IN THE SUPREME COURT OF NEW ZEALAND SC 37/2017

BETWEEN **SOUTHLAND INDOOR LEISURE CENTRE CHARITABLE TRUST**
Appellant

AND **INVERCARGILL CITY COUNCIL**
Respondent

Hearing: 10 and 11 August 2017

Coram: Elias CJ
William Young J
Glazebrook J
O'Regan J
Ellen France J

Appearances: M G Ring QC and C J Jamieson and
D R Weatherley for the Appellant
D J Heaney QC and K B Dillon for the Respondent

CIVIL APPEAL

MR RING QC:

May it please Your Honours, I appear with Ms Jamieson and Mr Weatherley for the appellant.

ELIAS CJ:

Thank you Mr Ring.

MR HEANEY QC:

And I appear with Ms Dillon for the respondent.

ELIAS CJ:

Thank you Mr Heaney. Yes Mr Ring.

MR RING QC:

Your Honours, I have a summary of what I hope to be submitting to you.

ELIAS CJ:

How long is that? It looks substantial?

MR RING QC:

Well it's a re-packaging, as always, it's not new submissions and it's divided into sections and on the basis that there are four basic issues here, that is, duty, negligent misstatement and specific reliance contributory nugents in 2016 and maybe, if my friend runs it, the 2000 contributory negligence. There's about three pages on the first three and one page on the last.

ELIAS CJ:

Thank you.

MR RING QC:

Before I start in on what I've just handed up, if I can just take you to some of the key documents and set the scene for Your Honours. If you could turn first to volume 3B, at page 1159, apart from the absence of snow this is what the stadium looked like at the beginning of the day on the 18th of September 2010. And then, after a snow fall which was not beyond expected design tolerances, and while the stadium, with a capacity of 5000 was fortunately only occupied by about 60 people, mainly children, having tennis lessons, there was a "bang" and then within a few minutes, if you turn

to page 1164, I'm sorry, 1168, that is what it looked like. Truss 1 is the truss in –

ELIAS CJ:

Sorry I haven't found it. Is it 1.1? I have it, thank you.

MR RING QC:

So in the closest, to the top of the picture, you are looking at truss 1.

WILLIAM YOUNG J:

Sorry what page are we looking at?

MR RING QC:

I am not sure what the number is anymore. This will be the after photo.

WILLIAM YOUNG J:

Yes, so the one at the – okay.

GLAZEBROOK J:

And you are at the top of the page?

MR RING QC:

The top of the page.

GLAZEBROOK J:

Can you please turn it round and point for me, sorry, okay thank you.

MR RING QC:

And the truss is numbered 1 – to 9, come down the page. So that bend that you can see in truss 1 there, that is the precipitating collapse. So the bang happened with that collapse and then successively the truss is coming down the photo. Those that you can see collapse obviously have collapsed, as people are literally running for their lives with the trusses falling behind them. If I can take Your Honours – I am just going to come back to that but I wanted

to take you to 3A now and to page 918. That is drawing 97139 which is the plans and specifications for the remedial work to the trusses. And this obviously is the document on which the building consent was granted. And now if I can take you to my written submissions, the previously filed written submissions and to schedule 2 to the three dimensional drawings at the back. 197139 required was for the top cords to be cut. That box section that you can see in blue to be inserted –

GLAZEBROOK J:
Which page of your submissions are you on?

MR RING QC:
35. That box section which is in blue to be inserted to lengthen the trusses. That box section to be butt-welded on all four sides.

WILLIAM YOUNG J:
Probably a stupid question. There are only two obvious sides, is this a cross-section?

MR RING QC:
Yes it is all the way round. And a strengthening plate to go all the way across and where the strengthening plate is met, that is to the right-hand side of that photo, they were to be butt-welded together so as to form a continuous metal sheet. If you turn –

ELIAS CJ:
Sorry this is not a contemporary drawing is it?

MR RING QC:
No this is an after the fact drawing to explain what's happened.

ELIAS CJ:
Yes and is the diagram you took us to before, does that – is that indicating this?

MR RING QC:

Correct. This is the easier version of that.

ELIAS CJ:

Yes I see. So the round circles on the diagram are the box sections are they?

MR RING QC:

Yes. What you are seeing with the round circles are for example where the box section is and where the butt-welding of the plates is. So that is what should have happened. So you had a splintered truss as the end result. What actually happened is on the next page, 36. There was no weld all the way round the packer plate; the welds that were there were sub-standard. Crucially the strengthening plate, the splinting strengthening plate, instead of strapping the packer plate went nearly to the packer plate but not quite on either side and stopped. And on the right-hand side, where the strengthening plates were supposed to be welded together to form continuous metal, was just a gap. So that was what was happening on the mid-span of the trusses and what we are looking at here at 36, that blue packer plate, that is where the collapse precipitated in truss number 1. And there are also problems in the quarter spans, similar problems. What should have happened as you can see from page 37 is again butt-welding around four faces of the packer plate of box section, not done and what was done was deficient and that is shown on page 38. So the result if I can again take you back to 3B. If you can turn to the next pages, what I hope are the next pages after the after photograph. On my booklet they are 1169 of 1170 but it is those –

ELIAS CJ:

Sorry, which volume?

MR RING QC:

It is 3B and should be immediately after the post collapse aerial view.

ELIAS CJ:

1160 is it?

MR RING QC:
1169 and 1170 I have.

ELIAS CJ:
Yes I have it, thank you.

MR RING QC:
So that gives you a better picture of the inside devastation that people were running from and if you look at 1170, the bottom picture, that truss that you are looking at in the foreground, that white truss is truss number 1 and to the left-hand side of the picture where you can see the bend, that is the precipitating collapse.

WILLIAM YOUNG J:
Sorry can just point your finger at it. Okay, thank you, yes.

MR RING QC:
And if you look right at the apex of that bend you can see that two metal plates have peeled, like a banana, in either direction. Now that's because there were two plates that did not meet, even meet, where there should have been a continuous steel plate all the way across to prevent that from happening. So, in other words, no splinting effect whatsoever. So, despite being the front line building regulator, the council's position, now endorsed by the Court of Appeal, is that no matter how negligent it was, no matter how causatively negligent it was, in failing to prevent this from happening it is not legally accountable.

If I can now take you to volume 3A. I just want to take you through a broad chronology by reference to some of the key documents. You will already have seen the chronology that's at the back of our written submissions. This largely replicates that with perhaps a bit more in light of my learned friend's submissions as well so at 3A, and just by way of preface to that, it all starts in 1996/1997 with the idea of this indoor community centre, an indoor sports centre. By the middle of 1998 Mr McCulloch was engaged as the architect

and Mr Major was engaged as the engineer. The trust was still trying to figure out how they were going to pay for the building. At that stage there'd been discussions with the council and in principle the council had agreed to provide the land at Surrey Park for the stadium to be built on. And that's the context in which, if you turn to 838 of 3A, this file memo by Warrick Cambridge comes to be written on the 8th of June 1999. Mr Cambridge is the council's solicitor and the memo talks about two things that are interrelated. First, council's agreed to provide a lease and significantly, in paragraph 3, the lease is to provide that if the use ceases to continue the lease is surrendered, improvements belong to the council, or similar charitable body as the council agrees. In fact this replicates the public bodies contracts, arrangements. Similarly, when the lease expires the building reverts to the council without any payment of compensation for the improvements.

ELIAS CJ:
So why are you taking us to this? What's the significance?

MR RING QC:
Well I'm taking you to this for two reasons. First, this memo also talks about the project agreement, which my learned friends raise so I want you to see the inter-relationship between those two. And second, there still seems to be, despite the High Court and the Court of Appeal decisions, some reliance by the council on the indemnity provisions, both in the lease and in the project agreement so I am setting that scene for you.

So the lease that is referred to there, you will find on the next page, starting on the next page and the relevant indemnity provision is on page 845 at paragraph 23. This was pleaded as a complete defence by the council to any regulatory liability. That was rejected by the High Court, it was appealed, that was rejected by the Court of Appeal and as I understand it, it is now resurrected as a reason that there should be no duty at all in this Court.

Going back to 838, the second part of the memorandum is about funding. Various public bodies made various offers of funding to assist the trust to build

the stadium. The council's offer was that it would provide $760,000 of drainage at no cost but before it would do that it needed to be satisfied or wanted to be satisfied that the trust had enough funds to complete the building. The obvious concern being it did not want to provide $760,000 worth of initial work and then find that the building never came out of the ground so that was the context in which the project agreement was then signed and the project agreement you will find without its schedules at page 874 of this volume. And if you turn to 876, and you look in the background A and B, you can see there how the lease and this project agreement have been inter-related.

And then at 2.1, under the mutual undertakings, on 877, the council agrees to carry out these drainage works, to grant the lease, provided it is satisfied that the trust can complete the work set out in schedule 3, and that's the building works and then storm water drainage arrangements and then paragraph 3 on 878 the relevant ones, as I understand it, the council are relying on. 3.1 is that acknowledgement I referred to, that the trust is fully able to perform and complete the works giving the council the assurance, if they give the money, it won't be wasted or do the work it won't be wasted but at 3.2 and 3.3 that are assuming significance for the council. 3.2 compliance with all statutes and regulations and as I understand the argument, the council says there was an allocation of risk and responsibility for building compliance from the council as regulator to the trust as the owner or a confirmation of that by 3.2 so no duty.

And 3.3 is also raised in the same context which is an indemnity similar to the one in the lease except that this is in the council's capacity as the party providing the drainage works in conjunction with being the party providing the land for the stadium to be built on. This was never pleaded in the High Court as a stand-alone indemnity, having the equivalent fatal effect on liability as the lease clause. It first emerged really in the Court of Appeal as a second indemnity having the same effect and in light of the Court of Appeal upholding the High Court on the first indemnity under the lease having no effect, it is now reintroduced, as I understand it, in this Court to say that it negates the duty. The duty is regulated.

ELIAS CJ:

With the lease no longer being relied on?

MR RING QC:

No both.

ELIAS CJ:

Both, I see yes, of course.

MR RING QC:

Even though the lease is the subject of that specific finding in both Courts.

ELIAS CJ:

I see, yes.

MR RING QC:

So that is where the project agreement fits in. We go back to –

O'REGAN J:

Can I just ask you. Clause 3.3 talks about insurance, enter into insurance and indemnify. What was contemplated by that? Was that insurance for the trust's own liability or was it insurance to fund an indemnity for the council?

MR RING QC:

It was the normal sort of public liability insurance that you might get for a building site.

ELIAS CJ:

Sorry, is this the lease?

WILLIAM YOUNG J:

Ensuring against liability to third parties, not against the integrity of the building that you have built?

MR RING QC:

Well correct. If the council is saying we are going to lease you the land so that you can build the building on our land. You are going to come on our land and you are going to do that. We are also going to provide you with drainage work to facilitate that building , if you do something that causes us to become liable as occupier or whatever, we want public liability cover to protect that. That's what we say it is all about. It is not the council coming along and saying, we are the building regulator, we have statutory duties that we can't contract out of but we want you to take some insurance to protect us against being negligent and carrying out those regulatory duties and that's effectively what the High Court and the Court of Appeal upheld in relation to the lease. That it was not in the capacity as regulator that whatever promises, however you construe these promises, they weren't being given in the capacity as a regulator.

So the next thing that I want to take you to is page 859, just to give you an idea of timing. 859 is the building consent for stage 4 of the Leisure Centre which is the structure and the plumbing. And this is in August 1999 and the only relevance that I want to point out on this is that this is the building consent under which the original trust work was done that proved to be defective so an amended building consent was applied for later but this is the original building consent. The other significance of this building consent is that the code compliance certificate in which the council finally signed off on stage 4 didn't happen until 2003, so some – I think it was April 2003, but we will come to it; it was some 18 months.

ELIAS CJ:

There is another code compliance certificate for this.

MR RING QC:

I think it is actually the last document in the volume. If you turn to it – 990. That is the final code compliance certificate for stage 4.

ELIAS CJ:

Yes 984. So this code compliance certificate doesn't feature at all. No?

MR RING QC:

No what happened was, building consent for the structure, work is done, work is found to be defective, remedial work needs to be done. New building consent for the remedial work, code compliance certificate issued for that remedial work which is the subject of this proceeding. Code compliance certificate finally issued some two years later for the original stage 4 and that is the document I just showed you. So if you turn to 861 that is where the remedial work problem first starts. 17 November 1999.

GLAZEBROOK J:

Sorry is that just over the page is it. Sorry I missed your page number.

MR RING QC:

Yes sorry, 861. So Mr Watson, who is a council inspector, visits the site and is informed by the foreman, Mr Malloy, the roof structure has sagged 240 millimetres. So there is the identification of a problem. And the next month or so is spent in trying to sort that problem. The first thing that happens is that there is some ad hoc remedial work taking place so again this is not the remedial work that we are concerned with, but that is the context in which the next letter I want to take you to is written, and that is at 862.

24 November 1999, the trust writes to the architect, Mr McCulloch, points to the suggestion the engineering design is inadequate; there has been under-inspection, requests advice from him, as the project manager, including details of remedial action number 2 which has been taken to date, whether further action is necessary. An assurance that the resulting structure has integrity, is safe, complied to acceptable designs and remain intact for the expected life of the building. And then also says at (5) "The trustees want an independent engineer to certify the structure following the remedial action is sound, complies with acceptable design standards and may be safely

accepted by the trust" and asks Mr McCulloch to suggest the name of an appropriate person.

Now the significance of this letter is probably two-fold. One at a factual level, it is the start of getting Harris Consulting involved (HCL) but it part of the pleaded 1999/2000 contributory negligence by the council. That was in fact never run in the lower Courts. And I just wanted to point you to the wording of paragraphs 3 and 5 because the allegation that is being made of contributory negligence which appears to be based on this and the other correspondence I am about to take you to is that the trust was seeking post completion private certification that the remedial work as completed is code compliant and is safe and it will last the life of the building. If – and it is a big if, from our point of view, Your Honours are prepared to embark on looking at this contributory negligence, given the way it hasn't been dealt with up until now. We say it is based on a factual misconstruction, misinterpretation of what the trust is asking for here. They are not asking for construction certification, post completion construction certification. This is a design brief. They are asking for private independent design certification that the remedial plan that is to be implemented will achieve these things. And that is a big difference, of course because the council says, "You, the trust, were contributory negligent because after everything was done and when we are now in code compliance issuing territory, you didn't follow up in October/November 2000, you didn't follow up in private certification that the building was compliant and safe and we say that is a misunderstanding. So that is the first document in that chain.

WILLIAM YOUNG J:
So was there no response in terms for that letter?

MR RING QC:
Yes I am now going to take you to the responses, to the chain on that letter. And I just wanted to point out on 863 the reference in the last sentence to the urgent response, so independent engineer can carry out inspections, that is, just in case it is suggested, not a reference to carry out inspections during the course of some future remedial work to certify it after it had been done. This

is inspections now while this ad hoc remedial work is taking place, before too much is done and nobody can see what the situation is exactly and plan the remedial work properly. So the next document that flows on from this is Harris Consulting, on the next page 864 –

WILLIAM YOUNG J:
Yes so when I said there was no response. Did the architects not reply to the letter?

MR RING QC:
Oh yes they did. No we don't have an actual reply from the architects but we know what happened because what the architects did was they contacted HCL and then HCL responded.

WILLIAM YOUNG J:
But they never responded saying, yes we have got heaps of insurance and you don't need to worry?

MR RING QC:
They may have. It may be in the original bundle.

WILLIAM YOUNG J:
Oh I see.

ELIAS CJ:
You have passed on.

MR RING QC:
I was coming to the minimum possible. So HCL provides a preliminary report but it is really the 7 December 1999 letter from the trust to HCL in 867 that is the next real step in this chain of correspondence. So this is the trust, the first letter is to McCulloch "Give us the name of an independent engineer to do this." Obviously McCulloch has given them HCL and now the trust is writing to HCL, effectively to provide the same request but now directly to the person

who is going to respond to it and you can see at the bottom of page 867, the trustees are concerned to ensure the integrity of the building and you can see it is similar language, as you would expect, to what the trust wrote in the previous letter to McCulloch. And on the next page, without in any way limiting the overall brief as described above, including your study and report, exact nature of the problem it's caused, details of the remedial action we've taken to date and whether further action is necessary." All of that, at least more consistent with it being a design brief and not a construction brief, or a design and construction brief. And I should just say that nobody cross-examined anybody from the trust on this correspondence.

ELIAS CJ:

Just explain why you say it's significant that it's a design brief as opposed to a construction?

MR RING QC:

Because the council's pleaded 1999/2000 negligence is that the trust had asked McCulloch and HCL to provide a, effectively, private certification after the work had been completed that it was constructed properly and the building would be safe, or the building is safe, and that the building would last for its estimated lifespan. We're talking about the difference between a design brief, which says look at what remedial work needs to be done, design, or assist in the designing of, or approving and independently certify the efficacy of the remedial design so that if it is implemented it will achieve these things as compared with do that and then monitor the construction all the way through of that remedial work and then certify at the end that it has been done to achieve that as well. And it's the later that is the alleged contributory negligence, the failure to get an independent certification of the construction after it had been completed.

GLAZEBROOK J:

And your point, just to make it clear, was that that wasn't part of the brief, it was effectively check beforehand before we do anything what we're intending. Well, first of all, check whether anything does need to be done and then check

what we're intending to do will fix up the difficulties and it didn't extend to the second part, to look at the construction?

MR RING QC:
Correct and with the, perhaps with the added thing, that only just do that checking but actively participate in formulating the design, the remedial design.

And the last letter in this chain, which we think makes it clear, is the one, 10 December 1999, at 869, which is Harris HCL reporting to the trust confirming, in the first sentence, it'll provide an independent structural report which covers the areas of concern that have arisen during construction and then if you turn to the next page and look at the conclusions you can see that HCL interpreted their instructions in the way that I have identified. The language, again, seems to pick up the language in the trust letters and provide the assurance that the trust had asked for, from a design point of view.

Next page I wanted to take you to was 887. This is the structural review that HCL then carried out and it was as a result of this document which is a lengthy document, it runs through to 917, that resulted in that drawing at 918 that I've already taken you to, that was the basis for the remedial work.

ELIAS CJ:
What date's this report?

MR RING QC:
It's dated December 1999 on page 886 and its exact date is unclear.

ELIAS CJ:
It almost certainly doesn't matter. I was just trying to make a note of what it was.

MR RING QC:

I think it is early December 1999. Oh no I am sorry, it has got to be late December. If you look at 920, letter from McCulloch to Mr Tonkin on 23 December. Says, "The independent report has been commissioned but yet to be received by this office." So we can narrow it to a week at least. The last week in December.

ELIAS CJ:

Thank you. And it led to the drawing that you first took us to.

MR RING QC:

I think the drawing is actually part of the report but if it isn't, it is the product.

WILLIAM YOUNG J:

It is referred to in your report.

MR RING QC:

And now go to 927 and this is an important letter for its existence and broad content without the need to get down to the details of the numbers. This is the letter 4 January 2000 from HCL to the trust which was then copied to the council. It identified the precamber measurements for the trusses that HCL was recommending which then found their way into condition 4 of the building consent. One feature of this letter is that it divides the recommendations into broadly two. There are some recommendations in relation to trusses numbers 1 to 6 and then there is recommendations for the last three trusses making up the total of nine. For some reason that never got explained, it appears the council interpreted the letter as only imposing recommendations in relation to trusses 1 to 6 and so the building consent condition only focussed on trusses numbers 1 to 6. That doesn't make any difference in the end because what was provided didn't meet any part of that condition. At 929 HCL provides its producer statement design review, PS2. So the upgrade of community trusses.

GLAZEBROOK J:

Sorry just missed your page number again?

MR RING QC:

Oh sorry 929. And that document is on 930 and Mr Majors' producers' statement for the design is on 931.

WILLIAM YOUNG J:

There is no complaint about the design is there?

MR RING QC:

No. And at 932 is the application for the building consent for this remedial work. 933 letter 10 January so part-way through because the work is already proceeding at this stage. 10 January the council has read Mr Harris's report at the end of December and they viewed the problems on site. They have also noticed when going on site, a number of deficiencies in the remedial work that has been done including welding not completed as per detail. They ask Mr Major to go over the items and come back to them. "Please note these were noted on a general walk around and did not constitute a full inspection." This was typical of the period in the sense that there were a number of either walks around, meetings or visits and inspections in which deficiencies were noticed, messages went from the council to Major through McCulloch and it was a long time, sometimes a very, very long time before there was any response from Mr Major as to any sort of acknowledgement and when and how it was going to be fixed. The next document obviously a vital document in the process, 936 is the building consent for this work. I point out to Your Honours the bottom left-hand corner, the $245 charge. The council says, "No duty amongst other things because we didn't do any inspections, or agree to do any inspections" Of course it is the charge for regulatory services. Whether or not it includes a charge for inspections, that is the material factor as to whether a duty arises or not.

WILLIAM YOUNG J:

Sorry, I don't understand that. I don't understand what you have said.

MR RING QC:

I am sorry.

WILLIAM YOUNG J:

They have charged $245 for issuing the building consent. Basically they have relied on the producers' statements?

MR RING QC:

Well they have charged $245 to give a go-ahead for the work to be done. This is their regular service charge for this work. Whether or not it includes an additional amount for inspections or not, this is the contract, the statutory contract and this is the statutory contract fee charged between the owner and the council.

ELIAS CJ:

But I would not have thought it is particularly material. You get there either on the regulatory scheme. You are not going to get there on some contract.

MR RING QC:

Well the reason it is relevant Your Honour is because I am relying, among other things, on what Justice Tipping said in both *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2011] 2 NZLR 289 (SC) *and Body Corporate 207624 v North Shore City Council [Spencer on Byron*] [2013] 2 NZLR 297 (SC) that it is the control plus the charge which are – the control being the primary factor but also the charge being a relevant factor and Justice Chambers in his judgment also pointed out that the fact that there is a charge for the service –

ELIAS CJ:

Oh that might have affected the policy question but I would not have thought it –

WILLIAM YOUNG J:

Do they charge differently if councils do their own analysis of the engineering basis of the design?

ELIAS CJ:

They must.

MR RING QC:

I am assuming that they do but as I understand it, what we are talking about here is a charge that you have to pay in order to get a building consent and that includes that you are going to get a code compliance certificate or you are going to get a council's assessment as to whether you are going to get a code compliance certificate at the end.

WILLIAM YOUNG J:

Does this matter? Because this is outside the limitation period anyway, this consent, isn't it?

MR RING QC:

Well –

WILLIAM YOUNG J:

And no one is complaining about the consent.

MR RING QC:

– I don't want to blow this out of proportion. That the only point that I am making here is that because the council is saying there were no inspections and no charges for inspections and that is a factor which means there is no duty.

WILLIAM YOUNG J:

But there wouldn't normally be inspections before a building consent anyway would there?

MR RING QC:

No we are talking about inspections after the building consent has been issued.

WILLIAM YOUNG J:

This is a building consent. I know it is for remedial work.

MR RING QC:

Yes. Well perhaps I can just leave that for the moment and come back to it on the next page if I need to.

ELLEN FRANCE J:

When you look at 939 which deals with, to inspect the work et cetera. That says, "The above project has been allocated zero inspections. Additional inspections may incur an extra cost et cetera." When are you saying those inspections, if they were provided for, would have taken place. Before code compliance?

MR RING QC:

Yes. The process is, building consent is issued, a form of inspection takes place and under s 76 of the Building Act 1991, inspections is defined as "The steps the council takes to reasonably put itself in the position where it can satisfy itself that the work is being done in accordance with the code and then on the basis of the building consent and the inspections, it then issues the code compliance.

WILLIAM YOUNG J:

But it doesn't have to, she doesn't have to do inspections though. It can rely on other material to decide that there's a reasonable basis for concluding that the building complies with the consent in the building code.

MR RING QC:

Absolutely and that is also – that is an inspection as well in terms of section 76. That is within – when we talk about the inspection role, when

Justice Chambers talked about the inspection role in *Spencer* as the building consent inspections and the code compliance certificate. Inspections are section 76 inspections, which include both the council going out and doing things itself and the council relying on others. That is within the definition of an inspection, in section 76.

Page 938 are the conditions on the building consent. Conditions 4 and 5 are the main ones. Condition 4 is the one relating to HCL and condition 5 is the producer statement construction –

WILLIAM YOUNG J:
Sorry, what Building Act should we look at? The 1991 Act I suppose?

MR RING QC:
Yes. So that's the PS4 and again, although nothing is necessarily made of it, but it's only confined to, even condition 5 is only confined to six of the nine community trusses.

ELIAS CJ:
Which page are you on now?

MR RING QC:
938, the conditions to the building consent. 939, we've looked at. Turning now to 944.

WILLIAM YOUNG J:
Sorry to hark back on you but I'm just looking at section 76 of the 1991 Act. Do you say inspection means the taking of all reasonable steps to ensure and because that can encompass getting a producer statement that producer statements are inspections?

MR RING QC:
Yes they are – the council has an inspection role in that shorthand sense and within that inspection role it is inspections which can be actual inspections by

the council itself or inspections by somebody else that the council relies on, reasonably relies on.

WILLIAM YOUNG J:

Maybe, I mean, I can see why you say that on the definition of inspection but everything else in this section is about inspection by council officers isn't it?

MR RING QC:

Well if that was right though Your Honour, then in the situation where a council issues, chooses to issue a PS4, it emasculates the inspection role down to nothing. It can avoid any risk whatsoever on inspections, just by getting a PS4.

WILLIAM YOUNG J:

Well I thought, that's what I thought – didn't I say something to that effect in *Spencer on Byron*?

MR RING QC:

I'm sorry Sir?

WILLIAM YOUNG J:

Didn't I say something along those lines in *Spencer on Byron*?

MR RING QC:

Well yes Your Honour you did.

WILLIAM YOUNG J:

But no one else agreed.

MR RING QC:

Yes, thank you for pointing that out, I was hoping you would.

WILLIAM YOUNG J:

No I realised that. Okay, sorry, it's just, maybe you're right, I hadn't actually thought of it in those terms. Are there other cases on that issue?

MR RING QC:

Not that I'm aware of. But otherwise the whole definition of the inspection role disappears if there are no inspections in the middle.

WILLIAM YOUNG J:

But there's no obligation to inspect.

MR RING QC:

Well there's an obligation to –

WILLIAM YOUNG J:

To take reasonable steps.

MR RING QC:

– either inspect yourself or get somebody else to do it so that you put yourself in the position that you can be satisfied, on reasonable ground, the work has been done in accordance with the code. I mean somebody's got to inspect because otherwise the council just simply cannot know, reasonably, that the work has been done in accordance with the code. I will be coming back to this, obviously it's relevant to the duty point.

944 is the council pointing out the work has been done. "Please let us have the conditions" and this is a fax sent to McCulloch. And this is going to be a feature of a lot of the correspondence from hereon in. The council primarily wrote to Mr McCulloch; it also at times wrote to Mr Major, on occasions some of the correspondence was cc'd to Nigel Skelt who was the man in charge of the stadium on an operational sense but employed, not by the trust but by the trust wholly owned subsidiary, a limited liability company.

In relation to the council's submissions, in a number of occasions, it refers to the knowledge of the trust about these matters, about the ongoing requests for satisfaction of the building consent conditions. When it makes those references, it is talking about not communications direct to the trust because pretty well there aren't any, it is saying, as I understand it, that Mr McCulloch, the independent contractor engineer, is effectively the trust for this purpose. So when the council writes to McCulloch, they are saying, whatever the council says to McCulloch, whatever McCulloch knows, the trust knows and obviously we take issue with that but I am just pointing that out on the correspondence because I am sure it is going to be a feature. 945, the advice of completion of the building work under the Act. The next few pages are building statement of fitness and compliance schedule.

O'REGAN J:
Just on 945. Who has signed that? Is that someone from the trust that has signed that?

MR RING QC:
No I believe that is actually one of the contractors.

O'REGAN J:
I see.

MR RING QC:
I think it is somebody from ABL, Amalgamated Builders who were the contractors.

O'REGAN J:
Describes itself as "the manager" but doesn't say what it is the manager of.

