followed through on them. That's what your argument is.

MR O'CALLAHAN:

20 It's precisely my argument, yes.

ELIAS CJ:

And the point that you're making about the Council's obligations in checking the qualification of the certifier is that if there isn't a certificate provided in terms of the Act, the Council, in both cases, both in the building consent and in the –

25

MR O'CALLAHAN:

Code of compliance.

30

ELIAS CJ:

– certificate of compliance has a default obligation.

MR O'CALLAHAN:

That's right.

ELIAS CJ:

5 It's the safety net so it has to know when that obligation has been taken from it.

MR O'CALLAHAN:

That's right.

10

BLANCHARD J:

The same difficulty would exist though for the Council in trying to assess whether the authority was being exceeded or not at both stages.

15 **MR O'CALLAHAN:**

Yes, it would be in some –

BLANCHARD J:

20 And surely the object here at the consent stage was to enable people to get consents from Council very speedily. They presented a pile of documents, they presented a certificate from a certifier and the work had already been done. They'd paid or were going to pay for the work to the certifier. Is it not inconsistent with the objectives of the Act that the Council then has to go back and go through the plans and specifications, itself, in order to be able to tell
25 where there is, in fact, a compliance with authority? It's the same difficulty with the way in which the Building Industry Authority spelled out conditions or limitations. We looked at that yesterday in connection with the particular certificate here but the same problem would exist at the consent stage.

30 **MR O'CALLAHAN:**

Yes, the – okay, that begs the question of what is the purpose of providing the regime of the independent certifiers? Now, in addressing Parliament on the third reading of the Bill, the – although the responsible Minister referred that one important piece of the legislation was the competition element that arose,

other members of Parliament who addressed it stressed importance arising, important matters arising from factors such as the innovation that this Bill allowed and the doing away with of the prescriptive regimes and the homogeneity of the actual performance standards across the country rather than divergent approaches through different councils and taking away the, what one of the members of Parliament referred to as, the Council mafia and he explained what that meant which was councils who have particular ideas about how things should be done and removing the ability for councils who have those ideas to influence and particular building works, so the competitive environment is not as narrow as saying we are giving an option to invoke a certifier in order to simply make this a streamlined process or simply reduce the cost of, in terms of the fees relating to the obtaining of the relevant consents, the economic justification for the competition could well be much wider factors such as the ability to work with certifiers who are prepared to engage with innovative techniques in terms of reaching, establishing compliance with the code, perhaps working closely with clients and making themselves available, giving sufficient resources so that they can turn up to site on time or when required, all these sorts of things and that may come at a greater cost and one of the items of cost here is that if the Council has a role in performing the checks that we're talking about, there might be a line entry there that is an amount of money larger in order to cover the cost of that than it might otherwise be.

Now, one could speculate as to how much that cost extra would be. If you ask Mr O'Sullivan in this case, he would say that it's actually quite obvious and the amount of checking required would be very, very little and in another case or another person made a different view about that. Those are the sort of things for a trial. What – so just because Council might have to take another step and just because it might actually have to charge more than what it actually charged or somehow worked that into one line of the costing, isn't inconsistent with the scheme provided for a competitive environment because that scheme serves many purposes on a wider economic basis.

Two other points that I wanted to address in reply and they're more nuts and bolts questions rather than the larger picture that I've just addressed. One is to revisit the question of what a, the definition of "building certifier" and the debate that the Bench had with my learned friend over the question of whether there is the concept of just a building certifier generally or whether the scheme of the Act forces you into saying that building certifiers are only as good as and must be understood as only in terms of the scope of authorisation. And I just want to remind the Court of the relevant sections. Section 2 defines "building certifier" –

10

TIPPING J:

Are you suggesting that helps you or is neutral?

MR O'CALLAHAN:

15 Well, it defines "building certifier" – it says, "Building certifier means a person approved as a building certifier by the Authority under part 7," so really we have to go to part 7 and part 7 begins with section 51 and it is headed, "Applications for approval," and it's this recurring concept of approval, which is the important point and which I say helps our interpretation of this. "Any
20 person may apply to the Authority for approval," and then as it goes down it says, in subsection (3), that, "Each application shall include information that will enable the Authority to decide whether or not the applicant has appropriate qualifications, adequate relevant experience and sufficient knowledge of the Building Code and, if so, the specific provisions of the
25 Building Code in respect of which the applicant should be approved and any limitations which should be placed on such approval."

Then section 52 sub (6) says, "After considering an application for approval as a building certifier, the Authority shall grant the approval, that is, if it is
30 satisfied that the applicant has appropriate qualifications, adequate relevant expertise," et cetera and then you look at subsection (7) and it says, "For the purposes of this section, appropriate qualifications shall include those qualifications, if any, that may be prescribed in relation to the provisions of the Building Code specified in the application and similar provision in respect of

evidence of training schools, i.e. irrelevant to the provisions of the Building Code specified in the application.” And then, when it establishes the register in section 53, the Act says at sub (2), “Whenever the Authority approves a person as a building certifier it shall cause to be entered on the register the
5 date of approval, name and address and the specific provisions of the Building Code in respect of which the person is approved and any limitations on the matters in connection with which the person may certify compliance with those provisions.

10 So, it all centres around this concept of approval which is necessarily confined to the specific provisions and subject to particular limitations. So a building certifier performing functions under the Act is only – and that's important – a building certifier performing functions under the Act, is only as good as the approval. So if someone purported to perform a function that was outside the
15 approval, then it's as good as we've been talking about Justice William Young performing that function. Assuming Justice William Young isn't a –

ELIAS CJ:

You could have chosen less qualified people on the Court than
20 Justice William Young. He at least can allow tripping off his tongue the names of this vexed provision in the code, E –

YOUNG J:

E2/AS1.

25

ELIAS CJ:

Yes.

TIPPING J:

30 Got anything to do with chimneys?

MR O'CALLAHAN:

I could have, presumably, picked anyone else in the room. So, I just needed, without developing the points any more because it's been done again and

again but that, that I remind the Court of in terms of the issues relevant to that and –

BLANCHARD J:

5 Just while we're there, can you just remind me what type of certificate subsection (4) is directed at because I've forgotten.

MR O'CALLAHAN:

Subsection (4) of –

10

BLANCHARD J:

Of section 53.

MR O'CALLAHAN:

15 Oh, that's a certificate by the Building Industry Authority that someone has been approved.

BLANCHARD J:

And where do we find reference to that kind of certificate?

20

MR O'CALLAHAN:

Well, nowhere, that I'm aware of.

BLANCHARD J:

25 Well, in that case subsection (4) can't be referring to that kind of certificate.

MR O'CALLAHAN:

Well, it says the certificate under this part is –

30 **TIPPING J:**

I think it does two things. It implicitly authorises the giving of certificates –

MR O'CALLAHAN:

Yes.

TIPPING J:

– and then it gives them evidentiary fall.

5 **MR O'CALLAHAN:**

Yes.

BLANCHARD J:

But where does the Act provide for such certificates?

10

TIPPING J:

Here?

MR O'CALLAHAN:

15 Yes, that's, with respect, perfectly correct. It's not a very good drafting technique, with respect to the drafters.

BLANCHARD J:

Well, I don't know about that.

20

MR O'CALLAHAN:

But it –

BLANCHARD J:

25 The only certificates that that part of the Act actually refers to are the building certificates.

MR O'CALLAHAN:

Well –

30

ELIAS CJ:

No but this is a certificate that someone has certified.

MR O'CALLAHAN:

Someone has approved.

ELIAS CJ:

5 Yes, someone has approved, yes.

MR O'CALLAHAN:

And registered.

10 **ELIAS CJ:**

Yes, yes.

TIPPING J:

Like ABC would have got one of these certificates.

15

ELIAS CJ:

Yes.

MR O'CALLAHAN:

20 Assuming, assuming –

BLANCHARD J:

Well, it doesn't say that.