MR RING QC:
If you look at 948 and 949, 950, 951. These are all interim code compliance certificates that were issued on or around about the day that the stadium opened. You can see that there is an interim code compliance certificate for

stage 4 construction and plumbing and another one for foundations and drainage. I would just draw your attention briefly to 953.

WILLIAM YOUNG J:
What is the effect of an interim code of compliance certificate?

MR RING QC:
It is – I don't think it has got any statutory significance other than the fact that it is what it says.

ELIAS CJ:
Well presumably you are not in default. Is that right?

MR RING QC:
Well I think it is saying that as far as we are aware, the building is code compliant and is safe to use, subject to whatever conditions are on it and the conditions –

WILLIAM YOUNG J:
Well what conditions were there in relation to the trusses?

MR RING QC:
None because this wasn't one in relation to the remedial work. Remember this is the stage 4, the over arching work as it were. So this is the interim certificate that then led to the final certificate in 2003.

WILLIAM YOUNG J:
When was the remedial work completed?

MR RING QC:
February. About the middle of February.

ELIAS CJ:

It's not terribly obvious to me how these two things are going in parallel but separate paths, the final completion certificate and the remedial completion certificate.

MR RING QC:

Under the original consent for stage 4 structural the trusses, the original design for the trusses was to be done.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

But that didn't comply though.

MR RING QC:

No but that's how it started. That work to originally build the trusses was approved by the original building consent for stage 4 structural. While that work was underway the problem was identified, a remedial design was put together in drawing 97139. A separate building consent was obtained for that work, so it became a little subset inside stage 4 structural.

ELIAS CJ:

It seems very odd, if you have a problem that you don't go back to go really but…

MR RING QC:

Well stage 4 structural is the whole structure so this is just a small part of it so often one, a small but quite a large area involved, but it's not the whole building. So other structural work is taking place presumably in accordance with the original consent while this is happening.

WILLIAM YOUNG J:

But the structure, well they couldn't really have properly granted a code compliance certificate in relation to the building as originally constructed, the trusses, as originally put in.

MR RING QC:

No and –

WILLIAM YOUNG J:

And I know the number, the building consent number that it relates to is the original building consent not the remedial building consent.

MR RING QC:

To me the practical effect is that once the problem arose with the trusses and you had to get an amended building consent specifically for the remedial work for the trusses that effectively took the trusses out of stage 4 structural and put them in their own little regulatory box so you did an amended building consent that work has been done. The whole inspection role takes place in relation to that work. A code of compliance certificate is issued in relation to that work separate from what's happening with stage 4 structural and plumbing.

ELIAS CJ:

Well it seems extremely odd to me but if it's not an issue – and I suppose it is also part of a question I have as to why the 2003 code compliance certificate isn't material to the claim that you make but you've explained it, that it's because you've treated it as being in a different consent process.

MR RING QC:

Yes, that's it exactly Your Honour.

WILLIAM YOUNG J:

So then follows quite a lot of correspondence chasing up the trusses?

MR RING QC:

Yes. There is quite a lot of correspondence chasing up the trust and –

ELIAS CJ:

I think it was said “trusses” but you've answered as “trust.”

WILLIAM YOUNG J:

Trusses, trusses.

ELIAS CJ:

Yes. Did you say, “Chasing up the trust”?

WILLIAM YOUNG J:

Trusses.

ELIAS CJ:

No, no, I know you said that but I understood Mr Ring to say, “Yes the trust was being chased up” no?

MR RING QC:

Well I’m sorry, let me be more specific with my language, based on what I just said before that Mr McCulloch was being chased up. Mr Major was being chased up to satisfy both of those two conditions that were outstanding.

The next thing –

GLAZEBROOK J:

And so what, which conditions?

MR RING QC:

4 and 5, that’s the –

GLAZEBROOK J:

So 4 and 5 we’re talking about, okay.

MR RING QC:
Yes, the HCL datum and the PS4.

This then culminates, if you turn to 957, 16 November is the last chase-up by the council to Mr McCulloch before the code compliance certificate is then suddenly issued four days later and that is at 958. And that as you can see on its face is expressed to be a final code compliance certificate issued in respect of all the building work done under the consent and the note saying "This signifies the building work undertaken under the above consent, complies with the building code."

WILLIAM YOUNG J:
Was this correspondence copied to the trust? Did they see it?

MR RING QC:
No evidence of that Your Honour.

WILLIAM YOUNG J:
So it all happened behind their backs?

MR RING QC:
Well there was just no evidence of that and nobody was cross-examined from the trust about that.

WILLIAM YOUNG J:
But they didn't say they had seen it?

MR RING QC:
No.

ELIAS CJ:
But their agents had seen it, is the argument?

MR RING QC:

Their independent contractors had seen it.

ELIAS CJ:

Yes the contractors all right, but that is the argument is it?

MR RING QC:

Yes.

WILLIAM YOUNG J:

So would Mr Majors' 16 January letter have sufficed for the council purposes, if it had been received in time?

MR RING QC:

No. No, it would have sufficed in terms of the condition 5, not because of the letter but because it attached a PS4 and that PS4 you will find at 960. And you will just note that what he is certifying is the modifications have been generally constructed in accordance with the details shown in the above drawings and specifications. An earlier PS4 that you have in the bundle in relation to some other aspect of the work didn't have the word "generally" in it. So there is still not the measurements required in terms of HCL's letter and that is not finally done or some measurements are not finally provided until 28 November 2001, that is at 988. 988 McCulloch to Mr Tonkin at the council, item number 1 there on that list. By this time there had been prior correspondence which indicated that Mr Major didn't actually have these measurements, that he had to go to the contractors to obtain them and then you will see at 989, what the code compliance certificates still outstanding at that stage were. Stage 3 fire design structure, stage 4 interior finishes. So with that introduction, can I take Your Honours now to the hand up

WILLIAM YOUNG J:

So there is a reference to Mr Major at 987, "To be undertaking measurement of trusses today and will forward info." Does that happen?

MR RING QC:

At 987.

WILLIAM YOUNG J:

"27 November 2001, call from T Major, he will be undertaking measurement of trusses today and will forward info."

MR RING QC:

Well that is what immediately preceded the letter of 28 November which provided the measurements.

WILLIAM YOUNG J:

Okay, all right, oh I see. So that's the data on sealed trusses.

MR RING QC:

Yes.

WILLIAM YOUNG J:

So is that –

MR RING QC:

That's the measurements. And it is common ground that those measurements –

WILLIAM YOUNG J:

– were wrong.

MR RING QC:

Didn't show compliance with HCL's recommendation.

ELLEN FRANCE J:

And at this point, at least in some of this correspondence around this time, is going to Mr Skelt and there is obviously from some of the correspondence, some discussion with him. Why is that not alerting the trust, do you say?

MR RING QC:

Well Mr Skelt –

ELLEN FRANCE J:

I mean I understand he works for Stadium Southland.

MR RING QC:

If Mr Skelt can be treated as the trust for this purpose, then whatever went to Mr Skelt obviously went to the trust. But Mr Skelt's actual position was he wasn't employed by the trust. He was employed by the trust's wholly owned subsidiary. He was effectively the CEO of the operating arm of the stadium and we would have said that he wasn't an agent for that purpose. But in the end Your Honours, the most that can be said of this is that up until November 2011, if these people are agents for the trust, the trust is treated as knowing, to that point, that there were some issues with the code compliance certificate. But from 2011, from November, sorry 2001 to September 2010, there is absolutely no suggestion that the trust was aware of any issue and so although you can point to some of these things and we could debate whether they are agents or not, I think we can just cut through all that and say, let's just take the position from November 2001 and look at what didn't happen between then and 2010. During that period, the trust was entitled to believe that the stadium was code compliant, was safe and all of the other things that an owner is entitled to have assurance about from a regulator and indeed the evidence from Mr Tonkin himself in his brief of evidence, which I will take you to in due course, says that as far as he was concerned, as far as the council was concerned, when the stadium opened in March 2000, the council was satisfied that the stadium was safe. So the argument by the council is that the trust shouldn't have been satisfied when the council was.

Moving to the hand out. The first issue, duty of care. In the High Court, the trial Judge accepted the trust's argument that the council owed a duty of care to the trust in its inspection role and in particular in issuing the code compliance certificate and this was a duty to protect the trust from physical and financial harm caused by defective remedial work to the stadium roof

trusses that were not compliant with the building code. The Court of Appeal, by majority, held that there was no duty owed to an owner builder where it was their own fault and there was no duty owed to a commissioning owner which it considered the trust to be because of fault by the owners' building contractors and building professionals whom it described as agents for this purpose. The approved ground of appeal in this respect or in generally was whether the Court of Appeal was wrong to reverse the High Court and in relation to this duty point, for each council argument that denies the existence of the duty of care, the Court of Appeal only needed to address two questions. The first was, what has the Supreme Court said about this point in *Sunset Terraces* and/or in *Spencer on Byron* and we say that the Court of Appeal should have held that every factor that the council relied on had been addressed and rejected. Second question, is this case materially distinguishable from *Sunset Terraces* or *Spencer and Byron* in that respect? And we say that the Court of Appeal should have held that this case was not materially distinguishable so that to deny the existence of the duty would be irreconcilable with these judgments and as a result, like the High Court, the Court of Appeal was bound to follow the Supreme Court.

Dealing first with the duty that was recognised by this Court in both *Sunset Terraces* and *Spencer and Byron*, first, the statutory framework. A primary purpose of the statutory framework is to protect health and safety of building users. This is achieved by providing that the building code is a minimum standard that all buildings have to attain and an owner cannot bargain for a lower standard with its building contractors or its building professionals. The council has frontline responsibility, regulatory responsibility, for ensuring that all building work complies with the code. This is achieved by its inspection role. That role divides into three parts; before the work is commenced, by issuing a building consent, the council ensures that if the work is done in accordance with the consented plans and specifications it will comply with the building code. Then during the work the inspection regime ensures that the work being done is being done in accordance with the consented plans and specifications. And then afterwards, in issuing the code compliance certificate

the council ensures that the work, as completed, complies with the building code and each of these gives rise to a separate duty of care.

Now, through these submissions I've put in those square brackets [ICC5.9]. That is a reference to the council submissions and it's the paragraph that lists eight reasons that this case is distinguishable from the principles in *Sunset* and *Spencer on Byron*.

GLAZEBROOK J:
When you say there are three separate duties of care. Was that, and I'm not – was that explicitly recognised in the cases you're referring to or is that a submission?

MR RING QC:
No that's expressly recognised.

GLAZEBROOK J:
With the paragraph numbers that you've given us?

MR RING QC:
Yes and –

ELIAS CJ:
Sorry, what do you mean three separate duties of care? There's one duty of care but these were the policy reasons, the legal policy reasons I suppose why the Court accepted there was a duty of care.

MR RING QC:
Well I think it's both Justice Tipping and definitely Justice Chambers, in *Spencer*, talked in terms of each of the components of the inspection role potentially giving rise to –

ELIAS CJ:
Giving rise to, I see.

MR RING QC:

– a separate duty of care.

ELIAS CJ:

I see, yes, I understand.

MR RING QC:

And third in this statutory framework, the functions of the councils are explicitly recognised as amenable to tort law without limits. The council cannot contract out a full performance of its statutory obligations. It can't contractually reallocate responsibility for its statutory functions and duties and it can't contract for immunity from careless performance, as the Court of Appeal held and which wasn't appealed to this Court, even if the council had contracted, in its capacity as a regulator in the lease and/or in the project agreement, which it didn't. And that's just the reference there to Justice Miller's judgment in which he rejected – that's the part of the judgment that talks about the public policy aspects that reject why the council's cannot contract out to reduce, allocate, re-allocate, or remove their statutory liabilities and their duties.

So that's the statutory framework that has been recognised. The nature of the duty is a duty on the council, in its inspection role, to protect owners, both original or first owners, and subsequent owners of premises, whatever they were designed to be used as against financial loss. The purpose of that duty is first to protect health and safety interests as well as the associated economic interests by ensuring that construction doesn't pose health and safety risks to occupants and second is achieved by facilitating a cause of action by the owner in economic loss because the owner has both the health and safety responsibility for all occupants and the physical ability and obligation to repair, to make sure the premises are safe and healthy. And that duty standards behind the council's statutory duty to enforce the provisions of the building code by providing compensation if the council contributes to breaches of the building code by careless conduct in its inspection role. The key elements to the proximity rationale are control and that is the primary

element. The council's control on building work imposed by the statutory framework but also the owner's payment of a fee to the council for its regulatory services, whether or not that includes actual inspections and similarly the council could not evade its duty by electing to charge no fee in any particular case or in every case. And the second aspect to the rationale is the forseeability of carelessness causing loss and general reliance. And that being the reliance on the existence of the legal regime imposing liability on the council for negligently carrying out its inspection role. The policy rationale is the council has statutory obligations so it should have to perform them carefully and it should not be immune if it performs them carelessly.

Second, the scheme of the Act is to provide the owner with an assurance of compliance, if through want of care on the part of the council, that system of assurance fails, then the owner is entitled to look to the council for its loss and neither do the wider of interests of society demand that there be a denial of this duty.

And third that the duty marches hand in hand with the council's statutory obligations. It imposes on the council no greater obligations than does the statute.

WILLIAM YOUNG J:
Well the obligations on the council under the statute are a bit limited aren't they. If certain things happen, it issues code compliance certificates and building consents and it has got various powers.

MR RING QC:
All I am relying on there Your Honour is the references in *Sunset* and *Spencer on Byron* which say exactly that.

WILLIAM YOUNG J:
They say obligations. It is not a statutory duty claim.

MR RING QC:

No but the council has statutory obligations.

WILLIAM YOUNG J:

Or functions.

GLAZEBROOK J:

The point was made that if it is within the functions. I think the point was being made in the cases that if it is within the functions of council, you are not actually imposing anything further on them by just requiring them to do their job.

MR RING QC:

Absolutely, whether you call it a function – I mean the functions –

ELIAS CJ:

Well it is an obligation owed under the statute. It is not owed necessarily directly to anyone but it is properly and is usually referred to as an obligation, if it is not a power. If it is something they have to do.

WILLIAM YOUNG J:

It is a function and I suppose it may be just a matter of semantics.

MR RING QC:

Well it is a function but the council cannot refuse to do it. It has an obligation to carry out that function and it has an obligation to carry out that function carefully.

ELIAS CJ:

The issue is whether as in *Stovin v Wise* [1996] AC 923 (HL), you characterise it as a power or an obligation. Both are functions.

MR RING QC:

The key point that is being made here as I understand it, in both *Sunset Terraces* and *Spencer on Byron* is that imposing tort liability on the council doesn't impose any greater functions or obligations than the Building Act already imposes on the council. That duty at 1.9 – I see it is 11.30am.

ELIAS CJ:

I am not sure whether you have been notified but we have to stop early this evening so we will stop at 3.15 if that is all right.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.50 AM

ELIAS CJ:
Yes thank you, Mr Ring.

MR RING QC:
Thank you Your Honour. I was just starting on line 1.9 and the hand-up on the duty of care. The duty is owed to every owner, that is, the owners of buildings constructed under the supervision and certification obligations of the council, even though the owner has the obligation to only carry out building work that complies with the building code. And it applies to all buildings including, we say especially relevant in this case, to those built on council land. There just cannot be, logically or legally, an exception such that the council has no regulatory, no duty of care arising from its regulatory responsibilities simply because the building happens to be built on land owned by the council.

It applies to the original owner, as sometimes described in the cases, otherwise described as the first owner, otherwise described as someone who is building the premises. Also described as those commissioning the construction of a building. So that's both the owner, builder and what came to be termed by the Court of Appeal for the first time in the judgment, the commissioning owner.

WILLIAM YOUNG J:
So commissioning the construction of a building, is that the language that's used in the passage you've cited?

MR RING QC:
Yes, yes, I think that's Justice Chambers and I think someone who is building premises, I think that's Justice Tipping.

And also owed to a subsequent owner purchaser. It's irrelevant to the existence of the duty that the owner is a commissioning owner, that is, someone who is engaged building professionals. This is reflects Justice Tipping's efficiency factor, "Do it once, do it right," and as he said, "Negating the duty would undermine the right to redress if services paid for are carelessly performed." And that was the point that I was trying to make before about the $245 for regulatory services.

So as the cases also say, fault by these parties, that is, the owner and the owner's building professionals or building contractor, are recognised by contribution not by denying the existence of the duty. Fault by the owner, that's a principle that goes back even before *Hamlin v Bruce Sterling Ltd* [1993] 1 NZLR 374 (HC) to *Brown v Heathcote County Council* [1987] 1 NZLR 720 (PC) and was endorsed by the Privy Council in that case and that's despite the Building Act obligations that are imposed on the owner to ensure that building work complies with the code, which the council places great store on in this case. And fault also recognised by contribution if it is the fault of the owners contractors, including building professionals. And, again, that is a principle which also long predates *Spencer, Sunset*, even *Hamlin*, back to *Riddell v Porteous* [1999] 1 NZLR 1 in the Court of Appeal.

So having dealt with all of the individual points in the council's paragraph 5.91 to 7, which are supposedly material distinguishing factors, we say it's the same statutory context in this case, the Building Act 1991, and we say there wouldn't be a material difference, even if it was the Building Act 2004. Same proximity factors, that is, regulatory control and the trust payment of a fee for regulatory services plus general reliance on the council properly carrying out its inspection role, plus forcibility that carelessness causing loss should give rise to a duty. Same policy factors, the duty is co-extensive with statutory functions and obligations. There is justifiable accountability for and there's no valid immunity from the consequences of careless performance, and that includes the project agreement, quite apart from the fact that it's entered into in a different capacity and the same applies to the lease.

Same relevant factual context, that is, there's negligent building work. The council was negligent in its inspection role and in particular non-compliance with the building code went undetected and un-remedied and that resulted in physical and financial loss to the trust as the owner. So we've got the same duty, that is, the duty in the inspection role to protect the trust as the commissioning owner from the physical and financial harm caused by code non-compliant building work by the trust building contractors and building professionals and that duty is owed as a means of and for the purpose of protecting the health and safety of stadium users.

So on that analysis the Court of Appeal ought to have upheld the High Courts conclusion that the council owed the duty that was being contended for but the Court of Appeal, of course, did not and the two key factors in that, first of all, it regarded it as a disqualifying factor that if there was fault on that there was fault by the commissioning owner.

First of all, that was not argued for in the Court of Appeal. The focus in the Court of Appeal was whether the duty should be owed to a developer and the Court of Appeal was keen to explore, in great detail, the policy factors that may apply to that situation as excluding the existence of the duty. But the trust was a million miles away from being a developer. A developer, even on the Court of Appeal's own definition is someone who builds a building with the intention to sell it for a profit in a commercial context. The trust is not in a commercial context. It built the building, of a type and in a way, that it could never uplift and remove and sell, it wasn't a relocatable building, and at the end of the term of its lease with the council it had to walk away without getting any compensation whatsoever for the value of the building as an improvement on the site. So if there's one category of owner who is the furtherest away from being a developer, who is the furtherest away from being somebody that could ever derive a profit from the building of this building, that is the trust. Even a homeowner hopes to gain by capital gain and by normal growth more when they ultimately sell the house than they paid for it.

So as we've said in the hand-up the denial of the duty to the commissioning owner, of which the developer is just one example, well that's the first time that term was ever uttered in the context of this case.

Second, it was contrary to the principles in *Sunset* and *Spencer* and the predecessor authorities that we've referred to, including comments in *Hamlin* in the Court of Appeal, which made it clear that the duty that was being recognised by the Court of Appeal extended to the first owner who was building the house on the premises.

ELIAS CJ:
Well I think we've had other cases in which that's been so haven't we? Wasn't *Osborne* one? I can't remember the names of these cases but we've had something like five cases before the Supreme Court in this area.

MR RING QC:
I did have a look at *Osborne v Auckland Council* [2014] 1 NZLR 766 and I couldn't find anything specific so I thought I would confine myself –

ELIAS CJ:
Oh I see. But wasn't it a commissioning owner? Wasn't that a couple who had built the home?

MR RING QC:
Yes, yes I think they were.

ELIAS CJ:
Yes. So, maybe it was assumed rather than determined, yes.

MR RING QC:
Well I think that's right Your Honour, it wasn't discussed, it was assumed. And even in the Court of Appeal judgment Justice Miller, in a footnote, appeared to believe, whether it's actually correct, appeared to believe Mr and Mrs Hamlin were a commissioning owner as well but that didn't seem

to deflect the Court of Appeal from the conclusion, or the majority, from the conclusion that they reached.

Anyway, as a matter of principle, leaving aside whether it was even argued for, as a matter of principle, based on the authorities, including the recent authorities of this Court and going back decades, it's contrary to the analysis of and the conclusions on the regulatory framework and it's contrary to the established position on recognising the owners fault by way of contribution. So that deals with the effect of fault by the commissioning owner and now fault, the effect of fault by the commissioning owners, building contractors and building professionals.

And the first point that we make here Your Honours is if the duty is owed to an owner who is personally at fault it seems illogical to deny the duty where the fault is of the owner's independent contractors and not the owner personally. Second, again, it's contrary to *Sunset* and *Spencer*, and in particular, contrary to the same two points, the analysis and conclusions on the framework and we add to that that attribution depends on context, including statutory context, as Justice Harrison's judgment acknowledges. And it also depends on the purpose for which attribution is being considered. But the same statutory framework that Justice Harrison said led to the conclusion and attribution is the statutory framework and the analysis that identifies the purpose and the rationale of the duty, as we've set out above, in a way that necessarily precludes any such attribution.

So there's been, in our respectful submission, a misconstruction, or misinterpretation of what the effect of analysing the statutory framework is in order to make the attribution analysis and reach the attribution conclusion. It's contrary, also, to the rationales for attributing conduct for liability purposes.

ELIAS CJ:

We did have quite extensive argument on the role played by producer statements in, was that in *North Shore City Council v Attorney-General [The*

Grange] [2013] 3 NZLR 341 (SC) and whether that changed the statutory scheme because building professionals were taking more of the strain?

MR RING QC:
I thought that was in *Sunset.*

ELIAS CJ:
Oh was it *Sunset.* I thought there was quite extensive –

MR RING QC:
You definitely have and the conclusions that were reached are definitely not consistent with what the Court of Appeal reached.

The two rationales, the two fundamental rationales for attributing conduct for liability purposes, and this is relevant, these two points 2 and 3 are relevant later as well when we talk about reliance, specific reliance, and also when we talk about contributory negligence. But the rationales for attributing conduct for liability purposes are, first of all, control over the manner that the work is carried out, which is different to what work is carried out. There is attribution, if you have that control, and it mirrors the same point on proximity in the duty of care analysis. The reason councils have a duty is because they have control. The reasons that someone's conduct is attributed to you is because you have control and that is control over the manner of the way the work, the manner that the work is carried out in, not the fact that you are directing that particular work be done. That is not enough to give rise to control and not enough for attribution.

And the second rationale is that the agent is effectively standing in the place of, and purporting to act as the principal and not in an independent capacity, and this is one of the rationales in *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] 3 NZLR 445 (CA). I don't think it focused so much in Your Honours judgment, Justice Young's judgment, but it was certainly the focus of Justice Baragwanath's judgment and it was part of the focus of Justice Arnold's judgment. Your Honours pinned it on policy rather than on

this factor but here the agents, the so-called agents, are obviously not agents as such, they're not acting in the place of and purporting to act as the trust, they are acting in their independent capacity.

And fourth, the reliance by the Court of Appeal on *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL) was misplaced. *Peabody* predated *Hamlin* and it dealt with a regime that had no, a statutory regime that had no health and safety issues. I'm sorry, let me rephrase that. The case did not involve any health and safety issues, in terms of the facts, and the regulatory regime was limited to council functions that had a regulatory and health and safety purpose. *Peabody* has been rejected by the New Zealand Courts as applicable to the New Zealand building regime for decades, way back to the Court of Appeal in *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).

So for those reasons Your Honours we say that the Court of Appeal judgment miscued on the duty point and the Court should have held that the case was indistinguishable from the judgments of this Court in *Sunset* and *Spencer*, that the High Court was correct to consider itself bound by the results of those judgments and so should the Court of Appeal.

Now turning to the negligent misstatement and specific reliance issues. In the High Court there were no negligent misstatement or specific reliance issues raised by the council at the trial. Nothing in cross-examination, nothing in opening submissions, nothing in closing submissions and so, unsurprisingly, there was no mention of these issues in the High Court judgment. Limitation was an issue, but in relation to the negligent cause of action, and applying the cited authorities, that is, *Montgomery v Auckland Council* [2012] NZHC 1732 and *Body Corporate 90247 v Wellington City Council [Glenmore Street]* [2014] NZHC 295 and the *Glenmore Street* judgment of Justice Ronald Young, the trial Judge held that time bar negligence could not form the basis of a tenable cause of action but could be taken into account in determining whether the council negligently issued the code compliance certificate.

WILLIAM YOUNG J:

Where does the 10 year cut-off come in? What was the date of the issue of the proceedings?

MR RING QC:

November.

WILLIAM YOUNG J:

So it's November 2000 that's the cut-off is it?

MR RING QC:

Yes.

WILLIAM YOUNG J:

Can I just ask you a question while I'm thinking about it. I take it that the insurance that the trust had was just accident insurance effectively, the building was damaged by a weather event?

MR RING QC:

Property insurance, yes.

WILLIAM YOUNG J:

So it's not insurance of the kind that's common in the UK, where it's effectively in the nature of a warranty of the building?

MR RING QC:

No. In the Court of Appeal negligent misstatement, specific reliance and limitation were not put in issue and were not encompassed by the council's grounds of appeal. There was no mention of them in the submissions, there was no mention of them in the argument in the Court of Appeal, there was no attempt to distinguish *Sunset* or *Spencer* on this basis and they were first mentioned in the judgment.

The Court of Appeal held that because the trust was relying on a negligently issued code compliance certificate it was confined to the negligent misstatement cause of action. And despite there being no challenge to the trust's unqualified evidence of specific reliance on the council and on the code compliance certificate, and despite there being no contrary evidence, the Court of Appeal held this was insufficient to prove specific reliance. We challenge both of those conclusions. So the issues –

ELIAS CJ:
What, your first point is that the Court of Appeal shouldn't have regarded this as first a negligent misstatement case, is that right?

MR RING QC:
Correct.

ELIAS CJ:
And that, secondly, they were wrong to say that there was no specific reliance.

MR RING QC:
Correct. Those are the two issues at 2.3, yes.

So dealing with the first point, we say that the nature of general reliance creates – and I think Your Honour the Chief Justice has, this is your comment – that it's a metaphor for proximity, its reliance on as much on the state of the law as on the Council. What it means is that the regulatory regime creates a relationship between the plaintiff and the Council such that the plaintiff is entitled to assume proper performance by the Council of all aspects of the inspection role without specific and conscious thought process. General reliance does not just disappear because the plaintiff's cause of action is only based on one or some of the aspects of the inspection role. Where the Council is issuing a code compliance certificate it is reassuring all building owners in its capacity as the building regulator that the building has been constructed properly with no hidden defects. As a result there is general

reliance on the code compliance certificate's existence rather than its specific content and on the Council having properly performed other aspects of the inspection role to put itself in the position to properly issue the code compliance certificate. If the work was not code compliant the Council would have issued a notice to remedy the defects to the owner instead, and that's a reference if I can just take you briefly to the book of authorities, that's our authorities, at tab 6 you'll find the Building Act, and if Your Honours look at the second page in, section 43 of the Act, section 43(3)(a) is the power to issue the code compliance certificate, "Shall issue the certificate if it is satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code." So that is an obligation as well as a function. And the complementary provision to that is subsection (6) where it considers on reasonable grounds that it is unable to issue the code compliance certificate it issues a notice to rectify in accordance with section 42, so it's a binary choice. You either issue the certificate or you issue a notice to rectify the defects, and that's section 42 which is the previous section. And just while we're there, where the producer statement comes in, as in subsection (8), "At its discretion the Council can accept a producer statement establishing compliance with any or all of the provisions of the building code," and, as the authorities say, that doesn't abrogate the Council's responsibility to make its own independent assessment –

WILLIAM YOUNG J:
Why do you say that?

MR RING QC:
Well, it still has to assess whether it will rely on –

WILLIAM YOUNG J:
Oh, yes, but it doesn't have to make an assessment that's completely independent of the producer statement.

MR RING QC:

No, but the producer statement – I think Your Honour and I are talking about opposite ends of the spectrum. What I'm saying is it can't just take the producer and say, "Well, that's good enough for me, I don't have to do any more than that."

WILLIAM YOUNG J:

Can't it?

MR RING QC:

No, it still has to – the producer statement is one factor.

WILLIAM YOUNG J:

But it may be the only and it may be an entirely decisive factor.

MR RING QC:

Well, it might be, but it might not be.

WILLIAM YOUNG J:

But if it identifies the particular issue directly, if there was a producer statement here that said, "The trusses have been constructed in accordance with the design and I've inspected that and confirm that that's the case," that would have been an answer to any claim here wouldn't it, if there had been a producer statement prior to the code compliance certificate?

MR RING QC:

Well, there was a producer statement but it was after the code –

WILLIAM YOUNG J:

I know that, but would the Council really have been expected to send someone out there with a ladder to go up and have a look at the welds?

MR RING QC:

Every case will depend on its facts. The only point that I'm making is that it's not a tick-the-box function for the Council, it can't just say –

ELIAS CJ:

Is that because of the words “reasonably” or something?

MR RING QC:

Well, that's because at its discretion it may accept the producer statement as establishing the compliance. But that doesn’t mean it can substitute its own discretion under section 43(3)(a) for the word of somebody else, that's all I’m saying, that it’s still got to make its own independent assessment and that the producer statement is only one factor. I might be a very important factor, I’m not denying that in any particular case, but it’s not the be all and end all.

WILLIAM YOUNG J:

I suspect in many cases it is absolutely the be all and end all.

MR RING QC:

Well, it may be that it shouldn't be the be all and end all.

ELIAS CJ:

Well, is your argument that it might not be a breach but that's not to detract from the duty of care?

MR RING QC:

Well, what I’m saying is that even if it’s got a producer statement the Council still has to be satisfied under (3)(a) and one of the things it can take into account but doesn’t have to is the producer statement, that's the scheme –

GLAZEBROOK J:

Well, isn’t it that it would have to check that the producer statement is capable of being relied on but it can look at the face of the producer statement to see whether that's the case, it doesn’t have to go back and say – one, it doesn’t have to go and inspected itself, and it doesn’t have to go and say, “Were you lying when you said you’d inspected it,” unless there’s some indication that the person might have been lying?

WILLIAM YOUNG J:
Or, “Show me the calculations.”

MR RING QC:
Well…

WILLIAM YOUNG J:
I mean, it might want to but it wouldn't normally be negligent if it says to, in response to an engineer’s certificate, “We’re satisfied this provides a resource basis for issuing the consent.” It wouldn't normally have to go back and go back to the engineer and say, “Show me your calculations, show me the photographs.”

MR RING QC:
No, but what it raises is several things, which are probably of not crucial relevance here. But the first is the producer statement here had that word “generally” in it that I referred to –

WILLIAM YOUNG J:
Well, the producer statement doesn’t help them really.

MR RING QC:
But I’m just going back to Your Honour Justice Glazebrook’s point that it’s the face of the –

GLAZEBROOK J:
Well, the face of that document might have said, “What do you mean by ‘generally’, do you mean –

MR RING QC:
Well, it generally means in some respects it isn’t, that's what you might take from “generally”, so that's one point. The second point is, and there was evidence on this but it didn’t become relevant in the end for the Judge to decide it, there was evidence that councils had policies about when and how

they would accept producer statements and in what circumstances, including whether they would conduct their own audit inspections of inspection records being done during the course of construction by the person who was going to be issuing the producer statement. So it flows into the question of policies around accepting producer statements and…

WILLIAM YOUNG J:
Are producer statements part of the current regulatory regime or are they just part of the general obligation not to issue unless reasonably satisfied?

MR RING QC:
I think they're out, they don't have statutory recognition any more in the 2004 Act.

GLAZEBROOK J:
So subsection (8) was the statutory recognition here?

MR RING QC:
1991, yes.

ELIAS CJ:
And producer statements related to materials, work…

MR RING QC:
The producer statement is the professional saying –

ELIAS CJ:
It's been done in accordance…

MR RING QC:
– that the work has been done in accordance with the building consent or in accordance with the building code.

WILLIAM YOUNG J:

So the sort of producer statements you're talking about would be supplied by engineers or architects?

MR RING QC:

Yes.

WILLIAM YOUNG J:

But can't the builders themselves sometimes provide building –

MR RING QC:

They're not PS4s, they're PS3s, they are construction certificates.

GLAZEBROOK J:

Well, is your point that it will depend on the circumstances whether you could rely both on its face and on the circumstances whether it would be reasonable for a Council to rely on a produce statement.

MR RING QC:

That's exactly my point.

GLAZEBROOK J:

So that if it was very, very detailed calculations that could only have been done by way of inspections during the construction process at the least you might want to find out that they did do inspections during the construction process rather than going along at the end and saying, "Oh, well, it looks okay to me but I haven't actually done inspections during the process," something of that nature.

MR RING QC:

Well, it is something of that nature and that's –

GLAZEBROOK J:

So it depends on the circumstances what you can rely on.

MR RING QC:

Well, it does, but it also depends also, and that whole place of producer statements reflects the need for a policy, for the Council to have a policy about how it's going to deal with producer statements, who is it going to take them from, what is it going to require that person to do in order to be in a position to provide the producer statement and how's it going to check that the person does that and what is it going to require on the face of the certificate when it gets it?

WILLIAM YOUNG J:

What's your evidence about that?

MR RING QC:

Yes, there was.

WILLIAM YOUNG J:

And aren't there various grades of, as it were, professionals, of architects and engineers as to what they can certify and what they do certify?

MR RING QC:

I think there is, yes.

GLAZEBROOK J:

It's irrelevant anyway because they didn't have one.

MR RING QC:

Yes, well, correct.

GLAZEBROOK J:

Or at least not at the proper time.

MR RING QC:

Yes.

So at 2.4 number 3, the substance of the claimed negligence in this case is that the Council failed to prevent a defective building from being constructed and used. It's not in substance a negligent misstatement case, even if it's based on just the code compliance certificate, just as much as it wouldn't be even if it was just based on the building consent or just based on the building consent and the code compliance certificate, which it could be if it was just a design issue.

WILLIAM YOUNG J:
How many of the cases deal with negligent misstatement?

MR RING QC:
Well, to actually apply it, none I don't think. For various reasons –

WILLIAM YOUNG J:
Well, normally because they're within time, I guess.

MR RING QC:
Well, because at least – yes. Because the inspections, I think in *Sunset* the inspections were within time and there was no code compliance certificate, but in *Byron* there was a code compliance certificate – oh, my friend says it was the other way around. Either way, there are those sorts of factual differences.

WILLIAM YOUNG J:
In *Sunset* there was one – might have been in *O'Hagan* there weren't code compliance certificates, or at least in some of the cases.

MR RING QC:
Yes. But the point we're making is that if you give the inspection role its full force and meaning as, we say, this Court intended in *Spencer on Byron*, then it's a negligence case even if it is based on the issuing of a certificate. Because if you take out the inspections in the middle, that is your case is solely based on the building consent or it's solely based on the code

compliance certificate, and if it is a zone issue only, it will only be solely based on either or both of those, then you miss out on general reliance, you cannot rely on general reliance.

ELIAS CJ:

Well, negligent misstatement is just a species of negligence, but it arises in circumstances where there isn't an obligation to provide advice or something of that nature, which is why specific reliance arises, that's really the difference isn't it?

MR RING QC:

Well, it is the difference, but the key point for us is that –

ELIAS CJ:

Well, the key point for you is that there's authority that says that there is sufficient relationship of proximity to ground a duty of care.

MR RING QC:

Yes, thank you, yes.

WILLIAM YOUNG J:

So are there any cases where the only negligence within time was the issue of a code compliance certificate?

MR RING QC:

Only this one that I'm aware of.

GLAZEBROOK J:

Wasn't that the issue in *Osborne?*

ELIAS CJ:

I can't remember. It was a divided case though.

WILLIAM YOUNG J:

It might have been. Yes, I think it was the issue.

GLAZEBROOK J:

I think it was the issue in *Osborne*, what that result has, but my recollection is that that was the only thing that was within time was the code compliance certificate, and the argument was that that wasn't a separate act on the part of the council, it just flowed out of the earlier act as far as I can remember.

MR RING QC:

Well one case that did deal with this, not quite obliquely, is *Johnson & Ors v Auckland Council* CA 139/2013 & CA 350/2013 NZCA 662 [18 December 2013], that's Your Honour Justice O'Regan and Your Honour Justice France's judgment, and there this issue arose but in a different context because the argument was well because the case is based on a code compliance certificate the plaintiff is confined to the measure of loss based on negligent misstatement and Your Honours held, of course, that not right and so if we are looking for a case example where the Court has held that a code compliance certificate based case is not to be treated, at least for all purposes, as a negligent misstatement case, well, that's one of them.

So we've dealt at 2.5 with the limitation point.

ELLEN FRANCE J:

Sorry, Mr Ring, just in terms of the pleading and your point about the sort of middle point of the inspection, here are we talking about issuing the code compliance certificate without the specified conditions being met?

MR RING QC:

Yes.

ELLEN FRANCE J:

That's the negligence?

MR RING QC:

Yes it is.

WILLIAM YOUNG J:

So the cut-off factor you say is that the, essentially, if they'd done a proper job there would have been an investigation, not simply there would have been a refusal, a non-issue of the code compliance certificate?

MR RING QC:

Correct. We say, well, we – the High Court and the Court of Appeal all say that the counterfactual is that instead of issuing the code compliance certificate the council would have embarked on a course of conduct which would have resulted in the defects being identified. And I'm coming to that really in the next section, about proven chain of causation.

But what we just say about limitation is that if the negligent consent and all the inspections, even though in themselves are time barred, the council can't be satisfied, on reasonable grounds, as to the code compliance of the completed work; that one flows into the other because of the interrelationship of all three parts of the inspection role. So as a result this code compliance certificate can't be sensibly divorced from other aspects of the inspection role. This reinforces the indivisible relationship between general reliance in the inspection role and it also reinforces that a claim based on the code compliance certificate and/or the building consent is not confined to the negligent misstatement cause of action otherwise, because of the inevitable period between inspections and issuing a code compliance certificate limitation would emasculate general reliance on a code compliance certificate in many cases and that is likely to hit subsequent purchasers the hardest.

And the second, and an independent reason that we say that the Court of Appeal was wrong, is that on the proven chain of causation here reliance by the trust just simply doesn't arise. The essence of a cause of action and negligent misstatement is that breach of a duty by the defendant causes the plaintiff to act differently leading to a loss that wouldn't otherwise have happened and that's why this Court has said specific reliance, or reliance, is an essential feature in the chain of causation. And also said that reliance is necessary before there can be causation. Well in this case the

Court of Appeal upheld the High Court that in the absence of the council's negligence in issuing the code compliance certificate the damage would have been prevented by the council and not by the trust because the council would have acted differently. It would have initiated a process leading to discovery of the defects which the trust would then have fixed. So specific reliance by the trust on the council on the code compliance certificate is not even a feature, let alone an essential or necessary part of the chain of causation in this case. And for that reason alone, it just simply cannot be a negligent misstatement cause of action.

WILLIAM YOUNG J:

Well it could be, I mean, if your client had seen the code compliance certificate then they would have had a negligent misstatement and had acted accordingly they would have had quite a good claim on a negligent misrepresentation.

MR RING QC:

Yes, and I'd be relying on only the first ground then, the general reliance ground.

WILLIAM YOUNG J:

But you'd have two claims.

MR RING QC:

Yes.

ELIAS CJ:

Specific reliance and negligent misstatement, I mean there are causative aspects to it, but the principal purpose of that is to establish sufficient proximity, and you don't need that if the other authorities are correct, that's the argument.

MR RING QC:

I think the way the Court of Appeal reasoned it is that because you need specific reliance, general reliance goes out the window, whereas the true analysis is because of general reliance you don't need specific reliance.

GLAZEBROOK J:

Well you could say you had specific reliance here anyway, couldn't you?

MR RING QC:

Well, we do, and that's the next section.

GLAZEBROOK J:

Yes, okay, I won't get ahead of things.

MR RING QC:

You're exactly right Your Honour, that's the very point.

ELIAS CJ:

But general reliance doesn't need to be demonstrated in every case, because that is what the policy determinations that these relationships give rise to a duty of care, that's part of the reasoning of that, but it's not something that has to be demonstrated in every case.

MR RING QC:

No, absolutely Your Honour. Yes. Yes.

ELIAS CJ:

Which is why I said it was a metaphor I suppose, the duty of care.

MR RING QC:

Well, metaphor for proximity.

ELIAS CJ:

Proximity, yes.

MR RING QC:

So the issue on specific reliance for Your Honours is that we say the Court of Appeal was wrong to reject the trust's unchallenged evidence of specific reliance on the code compliance certificate is insufficient. Because of the absence of this being an issue even, the absence of any argument on it, there was no submissions to the Court of Appeal on what it should make of the evidence, and it wasn't directed to all of the relevant evidence. Again, this is something that emerged for the first time in the judgment.

ELIAS CJ:

So it wasn't the subject of argument in the Court. The Court didn't say this can only be a negligent misstatement case.

MR RING QC:

That has never been argued for by the council.

ELIAS CJ:

Although you pleaded it as your fallback cause of action?

MR RING QC:

Yes, and our starting point was based on the comments of Justice Tipping and Justice Chambers in *Spencer*, that it was virtually redundant, we didn't need it. We had it there but we didn't need it.

GLAZEBROOK J:

And we said something similar as well in *Carter Holt Harvey Ltd v Minister of Education* [2017] 1 NZLR 78 I think.

MR RING QC:

Yes.

O'REGAN J:

Slightly different circumstances.

GLAZEBROOK J:

Slightly different circumstances.

MR RING QC:

So what we deal with in 2.8, what we say is the nature of specific reliance. It's a misstatement that influences the mind of the plaintiff to do or not to do something that was materially substantial cause of the plaintiff's loss. In this case, because of the code compliance certificate, and the 10 year period from the issue of the certificate to collapse, the trust believed the stadium was code compliant and safe to use so it didn't do any remedial work. And this is where the point comes in again about whether some of the correspondence between 2000 and 2001 might have suggested there were some issues if the trust is foisted with the knowledge of certain people or not. From 2001 when the council was apparently satisfied, so were we, is the simple point, and the unchallenged evidence was that the key date was the date of the collapse obviously in 2010. The unqualified and unchallenged evidence by the trust chairman Mr Acton Smith was on reliance on the code compliance certificate, that's specifically what he said in a number of places. Obviously that could only be after it was issued and it doesn't negate or reduce the trust's reliance on the council that it concurrently relied on the trust's building contractors and professionals, which is also what Mr Acton Smith said in the same parts of his evidence. And it also highlights how inappropriate we say it is for the council to now allege for the first time that the trust's reliance on the code compliance certificate is unreasonable. But anyway, as I've said, at best for the council this couldn't apply after November 2001. Justice Miller divided this part of his analysis into two parts, that's pre-2006 and post-2006. In pre-2006 he held it was wrong for the High Court to hold that the trust relied on its own agents and not on the Council. First, that mutually exclusive point, there can be concurrent reliance on multiple sources, second, the evidence that he relied on was not logically probative, and if I can take you to that passage in the judgment it's, as I've got noted there, volume 1, it's at page 141 of the case, paragraph 111. So it's case 141, paragraph 111 at the bottom of the page…

ELIAS CJ:

Sorry, I've lost which volume.

MR RING QC:

Volume 1, pleadings volume. So what he's relied on is in 1999 on learning of the defects the trust demanded assurances from the architect that it was safe, "It then engaged Mr Harris to find out, to design remedial work." We say, well, that can't be probative of a lack of specific reliance on the code compliance certificate after November 2001, the trust didn't propose to seek a building consent, it would have pressed on with remedial work, that's not logically probative, the trust chose to rely on Mr Major to verify the remedial work had been completed as Mr Harris had designed it, and did so knowing the Council would rely, that is the PS4, and again that doesn't negate reliance, logically reliance by the trust on the code compliance certificate. The trust had no particular need of the code compliance certificate, it was not a developer building for sale, it seemed likely that it wasn't, not until it needed a liquor licence it pursued the Council for a certificate. I want to specifically comment on that. Because that wasn't evidence, that was just pure speculation by the Council that the head of the Council's building division, Mr Tonkin, and at 210, the second bullet point, I've actually given you the references to the evidence, and perhaps I can just take you to –

ELIAS CJ:

Does it really matter?

MR RING QC:

No, no, it doesn't matter except in the sense that it was relied on by Justice Miller as part of the reasons that when Mr Acton Smith said, "Expressly I specifically relied," that it couldn't be taken at face value.

WILLIAM YOUNG J:

Mr Acton Smith has had evidence of a pretty high level of generality, and he doesn't really explain how he could have relied on the code compliance certificate that he hadn't seen and would appear not to have been aware of.

MR RING QC:

Well, let me just unpack that a little bit.

WILLIAM YOUNG J:

Well, was he aware of it?

MR RING QC:

Well, he said he relied on it.

WILLIAM YOUNG J:

I know, but other than that statement, was there any evidence that it had never come to his attention?

MR RING QC:

I can't remember a specific statement of that. But that's a matter of inference from what he said, he wasn't cross-examined on it, nobody cross-examined him on any of those paragraphs in his evidence.

WILLIAM YOUNG J:

I mean, the main focus of his evidence seemed to be that he was satisfied it was safe when the building opened.

MR RING QC:

And also after he got the code compliance certificate, paragraph 44, paragraphs 35 –

GLAZEBROOK J:

Well, you say it was never put in issue in any event, so.

MR RING QC:

No. And that's the point we made in bullet point 4, and Justice Miller didn't deal with paragraphs 37 of Mr Acton Smith's judgment where he says specifically he relied amongst other things on certificates from the Council as establishing that the stadium was properly constructed.

WILLIAM YOUNG J:
But he did get some certificates?

MR RING QC:
Yes.

ELLEN FRANCE J:
He says, "When we received the appropriate assurances and certificates from those experts and from the Council."

MR RING QC:
Well if somebody was going to suggest that that excludes a code compliance certificate for the trusses, that would need to be specifically put, and could not be inferred from that just as it stands. That's got to be a minimum fairness forensic requirement surely.

WILLIAM YOUNG J:
He might of said so specifically, that's all. It's there and we have to make of it what we will.

MR RING QC:
It's not just there, with respect, six paragraphs of reliance repeat almost the same thing in different ways. None of them are challenged. To suggest that it's, with respect, to suggest that that's inadequate as unchallenged evidence, is not a fair process in terms of properly putting the case, of properly challenging the trust case.

ELLEN FRANCE J:
Well in both 34 and 37 he is talking both about, he's combining, isn't he, the assurances and the code compliance.

MR RING QC:
Yes he is.

ELLEN FRANCE J:

So there is some reliance on the separate certificates et cetera.

MR RING QC:

Bearing in mind, of course, this is also at a time where in Mr Tonkin's own evidence he's saying as far as he's concerned, as far as the council's concerned, the building is safe to be used and safe to be opened. So now we come at the top of page 6 to the 2006, the post-2006 events.

ELLEN FRANCE J:

Sorry, can I just check one thing. The council makes something of the file note of 17 January 2001.

MR RING QC:

Yes.

ELLEN FRANCE J:

Do you say that's not relevant because that's an earlier point in time?

MR RING QC:

That's the main point.

ELLEN FRANCE J:

Right.

MR RING QC:

All I'm saying is that there are issues as to whether that is knowledge that can be imputed to the trust, and whether it's sufficient to say that the trust, on the basis of that, should not have relied on the code compliance certificate to believe the building was safe, at a time when the council itself did, but the cleaner point is that even if that is the worst, you take the worst connotation of that, once the council effectively signed off on the code compliance certificate as being satisfied with the conditions, albeit negligently in 2001, we've still got nine years until the building collapsed.

In order to look at the 2006 specific reliance aspect of Justice Miller's judgment, I really need to take you to a few of the key documents from that period. So if I can ask you to look at volume 3B, the context here is that from 2000/2001 and certainly from about June 2001, the trust was experiencing leaks through the roof onto the community courts, and that was obviously a danger to people who were using the courts. Various things were tried, nothing was completely successful, and by the time we got to March 2006 the trust was determined to get to the bottom of it and get it fixed once and for all. So at 1033 you see the general manager's report, March 2006.

WILLIAM YOUNG J:
Sorry, 1033?

MR RING QC:
1033, under the heading, "Community Court Roof." Ray Harper has been proactive in attempting to find a more permanent solution. Meetings have taken place. Consultants from Southland District Council, that's Mr Graham Jones, the engineer from the Southland Council who was involuntarily co-opted to provide some assistance, and then at the bottom of those four points the trust is asking Robin Harris, that's HCL, who did the original peer review, to make comments.

The next, at 1044, you're looking at the minutes of the trust board meeting, 24 March, at the bottom of 1044, a motion the matter be referred back to McCulloch to design the original stadium expecting to go back to the original consulting engineer, obtain recommendations on what work needs to be done in order to reduce the level of flexibility in the roof structure and would lead toward solving the leakage problem. At that stage it was believed that in high winds there was wind deflections and that that might be causing the leaks. So that was the point of time in which the investigative team, headed by McCulloch, was tasked with the job of finding and solving these leaks.

Next, at 150, –

WILLIAM YOUNG J:

Can I just – were the cause – is it now established that the cause of the leaks was the faulty truss number 1?

MR RING QC:

No. Absolutely not.

WILLIAM YOUNG J:

It's unrelated?

MR RING QC:

Absolutely unrelated. So –

ELIAS CJ:

But was it due, as was suggested, to the roof lifting?

MR RING QC:

No.

ELIAS CJ:

It wasn't, thanks.

MR RING QC:

No.

ELIAS CJ:

What was it?

MR RING QC:

What was it?

ELIAS CJ:

Yes.

MR RING QC:

It was the fixings and also thermal expansion.

ELIAS CJ:

Right, thank you. Unrelated.

MR RING QC:

Unrelated. So at 1050, just records in the April general manager's report, the trust is working with Mr Harris to gain his professional opinion in finding solutions, stabilising the roof structure and preventing the continual leaks. So that's at a point when they thought it still was, or might be, the deflections.

The next thing that happened, at 1054, is that Mr Acton Smith read about a media report overseas, about a stadium in Poland that had collapsed because of excessive snow and was concerned that the stadium had been designed with a sufficient margin for snow load in it or, more precisely, he wanted confirmation it had been designed in accordance with the code. And he also took the opportunity to say to HCL about the concern about the movement and he asked for them to, for HCL to give an assessment that the roof is safe but from a design point of view. And he gave this evidence in his brief of evidence. He was also cross-examined on it and he steadfastly stood by that this was a design request, it wasn't a construction concerns request and that, let me just give you the references to that. Volume 2A, 208, 42 and 44. And cross-examination, 240, line 25 through to about 242.

Next, in 3B, at 1074, we're talking now 19 May 2006 meeting of the trust. Report from Mr Jones and expecting an independent report from HCL and that report from HCL arrived dated 9 June 2006 at 1084. The effect of what he's saying at the top of page 1085 is the wind deflections, as designed, are within code. The static deflections may be a cause if the leaks if the upward camber is not, was not as required by the remedial design, and he recommended that that be checked. And that then led to his six recommendations on the next page, which of course are all recommendations

on how to find and eliminate once and for all the cause of the leaks. And number 1 –

WILLIAM YOUNG J:
But is that right. Is it not also to do with safety or not?

MR RING QC:
No, it's to do with the cause of the leaks. These recommendations are how to identify the cause of the leaks so that they can be fixed.

WILLIAM YOUNG J:
I may have missed something but over the page, going back to 1084, the trust concerns and requirements generally include a reassurance the roof load can support the ultimate loads, that the roof is safe.

MR RING QC:
Yes, and if you go to the bottom of 1086 he provides those assurances. So the six recommendations are recommendations that are solely directed to solving the cause of the leaks. Number 1 and number 6 are the ones I previously mentioned to Your Honour the Chief Justice. Those are the ones that, with some elements of number 2 in it as well. The ones that involved inspection of the trusses were 3 and 4.

O'REGAN J:
So what's the relevance of the letter about the stadium in Poland collapsing?

MR RING QC:
He says, I've read that there's a stadium in Poland that collapsed under the weight of the snow. Please reassure me that our stadium is being designed so that it is compliance with the snow loading as required by the building code, and Mr Harris comes back, in this letter at 1086, and says, not only was it designed in accordance with the code as far as snow loading when it was built, in respect of any changes to the code that there have been between 2000 and 2006 it is compliant now with design requirements.

O'REGAN J:

But that follows immediately after saying you should inspect it, doesn't it?

MR RING QC:

But the inspection, there is to inspect for the purpose of identifying the causes of the leaks.

O'REGAN J:

Well it doesn't say that, it just says we recommend the following items are investigated.

MR RING QC:

Yes, but the reason being investigated is to identify the causes of the leaks.

WILLIAM YOUNG J:

There's quite an elaborate superstructure going over the words in this correspondence. All Mr Acton Smith writes is that he wants to know that the roof's safe. He says, well of course that only means design, I don't really care if it's been badly built, that's not what we're after, and then this chap writes a letter saying, "You want to know that the roof's safe. Amongst the things you should do is check to see the truss welds and support fixings to see if there are any signs of deterioration or fatigue," and you say that's nothing to do with safety?

MR RING QC:

Again, let me just pick up on some of those things. It is not true that the trust did not care that the building was properly constructed.

WILLIAM YOUNG J:

Not interested in the design, in the structure because they were relying on something else.

MR RING QC:

Well, to be precise, there's specific unchallenged evidence which says as far as construction was concerned, at this time, we were relying on the assurances that we got from our contractors and from the council including the code compliance certificate. So we weren't concerned that it had not been constructed properly. We were only concerned because we read that a stadium in Poland had not been designed properly, we were concerned that our building had not been designed properly, please reassure us about that." Now –

WILLIAM YOUNG J:

I mean, I do have to suggest to you that it is a gloss on the language of – I know he said it in evidence, but he is glossing what was said in the correspondence.

MR RING QC:

Well, that's not what he said in the evidence and that's not what he said when being cross-examined, and the –

GLAZEBROOK J:

But why would he think there was anything wrong with the construction, apart from the leaks?

WILLIAM YOUNG J:

But why would he think there was anything wrong with the design?

GLAZEBROOK J:

Well, because – well, I can understand that totally. You've got something in a country overseas that's collapsed. It's like why would you think there was anything wrong with your cladding on your buildings after the Grenfell fire. Well, of course you'd think there might be something wrong with the claddings on your building after the Grenfell fire, whether they were code compliant or not I would have thought.

WILLIAM YOUNG J:

Yes, the language is, “Would you give your assessment of the roof your attention if we want to be certain the building is totally safe,” and you're saying, as I understand, or he was saying as I understand, “All I was looking for was a confirmation of design, I wasn’t pursuing any interest as to whether it had been properly built.”

MR RING QC:

Yes, because I relied on the assurances that it wasn’t, and that was challenged evidence that the Judge accepted.

WILLIAM YOUNG J:

Did she? What did she say? Where does she deal with it?

ELIAS CJ:

I think you might need to take us to that.

MR RING QC:

Okay.

ELIAS CJ:

It’s almost the adjournment time, so would you –

MR RING QC:

Can I come to that after the adjournment?

ELIAS CJ:

– prefer to find it and come back to it after the adjournment?

WILLIAM YOUNG J:

Yes, sure.

MR RING QC:

Yes. Do you want me to pick up the next three minutes elsewhere?

ELIAS CJ:

Yes, please.