25 **MR O'CALLAHAN:**

No, it doesn't say that but –

TIPPING J:

Well, it doesn't make any sense, unless it's –

30

MR O'CALLAHAN:

Yes. It could have said, "A certificate under this part of the Act," to the effect that someone carries approval and is registered under the section.

BLANCHARD J:

The Act isn't providing for such certificates, it's providing for a register. That's how you check on what the approval is, what the extent of the Authority is.

5 **MR O'CALLAHAN:**

Yes but we do have these –

TIPPING J:

It's ham-fisted drafting but it's –

10

ELIAS CJ:

It may be evidential.

BLANCHARD J:

15 Well –

McGRATH J:

Yes, yes, alone.

20 **ELIAS CJ:**

Yes.

McGRATH J:

To limit the –

25

ELIAS CJ:

I mean, you maintain the register –

McGRATH J:

30 – formalities of proof.

ELIAS CJ:

Yes.

BLANCHARD J:

Well, then you'd expect it to relate to a copy of the register.

MR O'CALLAHAN:

5 Well, that's what say –

BLANCHARD J:

Or a copy of an entry in the register.

10 **MR O'CALLAHAN:**

Yes, well, that's what say the Births, Deaths and Marriages Act would provide for, so a certified copy of an extract from the register.

TIPPING J:

15 But it must envisage a certificate being issued by someone on behalf of the Authority.

MR O'CALLAHAN:

20 Well, when we look at these registers, if we look at, just, say, tab 39, for example, this is – of the blue volume. To be quite frank, I'm not sure how this page comes to be produced. I don't know if it's a copy from some hard copy register that exists, I'm not sure if it's a printout from the Internet of one –

25 **BLANCHARD J:**

Well, it's not under anybody's hand.

MR O'CALLAHAN:

30 But it's not under anybody's hand either. So – I can't say it any better than His Honour Justice Tipping, in the sense that it's ham-fisted drafting but, to give it any effect whatsoever, that is the obvious answer and there's no other proper contender. I presume Your Honour is concerned that it might be reference to a building certificate –

BLANCHARD J:

Yes, yes –

MR O'CALLAHAN:

5 – and the implications of what that might be –

BLANCHARD J:

– I'm just wanting to be able to exclude that possibility.

10 **TIPPING J:**

Well, Mr Goddard had that seductive thought –

ELIAS CJ:

Yes.

15

BLANCHARD J:

Yes, he did, he did.

TIPPING J:

20 – and he, I think, quite rightly, declined –

ELIAS CJ:

Abandoned it.

25 **TIPPING J:**

– to accept the carrot –

MR O'CALLAHAN:

Yes.

30

TIPPING J:

– and I backed off it too when I –

BLANCHARD J:

Well, I'd have to say that it is in an odd position, if it's intended to relate to building certificates –

5 **MR O'CALLAHAN:**

Well –

BLANCHARD J:

– you'd expect it to be in section 56.

10

MR O'CALLAHAN:

And I think the answer to exclude that proposition is that, it says, "A certificate under this part."

15 **BLANCHARD J:**

Well, that doesn't help.

MR O'CALLAHAN:

Oh, hang on, that doesn't help because that's section 56, isn't it, yes.

20

BLANCHARD J:

That's exactly why I thought it might.

MR O'CALLAHAN:

25 All right.

TIPPING J:

Quit while you're ahead, Mr O'Callahan.

30 **MR O'CALLAHAN:**

Not the best submission. All right, I'll leave it there.

BLANCHARD J:

I think perhaps the best point is that the Authority doesn't actually authorise some person to use their hand in relation to –

5 **MR O'CALLAHAN:**

Yes, that's right –

BLANCHARD J:

– a building certificate –

10

MR O'CALLAHAN:

– it's the Authority's certificate.

BLANCHARD J:

15 Yes.

MR O'CALLAHAN:

Yes.

20 **BLANCHARD J:**

All right, I'm sorry if it was a red herring but I'd rather tease it out here with a bit help from counsel –

MR O'CALLAHAN:

25 Sure –

BLANCHARD J:

– than in my lonely chambers.

30 **MR O'CALLAHAN:**

Good faith. My –

ELIAS CJ:

How much longer do you expect to be Mr O'Callahan?

MR O'CALLAHAN:

Not very long but it –

5 **ELIAS CJ:**

No, we'll take the break now for 15 minutes, thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.53 AM

10

MR O'CALLAHAN:

Before moving on to just a couple of brief points about good faith, I just wanted to finish off some nuts and bolts on the way the Act works on some of the other points I have made. One thing that I didn't mention in my address, in reply earlier, about the overview of the Act, is just to – and I want to mention it to the Court – is that if the Council doesn't have that role of checking, then there is – there can be little incentive for owners or – particularly if it is known to a developer, to self report in the sense that my learned friend took Your Honours to, my learned friend said well there is provisions in here under section 57, obligations on the owner/developer, I only say developer because in many cases it is not someone who just wants their house built correctly, it is somebody who is doing so for the purpose of on-sale and for the purpose of achieving profit and they, having the self reporting function there, saying the owner has got the obligation to report and expect him to do so, might be an unrealistic expectation in many circumstances and so it does end up giving rise to that lacunae that I identified.

The next point is, my learned friend referred to the fact that the form itself provided for in the regulations, doesn't provide much information and I say that actually supports the appellants' contentions because when we are talking about on the face of it, these certificates on the face of them, aren't really much at all, they are just a certificate with very little information. In order to even get the most basic form of information such as whether this

30

person is even on the register, if that is one possible first step, one has to go to other information and the other information that is readily available, right at the fingertips of Council, is the public register and the other bit of information that is available, is the Council's file and the Council's file includes the plans
5 for specifications.

So, the fact that the form doesn't provide that information or any real components of it, necessitates and therefore one would say it could be expected that Council would go to those other sources, which the Act provides
10 a scheme for the establishment of and for the obligation to hold the records et cetera. Now onto good faith, just very briefly. In my learned friend two page outline this morning, he makes a proposition at paragraph 2, that if section 50 sub (1) does apply to purported certificates, then the whole case can be decided without reaching section 50(3). Now that is not a proposition
15 that I adopt and even to the extent that I had in written submissions, had taken the approach that section 51 sub (1) might apply to a purport certificate, it was never on the proposition that that would resolve everything.

The two options, as far as I would submit the Court has to choose on
20 interpretation, is either section 50 sub (1) applies to a purported certificate and then you read into that the reliance on good faith, so simply "shall accept" means "shall accept" in good faith when read together with section 50 sub (3). Alternatively you say that section 50 sub (1) doesn't apply to a purported certificate and then my learned friend's identification at paragraph 3 of the two
25 functions of section 50 sub (3) would serve.

He says if you accept the proposition in his (2), I say those are really the two things that I pointed out to this Court yesterday, should still provide some teeth for section 50 sub (3) even if you say section 50 sub (1) doesn't apply to
30 a purported certificate so he is using it in a different way and I say that really wouldn't be fair to the section because you are – in order to make sense of the scheme, you either have purported certificate with the bringing in of the concept of good faith or you just have no application to purported certificate and you rely on negligence.

My learned friend referred to the passage of the Bill in respect of the former clause 73 which is in tab 24. One can see why section 73 sub (1) might have been changed when Parliament finally came to pass.

5

ELIAS CJ:

Sorry is this the O'Sullivan?

MR O'CALLAHAN:

10 Sorry, no, this is tab 24 of the bundle of authorities, tab 24, yes and it is page 93 of that document. There had been, in a prior iteration of the bill, clause 73, which is shown there as having been struck out for this iteration and it said that "No proceedings civil or criminal shall lie with the authority" , oh it is actually sub (3) is the relevant one, over the page. "No proceedings, 15 civil or criminal shall lie against territorial authority for anything it may do or fail to do in the course of the exercise or intended exercise which functions under this Act, unless it is shown that the territorial authority acted without reasonable care or in bad faith."

20 That is a very odd provision and it is no wonder that that was changed because unless it is shown, without reasonable care or in bad faith, it just doesn't mean anything if that is the provision. You might as well not have a section saying that you can't be sued because that means you can be sued for anything that might be available at law. Because you are either going to 25 be sued for reasonable care or if reasonable care isn't available to you, you have to go to the next step and invoke a provision such as a good faith, or a bad faith, type of an idea, so that has been taken out.