MR RING QC:

So let me move to Justice Harrison's judgment at 2.12. We say he was also wrong to find that the trust and its agents were indifferent to the certificate. So unlike Justice Miller, who was confining his issues to the trust's agents, Justice Harrison was relying on non-reliance by the trust and its agents, he said the trust the and its agents were indifferent to the certificate. So by "agents" what he's saying is that Mr McCulloch was indifferent to the code compliance certificate and because Mr McCulloch is an agent of the trust and therefore there could be no specific reliance by the architect on the code compliance certificate, there couldn't be any reliance by the trust on the code compliance certificate, because Mr McCulloch's non-reliance is imputed to the trust. Well, that, Your Honour, has a number of legal and factual problems to it. To the extent that the Judge relied on, well, the Court of Appeal relied on the evidence of the trust's indifferent, it did not specifically identify the evidence that it was relying on. There were pejorative references in the judgment about the trust's "desultory practices", we say that were unfair and unjustified when nothing of the sort was put to the trust's witnesses, there was no evidence of the trust's actual knowledge of any of the requisitions or reminders, except perhaps that meeting in 2001 and, to be fair, there's one or two other pieces of correspondence that were cc'd to Mr Skelt after that, but nothing of course after November 2001. There's no admissible evidence of the request from the trust or the need for a liquor licence prompting the Council to issue the code compliance certificate in November 2000, another factor relied on by the Court of Appeal. There's an unreferenced comment in the judgment that the trust did not treat what purported to be a final code compliance as actually final, there's no evidence that the trust knew the code compliance certificate was issued without the Council being satisfied on reasonable grounds that remedial work as completed was code compliant. The Council never told the trust that the stadium was not or may not be code compliant, the Council thought the stadium was safe to use, and at least after

November 2001 the trust was entitled to assume that the Council was also satisfied.

To the extent that Justice Harrison relies on agents, we say that there's the same attribution error as the Court of Appeal made for the duty. Specific reliance must refer to the trust's actual state of mind, not the constructive state of mind of its independent contractors otherwise, on the Court of Appeal's analysis, there would hardly ever be sufficient specific reliance. And the only reasonable inference from the evidence is that from at least November 2001 the trust relied on the Council's having properly issued the code compliance certificate, there was concurrent reliance with the building contractors and professionals, it believed it was safe to use the building because it was code compliant, it's an unreasonable inference and an unfair conclusion from the same unchallenged evidence that in the absence of the negligently issued code compliance certificate November 2000 or of the Council being apparently satisfied from November 2001 the trust would nonetheless have continued to use the stadium for the next 10 years until the collapse, indifferent as to whether the Council had issued a code compliance certificate.

ELIAS CJ:
Yes, thank you.

MR RING QC:
So I'll come back and pick up that point after lunch.

ELIAS CJ:
Yes, thank you, that would be excellent. We'll take the lunch adjournment and we'll resume at two.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.01 PM

MR RING QC:
Your Honour, I was going to take you to the High Court findings that related to the recommendations in the letter. Volume 1 at page 90 starting at paragraph 167.

GLAZEBROOK J:
Yes, I must admit you seem to have it under the heading “reliance” but I would have thought it was a contributory negligence issue.

MR RING QC:
It is, it comes in in both because Justice Miller held that there was no specific reliance in the post-2006 period, so during this period that the remedial work was being done.

GLAZEBROOK J:
I just can't really understand why that would follow, just because you get something checked out, doesn’t mean you’re not relying on…

MR RING QC:
Well, I’m with you there Your Honour.

GLAZEBROOK J:
That’s all right. As long as I’m not missing something. But I can certainly understand the contributory negligence issue.

MR RING QC:
So let’s just think of this as the introduction to my 2006 contributory negligence section. Here are the Judge’s findings on what should be made of those recommendations and that they should be treated as all to do with identifying the sources of the leaks, and not of some independent or other purpose. The second thing I just wanted to remind Your Honours of in the

same context is the minutes of the meeting that preceded that letter, that's the 19 May 2006 trust meeting at volume 3B, 1074, where the minutes refer to this report, that's the 9 June report, "This report will provide some indication of what expenditure, if any, needs to be spent on reducing the flexibility in the roof structure which will also help to reduce or eliminate the water leakage problem that currently exists."

The third thing I wanted to tell you, which isn't in the bundle, but it is in my submission significant in this context, is HCL was the subject of a third party claim by the council, which was settled before the trial. Two of the allegations that were made in the last statement of claim against HCL by the council were 1, that by the letter HCL gave an unqualified assurance that the roof was safe.

ELIAS CJ:
What are we to take from this?

MR RING QC:
Well, HCL and the council settled.

ELIAS CJ:
Yes I know but we don't know the basis on which they settled.

MR RING QC:
Well we know that they settled on the basis of the allegations, whether without prejudice or whatever, on the basis of the allegations that were being made against them in the proceeding. They settled the issues in the proceeding.

WILLIAM YOUNG J:
I can't read in the letter any assertion that the roof is safe. I can read in the letter that the, because there's no suggestion that Mr Harris had inspected the roof. The letter, although you don't like it that much, does refer to checks to be made on welds –

MR RING QC:

I don't mind that Your Honour.

WILLIAM YOUNG J:

Sorry?

MR RING QC:

I don't mind, it's not that I don't like it, I don't mind it because it's not in that context. It's in the context of finding leaks.

WILLIAM YOUNG J:

All right, but there's nothing in it to say the roof is safe, other than the last two, the second and third to last paragraphs.

MR RING QC:

Well, yes, other than the specific reference that the roof is safe.

WILLIAM YOUNG J:

Yes, but that must be reference to design because he hasn't inspected it.

MR RING QC:

Well, yes.

GLAZEBROOK J:

And you say that's all he was being expected to do…

MR RING QC:

Yes.

GLAZEBROOK J:

But we take from that what we take from that though don't we?

MR RING QC:

Yes.

GLAZEBROOK J:

Because even if they'd been asked to do something else – well, it's sort of hard to see contributory negligence after the fact and not finding the defects that are already there, you'd still have to fix them wouldn't you?

MR RING QC:

Yes.

GLAZEBROOK J:

And presumably – well, is there any evidence that they would have cost less to fix if you'd found them then, than after the collapse, or do we not know? I suppose the collapse caused other issues.

WILLIAM YOUNG J:

Well, the whole roof's collapsed.

MR RING QC:

Well, after the collapse, yes – I mean, I think there was evidence at one stage from the Council that the cost of fixing the defects wasn't all that much. There was some question about whether the trust could have recovered it anyway from, because of insolvency issues with the builder and the subcontractor, but I mean no question that it was remedial with the trusses in place, as opposed to the whole building needed to be replaced.

GLAZEBROOK J:

Well, it just seemed to me that it would be quite difficult to do a remedial with the trusses in place wouldn't it? Because wouldn't you have to have taken it all down to weld on the four sides and to add the beams and weld those?

MR RING QC:

It wasn't really explored in the evidence, Your Honour, what would have been required.

GLAZEBROOK J:

Okay.

WILLIAM YOUNG J:

Was there only one defective truss?

MR RING QC:

No, they were all like that.

WILLIAM YOUNG J:

So it was only one that failed?

ELIAS CJ:

One failed…

MR RING QC:

No, they all failed.

WILLIAM YOUNG J:

Sorry, one failed initially, precipitating the failure of the others.

MR RING QC:

Yes.

GLAZEBROOK J:

Yes.

ELIAS CJ:

Domino.

WILLIAM YOUNG J:

So were all the trusses defective in the same respects?

MR RING QC:

Yes. More or less, yes. I mean, all of them had at least one, but I think actually all of them had multiple of these defects to varying extents.

So just dealing with the contributory negligence as a separate item. The High Court held that in investigating the cause of the leaks the trust didn't implement HCL's two of six recommendations to inspect the trusses. Once they'd identified the cause of the leaks and fixed it the High Court held that wasn't contributory negligence even though it would of likely revealed the defects and prevented the collapse. The High Court did not need to deal with the trust's fall-back argument that any negligence by the investigative team was not attributable to the trust, so this is the agency argument, the same agency argument as arose in the duty point. The Court of Appeal held that the trust was contributory negligent, Justice Miller, by itself and not following up the investigative team to ensure that they inspected the trusses, and the majority judgment by the trust's agents that it's its independent contractors comprising the investigative team and not implementing the recommendations to inspect the trusses. So that gives rise, we say, to these issues. Was the trust contributory negligent in not implementing the recommendations made to identify causes of the leaks and then superseded by the identification of those leaks when there was no reason to suspect anything wrong, and that's a conduct issue, when they would have fortuitously revealed unrelated construction defects, and that's a causation opportunity issue? Was the trust liable in contributory negligence because of the conduct of its investigative team because it was contributory negligent for the trust to rely on the investigative team to act properly and/or because any negligence by the investigative team was attributable to the trust?

ELIAS CJ:

What's the investigative team's…

MR RING QC:

That's Mr McCulloch, Mr Major, HCL.

ELIAS CJ:
Yes.

MR RING QC:
And a number of other people.

I've given Your Honours the factual context. There's just one other thing or a couple or other things I wanted to make clear. That is, by the time HCL gave its report on the 9th of June there was already in serious consideration he prospect that the leaks were being caused by the inadequate fixings and the thermal movements that turned out to be the actual problem. And Calder Stewart, who were the roofing contractor, were already part of the investigative team and already doing something along those lines. So in terms of the timing of what happened, HCL delivered its report on the 9th of June with the six recommendations. Within two weeks of that, that's on 20 June, Calder Stewart had already recommended, at that stage, trial remedial work which was effectively implementing the recommendations in numbers 1, 2, and 6.

That remedial work was then pursued.

ELIAS CJ:
Sorry, where do we see the Calder Stewart recommendation?

MR RING QC:
If Your Honours would go to 3B and turn to 1121, so there, 20 June, that's their recommendation. And the only other point is the one I just made before, that this didn't come out of the blue, this was already in prospect before the 9 June report and then if you turn to 1139, there's the trust minutes of meeting for 2 August 2006, matters arising, refers to the HCL report. States, "Flexibility in the roof structure. Acceptable further work needs to be done to carry out on improving the flashings and gutterings. Mr Harper reports that work now carried out on two of the five areas. Satisfactory results been

achieved." So it's clear that the trust read the 9 June report as recommendations to pursue leak identification.

Next, 1147, minutes of the trust meeting 9 September. Chairman's report, second bullet point, "Work being undertaken on the community court's roof in relation to repairs made to stop water leaks. Work on two of the five panels successfully completed. Now we need to get a quote for the additional work." And then 21 November, 1157, second bullet point under, "Chairman's report." "Work being undertaken, Calder Stewart Roofing engaged to complete this work, approximately $8500." And Mr Acton Smith's unchallenged evidence was that the work was successful in eliminating the leaks. And as a result of that neither the trust nor the investigative team then implemented the recommendations involved in inspecting the trusses.

So the first issue is the conduct issue, in terms of whether a fortuitous inspection was required in order to avoid being contributorily negligent. We say it wasn't contributorily negligent not to undertake apparently unnecessary inspection of the trusses. The onus is on the council to proving the context, that it's already shown the trust is entitled to rely on the council. Did the trust fail to take reasonable care in looking after its own interests? HCL only made the recommendation for the purpose of identifying the cause of the leaks. The trust had no reason to suspect any other construction defects and once the cause of the leaks was found and fixed the recommendations were redundant. In any event we say the causation that's alleged is too remote. The requirement is to look for material and substantial cause, not just for the opportunity for the occurrence of the loss. The trust's failure to take reasonable care to look after its own interests has to have that material and substantial cause significance. The trust, we say, did no more than miss an opportunity to inspect the trusses for an unrelated purpose that would have been fruitless for that purpose but would have coincidentally revealed defects ultimately causing the collapse, and that isn't a failure to take care of your own interests from a causation point of view.

Second, and independently of that, the trust was entitled, reasonably entitled, to rely on the investigative team. They had the superior knowledge and expertise, included HCL, the trust was reasonably entitled to expect that the team would follow up on HCL's recommendations as they considered appropriate, to liaise with each other, not to incur costs for the trust by implementing recommendations on how to identify a cause of leaks after the cause of leaks had already been identified and fixed, to report back to the trust on any further steps they considered necessary, and all of those were matters of evidence by Mr Acton Smith that weren't challenged. So it wasn't, we say, contributory negligent for the trust not to second-guess the investigative team's investigative strategies or decisions or to check that they were doing their assigned tasks properly.

So to the extent that the contributory negligence relies on the conduct of the "agents", in inverted commas, the principles that we say govern this issue are, first, the general rule that the litigant is not vicariously liable for the negligence of an independent contractor. Second, this is ordinarily determined by the both ways of identification rule. What is required is that the independent contractor's negligence can only be attributed to the plaintiff if the plaintiff would have been vicariously liable for that conduct if sued in tort. Attribution depends on context, and that includes the statutory context and the purpose for which attribution is being considered. And the same rationales as we referred to above apply: control over the manner of the work, not what work is carried out, and that the agent has to be effectively standing in the place of the principle.

The Court of Appeal did not identify any statement of legal principle to show what the legal basis was that it was calling the investigative team "agents" for this purpose, it simply adopted the agency conclusion from the duty of care analysis, even though that was stated to be based on an analysis of allocation of liabilities for building work under the Building Act 1991. We say that that wasn't even a correct analysis anyway, with respect, but even if it had been, in that duty context, we were no longer in 2006 in the same statutory context, we're no longer looking at attribution in the statutory context of building work.

It doesn't appear, we say with respect, that the Court of Appeal recognised that it was now dealing in a different context and in fact dealing in what is almost certainly a non-statutory context, and so that statutory attribution analysis under the Building Act would not be relevant. So that takes us to page 9, 3.10…

ELIAS CJ:
Is there any authority in which that attribution analysis based on the legislation has been adopted?

MR RING QC:
Yes, *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 WLR 413 (PC). Lord Hoffman's judgment in the Privy Council in *Meridian Funds* – I can't remember the full name but I think it's probably footnoted. It was one of Justice Harrison's favourite judgments so I'm pretty sure it'll be footnoted in his judgment.

WILLIAM YOUNG J:
Attribution is dealt with extensively in a slightly different but not completely different context interview the Blue Chip litigation, *Hickman v Turn and Wave.*

MR RING QC:
Yes, *Turn and Wave*. Yes, he borrowed heavily from that as well, in the judgment. But that was more of a situation of the person standing in the place, the agent standing in the place of the principle, which is a different situation here.

So we say to the extent the statutory context is relevant to determine whether –

ELIAS CJ:
So was there no argument addressed to this, apart from, the duty of care analysis?

MR RING QC:

Yes there was. What happened in the High Court was, it was in our submissions but the Judge didn't need to deal with it and so it didn't get dealt with.

ELIAS CJ:

Oh yes that's right.

MR RING QC:

It was in our submissions in the Court of Appeal as well. It wasn't the subject, as I recall, of any oral back and forth at all, but I certainly, I handed up one of these things and it had it in it in a similar way to it has in here and I definitely articulated it but I don't recall any comment on it at all, or any discussion about it, and I also couldn't find anything in my learned friend's submissions about it in this Court either.

So, to the extent that the statutory context is relevant to determine whether it's justifiable to attribute the investigative team's conduct in 2006 to the trust, we say the Court of Appeal was wrong to use the attribution analysis and conclusion that it had got to under the Building Act 1991 in respect of the duty of care. Anyway, the Building Act 1991 was not the relevant statutory context for attributing the 2006 investigative conduct. There is no statutory context here or, at best for the council, the statutory context is the Occupiers' Liability Act 1962 and section 4(6) of that Act says, "That the trust is entitled to rely on delegation to someone who is apparently competent."

If you apply the both ways test which, again, wasn't mentioned by the Court of Appeal, there's no trust liability as defendant, again, because of section 4(6), apart from anything else. There are no policy reasons justify an exception to the both ways rule, such as there was in *O'Hagan*. There was no control by the trust over the manner in which the work was being carried out, only over what work was being done and the investigative team was not standing in the place of, or purporting to act as the trust, it was acting in an independent capacity.

So just two other small things that I just wanted to pick up on at the end. Your Honours asked me, I think the Chief Justice asked me about interim certificates.

ELIAS CJ:
I think Justice Young did.

MR RING QC:
Sorry, section 43(3A) of the 1991 Act deals with that specifically. It's in the bundle in that section, and I was asked also about producer statements under the 2004 Act and I think I erroneously said that they didn't have statutory recognition. I'm completely wrong of course, they had much more statutory recognition than they ever did under the 1991 Act, but again, we're not under the 2004 Act so it probably doesn't matter.

So unless I can help Your Honours with anything further at this stage, those are our submissions.

ELIAS CJ:
Yes, thank you Mr Ring. Yes Mr Heaney.

MR HEANEY QC:
Thank you Ma'am. There are a couple of matters I want to clear up right at the beginning because I don't want to take too much flak for them on the way through and some of them, I think, are relatively straightforward. First one I know I won't get any flak for but should clear up is the issue about fixing the trusses in situ. That's, of course, what was intended to be done by the remedial work so I don't think there's any issue in fact about fixing the trusses when they're in situ. The complaint here, of course, is they weren't fixed properly in 2000 when the work was done so there is evidence somewhere in the notes about how it wouldn't have cost much to fix them then but I hope that nothing too much turns on that.

GLAZEBROOK J:

No, no.

MR HEANEY QC:

The next issue, and not in any particular order, I want to deal with is this raising by the Court of Appeal of the term "commissioning owner". I didn't use that term in my submissions to the Court of Appeal and nor did I use it in the High Court. The term I've always used is "developer" and by "developer" I don't and haven't ever meant someone who builds something for profit, I've meant someone who actually carries out the development work, as I meant here by the trust, and I referred both the High Court and the Court of Appeal to two decisions in that regards, *Bell v Hughes* HC Hamilton A110/80, 10 October 1984 and *Three Mead Street Limited v Rotorua District Council* [2005] 2 NZLR 504 (HC). Those were both cases where the owner who had built the premises was seeking to claim damages against a council. Now the term "commissioning owner", it's true, did first turn up in the Court of Appeal judgment and when I read it I wasn't quite sure where it came from myself, and then I discovered where it came from because those cases that I'd referred to *Bell v Hughes* and *Three Mead,* are actually in the section in Todd's *The Law of Torts* where Todd refers to the developer that I've been talking about as a commissioning owner. But the Council has always taken the view that it is – and I'll use the term now – "the commissioning owner" that has to take responsibility for the work that's been carried out. And the next point I want to address is the –

ELIAS CJ:

So you didn't use it but you're content to adopt it?

MR HEANEY QC:

Absolutely, yes. I mean, it's exactly –

GLAZEBROOK J:

So that means that if I engage contractors to build my house I can't rely on *Hamlin*?

MR HEANEY QC:

No, no, it doesn't…

GLAZEBROOK J:

Well, why not, because I've commissioned them to build a house?

MR HEANEY QC:

Well, you can rely upon *Hamlin* because almost –

GLAZEBROOK J:

Well, I meant to say that the Council hadn't done its job properly issuing building consents or whatever else the Council might have been doing.

MR HEANEY QC:

Well, I'm hopeful that you can, and the reason that you can –

GLAZEBROOK J:

But what's the difference?

MR HEANEY QC:

Because the Council will carry out inspections when you build your house and when you get a builder on board.

GLAZEBROOK J:

Well, what say it's not relying on inspections?

MR HEANEY QC:

Then it will – well, if it's not relying or inspections or a producer statement or some other means of satisfying itself that the work has been –

GLAZEBROOK J:

But if it is relying on a producer statement isn't it the same thing? What causes me not to be a commissioning owner and the trust to be a commissioning owner that makes the difference between me being able to sue the Council and the trust being able to sue the Council?

MR HEANEY QC:

Because the duty that is owed by the Council is owed in respect of the whole train of events from the issuing of the consent to the inspections, to the issuing of the code compliance certificate, and all of the cases that have been before this Court as far as I've found have been different than this case. None of them have been cases where there is a claim only in respect only in respect of the code compliance certificate, this is the only case now.

GLAZEBROOK J:

So if I'm out of time for anything apart from a code compliance certificate it's just tough, I'm in the position of the Council, whereas if it's a subsequent owner what would happen there? Presumably the subsequent owner could sue the Council?

MR HEANEY QC:

Absolutely. The subsequent owner would be in a vastly –

GLAZEBROOK J:

All right. So the difference is a commissioning owner only able to rely on the code compliance certificate, is that the distinction? I'm sorry, I'm just trying to understand it.

MR HEANEY QC:

No, no, I have no problem with the question. Yes –

GLAZEBROOK J:

So if a commissioning owner has to rely only on the code compliance certificate they're out of luck in terms of the Council?

MR HEANEY QC:

Well, they're certainly out of luck if they know that the code compliance certificate has been issued when it shouldn't have been issued, as the trust did in this case. Because the trust in this case knew that the code compliance certificate had been issued before the PS4 had been provided and before the

precamber measurements had been provided. So the trust can't say, "Oh, but we got this producer statement," as you might want to say, Your Honour, when you're looking at suing the council for your house, the trust can't say, "We got this producer statement and from that we knew that this building was code compliant." They can't say that because they full-well knew that it was a term of the –

GLAZEBROOK J:

And how did they know, because it was copied to Mr – I've forgotten his name.

MR HEANEY QC:

Well the sequence of knowledge goes like this. The application for the building consent was signed by McCulloch Architects, it was lodged by McCulloch Architects. Now it would seem to me pretty straightforward that McCulloch Architects must be the agent for the trust, in the lodging of the building consent application, and they knew that part of the building consent granted was that there was to be a PS4, by Mr Major, and provision of the precamber measurements. McCulloch knew that. The trust must have known it. McCulloch must have been the agent for the council for at least that purpose, if not for other purposes that my friend argues for. They knew that the work was done. They knew because McCulloch had been chased up.

GLAZEBROOK J:

In most cases the people who are building will know very well that they haven't done what they're supposed to have done. I mean in virtually every case I can think of, unless they are so incompetent that they don't even know what they've not done, usually they actually know what they've done and are hiding it from the owner aren't they?

MR HEANEY QC:

Hiding it from the council.

GLAZEBROOK J:

And the council which does, I know, make it slightly unfair on councils but the point is…

MR HEANEY QC:

Okay, well I'm starting off on the soft approach so let's get a little tougher on it. Let's go to the 17th of January, after the code compliance certificate has been issued. So the code compliance certificate is issued in, I think, 20 November 2000. By 17th January –

GLAZEBROOK J:

Well can I, I just would prefer – can we just go back a step again and say what exactly is the proposition. When can't you rely on a code compliance certificate or when are you imputed with – so what's the distinction with *Sunset* that you're arguing for because I'm not sure I've totally got it and if I haven't got it I'm not going to understand –

MR HEANEY QC:

No and you're not going to find my way so I'm going to get you there.

GLAZEBROOK J:

Well, no, it's not so much that, it's just I'm not going to understand when you go through the evidence what proposition it's relating to.

MR HEANEY QC:

Okay, well the basic proposition I'm putting to you is that a commissioning owner who knows the certificate that they have from the council isn't correct isn't able to recover against the council.

ELIAS CJ:

But that's then got nothing to do with a commissioning owner absent to that knowledge. So it's all put on knowledge isn't it?

MR HEANEY QC:

Let's say yes to that, which means we don't have to argue about the agency business.

WILLIAM YOUNG J:

What if you do have to worry about the agency, because the council only have knowledge via McCulloch.

MR HEANEY QC:

The trust.

WILLIAM YOUNG J:

Sorry, the trust only has knowledge via McCulloch.

MR HEANEY QC:

No they don't and that's – they don't.

GLAZEBROOK J:

Well just going back a step. So you're now not saying that absent knowledge, you can't rely on the certificate because that's what the Court of Appeal says. A commissioning agent – it's nothing to do with knowledge, as I understand it, under the Court of Appeal –

ELIAS CJ:

A commissioning owner can't rely on a code compliance certificate.

MR HEANEY QC:

Certificate alone, no, so if we –

ELIAS CJ:

No, sorry, but you're not saying that are you?

MR HEANEY QC:

Well I'm saying that a commissioning owner, in a situation where there is only a code compliance certificate and no inspections can't rely on it to recover against the council absent proceeding on a negligent misstatement case. That's my proposition. So I agree with Justice Miller so, I mean, I'll come back to the –

ELIAS CJ:

You say it's not an action, it's only negligent misstatement?

MR HEANEY QC:

I say it's only negligent misstatement.

ELIAS CJ:

And there's no relationship as sufficient proximity arising out of the statutory scheme, you have to show reliance?

MR HEANEY QC:

There are a whole lot of things. If we're talking about duty, there are a whole lot of things that go into the mix for duty, considering it from proximity or policy perspectives. So certainly the statutory scheme is a major component but so –

ELIAS CJ:

And you make this argument only because there is no case where liability has been found, not authoritative case where liability has been found simply on the basis of a code compliance certificate, is that right?

MR HEANEY QC:

Yes. The case –

GLAZEBROOK J:

And it is just related to it only being a code compliance certificate?

MR HEANEY QC:

Yes.

GLAZEBROOK J:

Because as I understand it, say there wasn't a limitation period here there would still have been no inspections?

MR HEANEY QC:

Correct.

GLAZEBROOK J:

But there you would accept that the Council could be liable, because of negligently issuing a building certificate – sorry, a building permit – and whatever actions it took along the way.

WILLIAM YOUNG J:

But there's no negligence over the building consent is there?

MR HEANEY QC:

There's no negligence in the –

GLAZEBROOK J:

No, no, I understand that, I'm just trying to get what the principle is.

MR HEANEY QC:

That's right. Yes, this case is unique, there's no doubt about that, on its facts, and just as an aside – and I'll come back to where I was – just on *Osborne*, which was before this Court, *Osborne* was a case that was being brought based upon the code compliance certificate, it was a weathertight homes case and the Weathertight Homes Tribunal threw it out because only the code compliance certificate was in time, that was appealed and ended up in front of Your Honours and it was found by this Court that building work encompassed the issue of a code compliance certificate and under the Weathertight Homes Resolution Services Act 2006 the building work had to be within 10 years. So

this Court didn't consider that from the perspective of duty in respect of a code compliance certificate, but it's the only case that I'm aware of that's been in this Court, or any Court really, where only the code compliance certificate was sued on in time. So back to where –

GLAZEBROOK J:
Although presumably if there wasn't any duty there wasn't much point in being in time?

MR HEANEY QC:
They were subsequent purchasers, I think, and so – I can't remember the facts of it, I should.

WILLIAM YOUNG J:
Oh liability was never dealt with at that level –

MR HEANEY QC:
Not by this Court, no, it was just a question of whether or not building work was within the 10 years and was the issue of a code compliance certificate within the compass of building work so, anyway, back to my principle.

GLAZEBROOK J:
I suppose my problem is on the wider proposition that I did not understand *Hamlin* and all of the cases to exclude owners being able to rely on the council, even if they'd done their own building work.

MR HEANEY QC:
No, because in *Hamlin* Bruce Stirling was the building company I think, and Bruce – and the Hamlin's owned the land when Bruce Stirling was doing the construction work so it's a reasonable first glance at the Court of Appeal judgment to say well, if this commissioning onus theory is correct then that knocks the Hamlins out which, I have to concede, isn't going to happen. So that's why I draw you to –

GLAZEBROOK J:

So that's why you say it's only because it's just the code compliance certificate?

MR HEANEY QC:

Yes.

GLAZEBROOK J:

All right, I think I now understand the – so you're saying it's a very narrow, narrow exception for a commissioning owner.

MR HEANEY QC:

Incredibly narrow, incredibly narrow. I hope very, very narrow and I'm not aiming for it to be anything other than very narrow but when –

GLAZEBROOK J:

What happens in a case such as this, where everything, say everything had been in time and as far as the commissioning owner was concerned everything had been done according to the building permit by its agent builders, it gets a code compliance certificate and thinks, well there we go. So it has to be that they have to know the code compliance certificate is not valid for this exception to work?

Because one can imagine a situation where there's nothing wrong with the building permit had the work been done in accordance with it. As far as the owner's concerned the builders done everything in accordance with it. The builder might be so negligent even he or she doesn't realise that's not the case. Code of compliance certificate comes –

MR HEANEY QC:

Can I just pause you there because there's a step, another step, and that is that there was a producer statement validly issued, and properly issued, and then the council issues its code compliance certificate all in time. Of course the trust would sue on the whole raft of events, including the code compliance

certificate, but in that case the council would be able to defend it upon the basis that it had reasonable grounds to conclude that the building work was completed in accordance with the permitted drawings in the building code because it had a producer statement from the engineer. Now that didn't happen in this case and, in fact, I put my hand up for the fact that the council, I use the word “carelessly”.

GLAZEBROOK J:
I was assuming the council had been negligent somewhere along the way in my analysis.

MR HEANEY QC:
Well then you'd win, then you'd win and I…

GLAZEBROOK J:
Yes but what I can't quite understand is why I’d win on your analysis.

MR HEANEY QC:
Because you'd win on the inspection.

GLAZEBROOK J:
Oh right.

MR HEANEY QC:
The issue –

WILLIAM YOUNG J:
Yes but you would win because something operationally done by the council was negligent.

MR HEANEY QC:
Correct.

WILLIAM YOUNG J:

Either inspection or taking a producer statement at face value when they should have realised that it wasn't fit to be relied on.

MR HEANEY QC:

Correct, that's right. Operational is a good way of putting it, it's an operational blunder that triggers the liability and there'd be nothing I could do about that, but that hasn't happened here.

GLAZEBROOK J:

Well there was an operational blunder because somebody issued a code compliance certificate when they shouldn't have.

MR HEANEY QC:

Yes, the only good news for me in that of course is that the trust, the commissioning owner, knew that to be the case.

GLAZEBROOK J:

Well is that vital?

MR HEANEY QC:

Yes.

GLAZEBROOK J:

Okay, all right, that's right.

WILLIAM YOUNG J:

Well how do you get the knowledge?

MR HEANEY QC:

I'm going to take you to the memo of the 17th of January 2001, which is at page –

ELIAS CJ:

Well just from that rapid fire exchange I'm left with the view, and you'd better correct me if I'm wrong, that it all comes down to knowledge by the trust because you say a wrongful issue of a code compliance certificate would be an operational blunder, rejecting the lifeline held out to you by Justice Young, that there may be a difference in classification between certificates because they're not operational and other matters.

MR HEANEY QC:

No, no, I want to back-up a little bit on that because there would be an operational blunder, and when I was answering that question I was thinking in terms of the issue of the building consent or the inspections that were carried out. As far as the code compliance certificate is concerned, if that's the only thing in issue, my proposition is that that is a case of negligent misstatement.

ELIAS CJ:

That is only a representation.

MR HEANEY QC:

Correct. Now perhaps I should just go down this path a little further. One of the other criticisms that has been levied against the council is that there was no cross-examination in respect of Mr Atkins-Smith on issues concerning reliance. Well that's no great surprise because the trust promoted its case in the High Court and for that matter in the Court of Appeal on the basis that this wasn't a – not wasn't a negligent misstatement case but was a negligent simpliciter case and in fact in the plaintiff's opening, it was acknowledged by the plaintiff that the second cause of action was largely redundant so there was little focus on that. And furthermore Mr Atkins-Smith, I think, his evidence tells us was a deputy chairman at the time and Ray Harper was the chairman of the trust at the time the building work was going on and the trust at trial chose not to call him to be cross-examined and nor did the trust call Mr McCulloch who was of course their agent, I say, but at very least on their evidence their project manager. So the witnesses that could be validly

cross-examined on that, the ones that were involved in it, weren't before the Court to be cross-examined and just to show you that that is so I do want to –

GLAZEBROOK J:
Well does it matter much because you had someone to cross-examine?

MR HEANEY QC:
Well I don't think it matters but my friend seems to think so, so I thought I should just address it.

GLAZEBROOK J:
I don't think he was saying there was a lack of evidence from other people that could have given evidence.

MR HEANEY QC:
No he wasn't saying that. I am saying that.

GLAZEBROOK J:
So, what?

MR HEANEY QC:
Well the criticism of the council is that there was no cross-examine on the issue of reliance but there was no witness before the Court who was on the coal face who should have been cross-examined on it, so I don't think anything turns on that.

GLAZEBROOK J:
Well why wasn't Mr Atkins-Smith, as deputy chair, somebody who was on the ground?

MR HEANEY QC:
Well, he wasn't involved in the meeting on the 17th of January. It was Mr Harper and Mr McCulloch.

GLAZEBROOK J:

Well maybe you need to – I should let you just go to what you want to take us to.

MR HEANEY QC:

Well I think I should take you to that so that's page 961 and you'll see that's the minutes of the –

GLAZEBROOK J:

Which volume is it?

WILLIAM YOUNG J:

3A.

MR HEANEY QC:

So that memo, I say, is important because it shows us that Mr Harper was at the meeting and it shows us that Mr McCulloch was at the meeting and we know that that was after the code compliance certificate was issued and we know from –

GLAZEBROOK J:

Sorry, where does it say that?

WILLIAM YOUNG J:

It's over the page I guess.

MR HEANEY QC:

964. The memo's 961 and goes…

GLAZEBROOK J:

Oh I see.

MR HEANEY QC:

And the point of it, the important point of it for my client's case is that Mr Harper was there, he's the chairman of the trust, and Mr McCulloch was there, he's the project manager, and so it's clear that after the code compliance certificate was issued they knew, the trust knew, directly, not through its agents, directly, that the PS4 had not been provided by Major and that the precamber measurements obviously weren't provided either.

WILLIAM YOUNG J:

Well just looking at that, was this the subject of particular evidence at trial or are you just really relying on the last paragraph of the note at 961?

MR HEANEY QC:

I can't remember to be honest Your Honour.

WILLIAM YOUNG J:

Because it might be more significant if the council people were conscious of a building code compliance certificate in relation to structure having been issued. Now perhaps they did, presumably Mr McCulloch would have known that.

ELIAS CJ:

The trust you mean rather –

WILLIAM YOUNG J:

Sorry I mean the trust, I'm sorry.

MR HEANEY QC:

I don't know the answer to that.

WILLIAM YOUNG J:

Unless they knew that the code compliance certificate had been already issued.

MR HEANEY QC:

No I think they might have known that the code compliance certificate was being issued by Major.

WILLIAM YOUNG J:

But Major didn't issue the code compliance certificate.

MR HEANEY QC:

I'm sorry, the PS4, the PS4.

WILLIAM YOUNG J:

Yes, but unless they knew that there was already a code compliance certificate issued –

MR HEANEY QC:

Oh I'm sorry.

WILLIAM YOUNG J:

– it wouldn't have troubled them that there was – the producer statements were still to come.

MR HEANEY QC:

No that's true, the code compliance certificate –

GLAZEBROOK J:

And, in fact, the first paragraph seems to think that everybody thought there wasn't a code compliance certificate issued.

MR HEANEY QC:

I thought it was common ground that everyone knew the code compliance certificate was issued in November.

GLAZEBROOK J:

Well, which are to be completed in order to obtain the code compliance certificate.

MR HEANEY QC:

Well it was issued by then.

WILLIAM YOUNG J:

Yes it just maybe a rather frail foundation for an argument. We don't really have a context for it. I mean part of the problem, were you perhaps a bit stronger, and it may suggest that no one really cared about the fact there'd been a code compliance certificate issued.

MR HEANEY QC:

Well I think that's pretty clear.

GLAZEBROOK J:

Well, I think, no I don't think that is right because they wanted a code compliance certificate, as you would with a public building, I would have thought.

MR HEANEY QC:

The stadium opened on 25 March 2000 and there was certainly no code compliance certificate then Your Honour.

WILLIAM YOUNG J:

Well there were some, weren't there?

MR HEANEY QC:

There were interim code compliance certificates but none in respect of this work. This work didn't get a code compliance certificate until 20 November 2000, well after the stadium had been opened.

WILLIAM YOUNG J:

Was there any evidence as to why they wanted a code compliance certificate?

MR HEANEY QC:

Only from Mr Tonkin who said that he understood that they wanted a liquor licence and they couldn't get a liquor licence unless they had a code compliance certificate. Mr Tonkin was the council senior building officer. But there is no evidence other than that. But certainly the code compliance certificate, I think, I am not sure if it is in the building, but I think the code compliance certificate was issued to Mr McCulloch because, of course, he was the contact point for the council but I will have to look at that. So can I go back to where I was going to start with what I think are some of the important facts because the significance argument here, of course, is the overall question of duty for my client and predictably I support the judgments of all the Court of Appeal Judges and it seems to me that this is a fact specific case. It is unique on its facts and I think that because we haven't –

ELIAS CJ:

Sorry when you say it is unique on its fact. It is because it relies only on the code compliance certificate, is it?

MR HEANEY QC:

Yes it is because the claim is only in respect of the code compliance certificate. It is not in respect of any of the other building matters that you would ordinarily see a claim in respect of.

ELIAS CJ:

Sorry, and I might have mistaken you but you said that *Osborne* was also one?

MR HEANEY QC:

But Osborne did not have the issue of duty considered by this Court or for that matter, any other Court ever as far as I am aware.

WILLIAM YOUNG J:

The case was settled I take it?

MR HEANEY QC:

It was settled Your Honour. It was settled just after the hearing and the Court was asked not to deliver a judgment because –

WILLIAM YOUNG J:

No but that settlement was conditional on us not delivering a judgment. It was like a red flag really.

MR HEANEY QC:

Not going to do that again. So yes, I say it is unique because it relies only on the code compliance certificate. We could have had a debate about whether or not the preceding inspection regime was something that could have been dragged back into the code compliance certificate and not be out of time but that is not how the case has been presented and not how the case has run.

ELIAS CJ:

What is the policy reason for treating code compliance certificates as different from any other work undertaken by a council, in overall certification of building work?

MR HEANEY QC:

I think you have got to dissect it right up to answer that question. There are three principal components to the building process. As Your Honour noted in *Spencer* it is an interlocking system and so you have got the building consent where the territorial authority makes an assessment of what is put before it to decide whether or not this should be built. You have then got the, what I will loosely call the inspection regime where the council is empowered to go and have a look and make sure everything is happening properly. All building certifiers under the previous legislation and really produce a statement. It is in that bundle as well, so that is the middle section.

ELIAS CJ:

That's inspection.

MR HEANEY QC:

Inspection – and then at the end of it you have got code compliance certificates. Now all of the cases that have come before this Court have involved all three of those processes and Justice Chambers, around about 219 I think in his judgment, talks about the process and he talks about the liability stemming from the inspection process when he comments that a negligent misstatement case, doesn't add anything to the case that a plaintiff will have anyway because the case will depend upon the negligent inspections which have ended up generating the code compliance certificate. So no one has ever had to think about this before because these components have always been in place.

ELIAS CJ:

If a code compliance certificate is wrong, leaving aside whether there are reasons for it, there must be some failure in the inspection process?

MR HEANEY QC:

You would think so and that would generate a claim that would have, at its heart, a failure in the inspection process.

GLAZEBROOK J:

Well it may not be because it may be a failure in the reliance, well a reliance on the producers' statement which obviously is also part of the inspection process but the council won't have failed though.

MR HEANEY QC:

And in that event, the council won't be negligent for having issued the code compliance certificate.

GLAZEBROOK J:

Well here it didn't have anything to rely on and so that was its omission.

MR HEANEY QC:

Yes but it is not being sued on that. It is only being sued on the code compliance certificate.

GLAZEBROOK J:

No, no sorry. When it issued the code compliance certificate, it had nothing whatsoever to rely on in terms of working out whether the conditions in the building consent have been fulfilled or not.

MR HEANEY QC:

That's right.

GLAZEBROOK J:

Well just because it had nothing to rely on, does that mean that it is not actually therefore a default on the part of the council?

MR HEANEY QC:

No, no there is a default on the part of the council which is actionable and it is actionable because the delivery up of the code compliance certificate, the relied upon by the trust, has led to a chain of events that the trust say has caused them loss.

ELIAS CJ:

But why is the certificate of code compliance not the end piece. I know that there is this process and there may be breaches of duties of care which are owed all along the way but why is the certificate of code compliance outside the same liability regime. It is a process and it does interlock but it ends with a certificate of code compliance.

MR HEANEY QC:

But it is, by its very nature advice, advice that the work has been done in compliance.

ELIAS CJ:

Well I question that and you will need to persuade me of that because it is not – if you think about the origin of negligent misstatement, it was to set up the conditions for liability outside the proximity achieved by a contractual relationship or something of that nature. If the Court takes the view, as it has done in earlier cases, that it is the statute that provides the relationship why do you need to go to *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 (HL)? It is just a label.

MR HEANEY QC:

Yes, I understand your argument. I will think of an answer.

ELIAS CJ:

Yes come back to that if you like.

WILLIAM YOUNG J:

Can I just ask you two questions. One, did Mr John Watson give evidence.

MR HEANEY QC:

No.

WILLIAM YOUNG J:

He was referred to in Mr Tonkins' evidence I think.

MR HEANEY QC:

No he didn't give evidence.

WILLIAM YOUNG J:

And he was the chap who was at the meeting on 17 January 2001.

MR HEANEY QC:

He was.

WILLIAM YOUNG J:

So he was perhaps the obvious person to talk about what was said there.

MR HEANEY QC:

Yes.

WILLIAM YOUNG J:

And then there was a building consent issued in 2003 for structure and plumbing.

MR HEANEY QC:

There was a code compliance certificate.

WILLIAM YOUNG J:

A code compliance certificate. So that is at 990. Now does that cover the trusses?

MR HEANEY QC:

He would have but for the remedial work. So the remedial work, as my friend explains, has been lifted out and is now the subject of a separate –

WILLIAM YOUNG J:

No. If you look at page 990.

GLAZEBROOK J:

I thought that was the final, final one for everything, for the whole of stage 4.

WILLIAM YOUNG J:

Page 990. And is this stage 4 or not?

MR HEANEY QC:

No. This is an amendment to stage 4. The work we are talking about.

ELIAS CJ:

Yes the work we are talking about. This was the discussion we had about the two parallel processes going on at the same time which I must say I find extraordinary as a concept. I know that they are different numbers and they are different processes that the council is focussing on, but surely if in the course of all of this procedure, you find something that is deficient and you require it to be remedied, I am just not sure why you sail on with the other code compliance without scooping up this correction in the course of that.

GLAZEBROOK J:

I had actually understand that that one at the end was the scooping up of everything, so the whole of stage 4 including the remedial work. That is what I had understood. So it was the final, final but I might be wrong.

WILLIAM YOUNG J:

So Mr Tonkin's evidence deals with what goes on before this and as I read it, this was issued in reliance on amongst other things, the calculations that Mr Major provided?

MR HEANEY QC:

Yes.

WILLIAM YOUNG J:

So does it really matter, in light of this, does it really matter that there was a code compliance certificate issued, probably by mistake earlier.

MR HEANEY QC:

No except that is what the council has been sued on. So that code compliance certificate that is the basis of the case, not the 2003 one.

ELIAS CJ:

Well why is the answer not that it has been overtaken I suppose, is that what you are saying?

WILLIAM YOUNG J:

No it is a really odd thing that the code compliance certificate.

ELIAS CJ:

I think so too.

WILLIAM YOUNG J:

The code compliance certificate was issued without everything being done but in a sense it seemed to me to have been overtaken by events and if one can look at the case as to whether it was a good thing for the council to have issued this code of compliance certificate on the basis of the material to hand at the time which included Mr Majors' calculations.

MR HEANEY QC:

I think that if the council had of been sued on the 2003 code compliance certificate, it would have been open to the trust to say that the council in relying, if it did on the producers' statement and the precamber measurements, probably got it wrong because precamber measurements didn't match Harris' design but that is not how the system worked or works.

WILLIAM YOUNG J:

You mean that is not how the claim worked, you mean?

MR HEANEY QC:

Sorry?

WILLIAM YOUNG J:

That is not how the claim worked?

MR HEANEY QC:

That is not how the claim works, it was framed and that is not how the system works. How the system works or worked, I should say, is that there was the original building consent for the number 4 which encompassed the defective trusses. That was all going along swimmingly. During the course of that, it

was noticed there was a sag. That resulted in the need to do remedial work and the remedial work, of itself, is of course building work. Because it is building work and because it is not encompassed by the original consent, it has to be the subject of a new consent so the trust was then asked to apply for a consent for the remedial work, which it did. Everything else goes along, just as it was, but the remedial work is now being governed by the amendment and that is what the claim is in respect of. The code compliance certificate in respect of that amendment. So as my friend said, it is effectively being picked out of the main consent.

WILLIAM YOUNG J:
But if you read Mr Tonkin's evidence, it does suggest that this is addressed to the trust work, this last code compliance certificate.

MR HEANEY QC:
Oh it may well be Your Honour, it may include that. Because it was an amendment.

WILLIAM YOUNG J:
Not all that correspondence he refers to is there but it does appear that from just what he says about it, Mr McCulloch didn't realise there had been a code compliance certificate issue because he was still pressing for one to be issued. For instance he says on 4 February "McCulloch wrote to the council identifying there were no outstanding issues for stages 3 or 4 or stage 9 and asked the council to issue code compliance certificates for these three stages."

MR HEANEY QC:
I would have to go back and look at it. I am not sure but yes you might be right. Well certainly the code compliance certificate was issued and McCulloch was the person to whom it would be issued. So it has never been in contention before. It is hard to imagine how the trust didn't know they had the code compliance certificate on 20 November.

WILLIAM YOUNG J:

Do you rely on attribution of knowledge of McCulloch to the trust or not?

MR HEANEY QC:

I do, certainly for the purposes of knowing that the code compliance certificate was issued before the producers' statement and the precamber measurements came to hand.

WILLIAM YOUNG J:

Because that is inconsistent with the practice reflected really by O'Hagan that while the negligence of a solicitor not getting a LIM is attributed to the client, the negligence of architects, engineers, builders et cetera isn't.

MR HEANEY QC:

Yes but the trust in this case appointed McCulloch as the project manager.

GLAZEBROOK J:

Every owner will do that. I mean normally the builder will be the people who apply for the building consent.

MR HEANEY QC:

I don't think so Your Honour. I think the building consent is usually applied for by the owner. Every one I have applied for is.

GLAZEBROOK J:

I am not sure about that because the owner doesn't have – I mean it might be in the name of the owner but it will usually be done by the builder because the builder is the only person who can put the plans in and explain them.

WILLIAM YOUNG J:

Or the architect.

GLAZEBROOK J:

Well if there is an architect, yes exactly.

MR HEANEY QC:

Well I would think, I know –

GLAZEBROOK J:

If you are a commissioning owner and you commission somebody to build you something, you actually are expecting them to deal to the building consents and all of that material as well because how would you know?

MR HEANEY QC:

Well I have signed everyone for when I have had work done.

ELIAS CJ:

Yes but you are a more careful man perhaps.

MR HEANEY QC:

No the builders won't do it because they don't want any liability.

WILLIAM YOUNG J:

Well that hasn't worked very well.

MR HEANEY QC:

But the trust know that they have to get a building consent. You know, someone has got to apply for it. The trust can't come along to this Court and say, oh we didn't know there was a building consent.

GLAZEBROOK J:

Well of course they would know there is a building consent but all I am suggesting is that most commissioning owners, who don't know anything about building, even if they put it to them, their own name would be relying on what their builder put in and then relying on the council if what had been put in was totally ridiculous for the council to say so and not issue the building consent. That is the whole point about the statutory function of the council isn't it?

MR HEANEY QC:

And that is why I accept that in respect of consents and inspections, the commissioning owner would have a different case than the case that is before Your Honours now where there is reliance only on the code compliance certificate.

GLAZEBROOK J:

Right, so we are back to that point again.

ELIAS CJ:

Now because we have to adjourn soon. I just want to ask you how we are going for time and whether we should sit early tomorrow.

MR HEANEY QC:

What time are we planning on finishing tomorrow.

WILLIAM YOUNG J:

1 o'clock.

MR HEANEY QC:

No that is fine by me. I am quite happy to start at 10 to 1 but probably I would need a bit more time than that.

ELIAS CJ:

I think we should start early.

MR HEANEY QC:

I wasn't planning on talking for three hours.

GLAZEBROOK J:

No but it is just safe to start early though.

ELIAS CJ:

Did you want to say anything to end on a high note Mr Heaney or shall we call it a day?

MR HEANEY QC:

I think I should end on a high note shouldn't I because I suppose the high note point really is to say that if Your Honours overturn the Court of Appeal, what you are sanctioning is a commissioning owner being entitled to recover losses that the commissioning owner itself has caused and that it had knowledge of at the time and that is my start and finish point really because the facts of this case are so different, it requires you to revisit the issue of duty in cases where there is just a code compliance certificate as opposed to cases where you have a consent, an inspection and a code compliance certificate.

ELIAS CJ:

We will take the adjournment now and resume tomorrow at 9.30 am.

COURT ADJOURNS: 3.11 PM

COURT RESUMES ON FRIDAY 18 AUGUST 2017 AT 9.30 AM

ELIAS CJ:
Yes Mr Heaney.

MR HEANEY QC:
Good morning Your Honours. I probably should have mentioned this yesterday but let me just tidy up the housekeeping now. There were some documents, one document and one case missed out of the bundles Your Honours have and they're here. The project agreement in its entirety and the decision in *Helson v McKenzies (Cuba Street) Limited* [1950] NZLR 878 which, for some reason, didn't quite make the bundle and I suspect you probably won't need to spend much time looking at it but for what it's worth there it is. The project agreement has been referred to in parts that have been set out so just in case you need the full agreement it's there.

So I thought today I would start off examining the duty of care issue and I want to start with a proposition which I hope I'll get general buy into and I suspect that if I don't then I'm really going to have a bit of an uphill battle here today. So my general proposition is this. Just because something goes wrong with a building in a council's patch, it's not automatically going to be something the council are liable for. Now I don't imagine I'll have too much difficulty with any of Your Honours on that proposition and if so then we go to the next point, which is well, if something does goes wrong how do we then decide whether or not it's a problem for the council? How do we decide the council should be liable and we all know that the start point in that is considering whether or not there's a duty of care. So, just leaving aside, for the moment, the argument between negligent simpliciter and negligent misstatement, we have to look at the straight up and down issue of duty and with minor tweaks, it's effectively the same test for both, I suggest. So that's traditionally been done on a two-stage approach, proximity and policy analysis, but overall, I think it's fair to say that all of the Judges who have looked at this have come to the conclusion that although examining it from the point of view of proximity and policy is a good framework within which to

organise one's thinking, at the end of the day the overall consideration has to be was it fair, just and reasonable for a duty to be imposed? And in this case it would seem that, one way or another, certainly all three of the appellate Judges came to the view that it wasn't fair and reasonable; perhaps not quite all the same way and perhaps misrepresenting a little the conclusions reached by Justice Miller but he effectively got to the point, in his way, by relying more on the reliance issue to say, well you just can't have it on these facts, that the trust should be able to recover against the council, whereas Justices Harrison and Cooper got to the point where they decided there was no duty and they didn't really have to go beyond that.

So what I would like to do now is work through why I say to you that there should be no duty in this case and once I have worked my way through the things that I say you need to consider. I want to then look at the general factual matrix of *Hamlin* and satisfy, in particular Justice Glazebrook from yesterday, that she, or the Hamlins would still be able to recover despite the fact that I say the Court of Appeal should be upheld in this case and there should be no duty imposed. So if I can start down the track.

I suggest that the first thing that has to be looked at is the factual background because the facts are always key to determining whether or not there is duty. So the factual matrix is like every case quite complex, if you go through and analyse every single bit of it but there are some key parts in this case that I think need to be emphasised and so I am just going to go through them in no particular order although I have tried to keep it roughly chronological. So we start off with the project getting underway for the community to have this facility in Invercargill and it has got underway and made possible only by the council's involvement because it is the council that gives the land to the trust by way of lease so that the stadium can be built. And then it is the trust and the council that enter into an agreement as to how they are going to regulate between themselves, as to how the stadium is going to be built and who is going to take responsibility for what and the project agreement, in the third schedule, identifies what is to be built – and that is the stadium that we are talking about and the project agreement identifies who is to do what.

Everyone wants to know that everyone can do what they have agreed to do and the council wants to know and the trust wants to assure the council that it can build the stadium; it has the wherewithal to do it and it agrees that in doing it, it will assume responsibility for fulfilling the relevant statutory obligations. Now I say that is not determinative of duty because no one thing is really determinant of duty but it is a factor that comes into the mix when considering whether or not there is duty. So here we have, in the project agreement, the trust assuming the responsibility for undertaking the building work and complying with the statutory obligations that go hand in hand with that. That is not to say that the council is stepping away from its regulatory role and I am not suggesting that at all. I am not suggesting the council has no regulatory role. I am just saying that as far as duty is concerned, that is a factor that has to go into the mix.

ELIAS CJ:

Well how do you say it gets put into the mix?

MR HEANEY QC:

Because I say Your Honour that in the project agreement, the trust has agreed that it will construct the stadium and that it will comply with all of the statutory obligations that go along with that.

ELIAS CJ:

Is there a particular provision you want to take us to on that?

MR HEANEY QC:

3.2 I the project agreement and in fact I have set it out in my written submissions Your Honour. So I say that that is something that needs to go into the mix, so it is not as if we have here a commissioning owner and I am going to keep using that phrase. It is not as if we have here a commissioning owner who is not accepting any obligations at all because that is the contractual obligation that it enters into with the council giving it the land.

GLAZEBROOK J:

But when you put in an application for a building consent, you are accepting an obligation to build in accordance with that, in the sense that if you don't, it is not going to be compliant with the Act et cetera and so is there a difference? In fact I seemed to remember reading you actually have to sign something when you put in the application.

WILLIAM YOUNG J:

It is more than that. Doesn't the Act impose an obligation on building owners to comply with the code?

MR HEANEY QC:

Yes Your Honours are taking me off path there. But I am coming to that because the statutory regime is another consideration.

ELIAS CJ:

Can you just tell me because there is quite a lot annexed to this. Oh I see I have found it, I wanted you to tell me what page it was on but I found it.

MR HEANEY QC:

Schedule 3 is the one you want Your Honour. Schedule 3 sets out the trust works Your Honour.

ELIAS CJ:

Oh I see, thank you.

MR HEANEY QC:

Your Honour and Justice Glazebrook, I am going to deal with the statutory regime. I am happy to deal with it now but I just prefer –

GLAZEBROOK J:

Well it is just that when you say you are going to comply with the regime, you are only saying I am complying with the law, aren't you?

MR HEANEY QC:

Yes it is a recognition on the part of the trust, that it has the obligations contained in the statute that it has to comply with, yes.

WILLIAM YOUNG J:

But so does – I mean although this is all an anathema to me really, so too does the council have an obligation to comply with the law.

MR HEANEY QC:

Absolutely.

WILLIAM YOUNG J:

So it is not contracting out of such obligations or the proper performance of statutory functions which is probably the way I much prefer to put it.

MR HEANEY QC:

Well I did consider running it on the basis that the council had an indemnity from the trust but that in effect was a contracting out.

ELIAS CJ:

Well on the basis of what is in this agreement?

MR HEANEY QC:

No I am not running that.

ELIAS CJ:

And you didn't get very close even in the mix thing in the lower courts did you?

MR HEANEY QC:

No I got about as far away from it as you can get actually. I have given up on it, so I am not going down that road but what I am not doing is rolling over and saying that the council is responsible.

ELIAS CJ:

Is part of the background.

MR HEANEY QC:

Yes exactly. So then the next thing and I will come back to the statutory regime Your Honour but the next part of the factual matrix I want to go to is what is going t o happen in this case. We know a building consent was applied for and part of the building consent in this case was that the application – the trust.

GLAZEBROOK J:

Which consent are we talking about? The amended one, that's absolutely fine. It is just we did get a bit confused yesterday.

MR HEANEY QC:

I am going to talk about the consent for the amendment.

GLAZEBROOK J:

That's great, thank you.

MR HEANEY QC:

So we know that that consent required and I suggest reasonably, that a PS4 should be supplied at the end of the project and a PS4 is a certificate by typically an engineer which says, "I have observed the work" and gives the council an assurance that the work has been carried out in accordance with the plans or the code, whichever way around it is. I always get it wrong but should theoretically come to the same point. And also the consent was issued on the basis that the trust would provide the precamber measurements which would verify the stricture had been altered in accordance with how Mr Harris, the trust's consultant thought it should be altered and thought it should perform.

ELIAS CJ:

That the council would be given by the trust the precamber measurements?