TIPPING J:

30 Well there is no limitation at all?

MR O'CALLAHAN:

No.

TIPPING J:

That's what you are saying?

MR O'CALLAHAN:

5 Yes. So and the other interesting thing about it, is that my learned friend says well it is obliterated now, the concept of reasonable care in the equivalent, well we have been picking up the idea of talking about the limitation on suit and instead of having the general provision that clause 73 once was, we now have at least two different provisions. We have one in the context of part 7,
10 which is the one we are looking at, section 50 so at (3) and the other one we have in section 89 and I adopt the observation by Justice McGrath, that trying to talk about section 89, or any other similar provision such as the Crown Entities Act, isn't necessarily going to help with interpreting section 50 because it is directed to internally, within the Act and directed to a different
15 thing and what has been, although my learned friend is right to say that the equivalent provisions now don't have the limitation on reasonable care, neither do they have the reference to bad faith, they have a reference to good faith and that might be seen as an indication that if there are two strands of good faith, that one is being directed to the concept of good faith that is on the
20 limb, that I say in *Mid Density* which includes taking the steps that one would reasonably expect one to take, which isn't reasonable care as we discussed earlier but it's important in that concept, as opposed to simply being the obverse of that faith.

25 ELIAS CJ:

I am sorry, I may have been behind in this but your point is that the legislative history, in changing from bad faith to absence of good faith, indicates that absence of good faith is not to be equated with bad faith, is that it?

30 MR O'CALLAHAN:

Yes. Now in terms of *Mid Density* my learned friend has indicated that *Bankstown* cast some doubt on it, they are not enthusiastic adoption of distinguishing it. There is a very important distinction on facts of *Bankstown* and that is that the trial Judge had found that in relation, trying to understand

the factual background. The factual background involved the approach to undertaking some works in respect of an area of land that was potentially subject to flooding. The Council had a degree of obligation to consider what should be done, in respect of undertaking works and had, for a period of time, not undertaken any works and there was the defence that the Council shouldn't be liable if it acted in good faith.

At trial, the trial Judge had found that the documentary history of the Council's turning its mind to the question of what works might be required in respect of this flood zone, well potential flood zone, indicated that quite contrary to there being no good faith, demonstrated positively, that they had acted in good faith and beyond, i.e. a lot of consideration had been given to it and for various reasons, documented in that trail of history. There just wasn't any basis to say that they acted in other wise in good faith.

The twist in the trial, though, came when it was suggested by the claimants that the Council having got to a point where they thought they might have to do some work – where it was possible they might have to do some work – delayed that work until there was a determination in the proceedings that had been bought against them, as to whether they were responsible under the Act for performing the work and the trial Judge had held that that was not in good faith and that was overturned on Appeal and it was overturned because just on the facts of it, it was a proper response to the uncertainty of the situation, to await the Court ruling before committing an enormous amount –

25

McGRATH J:

It was a priorities decision really wasn't it.

MR O'CALLAHAN:

Yes, other works had priory and committing an enormous funds to this project when possibly, potentially it wasn't something that the Council had any responsibility to do, was actually not in absence of bad faith, it was the proper thing to do, so that is the factual distinction of *Bankstown* and all of the attempts, my learned friend says, well it is one of these unenthusiastic

distinguishing matters. Quite clearly, on its facts, it spoke for the result, at least in a way the appellate Courts saw the fact.

McGRATH J:

5 So it just turns on its facts and doesn't interfere with the statutory interpretation approach to good faith, as taken in *Mid Density*, that is your submission?

MR O'CALLAHAN:

10 Yes. And, of course, in *Mid Density*, *Mid Density*, just extrapolated, well, not extrapolated but applied various other statements of the law in that respect in various other cases. There is quite a lengthy recitation of those in the judgment so it is not just a case that is out there on a limb, it is the full Court of the Federal Court of Australia.