MR HEANEY QC:

There is some debate and we don't have to resolve it here but the debate was, do the precamber measurements actually mean anything? Do the precamber measurements mean that it has been built as Mr Harris designed it. Or are the precamber measurements simply measurements taken so that in future, if the trusses can be monitored against those precamber measurements to see if there has been any movement and there was some debate about that at trial but that is not something we need to resolve here because we know that it was a condition of the consent that the trust should get the precamber measurements and we know that, in fact, it didn't get them before the code compliance certificate was issued and the council has to put its hand up and say that it should have had them before the code compliance certificate was issued. But the point I make is that the obligation was put fairly and squarely on the trust to provide a PS4 and the precamber measurements as part of the building consent process, leading up to the issue of a code compliance certificate so it was responsible for that. We know that the trust engaged both Mr McCulloch and Mr Major. Well McCulloch Architects, but everyone refers to it as Mr McCulloch; there is probably no distinction to be drawn to provide the wrap-round services it is referred to. He was to be the project manager and in fact he was even authorised to accept the tender for the job. His firm was the applicant for this particular building consent; I am sorry, signed on behalf of the trust. The trust was the applicant but someone in Mr McCulloch's firm signed the application for building consent so I am going to attempt to persuade you later as I go through this that Mr McCulloch, for the purposes that are necessary for me in this case, the agent of the trust.

ELIAS CJ:

Just pause a second. These issues that you are flagging at the moment in this second point are common, of course, to all cases where the Court will consider contribution or contributory negligence or matters such as that.

MR HEANEY QC:

Yes. Well not all cases but these sorts of cases, yes.

ELIAS CJ:

Yes lots of cases. I mean you won't have contribution unless someone is to a greater or lesser extent, responsible also.

MR HEANEY QC:

Correct, yes I agree with that. So I am not sure what Your Honour wants me to answer.

ELIAS CJ:

Well I am just commenting I suppose on the strength of this point and I understand that you are building up a bundle of strands which you say overall indicate that the ultimate assessment, whether it is fair, just and reasonable, it falls short of but I am just pointing out that there are weaknesses in some of these strands.

MR HEANEY QC:

Oh any one strand by itself won't lead to the, no just, no fair, no reasonable conclusion. It is the whole package that has to get there and I accept that and that is why I am going through it on a piecemeal basis. And of course you talk about other cases that deal with contribution and I digress slightly but I will come back to where I was. The problem with duty and causation and contribution is that they always overlap. There is just always that overlap amongst all three and sometimes it can be analysed in terms of causation; sometimes analysed in terms of duty and sometimes analysed in terms of contribution but the point in this case that has always been the council's argument is that this is a case where it is the trust that has the primary responsibility for this building. It is the one that has to make sure the building complies with the Building Act and the building code. It is the one that has, through its agents, not done that. It is the one that has not – well if you go right back to the root cause of this problem, as far as the remedial work is concerned, it's the trust's experts, consultants and contractors that have got it wrong. The bottom line is the welders engaged by the builders didn't weld the top of truss 1, and did a sloppy job on some of the others, right up in the sky. Mr Major didn't inspect it which became clear at trial and no one knew

because Major hadn't inspected it but assured the council and his presence himself, assured everyone that the job was being done properly and he was fraudulent in that respect and of that there is no doubt and in fact so much so that he was struck off the Register of Engineers because of his actions in this particular case. So that is the real cause of the problem but let me come back now to –

GLAZEBROOK J:

I suppose my problem with this is and that probably given that I was the author of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 is no – that I certainly saw there was a distinction between commercial and residential but that is now gone. There is no such distinction because of the decisions of this Court, so I find myself in the same position as Justice Young on that point, but that is gone now. But I can't see how this doesn't apply to every *Hamlin* case.

MR HEANEY QC:

I am going to get you there Your Honour, it is my aim of the day.

GLAZEBROOK J:

Well at the moment I am having some difficulty with it because unless you make that distinction between commercial and otherwise, I don't see how you can get there, just to let you know.

MR HEANEY QC:

No I understand but I am hoping to get you there but I need to work my way through it all to get you there. I can see that it troubles you and frankly I do have to get you there, I understand that because I know there is no prospect of this Court saying that the *Hamlin* facts cannot in the future succeed. I don't expect this Court to get there and I am not asking it to get there so I have to demonstrate through my analysis that upholding the Court of Appeal decision, finding no duty in this case, will not interfere with *Hamlin* type liability but will prevent a plaintiff like the trust from recovering, that's my aim, that is where I am heading. So I just want to keep plugging away at the facts for a little while

if I can. So I have dealt with the PS4. Now importantly in this case as well, there were to be no inspections. Now that I suppose for us not involved in building all the time, seems a little bit odd but the building regime, certainly under the 1991 Act.

ELIAS CJ:
But there were to be producer statements but that is the inspection regime provided for by the legislation.

WILLIAM YOUNG J:
Well do you think that that is not an inspection. Do you accept a producer statements is an inspection?

MR HEANEY QC:
No.

ELIAS CJ:
No, no it is not an inspection by the council but it is the inspection regime provided for by the legislation.

MR HEANEY QC:
Yes to pick up on what Your Honour said in *Spencer*, that is part of the interlocking system set up by the 1991 Act.

WILLIAM YOUNG J:
Just pause there. Do you accept it is part of the inspection regime?

MR HEANEY QC:
No.

WILLIAM YOUNG J:
No, I don't either.

ELIAS CJ:

I thought that the definition we were taken to yesterday in the legislation indicated that a producers' statement –

WILLIAM YOUNG J:

It can be read that way.

ELIAS CJ:

Oh I see.

GLAZEBROOK J:

Does it matter because it has passed?

WILLIAM YOUNG J:

The issue is whether the consent, the code compliance certificate or the consent is issued on a reasonable basis.

MR HEANEY QC:

Not quite Your Honour. Whether the council was satisfied on reasonable grounds.

WILLIAM YOUNG J:

Yes. And I would say myself it could be satisfied on reasonable grounds, either as a result of inspections or as a result of producer statements but it doesn't mean that a producer statement is necessarily an inspection although I agree that there is a statutory provision that could possibly be read that way.

GLAZEBROOK J:

On the other hand, you probably couldn't be, on the basis of a producer statement or a statement by a engineer, be reasonably satisfied unless there had been inspections. So if Mr Major had done a certificate saying well I haven't actually looked whether they have done it but I trust them and so I will give a certificate. Then that wouldn't have been a certificate that the council could reasonably have been satisfied on the basis on.

WILLIAM YOUNG J:

Sorry a producer statement can come from a specialist tradesman. For instance a fire system, for instance.

MR HEANEY QC:

There are four types of producer statements. There is a PS1 which is normally a producer statement by the designer, in this case the designer of the structure. A PS2 which is usually given by someone who has reviewed the design. A PS3 which is given by the person that undertakes the work, so that could, in this case, have been if one was required, a statement from the welder or the construction company saying, we've done the work and we have done the work in accordance with the code and a PS4 which is usually, and in this case, Mr Major who was the original designer and the provider of the design certificate saying well the building has been designed and I have had a look at it and it complies with the design. So that's the regime and the 1991 Act specifically recognised that the council may accept that the –

WILLIAM YOUNG J:

Just pause for a second. That came out of the 2004 Act but then got reinserted in 2012, is that right?

MR HEANEY QC:

Yes I think that is right Your Honour. I think it might have had something to do with the licence building practitioner amendments but I am don't want to be quoted on it but I am concerned with it in the context of this case, of course in the 1991 Act and it was certainly given recognition for that. So I want to come back to this debate about whether or not it is an inspection. It certainly not is an inspection by the council and I certainly don't accept that it is an inspection by the council.

ELIAS CJ:

No I wasn't trying to suggest that.

MR HEANEY QC:

Okay. All it is, is something that means that the council may take into account in arriving at the conclusion on reasonable grounds that the building complies and it is a specialist review, of course, by an engineer and I think there have been plenty of cases that have commented on the fact that councils don't necessarily have on board the expertise that is available by way of consultants.

ELIAS CJ:

Sorry when you said it is a specialist review, you are referring to the PS4?

MR HEANEY QC:

Yes it is a review by the engineer. The engineer, who has designed it, knows what it should look like, knows how it should be constructed. He is going to tell the council, okay, good news, I have had a look at it all and it looks as though it complies. Now my friend makes a bit of a fuss about the specific words of the producer statement, generally complies and I suggest that there is nothing to be read into that. My friend says because it says "generally" it means that some parts of it don't but we are not talking about a bunch of lawyers sitting around writing producer statements or lawyers, Mr Tonkin, the person who should have got it in –

GLAZEBROOK J:

Well either it fits the design brief or it doesn't. It can't generally fit a design brief, so I wouldn't have thought the council could possibly accept it generally without asking what that means because the whole point about engineering is that it's quite precise, near enough is not good enough especially for a – well as it shows in fact.

MR HEANEY QC:

Well he didn't inspect it, that's the problem but he does tell the council that he has inspected it and so the council, I say, should be able to reply upon, not that it matters because we didn't have it anyway when we issued the code compliance certificate, to some extent this debate is academic but the bottom

line is that he's told the council that he's inspected the work. He got struck off because he hadn't actually inspected the work but told the council he had. So whether he said it generally complies or not is really neither here nor there. He's fraudulently led the council to believe that he inspected it. If the council thought that having received an assurance from him that he has inspected is good enough to say that the work has been done as he designed it, because if it hadn't been surely you'd expect him to say it's not up to scratch, he wouldn't front up with a PS4 saying he'd inspected it if he didn't think it complied. Well that's what I would think if I got one and I'm sure that's what any council inspector should think.

GLAZEBROOK J:
I think any council inspector should say, "What do you mean by generally does it or does it not comply because our consent was given on the basis that it was done in accordance with that design and that's what you're certifying. Generally is not good enough."

MR HEANEY QC:
I just don't think that it's such an exact science Your Honour.

GLAZEBROOK J:
Well I think engineering is an exact science, that's the whole point about it, you can't say oh well, you know, it's within a centimetre or so it's fine, that's the point about engineering isn't it?

MR HEANEY QC:
Well yes but does "generally comply" mean that it doesn't comply in some respects?

GLAZEBROOK J:
Well who knows which is why you'd have to ask.

WILLIAM YOUNG J:
Was there any evidence about that?

MR HEANEY QC:

No, no. Well largely because Your Honour it was –

WILLIAM YOUNG J:

I mean it was after – the whole thing is so chaotic.

MR HEANEY QC:

Oh yes, look I agree. I mean I've got to put my hand up for this, you know, we careless issued the code compliance certificate, I'm not shying away from that, we shouldn't have issued it on the 20th of November. Nothing I can do.

WILLIAM YOUNG J:

Or the one in April 2003.

MR HEANEY QC:

I'm not being sued on that.

WILLIAM YOUNG J:

No.

GLAZEBROOK J:

The statement of claim is a bit vague on which code compliance certificate we're talking about. It doesn't say that one but I accept that at trial it was always the November one, presumably because of the split between the different consents.

MR HEANEY QC:

Well it must have been this one because this was on the 20th of November 2000 and the case was run on the basis that the collapse which occurred on the – the proceedings were issued on the 18th of November, oh sorry paragraph 18 of the statement of claim apparently has the date in it.

GLAZEBROOK J:

Oh it does have the date does it? I'd only looked quickly.

MR HEANEY QC:

Anyway I mean it's certainly –

GLAZEBROOK J:

And in any event it is because of the split.

MR HEANEY QC:

Yes, yes. Sorry, now I've allowed myself to get distracted and I promised myself I wouldn't do that. So I was talking about Mr Major and Mr McCulloch and saying that the council had engaged them to be their agents, sorry engaged them as consultants and I'm going to hopefully persuade that they're their agents. Now another consideration which has to go into the mix for determining whether or not there's duty, is the element of control and this comes from many of the cases and I've referred to it in my written submissions and so I guess one of the questions is what do we mean by control? Well I suppose control can be looked at in two ways. Could say, is it control in the sense that the council has control over the building work because the council has control over the statutory regime or at least some control by virtue of the statutory regime or is control something that should be looked at in the context of, who actually has control of the work that goes on, on the site. Who can actually make a difference.

ELIAS CJ:

You mean a matter of fact and practicality to be assessed in every case?

MR HEANEY QC

Yes, if you are assessing duty, yes.

WILLIAM YOUNG J:

It sounds to me a bit more like assessing negligence. It means every case is a new case.

MR HEANEY QC

Well every case is a new case.

WILLIAM YOUNG J:

Yes but I mean we don't want to have every time a building fails that the case has to go to the Supreme Court as to whether there is a duty of care.

MR HEANEY QC

No I agree with you and you will only be looking at –

WILLIAM YOUNG J:

You will only get cross.

MR HEANEY QC

We don't want to keep everyone in business for too long. I am kind of hoping we can bring all this to an end.

ELIAS CJ:

It is like looking at retirement Mr Heaney.

MR HEANEY QC

Oh well I don't know, it is not working out that well so far.

WILLIAM YOUNG J:

But I mean it is basically statutory control isn't it. Isn't that what the cases proceed on?

MR HEANEY QC

Well I am not sure Your Honour. I've looked at them and certainly from some of them, you can take that but I think that it must be valid when considering duty and let me make the point that in this case, it is my submission that it is perfectly valid for Your Honours to be considering duty and the reason I say that is because of what I said yesterday. This is a unique case. This is not the same case that we see day in and day out in this arena. This is very, very different. This is a commissioning only case for a kick-off. There aren't many of them, I will refer you to a couple later. This is a case where the operational aspects of the work were done outside the 10 year period. This is a case

where only the code compliance certificate is in time. This is vastly different than *Spencer. Spencer, Sunset* and *Byron Ave* were all cases where you were dealing with subsequent owners. The first round of course was *Sunset on Byron Ave* was the residential owner. The second round with *Spencer* was whether or not the duty also applied to commercial owners. Neither of those were commissioning owner cases and neither of those were cases where we were only talking about the issue of a code compliance certificate alone with the operational aspects of the work being otherwise time barred. So coming back to Your Honour Justice Young's point, should we be looking at every case? No, we shouldn't be looking at every case. If you get another *Sunset* or another *Spencer* coming along, it shouldn't end up in this Court and I expect that leave would be refused. But in this case, you should be looking at this case as a new case because it is vastly different from other cases that you have looked at. So that being so, having got you to that point and in fact I suppose I could say Your Honour you have almost got yourself to that point by granting leave. This is a case where necessarily we are looking at –

ELIAS CJ:
Well –

MR HEANEY QC
A bit unfair, I know.

ELIAS CJ:
- you are the respondent.

WILLIAM YOUNG J:
Well the problem is, I mean there are all sorts of problems but ideally one would have – well making the best of a bad world one would have a system where it is reasonably predictable whether there is a duty of care in case it could simply be about the facts.

MR HEANEY QC

Yes and that is what I am trying to achieve. So you have got the residential cases, you have got the commercial cases and now we are talking about –

WILLIAM YOUNG J:

Well I mean, are *Spencer on Bryon* by virtually all the arguments that you mentioned were, one way or another, addressing my dissenting judgment. They didn't carry the day then, that is that the whole world was turning to producer statements, that councils wouldn't as far as possible put responsibility back on building owners, delay or risk. No but I mean hasn't the ship sailed?

MR HEANEY QC

No, no I'm here to rescue Your Honour on this. The ship hasn't sailed because –

GLAZEBROOK J:

Well it's a very odd and very small exception though that you're now asking and it would have to apply to residential and everybody that if you're only in time, like the Osbornes, if you're only in time for a code compliance certificate, sorry if it was your builders or engineers who provided the certificate to the council.

MR HEANEY QC

Not quite Your Honour.

GLAZEBROOK J:

Well how do I get out of it if I'm just in a code compliance –

ELIAS CJ:

You want to complete the factors first do you?

MR HEANEY QC

I'd like to.

GLAZEBROOK J:
Oh okay, well that's fine.

MR HEANEY QC
Believe me Your Honour, I'm conscious I've got to get you there, it's not going to escape me and I'm sure you won't let me but I do need to work through because what I am saying is that there are a whole bunch of reasons why there shouldn't be a duty in this particular case and I'm saying that you have to examine each case on a case by cases basis but of course it's always been the case that if there is precedent for a duty being established, then that's what is used to deal with that particular case. So you will only be looking at cases where there is no precedent, ie where there has not been a case with the same broad factual matrix, so it has to be re-considered and what I am saying to you is this is different. This is different than any other case and I'm trying to work through the various factors that I think need to be taken into account. I'm not suggesting that you overturn *Spencer, Sunset, Hamlin* or anything like that.

So if I can come back to – I was dealing then when we got into that discussion about the aspect of control and I just want to finish that if I might because control, yes can be viewed as control set up by the statutory regime but there's another component to control that I suggest should go into the mix and that is who actually has control of the building work? How has the building work controlled, who is looking after it, who is managing it because it's the carrying out of that building work that is ultimately the cause of a disaster or the cause of a really good building and in this case we know that the control of the building work lay with the trust because it was a trust that engaged the engineer, the architect, the builders and it was the trust that was obliged under the statute and by virtue of its contract to carry out the work properly and I'm going to come to the statutory principles shortly but at a practical level, what I say is that from a controlled perspective the trust was in practical control of the building work. Another factor that is sometimes taken into account in assessing duty is the foreseeability of damage and by that, in relation to this case, I think we need to say is it reasonable foreseeable that by issuing the

code compliance certificate here we should have foreseen that if it wasn't right, there would be damage. Well I say in this case, no probably not and I say probably not because the code compliance certificate was to be issued and we're looking at duty, so we don't have to know exactly what happened as far as the issues of the code compliance certificate is concerned because that's a consideration we come to breach but in terms of duty we know that the code compliance certificate, the completing of the building regime, was to be the code compliance certificate and it was to be issued against the backdrop of a PS4. Now we know that the PS4 was going to be supplied by an engineer, a Mr Major and we know that Mr Major was the consultant engaged by the trust. So is it reasonable to foresee that us issuing the code compliance certificate based on the trust's engineers, PS4 was going to cause –

WILLIAM YOUNG J:

That is not the question. The question is if you issued a code compliance certificate that wasn't correct, was it foreseeable that there might be a building failure. Put on that general term, the answer is obviously yes. There is not a requirement that you be able to foresee the precise concatenation of events that leads to that catastrophe.

MR HEANEY QC

What you are really saying I think Your Honour is it is reasonably foreseeable that the trust would have relied.

WILLIAM YOUNG J:

No I think you are looking at it in too specific terms. The duty of care is the general level. When we issue a code compliance certificate, is it foreseeable that if it is wrong there might be a catastrophic building failure. At that general level, the answer to that is yes.

MR HEANEY QC

I think that I would agree with you in the context of a subsequent purchaser but I am not sure that I would agree in the context of the original

commissioning owner because while I accept that there might have been damage to the building, would it be reasonably foreseeable that the owner will be damaging the owner's own economic loss.

ELIAS CJ:
Is this an aspect of your negligent misstatement argument, really?

MR HEANEY QC
It's probably more applicable to that if it gets to that and certainly I think Justice Miller considered – no I can't remember.

GLAZEBROOK J:
Well if you are making a distinction between subsequent owner, you must be relying again on the agency argument are you?

MR HEANEY QC
In connection with the reasonable foreseability of loss?

'**GLAZEBROOK J:**
Yes.

MR HEANEY QC
Yes absolutely.

GLAZEBROOK J:
Then again, if you are an owner builder and you apply for a consent, you mightn't foresee that it would cause damage because you might not have any idea what you are doing, you might think it is fine. I am talking about the home handy person and the council is there to say sorry it is not fine because it is not in accordance with the consent that we gave and you might think it won't fall over but we do.

MR HEANEY QC

Yes, that's right but that is a different issue when you are talking about an engineer.

GLAZEBROOK J:

Well you seem to be saying the foreseability is different with an owner, a first owner and a subsequent owner.

MR HEANEY QC

No I am saying duty is different between a first owner and a subsequent.

GLAZEBROOK J:

No sorry I thought we were talking about foreseability of damage and you said it would have been – sorry I might have misunderstood you.

MR HEANEY QC

Foreseability of damage, economic loss in effect to that owner.

WILLIAM YOUNG J:

There is always going to be shades of grey issue isn't it, because most of the building cases will involve some sort of building expert, possibly just the builder but commonly architects and engineers who have been committed to a greater or lesser extent. Now I am not aware of any cases which have turned on just how detailed the involvement of the architects and engineers were and such a focus would be inimical to establishing a general rule by which cases can be determined economically.

MR HEANEY QC

Is Your Honour saying that we can't have the issue of duty in any way determined by whether or not there is an architect or an engineer engaged?

WILLIAM YOUNG J:

Well what I am saying, in *Spencer and Bryon* there must have been architects and engineers involved because it is a big tall building. Now there

is no suggestion of a judgment that those who bought or were involved in that, wouldn't rely on the council because they knew there were specialists, building professionals involved.

MR HEANEY QC

Oh I agree, I totally agree and the council in *Spencer* issued, I don't know, probably more than one, I can't remember, code compliance certificates in respect of the building work and the purchasers obviously don't have to show actual reliance.

WILLIAM YOUNG J:

But there's no suggestion in *Spencer on Byron* that the developers too wouldn't have had a claim against the council, albeit that if it was their fault they might have had contributory negligence assessments.

MR HEANEY QC

Well they might have had duty problems.

WILLIAM YOUNG J:

Might have had sorry

MR HEANEY QC

Duty problems.

WILLIAM YOUNG J:

Well I don't think I can see that in the judgments in *Spencer on Byron*.

MR HEANEY QC

Well it wasn't an issue in *Spencer* because the original developer, I think I'm right in saying, wasn't one of the parties. The parties were all the purchasers of the units and the developer wasn't anywhere near it.

WILLIAM YOUNG J:

Isn't it implicit and perhaps explicit in the judgments and the majority that there's no difference between a developer and a secondary purchaser, it's the same duty of care is owed to both?

MR HEANEY QC

Well it can't be exactly the same because when I come to the statutory regime, I'm going to show Your Honour that in a case of a commissioning owner, the commissioning owner has obligations imposed upon it in this case by virtue of the Act and those obligations are certainly not imposed upon the –

GLAZEBROOK J:

Well because they haven't done the building work, so you wouldn't expect –

MR HEANEY QC

No exactly, exactly. So there must be a different consideration in respect of commissioning owners versus subsequent –

GLAZEBROOK J:

That's *Hamlin* gone.

MR HEANEY QC

Why? I don't see that. Because in *Hamlin,* well I am coming to that.

GLAZEBROOK J:

Well in terms of duty I can quite understand because it might be that the council has zero responsibility on a contributory negligence if you're looking at it between Mr Major and the council, if Mr Major actually had any funds.

WILLIAM YOUNG J:

But you've got, to get contributory negligence, you've got to get Mr Major actions contributed to the trust.

MR HEANEY QC

Yes. Well that's just –

ELIAS CJ:

I think we should perhaps let you develop this fully because otherwise I think we may run out of time. So let's go through these factors. I've got you up to E.

MR HEANEY QC

Yes. Then I want to go on and say, well as I said before in terms of the analysis of duty, when you are looking at it, as we are here, it's relevant to look at other cases and see what's happened in other cases. Now there aren't many other cases where a council's been pursued or where the issue of the commissioning owner has come to the fore.

ELIAS CJ:

Sorry, can I break the rule I've tried to impose and just say it's a little bit odd that the importance of the cases about subsequent owners was that they were more remote and so the law had to decide that this was like durable goods or something like that and that the liability would apply. There's never really been any doubt about the sufficient proximity and policy considerations in relation to what you want to call commissioning owners. It's a bit strange to have it turned on its head a bit like this.

MR HEANEY QC

Well is it really because when you're looking at duty you have to look at the duty being owed to a plaintiff and so you've got to examine duty, not in respect of a particular building like Spencer on Byron or not in respect of a building like the Southland Stadium but duty has to be considered in the context and on the basis of who is the plaintiff who is going to be claiming to be owed a duty. So as far as subsequent owners are concerned, of course you would expect and we know that they are owed a duty by a council that issues a code compliance certificate and thereby assures –

ELIAS CJ:

Well it wasn't self-evident. I mean that really was quite a significant advance in the law, that recognition.

MR HEANEY QC

Moving from inspections to code compliance certificates?

WILLIAM YOUNG J:

Look in a nutshell is your argument that *Spencer on Byron* doesn't apply where the plaintiff is the commissioning owner, ie a council does not owe a duty of care to the commissioning owner of a commercial or industrial building?

MR HEANEY QC

Yes but narrowed.

GLAZEBROOK J:

You don't go that far though do you?

MR HEANEY QC

Sorry?

GLAZEBROOK J:

You don't go that far because you're only relying on the code compliance certificate part of it?

MR HEANEY QC

That's right, that's right, that's exactly right.

GLAZEBROOK J:

Is that true?

MR HEANEY QC

Yes doesn't owe a duty of care in respect of the issue of a code compliance certificate in these circumstances to a commissioning owner who has been responsible for the defective work. That's my thesis.

So I was going to tell you about a couple of other cases that I have found. I mentioned yesterday *Osborne* and said to you that it's not really one that

deals with the topic because it wasn't dealing with duty. *Bell v Hughes* was a decision where a builder building defective work was trying to recover against the council and was found unable to do so, High Court. *Three Meade Street v Rotorua District Council* was a decision of Venning J and in that case he decided that there was no duty owed to the plaintiff which was the constructor of the defective work. So those are the only ones that in New Zealand I've been able to come across. I actually did *Three Meade* and I'm not aware of any of the cases that have been before the Court of Appeal or the Supreme Court that have fallen into that category and that's one of the reasons why I say that it's valid now to examine duty on this factual scenario.

So now the real bugbear I suppose for me has to be this issue of community reliance which goes into the mix for duty and Your Honour the Chief Justice put to me that community reliance is there in these sorts of cases which means that you don't need specific reliance and that the community reliance, I think you put it to me on the basis that it is generated by the particular statutory regime and so I just want to track briefly through community reliance and just make a couple of observations in respect of it.

ELIAS CJ:

Well I would say that actually reliance is not a very useful concept in the case of negligence. It may be a factor but the real question is that there is sufficient proximity. Reliance in negligent misstatement cases looms large because otherwise how do you show that there is proximity if someone gives some advice to somewhere. So that's the difference. I'm not sure that the concept of general reliance except to explain that statutory regime permits is necessary. Yes, I'm not sure that reliance is very useful in that context.

MR HEANEY QC

No except that there has to be some connection between the breach if there is one on the part of the council and the loss that arises and so at least notionally isn't the plaintiff going to be in the position usually of saying well, you know, there was a code compliance certificate and/or I'm entitled to rely on the fact that councils generally do inspections, there's a system in place

and so I'm entitled to rely on that and this building didn't come up to standard and it's costing 100,000 to fix, so it's not up to standard because you didn't inspect it properly and you issued a code compliance certificate that was shonky so pay up. So to that extent there's an underlying theme of reliance in some way which has to be considered when you go through the whole track of getting –

ELIAS CJ:

Well there's proximity and it's foreseeable that loss will be caused if the – I would've thought that was really enough in the case of negligence but anyway I understand your point all right.

MR HEANEY QC

Well I agree with what Your Honour says but it does go a little further than that in my submission it goes beyond just proximity and policy, it goes beyond it to the extent that the overarching consideration in all cases has to be is it fair, just and reasonable to impose a duty and you can only make that decision, taking everything into account which is what I am trying to do and I'm not saying that every case is going to fit into the same bucket. There are a whole bunch of considerations which I am working my way through which I think when we get to the end of it, I'm hoping when we get to the end of it Your Honours will conclude the same as did the Court of Appeal Judges, each in their own way, that this is just a case where it's not fair and not just and not reasonable for the council to face liability. So I turn to look at community reliance, just to start tracking through to the legislation which I want to turn to. So we know that that component of community reliance has been around for a long time and really came to the fore in *Hamlin* and then re-enforced by both *Sunset* and *Spencer* in this Court.

Now we know that it originally had its birth, it was not being dealt with under the 1991 Building Act and I know there'll be a temptation to stop me here and say that the Privy Council considered that and decided that, or maybe it was the Court of Appeal, and decided that the 1991 Act didn't make any real difference and I accept that that's the position that the Courts took then. What

we are doing now is we're telescoping that community reliance for it into the 1991 regime but more importantly in this case we're telescoping it forward into a case where there are no inspections, where the council has not inspected and has not inspected the commissioning owner's building and has not inspected the work done by the commissioning owner and so I asked the question, can we say that community reliance is something that should automatically apply in a case where there is only a code compliance certificate and where there have been no inspections and where the plaintiff is the author of the work. So perhaps I won't get anywhere on that point but I think it brings to the front the need to look at this case in a slightly different light than perhaps we've looked in the past at cases involving subsequent purchasers. So then I looked to the statutory regime which –

ELIAS CJ:

Sorry, are you saying that there are no cases where the – you're not saying that there are no cases where the council has not been held liable simply on a code compliance certificate?

MR HEANEY QC:

There are no cases I know of where a council has been held liable simply on the basis of a code compliance certificate.

ELIAS CJ:

In all the cases –

MR HEANEY QC:

In all the cases I've done and seen.

ELIAS CJ:

- you say that the council has had an obligation of inspection? None of them are cases concerning producer statements?

MR HEANEY QC:

No, no, no, no, that's mixing the concepts up with respect Your Honour. There are plenty of cases with producer statements but there are no cases that I'm aware of where a council has been held liable simply for the issuing of a code compliance certificate where there have been no inspections. I am not aware of any of those and in fact if you look, as I referred you to yesterday, the decision of Justice Chambers in *Spencer*, I think around about 219, I think he was talking about negligent misstatement and he said there that little is added by bringing a negligent misstatement because the liability of the council inevitably stems from the inspection regime and that's the case. Every case Your Honours have dealt with in this Court involving council liability have been cases where there have been inspections.

WILLIAM YOUNG J:

What difference does it make? I mean say they had issued the code compliance certificate on the basis of inspections that have been negligently carried out but the facts are otherwise the same, but the inspections have been carried out prior to the 10 years preceding the claim, you'd be stuck on that wouldn't you?

MR HEANEY QC:

If this was a consent that was issued without a PS4 and/or, sorry without the requirement for a PS4 and/or a case where it was anticipated that the council would undertake inspections, I'd be in bother.

WILLIAM YOUNG J:

Yes, yes I know all that. So just let's assume they'd issued a code compliance certificate based on their own incompetent inspection, that incompetent inspection happening before November 2001 or 2000, you'd be liable.

MR HEANEY QC:

Oh absolutely, I'd be liable on the inspection.

WILLIAM YOUNG J:

Okay, well what's the difference between that and issuing a code compliance certificate based on their negligent misreading of a PS4?

MR HEANEY QC:

Because as the Chief Justice pointed out in *Spencer* the whole system is an interlocking system culminating in bringing the consent, the inspections together and culminating in the code compliance certificate being issued.

WILLIAM YOUNG J:

Well say the issue, as in this case a code compliance certificate without either a PS4 or an inspection which is really the worst of all three hypotheses I put to you, you say they're out, there's no liability.

MR HEANEY QC:

Yes I do say there's no liability and I say that because the interlocking system contemplated by Her Honour in that case contemplated a consent, inspections and the code compliance certificate but because of the unique facts in this case that didn't happen and so we're only dealing with a –

WILLIAM YOUNG J:

But here the facts are there's neither inspection nor PS4.

MR HEANEY QC:

That's right, so we're only dealing with a code compliance certificate and that I suggest is why Justice Miller got to the point he got to and he must have thought oh this doesn't fit within the ordinary box that we're used to dealing with, we're just dealing with relying on the code compliance certificate so we're dealing with a negligent misstatement case and not a negligent simpliciter case. Now I've kind of gathered from my discussions with you so far that I'm going to be struggling to hold onto Justice Miller's rationale which is why I've shifted the emphasis more to the lack of duty advocated or held by Justices Harrison and Cooper but I say, if you're asking me what my submissions is in this case, I say the interlocking system that the Chief Justice

talked about in *Spencer on Byron* contemplated all of those steps being together and because we're dealing with a case where we only have the code compliance certificate, we have a different duty consideration.

ELIAS CJ:
What's the difference? It's still the system it's just that's all you have.

MR HEANEY QC:
Yes that is all you have but as Justice Chambers said Your Honour –

ELIAS CJ:
Oh really these judgments can't be looked at as if they're statute Mr Heaney.

MR HEANEY QC:
No I know that and it must be very annoying when people keep reminding you of parts in them. I've got another couple of parts but I'm just saving them up. But I mean I want to look at it in a global way but of course I'm bound by what's gone on before but I come back to the point that in this case, because there were no inspections and in fact if there were they were out time but, you know, we probably don't have to go there because only the code compliance certificate is sued upon, I say it's got to be a different case. Hopefully I will get you there.

So just coming back, if I can, to the statutory regime, just give me a minute. There are some important provisions that come into play vis-à-vis the commissioning owner versus the subsequent purchaser and the statutory regime of course must be taken into account in assessing whether or not there's a duty. So section 33 of the '91 Act requires someone undertaking building work to obtain a consent and the work has to be done in accordance with the Act of the code. So the obligation is firmly upon the owner having the work done, to get the consent and do the work in accordance with the code.

Now that is something that isn't the case with a subsequent purchaser. So I bring this to your attention because again I say there are different obligations

as between the council and the plaintiff in a commissioning owner case versus a subsequent purchaser case, the usual sort of cases that we are dealing with and then as we go further through the building process we come to section 43 and that was mentioned yesterday and that's the section that requires the owner to give the council advice of completion in the standard form or whatever it is that's required, advising the council that the work has been done in accordance with the building consent and that was done here and it was signed off actually by a chap called Bruce Middleton. That's whose signature you were, I think Justice O'Regan you might have been looking to see whose signature it was. I think the evidence was that it was Bruce Middleton who was the manager of ABL, the construction company. That company was engaged by the trust to do the work and you can't get a code compliance certificate as the commissioning owner until you comply with section 43 and you front up with the notice of completion. That's how the statutory regime works.

So I say it's not really open for the trust to say oh well we just got the code compliance certificate, we don't know how it came about, you know, we didn't authority Middleton to sign it, the fact that the trust got a code compliance certificate for this building means that they, in fulfilment of their statutory obligations, must somehow or other have got someone to ask the council for it and complete the required notice under section 43 and of course that was done, we know, without the PS4 and the precamber measurements being attached and so it was asked for, the code compliance certificate processes was triggered, it was asked for in full knowledge by the trust, through Mr Middleton, that all of the components required as a prerequisite to the issue of the CCC weren't actually there, there was no PS4, there were no precamber measurements.

So to be compared now, as I will, with the subsequent purchaser and the subsequent purchaser cases, again this is not an obligation that the subsequent purchaser has, this is only an obligation that is an obligation of the commissioning owner. So again the commissioning owner is in a different category than is the subsequent purchaser. Something else I say has to go

into the general mix to determine at the end of the day whether or not it's fair, just and reasonable to impose the duty. So I'm saying to Your Honours that it is the primary obligation of the commissioning owner to make sure the work is done properly and to make sure that the consent conditions are complied with and that's absolutely to be contrasted with the subsequent purchaser.

GLAZEBROOK J:
I suppose that's still my point, why doesn't that take out where there has been inspections as well? I mean that particular point applies, whether there's been inspections or not by the council, it seems to me, so why…

MR HEANEY QC:
I think Your Honour is looking at it from the perspective of an obligation in respect of a building whereas I am presenting it to you on the basis of the duty of care vis-à-vis this plaintiff and this council. So if you look at it in terms of the building itself you could come along after the event if – and it can't happen in this case, we know, but generally speaking, you can come along after the event and say, "Well, council, you've issued a code compliance certificate, albeit you issued that in the absence of any inspections, but I'm entitled to rely on the code compliance certificate because I know no different. I don't know that you haven't undertaken inspections. I'm entitled to assume that you've done what has to be done to enable the code compliance certificate to be issued." But in this case that's not so, because in this case you would come along and you would be saying, "Well I've got a code compliance certificate, the building's got problems so I'm entitled to be recovered, although I did happen to know that the code compliance certificate had been issued absent the PS4, which was a condition of the building consent."

WILLIAM YOUNG J:
But you've yet to persuade me that they did know that.

MR HEANEY QC:
Yeah I'm coming to that.

GLAZEBROOK J:

And that's a different point because I thought your point was that whether you knew or not you couldn't rely on it.

MR HEANEY QC:

Well, if you're the commissioning owner you can't I say.

GLAZEBROOK J:

Well that's what I'd understood your point to be.

MR HEANEY QC:

It is because, and I say that –

GLAZEBROOK J:

Whether you knew about it or not.

MR HEANEY QC:

I say that because you're responsible for having carried out all the steps to get to the code compliance certificate. You know there's no inspections.

WILLIAM YOUNG J:

Well you've said it again. You haven't persuaded me that they, they may have known there weren't inspections but there's no basis, at least, sorry, you haven't persuaded me that they knew there was no PS4.

MR HEANEY QC:

Yes, we're going to have to get there obviously and I –

WILLIAM YOUNG J:

And you haven't persuaded me yet that Mr Major was their agent.

MR HEANEY QC:

No, well I'm going to try and do that too.

WILLIAM YOUNG J:

Because we have been going round and round with the same ideas being…

MR HEANEY QC:

Okay, well let's deal with that then.

ELIAS CJ:

I should indicate that we'll take the adjournment at 11, since we started early, so I'll take it for 15 minutes then.

MR HEANEY QC:

I just want to make sure I don't miss anything so just give me a second please. Okay, well let's deal with the who knew what and who's whose agent. We'll start dealing with that. We probably won't finish it before the adjournment but what we do know is that the code compliance certificate that the trust relies upon was issued on the 20th of November 2000. That's beyond doubt, that's the code compliance certificate they're suing on. That's the date on the code compliance certificate. Forget for the moment when they got it, that's the one they're suing on. They know it's dated on, sorry, it knows, the trust knows it's dated the 20th of November 2010.

WILLIAM YOUNG J:

But why do they know that? They know it now but why did they – how – you're making these assumptions that, I suppose, are triggering responses from me because I don't think they're right and if you're building an argument on that assumption then you've lost me from the get-go.

MR HEANEY QC:

Well, let me take it step by step. We know the code compliance certificate was issued on the 20th of November. We know that's the code compliance certificate that's being sued upon, the only issue we have to determine is whether or not, when that was issued or view by the trust as having been issued, that it, I say the trust knew that it was issued incorrectly because I say the trust knew that there was no PS4.

WILLIAM YOUNG J:

Okay well tell me why?

MR HEANEY QC:

Because McCulloch knew, because it was McCulloch or Major or McCulloch but McCulloch in particular was the person who fronted up with the precamber measurements a year or so later in the issue of the code compliance certificate.

WILLIAM YOUNG J:

And why is he their agent?

MR HEANEY QC:

He's their agent because the obligation on an owner undertaking building work is to comply with the Building Act, apply for a building consent and carry out the work in accordance with the building consent and it was McCulloch who signed on behalf of the council for the building consent, on behalf of the trust for the building consent. So the trust had to know.

WILLIAM YOUNG J:

Well you keep on stepping over it. As I understand it the cases say that while we will attribute the actions of a solicitor not checking a limb to the client, we will not attribute to the plaintiff the actions of engineers and architects. Are there any cases where they have had actions, where plaintiffs have had the actions of an architect or engineer attributed to them?

MR HEANEY QC:

Well I think if you look at *Peabody*.

WILLIAM YOUNG J:

But we don't do *Peabody*.

MR HEANEY QC:

Well we don't do *Peabody* in some respects. We don't do *Peabody* presumably because of *Stieller* but of course the facts in *Stieller* were vastly different than the facts in *Peabody* and it was distinguished on that basis instead because in *Stieller*, the Stiellers were acquiring their house when it was virtually finished, whereas in *Peabody* the plaintiffs were doing the work right from the get-go. So it's a vastly different set of fact and in fact the facts in *Peabody* are closer by far to the case we're dealing with here.

WILLIAM YOUNG J:

But don't you have to look at cases like *O'Hagan* which say we don't attribute the actions of engineers and architects to plaintiffs, that is a policy decision? I mean is there anything since say 2007 that's, you know, reasonably contemporary which you can rely on?

MR HEANEY QC:

No, no I don't have anything that fits into that category. I say that you have to look at it and track through what the commissioning owner, the builder, the owner of the land upon which the building is being built, you have to track through and see how does that owner fulfil that owner's statutory obligations and it must be by virtue of getting someone to do it. So it must be an agency arrangement, it can't be anything else I say.

ELLEN FRANCE J:

Do you rely only on Mr McCulloch, is that your only source of the knowledge?

MR HEANEY QC:

It's my best source of the knowledge.

WILLIAM YOUNG J:

Why not Mr Major?

MR HEANEY QC:

Well he's not very reliable our Mr Major.

WILLIAM YOUNG J:
But he's directly retained isn't he, by the trust?

MR HEANEY QC:
He's actually retained by McCulloch which is why I emphasised McCulloch. McCulloch engages Major.

WILLIAM YOUNG J:
Who paid his fees?

MR HEANEY QC:
Well I think they were included in McCulloch's fees.

WILLIAM YOUNG J:
McCulloch's bill.

MR HEANEY QC:
But I'm not 100% certain. But McCulloch's the direct line link for me and frankly I'm not sure that I want to embark in an argument upon whether or not Mr McCulloch is the agent of the trust. Sorry Mr Major. So for if I can persuade you that McCulloch, whose is providing the entire wrap round services, who is doing everything for this project as we know, if I can persuade you that he's the agent for making things happen and knowing what's going on, then I think I should probably have done enough.

So someone for the owner has to know that a building consent is being applied for, someone has to be dealing the matters that come up on a day by day basis. The trust doesn't actually know anything itself, it only knows things because people that are either trustees or part of it know things. So I'm putting Mr Major in the – he's the bloke that knows everything camp, McCulloch, in the camp, if he's the bloke that knows everything and, you know, you see for instance that McCulloch is at the 17th of January meeting with both the council and the then chairman of the trust board, Ray Harper and McCulloch's all over everything really. McCulloch is the person to whom

the council writes and that's who the council communicate with. There's no communication, I think I'm right in saying this, there's no communication between the council and the trust and you wouldn't expect there to be any communication between the council and the trust because the wrap round services for the whole project are being provided by Mr McCulloch and he's the go-to man, he's the co-ordinator, he's the person in whom the trust puts its faith and so for my simple mind to say well if he knows something it's not fair to say that the trust doesn't know it, it just doesn't really make sense because someone's got to know it and McCulloch's the person, he's the guy that's got the wrap round job. So I say that you should be looking at him in the context of this case as the trust's agent.

GLAZEBROOK J:

But does it, just because technical requirements weren't provided, does that mean, because if the trust thought that Mr Major had been doing his job and the builders had been doing their job and they might have technically thought that the certificate hadn't been provided in a proper sequence but is that enough? I mean it's certainly enough for the council because that is a specific requirement.

MR HEANEY QC:

I'm sorry can you just do it to me again?

GLAZEBROOK J:

Well if the trust, and presumably it was, and Mr McCulloch had actually thought that everything had been done properly and that Mr Major had done his job, does the fact that the trust knew, even if the trust that the certificate hadn't been provided by Mr Major, is that sufficient?

MR HEANEY QC:

Well it's not so much the certificate Your Honour.

GLAZEBROOK J:

Well no it's the fact the work's been done is the really important thing to the trust and if the trust had no reason to think that it hadn't been done and the council had issued the code compliance certificate, does it matter if the technical requirements hadn't been complied with and in fact we wouldn't even be here if it had issued the code compliance certificate and in fact Mr Major had inspected it and everything was fine.

MR HEANEY QC:

Well yes but McCulloch knows that the code compliance certificate predates the provision of the precamber measures. So what's absolutely clear is the code compliance certificate has been issued without complying with the consent requirements.

WILLIAM YOUNG J:

Was it your case at trial that McCulloch's knowledge was to be attributed to the trust?

MR HEANEY QC:

I'm not sure that I put it exactly that way. I blamed the trust for the failure of the stadium. The trust, through its various representatives, contractors and representatives, so to that extent I package the whole lot up as one including, I think, Major.

WILLIAM YOUNG J:

And you did seek contribution against McCulloch?

MR HEANEY QC:

No, no, I didn't –

WILLIAM YOUNG J:

Just against HCL?

MR HEANEY QC:

Well yes we joined HCL as a third party.

WILLIAM YOUNG J:

Did you join McCulloch as a third party?

MR HEANEY QC:

No, I'm sorry, no I'm sorry, we only joined HCL as a third party I think. We were out of time for McCulloch. We were only sued, I think, two days inside the limitation period on the code compliance certificate so by the time the file hit Auckland we were dead in the water as far as limitation went I think Sir.

WILLIAM YOUNG J:

There's an argument as to whether that's right isn't there?

MR HEANEY QC:

I lost it. I'm the guy that lost it.

WILLIAM YOUNG J:

Right, okay.

MR HEANEY QC:

So – I'd love to have another go at it but that's a 17, what is it, 3C argument.

WILLIAM YOUNG J:

It's whether the limitation period down the track could kick in until there's liability, okay.

MR HEANEY QC:

Well I ran it, I did exactly that and I ran it in front of Justice Lang I think and in the York Street apartments and I was –

GLAZEBROOK J:

Oh, that was in – we've seen that haven't we?

WILLIAM YOUNG J:

Yes.

MR HEANEY QC:

So we've hit 11 o'clock, can I have a break?

ELIAS CJ:

Yes, you can have a break and we'll resume in 15 minutes, thank you.

COURT ADJOURNS: 11.00 AM

COURT RESUMES: 11.14 AM

ELIAS CJ:
Yes Mr Heaney.

MR HEANEY QC:
Thank you Your Honour. Just before I forget, included in the authorities is a section from *Todd on Torts* and there is paragraph 6.4.05.

ELIAS CJ:
Is this your tab?

MR HEANEY QC:
I'll give you the authorities, tab 14. I don't intend going through it and I just mention it because I feel I'm taking a little bit of flack for looking at commissioning owners.

ELIAS CJ:
So it's the negligent building owner?

MR HEANEY QC:
Yes and the author notes that special consideration needs to be given to the case involving the negligent building owner. So at least I'm not all out there on my own as being the only person to think about it as a different category requiring special consideration and just while I was having a quick look, I noticed in the adjournment that the author refers to the various cases that I've referred to here and there but also to *Spencer* and in particular to Your Honour Justice Young's decision where you comment that a building owner who is the author of the negligent work is not well placed to recover the losses in connection with that against local authority. So based on that I'm hoping I've at least got you on side for thinking that I might be onto at least a path that's worth pursuing. So I don't want to spend too much time dwelling on that

because we've really – I've moved on from that in my trek down through things because I'm saying that the commissioning owner is a different category of beast and warrants that special consideration.

So I want to come back to now fronting up and centre on this agency business because it is a key plank for my case that the owner, the trust in this case, had the code compliance certificate, has the code compliance certificate, whatever tense we want it in, had or has, knowing that the code compliance certificate must have been issued absent the PS4 and absent the precamber measurements. Now I say that it is knowledge that the trust has, by virtue of McCulloch, and I want to re-emphasise this point that the trust has obligations, it is undertaking a building project, it has obligations as well as the council having obligations. It has a relatively, a number of them, but a relatively simple obligation of fronting up with the paperwork when it wants the code compliance certificate to be issued and by the paperwork I mean the PS4 and the precamber measurements and it can only do that through someone who it authorises to do it, otherwise it can't validly get the code compliance certificate and it fronted up with the application without the paperwork, it didn't fulfil its obligations. I say that it must be taken as knowing that the code compliance certificate was issued absent the producer statement and the precamber measurements. It was of course McCulloch who, in the end, provided the precamber measurements.

So the reason, one of the reasons why I'm concerned about this part of the case is because were Your Honours to come down with a decision that said that the trust had no responsibility in respect of the provision of this information, that would be, I suggest, tantamount to saying that the entire responsibility for building projects rests with the council, the sign-off is entirely with –

GLAZEBROOK J:

But nobody would say that would they? It wouldn't be relevant to be contributory negligence. You're just saying there's no duty.

MR HEANEY QC:

I am saying there's no duty.

GLAZEBROOK J:

But it would clearly be relevant to contributory negligence.

WILLIAM YOUNG J:

No not attributed to the council, not if he's not attributing –

GLAZEBROOK J:

No, no sorry, what you were saying is that the owner has no responsibility under the legislation but that's not to say that the council owes a duty to a commissioning owner, is not to say that the commissioning owner doesn't have a duty under the legislation to provide the material but maybe I misunderstood what you were submitting.

MR HEANEY QC:

No I'm submitting that your decision I hope will reflect the fact that owners have obligations as well as the council having obligations and the owner's obligation is to produce – is to front up with, in this case, a producer statement and the precamber measurements because they're a condition of the building consent and the owner is obliged to do the work in accordance with the building consent in order to get the code compliance certificate, section 43 triggers that, they need to front up with a notice of completion of the work and so by not fronting up with that part of their obligation, can they then realistically turn around and say to the council well despite us not having done what we're meant to do, you still owe us a duty to issue the code compliance certificate upon which our cause of action can be based but we don't have to do what we're obliged to do under the Act. I mean the trust simply has to fulfil its obligations just as the council has to fulfil its own obligations. We know the council shouldn't have issued the code compliance certificate but we know, well I say we know that the trust knew it was issued without those primary obligations having been completed by the trust itself. So I say in a case like that, that's a factor that must be taken to say that there's no duty because the

duty arising out of the code compliance certificate, I say, should only arise on the basis that everything else has been done to get to the code compliance certificate stage. We're not talking about an inspection case here, we're talking about a case solely in relation to the code compliance certificate.

So I want to move onto at least what I call policy considerations and I hope I can persuade Your Honours that indeed they are policy considerations and there's really only one that I am going to hammer and that's this, it seems to me that whether you follow or adopt *Peabody* or *Anns* or not, is not necessarily the question but what I submit to you you should do is to look at the statements in both *Peabody* and *Anns* which are to the same effect and that is that it doesn't like well with an owner, the source of his/her, its own negligent building work, it doesn't lie well with that owner to then turn around and recover the losses against the local authority and that is the effect in both of those decisions and I say that when that analysis was undertaken by the English Courts in those cases it was a perfectly sensible approach to take and as a matter of policy for you, I submit that you should see that as a reason to come to the conclusion that it's not fair, just and reasonable to impose a duty here because otherwise it might be seen as allowing a commissioning owner to take shortcuts and then when the shortcuts turn to disaster sue the territorial authority to fix up the shortcuts so a commissioning owner could cheapskate on the insurance that's available by way of professional indemnity insurance with its engineers and architects, so that they get an engineer or an architect doing the work for a lower fee. They could cheapskate on the constructors. In fact, I think, what happened in this case is that the trusses that were originally built were built of a smaller gauge metal than they should have been, which is why they sagged in the first place, and there was some suggestion, at least, that that was because it was cheaper. I don't put that up as a specific factor to be taken into account in this case but rather just to say that unless there is some responsibility attributed to a commissioning owner there could well be a tendency for shonky developers of residential units, or other buildings, to cut corners knowing that the disasters that finally arise as a result of the corner cutting would lie at the feet of the council and everything would be made well and the developer, instead of paying $10 million dollars to

have his building built, might build it for eight million and then pick the other two million up from the council when it goes wrong.

So, one way or another, no matter what analysis you undertake in this case, it seems to me that it can't be the case that community reliance, or some default duty, or a duty that, a general duty, can actually trump the situation we find ourselves in here, where the code compliance certificate has been issued, and in the knowledge of the plaintiff has been issued, against the backdrop of the building consent conditions having not been complied with. That, it seems to me, can't be right.

So, from a policy perspective, I say that you need to take that into account, no matter how you analyse it, because as many Judges have said in this area, looking at policy and proximity provides a framework but the framework in all cases is to get to the end-point and the end-point is, is it fair, just and reasonable to impose a duty, and I come to that and say that in this case it is not fair, just and reasonable to impose a duty.

So, that's more or less where I get to on the background to the duty issue. I suppose if there is no community reliance available, if I can get you to that point then I suppose, in the context of causation, we probably need to examine what we have to take into account and that's where, it may be, that this case goes down the path that His Honour Justice Miller went and we might then need to look at it as a negligent misstatement case but that is my backstop position really because my primary position is that there's no duty and then, if it is a negligent misstatement case then, of course, I simply adopt the analysis that Justice Miller has done and, in particular, I would adopt his approach, which seems to me to be very largely based on the decision in *Boyd Knight v Purdue* [1999] 2 NZLR 160.

So I need to now come back and address the issue of *Hamlin* before I go any further. So if what I say is right and the commissioning owner should have no duty, how is that going to impact upon the Hamlins? Well let's look at the *Hamlin* case. The facts in the *Hamlin* case were that the Hamlins owned the

land and the house was being on the land for them. A building consent was, a building permit actually, was issued by the Invercargill City Council and as part of that building permit there were inspections required. The inspector attended the site and undertook inspections. The inspection that eventually proved to have been inadequate was in respect of the foundations because it transpires from that case and others we know about, that it is important to excavate down to firm ground so that the footings can be put on firm ground. The building inspector missed identifying that part of the footing was not on firm ground but was on ground that was going to be sort and move. The house was built, some years later it tilted down in one corner, a cracked opened between the steps of the house, cupboards didn't close, usual stuff, the council was sued.

There was no code compliance certificate issued by the Invercargill City Council and that's because this house was built well before the regime created by the 1991 Act, introducing code compliance certificates but let's just say, so that we can bring it into the modern day, that those facts were the same and happened a couple of years ago, well let's say happened under the '91 Act, so we don't confuse ourselves with the two Acts and the council at the conclusion of the inspection regime was provided with a notice of completion of building work which the council would have to be provided with to trigger the issue of code compliance certificate and let's say the code compliance certificate was issued by the council. Under my scenario and taking on board the arguments I've raised in the case, would the Hamlins be able to succeed in recovering their loss against the council despite the fact that they were a commissioning owner? Well in the broad camp of a commissioning owner having building work done for them and I say yes they would be able to because at an operational level here, I say the council would have contributed to the Hamlins loss, along with the builder, Bruce Stirling, because the council were out there at the operational stage of this building being put together and involved in the building process and they mucked up the inspection and they would be able to be sued on the inspection obviously, just as they were in *Hamlin* but in a practical world, would they be sued on the code compliance certificate? Probably not. And why probably not? I think it would be valid for

them to be sued on it but at a practical level, would they be sued on it? No they wouldn't because if you follow the logic of Justice Chambers, he sees the liability stemming largely from the inspection process and that's how it should be in respect of that set of facts. So in this case it is different, in the trust's case it is different because –

GLAZEBROOK J:
Well let's have the Hamlins getting an architect to certify for them and that was a requirement, so that there were no inspections required, they just needed to provide an architect's certification and did.

MR HEANEY QC:
Well let's go a bit further than that Your Honour, let's say that it was a condition of the – there's a thing called specific design, so you either build in accordance with the standard building code back in the day or you have specific design. So let's say their house was a bit of a tricky house and had a few unusual features and required specific design and let's say it required specific design of the foundations and so the council might recognise that, let's say it was on the Taieri Plains, which are renown for having a bit of soft ground around and about, and let's say that the council required – well, not Taieri Plains because it's out of their jurisdiction. Let's say it was on soft ground and the council required the foundations to be designed by an engineer and for the engineer to provide a PS4. So the council would expect, and the Hamlins, on today's regime, would be obliged to front up with a design by an engineer for the foundations. The council would accept that, presumably with a PS1, which is what would normally happen, and may or may not get it reviewed, probably not in respect of a house, and then the house would be built and the engineer would attend and inspect and have a look at what went on onsite and would then, all going well, provide to the council, they're the owners whose obligation of course it is, would provide a PS4 which would be the assurance the council's looking for that the building work had been done as contemplated by the building consent. Council would then rely on that PS4 and would then, subject to all other matters being in accordance with the code, would then issue a building consent. Now

Your Honour will say to me but, and let's assume that it's a bad job and that, you know, there's soft ground and the engineer mucked it up and didn't spot the soft ground and stuck a penetrometer in when he should of, or whatever it is he's meant to do, so he got it wrong and his PS4's wrong. That would trigger the Hamlins thinking well we'd better sue the council obviously.

WILLIAM YOUNG J:
But there would be – I mean this is, it's a very elaborate discussion. There's no negligence there on the council.

MR HEANEY QC:
Exactly.

WILLIAM YOUNG J:
But there is a duty, it's just there's no negligence.