15

TIPPING J:

This is significant but in the end if there are two possible views of what constitutes good faith, we have to make the call, in this case, which one, it is as simple as that, assuming that there are these two tenable views.

20

MR O'CALLAHAN:

That's right, yes and I have addressed this Court earlier on why I say it should be –

25 **TIPPING J:**

But *Mid Density* helps you to the extent that it suggests there are two tenable views but it doesn't help us, does it, to resolve which one of those views should be applied in this case or do you say it does.

30 **MR O'CALLAHAN:**

Oh well it does in the sense that it is actually one of the closest examples, in terms of the type of statutory provision. I know it was in respect of the provision of information but that is very close to the type of statutory context one has here.

TIPPING J:

I haven't read it closely but I didn't think that the statutory regime in *Mid Density* bore any particular resemblance to the material aspects of the statutory scheme here and I emphasise the word material.

MR O'CALLAHAN:

Well the statutory context of the *Mid Density* good faith provision was in respect of a Council's obligation to give information upon enquiry and in particular information concerning the risk of flooding et cetera, that sort of topic and it said that the provision of – you cannot be sued for the provision of that information if the Council acted in good faith.

TIPPING J:

But here we – the crucial element, I put this to you directly. The crucial element here, as it seems to me, or a crucial, is the fact that you have two competing regimes. You have the building certifier regime which you can to, or you can go down the territorial authority route, for providing the compliance certificates and so on. Now, it's against that background that we have to assess what degree of protection good faith is intended to give to Council –

MR O'CALLAHAN:

Well, if we get –

TIPPING J:

– and that's quite different from *Mid Density*, it's got nothing to do with *Mid Density*.

MR O'CALLAHAN:

– if we get to the proposition that we're looking at good faith, then we've – the Court has, on that hypothesis, accepted the proposition that there is a function, implied in the statutory scheme, for the Council to check the authorisation of certifiers because if there is no such function then you won't

even be there. You will have decided the case against the appellants, on that basis.

5 So, if there is a function, then the good faith provision is in the context of the way in which the Council performs that function. It's highly unlikely that a legislature might have contemplated that the Council would, or possibly would, undertake that function in a truly dishonest way, or in a way for ulterior purposes. It's much more likely that when one is regulating the performance of statutory functions in that type of matter, that one would require
10 performance by the Council in a way that simply addressed squarely their functions and obligations.

BLANCHARD J:

But this was being drafted before *Mid Density*, wasn't it?

15

MR O'CALLAHAN:

Probably, I think that's right.

BLANCHARD J:

20 And if –

MR O'CALLAHAN:

But if – yes, yes, it was.

25 **BLANCHARD J:**

– the usual meaning of good faith in the New Zealand statutory provisions had always been accepted to be a requirement for honesty and proper purpose. Wouldn't you have expected that if they wanted to go further than that, they would spell it out?

30

MR O'CALLAHAN:

Well, the New Zealand authorities aren't necessarily that clear. One of the ones I put into the bundle is – it's in the bundle somewhere I think, it's Justice Fogarty's judgment in –

BLANCHARD J:

These will all be later anyway.

5 **MR O'CALLAHAN:**

Yes but the –

BLANCHARD J:

Maybe there wasn't any New Zealand authorities before then but I suspect
10 there was an understanding.

MR O'CALLAHAN:

Well, if one takes the position of a company director which is what
Justice Fogarty's judgment deals with and there's a provision that says that
15 the directors must perform their duties in good faith. What Justice Fogarty
said was that there was no good faith because the directors hadn't turned
their minds to those things that directors could be reasonably expected to turn
their minds to.

20 **BLANCHARD J:**

Where's that decision?

MR O'CALLAHAN:

It's *Sojourner v Robb* [2006] 3 NZLR 808 and it's at tab 15 and of course it's
25 later than this Act, it's this decade.

YOUNG J:

But this was a self-dealing case.

30 **MR O'CALLAHAN:**

Yes. It demonstrates that – well, it's consistent with various remarks in the
judgments that were picked up in *Mid Density* to show that good faith can
require one to turn ones mind to those things which one could reasonably

expect you to turn the minds to, under some form of obligation. Whether that's an obligation at law equity or under statute.

YOUNG J:

5 But this case did go to appeal?

MR O'CALLAHAN:

Ah, if it did I –

10 **YOUNG J:**

Where the decision was upheld but on rather than different grounds, if I remember rightly.

MR O'CALLAHAN:

15 All right, well we've missed that if that's the case.

BLANCHARD J:

Where's the reference that you're wanting to make to it, where do we find it?

20 **ELIAS CJ:**

What volume?

YOUNG J:

It was around 84.

25

MR O'CALLAHAN:

It's in 90, the second allegation was under section 321. "That the directors had not acted bona fide in the best interests of the company when completing the sale, leaving the company as a shell destined for liquidation and preferring a body of creditors over one creditor." Oh, that's right, it's reference to *Lion Nathan v Lee* [1997] 8 NZCLC and said this is a comparable allegation to the one here.

30

BLANCHARD J:

What does the Judge say about that?

MR O'CALLAHAN:

5 The Judge says –

BLANCHARD J:

Because it is a composite phrase, bona fiding the best interests of the company. It is not a pure good faith standard.

10

MR O'CALLAHAN:

No, it's not.

TIPPING J:

15 Well the Judge says at 102, picking up the point that my brother has just mentioned, "It is an amalgam of objective standards as to how people in business might be expected to act, coupled with objective criteria," et cetera. So it is not really in parallel with our problem.

20 **MR O'CALLAHAN:**

Well, you have to act bona fide in the best interests of a company. If you were to –

BLANCHARD J:

25 What does he say about it?

MR O'CALLAHAN:

Oh okay, you come to 103 and he says that Mr Hornsey and Mr Robb made a number of mistakes of law, which meant that the directors did not recognise
30 the fiduciary obligations of the directors to act in the interests of the company which had significant obligations to the plaintiff's contingent creditors, in short, to consider the interests of those creditors, et cetera, et cetera. There is at least errors of law in 104.

BLANCHARD J:

But isn't it reasoning that they weren't acting in good faith, in the interests of the company.

5 **MR O'CALLAHAN:**

Well –

BLANCHARD J:

10 The fact that they personally thought they were acting in the interest of the company is irrelevant in this context.

YOUNG J:

I mean this is just a phoenix case, they sell the company to themselves and cut the lunch of the credit.

15

BLANCHARD J:

I don't think this case helps at all.

ELIAS CJ:

20 Did anyone do a search of the statutes to see – I know that Mr Goddard has put in front of us a contemporary statute referring to good faith but I am just really wondering whether there are so many statutes which use the terminology.

25 **MR O'CALLAHAN:**

Well I will just ask Mr Erskine but my recollection is that we did do it and we came up with hundreds of references and we started an attempt to analyse them.

30 **ELIAS CJ:**

And you gave up. Well that could have been a good point in your favour.

MR O'CALLAHAN:

Well if it is, I make it now.

ELIAS CJ:

If they don't make much sense, if they are all over the show.

5 **MR O'CALLAHAN:**

Yes they are. Like I, to be quite candid, I thought the point was actually well made in *Mid Density* which says that they appear all over the place in the statutes and here are, you can identify two distinct strands of how you go about approaching them and leave it at that and yes I could support that by
10 saying that in New Zealand, there are – I will just ask Mr Erskine. Yes, we started – having found hundreds, we started to narrow the focus on to this type of thing and that is where we ended up finding *Mid Density*.

TIPPING J:

15 Can I just ask you something Mr O'Callahan. You quite rightly say that this point only arises if the Council had the function of checking the authority of the certifier at the relevant time.

MR O'CALLAHAN:

20 Yes.

TIPPING J:

On that assumption, it didn't. What if it honestly thought it didn't have to, is that good faith or lack of it?

25

MR O'CALLAHAN:

Well if it honestly thought it didn't have to, then –

TIPPING J:

30 Because that would be the inference I would draw from the material in front of us.

MR O'CALLAHAN:

Well that depends on your – on which of the strands, or potentially turns on which of the strands you choose. If you – I say certainly it doesn't arise as, it doesn't establish good faith if you choose the strand that I contend for from
5 *Mid Density* because they haven't then turned their minds to those things which they would expect to be, have turned their minds to, i.e. the checking function –

TIPPING J:

10 But they wouldn't if they honestly thought they didn't have to or that it wasn't required of them. They've got the law wrong in effect.

MR O'CALLAHAN:

Well, if that was established as a fact –
15

TIPPING J:

Well, I could put you on notice that that would be the inference I would be inclined to draw from this material, particularly the evidence of Mr de Leur.

20 **MR O'CALLAHAN:**

Well, even – just on whether you can draw that inference, Mr de Leur accepted the responsibility to do it at the outset –

TIPPING J:

25 Yes, yes, I appreciate that but I'm talking, not at the outset, I'm talking about at the crucial stage because the e in 'effect' says as much and it's a perfectly rational view.

MR O'CALLAHAN:

30 Well, this is a statute that –

TIPPING J:

Even if it's wrong.

MR O'CALLAHAN:

– yes, he, well, it's a bit unclear what he actually says about the later stage because he says, "Well, the BIA gave us a 11,000 files and we worked on those," and all of that sort of thing and then eventually in his reply affidavit
5 says, "We don't think that we actually had any obligation at code compliance stage," so he says that but, you know, we haven't cross-examined him and –

TIPPING J:

No, no, I appreciate that.

10

MR O'CALLAHAN:

– it may be that rather than getting the law wrong they, you know, went half way towards introducing a scheme but just didn't do it appropriately or what. We just don't know precisely how that would resolve itself.

15

TIPPING J:

I'm very conscious that this is strike out and also I'm very conscious of that but it seems to me to be a pretty powerful view of what was going on here. It's, let's – I just want you on the hypothesis that that inference is open and it's
20 drawn. Do you say that that's lacking good faith to get the law wrong on a point of some contestability, if you like, or to misunderstand one's statutory duties?

MR O'CALLAHAN:

25 Well, yes –

ELIAS CJ:

Well, it is in good faith in reliance on a document.

30 **TIPPING J:**

Well, it's in reliance on a –

ELIAS CJ:

And there's plenty of law that equates good faith with lack of notice –

MR O'CALLAHAN:

Yes.

5 **ELIAS CJ:**

– so I'm just wondering whether we're getting a little bit detached from –

TIPPING J:

Well, it's in reliance on this document on the premise that you don't have to go
10 behind it. The law doesn't require you to go behind it.

MR O'CALLAHAN:

Well it's a public, it's a law, this statute is a statute about public bodies and
requiring them to express by implication, perform certain functions and the
15 purpose of it is to ensure that underlying it – to ensure that buildings are built
in accordance with the Building Code. Now it could well be and I say the good
faith that I contend for, includes an obligation to get these kind of things right
and the law isn't immune to situations where actors are required to get the law
right. For example, just on the example we had yesterday, of the
20 US international marketing case, a bank is required under the judgments of
the Court of Appeal which Justice Tipping was on, to get the law right and
make a proper assessment about something which ultimately is going to be
tested in Court.

25 **TIPPING J:**

Well that's knowing assistance in the breach of trust Mr O'Callahan, that is a
mile away from this.

MR O'CALLAHAN:

30 But if you start the proposition that the Council is required to get the law right
because it can be advised on that, then that is not inconsistent with an
obligation to act in good faith. You have to identify, there is underlying duty to
identify obligation to identify your functions and then you have got to make
some nod towards at least some nod towards carrying them out and it would

be strange if, in a public statute like this, where liability is contemplated, or isn't excluded in the context of *Hamlin* type propositions. It would be an odd thing to exclude liability where the Council, just on something significant like that, gets the law wrong. So in interpreting good faith, one should interpret it in good light. Well unless the Court has any other questions, I have no further submissions.

ELIAS CJ:

Thank you Mr O'Callahan. We will reserve our decision in this matter. Thank you counsel for your considerable assistance.

COURT ADJOURNS: 12.26 PM