MR HEANEY QC:
Exactly.

WILLIAM YOUNG J:
But say he didn't give a PS4 or say he gave a PS4 in respect to the wrong property and they issue a code compliance certificate well then there they're in the gun.

MR HEANEY QC:
Yeah, I think that's probably right.

WILLIAM YOUNG J:
Which is this case.

GLAZEBROOK J:
Well yes, except the trouble is on what you're saying is that they would be, they wouldn't be able to recover on those facts.

MR HEANEY QC:

Yes.

GLAZEBROOK J:

If, in fact, the PS4, or the council should not have reasonably relied on the PS4 they were given.

MR HEANEY QC:

Yes.

GLAZEBROOK J:

So commissioning owners, like the Hamlins, of residential properties would come under your –

MR HEANEY QC:

No because my scenario involves the owner, the Hamlins, knowing that the –

GLAZEBROOK J:

So knowledge is important?

MR HEANEY QC:

Knowledge is important.

GLAZEBROOK J:

Well because you have been shifting around on that, whether knowledge is important or not, so you're now coming down to –

MR HEANEY QC:

Knowledge is important.

GLAZEBROOK J:

– there's no duty if you know the code compliance – if you're a commissioning owner and know there's something funny about the code compliance certificate but that you would know that, I mean, if you're imputed with the knowledge of Major, you would know there was something shonky about the

code compliance certificate even if the PS4 had been provided beforehand wouldn't you?

MR HEANEY QC:
You would but…

GLAZEBROOK J:
So you could never recover, if you have an agency argument.

MR HEANEY QC:
If your agent's fraudulent.

GLAZEBROOK J:
Well not even fraudulent. They could just be, sort of, –

WILLIAM YOUNG J:
Negligent.

GLAZEBROOK J:
– negligent and you're imputed with the knowledge that the PS4 is false.

MR HEANEY QC:
Yes but I'm not going –

GLAZEBROOK J:
No, not on purpose false but just because you've got an incompetent person.

MR HEANEY QC:
I'm not going down that exact road. What I'm saying is that the trust knew that the code compliance certificate was given ahead of McCulloch fronting up with the precamber measurements.

WILLIAM YOUNG J:
But this is just another way of saying McCulloch's knowledge is attributed to the trust.

MR HEANEY QC:

Absolutely, absolutely.

WILLIAM YOUNG J:

Well I think we get that.

MR HEANEY QC:

Well I mean my case, in that respect –

GLAZEBROOK J:

But I'm just wondering what else – because McCulloch, is he imputed with the knowledge of Major, that Major did nothing that he was supposed to have done and was giving a – say it had been issued beforehand, the PS4?

MR HEANEY QC:

I haven't argued that and –

GLAZEBROOK J:

Well I'm just trying to get the limit of exception you say exists to *Spencer.*

MR HEANEY QC:

The limit of the exception for me, what I'm submitting to you, is that the code compliance certificate was issued absent the PS4 and absent the precamber measurements. The PS4 came along afterwards, it was fraudulent afterwards. I'm saying on the 20th of November the code compliance certificate was issued, that's the code compliance certificate that's being sued upon.

GLAZEBROOK J:

I understand what you're saying.

WILLIAM YOUNG J:

I think we understand that and it all comes down to McCulloch's knowledge being attributed to the trust,

GLAZEBROOK J:

And then the extent of when you do impute knowledge, so do you impute Major's knowledge that he did nothing of the sort, say it had been issued beforehand, the PS4, do you impute knowledge that he had done nothing whatsoever?

MR HEANEY QC:

Well I don't think I need to deal with Major.

GLAZEBROOK J:

Well you sort of do because I want to know what the limit of this agency is for a commissioning owner because if the Hamlins, say in terms of the Hamlins, they are imputed with the knowledge of the builder or whoever it was who got the foundations wrong, then on your argument they should not have been able to succeed.

WILLIAM YOUNG J:

Well what you've got going for you is that when the documents are supplied to the council, they're supplied by someone acting as agent, fulfilling a legal duty of the owner, that person is McCulloch.

MR HEANEY QC:

Yes.

WILLIAM YOUNG J:

Now I'm not particularly sympathetic to the argument but at least I understand that and that on what I understand from you saying, Major is not in that sense acting as the agent because he's not the person who's purporting to discharge the owner's duty when the documents are handed over.

MR HEANEY QC:

That's right.

GLAZEBROOK J:

What I don't understand though is how much of McCulloch's knowledge is attributed and why? Because say there's only McCulloch and we don't have a Major and McCulloch is the person who put in the, like in the *Hamlin's* case, the builder who was providing all of that documentation as agent.

MR HEANEY QC:

Well I'm only going as far in this case as saying that it's McCulloch's knowledge. That's as far as I can go in this case.

GLAZEBROOK J:

Well say McCulloch knew that Major hadn't inspected.

WILLIAM YOUNG J:

Well you say it's all of his knowledge because when he submits this document to the council he's the trust.

MR HEANEY QC:

He is the trust.

WILLIAM YOUNG J:

He is the trust.

MR HEANEY QC:

He submits –

WILLIAM YOUNG J:

So everything he knows is referable to the task at hand, that is submitting the documents. That's the argument.

MR HEANEY QC:

That is the argument.

GLAZEBROOK J:

Okay, that's fine.

ELIAS CJ:

The only reason it's necessary to be as elaborate about this, because in the normal course the council would simply say it was not negligent if it received the PS4.

MR HEANEY QC:

Correct.

ELIAS CJ:

And was entitled to assume that as part of that the conditions have been complied with. The only reason is that they issued the certificate without the PS4 and that's why you have to go back to looking again at duty of care, through what the council knew.

MR HEANEY QC:

Exactly. Right, well I've probably gone about as far as I can go with that today. So I wanted then to, well I suppose I should discuss this issue of – I'm not going to spend any time, unless you particularly want me to on negligent mistake and I've said that I support Justice Miller's decision. Whether it's a negligent statement case or not, I understand that we're not all together onboard with me on that and Your Honour the Chief Justice is not on board because I think you say that community reliance supersedes the need in this area for specific reliance in the council.

ELIAS CJ:

Well I just see it as a negligence case at the moment rather than a negligent mistake.

MR HEANEY QC:

But I'm happy to deal with it as a duty case, as of course I must. If you do see it the way Justice Miller does, as a negligent mistake case well then I can't really do much better than adopt what His Honour had to say in his decision. And there's probably no point me dragging through all of that. So what I should do though is talk about the cross-over between the duty causation and

contributory negligence for a couple of minutes because I said earlier today that these three things tend to all cross-over each other. In the pleadings before Her Honour Justice Dunningham, there was a plea of contributory negligence in respect of the 2000 activities. Obviously if Your Honours don't go down the attribution path, then it's going to be a little bit difficult to get anywhere on that because everything was done, not so much by the trust itself but by its agents and in particular McCulloch and what I say in that regard now is that McCulloch was obliged to front up or the trust through McCulloch was obliged to front up with the precamber measurements, so as to be in line with Harris' design and that didn't happen.

Now I say, of course though, that my focus in this case has not been on that as much as on duty because I say there's no duty as you know and I go further and say that the causation aspect shouldn't be seen to be there because I say that it's not the council that's caused the loss that the trust claims here but rather the trust, through its agents, that's caused the loss. So I say that at a level of 100% it's not our fault and so if there is to be adjustment then I say that it was open to the trial Judge to adjust it that way on the pleadings.

As far as the causation itself is concerned, the trial Judge found that if the trust had not issued the code compliance certificate as it was then, that would've triggered an inspection and of course I query that and did in the Court of Appeal because I say that the trust in this case knew that the code compliance certificate was issued absent the requirements necessary for it to have been issued the PS4 and precamber, so I say now that in that situation it's hard to see how the council could've caused the loss.

But as far as contributory negligence in 2006 is concerned, that's in a different category all together. So what happened on the 12th of April 2006, is that the trust, Mr Aitkin-Smith, wrote to –

GLAZEBROOK J:
And if I'm right this wasn't pleaded is that right?

MR HEANEY QC:

No this was pleaded.

GLAZEBROOK J:

The 2006 was pleaded?

MR HEANEY QC:

Absolutely and on the 12th of April in 2006 the trust wrote to Mr Harris and well I've set it out in my written submissions actually but the short and long of it is, they were aware of collapses in Poland and he and the chairman Ray Harper were concerned about the safety of the roof in this particular case and that isn't something that came amount in a vacuum. The evidence clearly establishes that they've been having trouble with this roof for some time and it was flapping around in the breeze and significant movements of it and responsible, I suggest, for the trust, its chairman and Mr Aitkin-Smith to look at it and think crikey this doesn't look too flash and maybe we better just check that we're not going to run the risk for having a major collapse as happened in Poland and so responsibly asked Harris to revisit the roof and ascertain whether or not it was safe and whether or not it would be able to handle the snow load that was so seriously overdue in Southland and so it, on the 6th – and my friend paints it, of course, as oh, well they were just worried about the water leaks but I've set the letter out in the submissions so you can read it for yourselves and I submit that it is clear that what was –

ELIAS CJ:

You're supporting, I'm sorry, because we've been concentrating so much on liability, you're supporting the Court of Appeal assessment of 50% contributory negligence?

MR HEANEY QC:

Yes the level is not in dispute between the trust and the council, the 50%, no doubt because neither of us are very good gamblers and we don't want anyone interfering with that. I'm happy with 50% and, presumably, if there is contributory negligence the trusts happy with the 50%. The only question is

should the trust be held to contributory negligent and that's the question for you.

So I say that it's hard to imagine a much clearer case, in fact, I'm slightly regretting the decision to stick at 50% but, be that as it may, the –

ELIAS CJ:
It is a little bit contradictory not to be going for 100% but anyway, in terms of the main argument you've been advancing.

GLAZEBROOK J:
This is a back-up argument.

ELIAS CJ:
No, no, I know, I understand that, but I'm just talking about the acceptance that…

MR HEANEY QC:
Well I've never been any good in casinos Your Honour. It's a big claim, 50% is a lot of money, and so they responsibly identify that there may be some issues and face up to them, get Harris' advice. Now, no matter what gloss my friend might put on the advice that's received from Harris and no matter what gloss my friend might put on the overall situation because of the water leaks that have been lurking around for a few years, the bottom line is this roof was moving, the trust knew it. They wanted an assurance that it would withstand snow load. They knew there hadn't been a serious snow storm for some time in Southland and they wanted to make sure that when one came along, like the one that did in fact come along, that this roof would cut the mustard and so they got Harris to have a look at it and Harris did have a look at it and he made a number of recommendations. The trust gave the –

WILLIAM YOUNG J:
He didn't actually have a look at the building did he?

MR HEANEY QC:

He had – no, no, no, he did not, he had a look at the situation I should have said.

ELIAS CJ:

Well he looked at the specifications.

MR HEANEY QC:

Design, yes, well he designed, he originally designed the remedial works that were the subject of the amendment consent so he knew what the design was, he knew what was intended to be done. He had actually said what the precamber measurements should be and he had prescribed how the work should be done and he knew, obviously, that the top cords were to be cut and spliced and welded because he prescribed all of that. So in his recommendations he said, "Well, I've revisited my calculations and everything looks fine to me but here's a couple of recommendations and have a look at them and come back to me if you want anymore." And the recommendations include getting somebody experienced to have a look at the welds and make sure there was no fatigue, and check the precamber measurements.

The trust did not follow-up on those recommendations. I don't need attribution here to get the trust for contributory negligence. The trust itself had that report. The trust had the recommendations and the trust did not follow up on those recommendations and it was accepted by, certainly in the Court of Appeal, that had those recommendations been followed up then someone would have spotted the welds weren't up to scratch and something would have been done about it and the disaster wouldn't have occurred some four and a bit years later.

So I say it's about as clear as you can get as far as contributory negligence is concerned and it is the trust itself that has not followed up on those recommendations when it so easily could have and I say it is the trust that must take responsibility for the failure.

GLAZEBROOK J:

What do you say about the High Court findings on that?

MR HEANEY QC:

Well I say that the Judge in the High Court was wrong. Contributory negligence is always a question of fact at the end of the day and the High Court Judge bought the story that they were only dealing with it for leaks and that it wasn't a safety concerned.

GLAZEBROOK J:

Well what justifies overturning that?

MR HEANEY QC:

A revisiting of the factual matrix.

WILLIAM YOUNG J:

Well it's not consistent with the documents.

MR HEANEY QC:

Correct.

WILLIAM YOUNG J:

But say, I mean I'm sort of broadly with you to that point but what troubles me is this, that say Mr Aitkin-Smith was worried and got the hebe jebes when he read about the roof collapse in Poland, asked for advice, leave aside the leaking for a moment, got told well crikey, you know, the design is fine but if you're really worried about it, send someone up and have a look at the welds but by the time he gets that advice, he's taken a valium, he's calmed down and he's no longer worried about it. Would that be negligence, contributory negligence if he doesn't do it?

MR HEANEY QC:

Yeah if he didn't know it was flapping about in the breeze.

WILLIAM YOUNG J:

But there's no suggestion that the flapping about the breeze is connected to what caused the failure of the trusses. I'm just taking that from Mr Ridge.

MR HEANEY QC:

Well if it was my truss and it was flapping about in the breeze, I'd want to know that it was going to hold up under a snow storm. I mean it's just a – common sense has to be applied to this and, you know, the fact that –

GLAZEBROOK J:

But you're told the design is fine, you don't have any reason to think that the work was bad because you don't have any reason to think that your engineer is just pure fraudulent or that your contractors were negligent.

MR HEANEY QC:

But you are told to check the precamber measurements.

WILLIAM YOUNG J:

But say they're satisfied that the leaking problem has been resolved, that's the roof flapping around problem is it?

MR HEANEY QC:

No.

WILLIAM YOUNG J:

What's the roof flapping around problem?

MR HEANEY QC:

Well it's just moving in the wind.

WILLIAM YOUNG J:

But that's not related to the trusses failure is it?

MR HEANEY QC:

Yes I think it is.

WILLIAM YOUNG J:

I'd sort of rather taken from what Mr Ring said that it wasn't.

MR HEANEY QC:

No, no, no the leaking problem was around the skylights or flashings or thermal changes. The leaking problem, there's no evidence that the leaking problems had anything to do with the structure.

WILLIAM YOUNG J:

Okay was there something that troubled him that is fairly referable to the ultimate cause of the failure?

MR HEANEY QC:

Just the movement as Justice Miller pointed out.

GLAZEBROOK J:

Well do you want to show us the evidence?

MR HEANEY QC:

Yes let me find that. I think I can point you to what Justice –

GLAZEBROOK J:

But I mean they weren't worried it was going to collapse because it was moving, they were worried it was going collapse because something has collapsed in Poland weren't they? Which one can quite understand.

MR HEANEY QC:

Well they were concerned that it might collapse under a snow load.

WILLIAM YOUNG J:

Okay but what is there that the trust knew that alerted them to the possibility that all might not be well and that it really did warrant investigation rather than just a reassurance?

MR HEANEY QC:

Okay, well give me a couple of seconds.

O'REGAN J:

Well do they need that though because the report they got said you should check.

WILLIAM YOUNG J:

Yes but if there's no occasion. It's not saying necessarily as a matter of practice you should check, it may be saying well if you are having an attack of the heebie-jeebies and you want to calm yourself down, then you better check it. Now if that's – and they're no longer worried, then it probably wouldn't be. But if they're worried about something that is fairly referable to what later happened, then perhaps they should have because fixing the leak didn't –

O'REGAN J:

Well they were worried about a snow fall and that's what caused it to collapse.

WILLIAM YOUNG J:

Yes but there were things happening at the time that they were on notice that was a problem and they don't check it, then they might have.

GLAZEBROOK J:

A problem with the construction as against the design. So they checked the design and told it's fine and is there something that should've alerted them to a problem with the construction?

WILLIAM YOUNG J:

I'm not sure I necessarily accept the design/construction dichotomy.

GLAZEBROOK J:

No, no sorry that they have been assured the design is fine in that letter.

ELIAS CJ:

But there is the suggestion that the welding and the precamber measurements be checked.

MR HEANEY QC:

Well more than a suggestion, it's a recommendation that that happen.

WILLIAM YOUNG J:

Is that a recommendation that's referable to calming irrationally worried people or is it a recommendation that is referable to a situation that is objectively indicative of a possible risk of failure?

MR HEANEY QC:

Well the 9th of April letter instructing Mr Harris –

GLAZEBROOK J:

Can you just give us the reference first so we can look at those things, sorry.

MR HEANEY QC:

1054 for the 9th of April letter, 12th of April letter sorry.

ELIAS CJ:

So which one was that 3A or 3B.

MR HEANEY QC:

3B.

ELIAS CJ:

3B thank you.

MR HEANEY QC:

Then the next document for you to look at is 1056 which is McCulloch talking about roof movement under high wind conditions and then 1057 is Major to McCulloch about the wind and the movement. So when you read all those things what we know is that the roof is moving.

GLAZEBROOK J:

Although they seem to think that's different because Mr Major is looking at uplift which is the roof is moving.

MR HEANEY QC:

Yeah moving by 160 millimetres at truss 1 which is at the end.

GLAZEBROOK J:

But the letter seems to think the uplift and the weight of the snow are different.

MR HEANEY QC:

Well I think where Mr Aitkin-Smith must have got to was he was concerned about the potential failure or he wouldn't have written a letter on the 12th of April.

WILLIAM YOUNG J:

Yes but if he's concerned about the failure because of leaking and roof deflection and his concerns about the roof deflection and leaking are resolved, then that puts a different complexion on it at least from my point of view, than if he's left with a situation where the roof is still moving and particularly if it turns out to be the case the roof is moving because of the faulty construction of the trusses. Was their evidence saying that the roof movement was associated with the defects in the trusses?

ELIAS CJ:

It's pretty precise.

WILLIAM YOUNG J:

Well that's right, I'm just in my own –

GLAZEBROOK J:

Well also this letter does assume that the welding has been done properly, it's just that there might have been deterioration and fatigue. So the letter doesn't assume it's been done improperly. I'm just thinking if you look at page 1086,

and one can understand that because nobody expects that the work has been done improperly.

WILLIAM YOUNG J:
Well they're concerned about something.

GLAZEBROOK J:
No but in terms of what they're saying, they're saying inspect it for fatigue, not inspect it to see whether it's been done properly.

O'REGAN J:
Yes but I mean the letter that Mr Smith writes starts off by talking about he's concerned about the movement in the spans and then he links that with the collapse of roofs in Eastern Europe.

GLAZEBROOK J:
No in the third paragraph he says, "The uplift occurring, what we're more worried about is when snow goes on top of it." Which seems to disaggregate the two.

WILLIAM YOUNG J:
Was there any explanation from an engineer as to whether recommendations 3 and 4 of Mr Harris were referable to roof movement? If there was then I think you may have, from myself, would have a good argument.

MR HEANEY QC:
I would have to go and look, I can't answer it as I said.

GLAZEBROOK J:
Didn't the finding just go to the extent that if they had done those, they would've said, "Oh golly it's not just because there's been deterioration or fatigue, it's been that it hasn't been done properly in the first place"?

MR HEANEY QC:

I think there is no doubt but that if an engineer looked at those welds it would have been obvious that they hadn't been done properly. All of the engineers said that and no one's shying away from that.

GLAZEBROOK J:

No, no, but is that as far as it goes? Because if it's you missed an opportunity to find out it's a slightly different statement from you should have done this and then you would have found out. And especially you should have done this because you should have been worried about whether the work had been done properly because you'd been alerted to the fact that maybe it wasn't.

MR HEANEY QC:

Well Mr Acton-Smith has alluded to the fact that the roof's moving, we know that. He is concerned – so he knows there's something that isn't right and he is concerned, because of events in Europe, that he might be sitting in a situation where something not done right might give rise to snow load collapsing the roof, so he wants Mr Harris to have a look at it and I'm not sure that I can advance the evidence anymore than that. That's what happened, the documents are the documents and on the face of it –

WILLIAM YOUNG J:

Was there engineering evidence?

ELIAS CJ:

Yes, there was expert engineering evidence.

MR HEANEY QC:

Yes there was and what I can't remember is whether there was any comment on the issues in 2006 I'm sorry.

ELIAS CJ:

I had the impression, from what Mr Ring said, that the reason some of these things weren't taken further is that the leaks stopped after remedial work.

MR HEANEY QC:

That's certainly the picture that the trust paints in this case.

ELIAS CJ:

When did that occur and was there evidence about what was entailed –

MR HEANEY QC:

Yes there was evidence about that and my friend took you to it yesterday I think and he took you to the evidence about Calder Stewart doing work on the roof and various bits and pieces so yes, there was evidence.

ELIAS CJ:

So when did that occur, when did that remedial work occur? How soon after?

MR HEANEY QC:

In around about this timeframe, it was – I can't remember the exact dates but it was in January the same time, but what my friend overlooks in his submissions to you is that there were two problems. There was the problem of the roof leaks, and that had been going on for years, and there was the problem of the roof movement, and the 12th of April letter deals with the perceived danger which relates to the movement in the roof rather than the roof leaks. And you've only got to read the documents to come to that conclusion I suggest.

WILLIAM YOUNG J:

Well sort of reading Mr Harris' report I've got a feeling that he's not that worried about the roof deflections.

MR HEANEY QC:

No because he thinks the welds have been done properly.

WILLIAM YOUNG J:

No but he also – he thinks that they are actually within the, what was designed for. He's saying, at the bottom of page 1085, "We understand that a

measurement of the actual roof movement under measured wind speeds have been carried out and these confirm the calculated deflection for maximum serviceability loads are in the right order."

MR HEANEY QC:

Yes, but he does on Your Honour to make the recommendations that you've got to get up and have a look.

WILLIAM YOUNG J:

He also – I agree. He also says, "The strength and trusses were pre-cambered to ensure the truss deflections due to self weight of the roof did not result in any visible sag. This needs to be checked."

MR HEANEY QC:

"This needs to be checked."

WILLIAM YOUNG J:

So that's probably one of the better passages in the letter from your point of view.

MR HEANEY QC:

That's right, and he made it clear that that needed to be checked and the welds needed to be checked, neither of which were done, despite the trust having expertise on its – delegated expertise.

WILLIAM YOUNG J:

Would the roof movement put pressure on the welds? Do we know that?

MR HEANEY QC:

Do you want me to answer as an engineer or evidentially?

WILLIAM YOUNG J:

Was there evidence?

MR HEANEY QC:

I can't remember.

ELLEN FRANCE J:

Mr Heaney, Justice Miller, at paragraph 139, in relation to Mr Harris says, "The trust was squarely on notice of his recommendations which were directed to safety concerns and it knew, as the council seemingly did not, that the roof's performance might evidence a structural problem." Is that based solely on what – is the only evidence in relation to that what Mr Harris says in the letter?

MR HEANEY QC:

Yes, yes and –

ELLEN FRANCE J:

And the precursor as to why the trust is asking the question, ie, the concern about Poland?

MR HEANEY QC:

Yes and just as the – the other component of that is that these concerns were not made known to the council in 2006.

GLAZEBROOK J:

Where was that bit about the roof sagging? I can't see that at the moment.

ELIAS CJ:

It's the roof's performance.

GLAZEBROOK J:

Well most of it's saying that it's within proper bounds and it seems to be just disturbing to building owners presumably because they're worried about it – rather that – ie it's not a safety issue, it's a comfort of user.

MR HEANEY QC:

Well it was clearly a potential safety issue for Mr Aitkin-Smith or he wouldn't have written his letter of the 12th of April and that's all his letter addresses. Well Harris addresses the issue in his letter, well I think it's the issue you're talking about it, he says that the precamber, it was designed to have a precamber and that's of course why he recommends that it be checked. Well I think that about does me Your Honours.

ELIAS CJ:

Thank you Mr Heaney.

MR RING QC:

Now just dealing with the duty issue first, it appears what the council's position is, is that there's no duty to a commissioning owner if the claim is based on or in respect of the issue of the code compliance certificate, in circumstances where there are no inspections. The first point that I'd just like to make is a general and self-evident observation is we're only ever in the position where we're considering the question of a duty because either an owner builder or an owner who has used building contractors and building professionals has been at fault in the building process. So either the owner has been at fault because the owner has personally done something or the people the owner has commissioned have been at fault because they've done something wrong. The council's duty is to prevent the consequences of those deficiencies, it's to prevent the collapse of the building or the damage to the building or the danger to users by detecting that deficient work and by requiring it to be remedied before it can cause any harm to anybody.

So when we're looking at the duty and we're looking at the question of whether there is this narrow exception, we're looking at it in the context that in circumstances where all of the features that I've identified in my hand-up of the duty recognised by this Court in the two previous recent decisions, that is, in circumstances where you have this statutory framework you have the nature of the duty as this Court has identified it, you have its purpose as identified by this Court, you have the proximity rationale, you have the policy

rationale, then you have a duty owed to all owners and for all buildings including where the owner is at fault and including where the owner has commissioned engineers, architects or contractors who have been at fault.

And although my learned friend said at one stage that he recognised that the ship had sailed –

WILLIAM YOUNG J:
No he didn't.

MR RING QC:
Oh well he didn't, well –

WILLIAM YOUNG J:
He thought it was still tied up.

MR RING QC:
Right. Well, let me then rephrase the metaphor.

GLAZEBROOK J:
I think the wider, the wider thing I think he certainly recognised.

MR RING QC:
If my learned friend thinks that the ship is tied up then, regretfully, he – this has kept jumping off into the water on pretty well every issue.

WILLIAM YOUNG J:
I think we've got that metaphor.

MR RING QC:
Because every one of the factors that he relies on to say this is an exception, if you go into *Sunset* or to *Spencer* or both, you'll find the Court – Your Honours did recognise that issue, recognise that factor and the effect of those judgments is to say that if those factors exist this isn't an exception. This is the paradigm case, this is the case in which the duty is owed. And,

essentially, we've got to the position Your Honours, in my submission, where my learned friend has identified a whole series of factors, each one of which is recognised specifically in those judgments, and yet he says that cumulatively they constitute an exception which takes this case out of those judgments and that just, in my respectful submission, makes no sense whatsoever.

Just a couple of individual points that I want to pick up, on the factual matrix that he identified, first, and just by way of preface, I'm just going to try and pick up the odd point on each of them but not deal with each of them where it would just involve a repetition of what I've said before. So where he talked about the building consent and he talked about the conditions to the building consent, he said at one stage that the trust was required to provide the precamber measurements –

O'REGAN J:
Are you talking about the CCC or the building consent?

MR RING QC:
No I'm talking about the building consent. So conditions 4 and 5 of the building consent, he said in relation to condition 4, that it was the trust that was to provide the precamber measurements. Condition 4 and condition 5 are the same in this respect. What they say is that Mr Major, by name, Mr Major is to provide each of those things. Now, yes, I fully recognise, Mr Major was the engineer involved in the project, subcontracted to the trust through Mr McCulloch, but the council chose Mr Major as the person who it would look to to provide these conditions. It didn't say the trust's engineer, or the trust, or whatever, it said Mr Major. And the reason it said Mr Major is because it was saying we are going to rely personally and directly on Mr Major, leaving aside all of his other capacities. They could have identified anybody for that and, indeed, one of the strong arguments we made at the High Court, which the Judge didn't even need to deal with in the end, was given Mr Major's responsibility for the need to do the remedial work in the first place, and given inspections and site visits and things that the council themselves observed about the work that were potentially or actually reflective

of Mr Major's competence and given Mr Major's responses to the council's queries to fix those and how did they occur and whatever, the council was remiss in putting its faith in Mr Major when it issued the building consent because at that moment it knew that it was –

WILLIAM YOUNG J:
This doesn't matter does it, this is out of time?

MR RING QC:
Well it is out of time but the important point I'm making is it wasn't the trust who was supposed to provide the precamber measurements, it was Mr Major and so that's where the linkage doesn't work in terms of the factual matrix from my learned friends in saying that this is a factual difference. It was Mr Major who had to provide it independently of his role in the trust but, you know, no doubt because of his role and because he knew.

O'REGAN J:
Well I mean it's not independent of his role, it's because of his role.

MR RING QC:
Well it's independent in the sense that he's giving an assurance to the council independent from his role from the trust and in the sense that it could've been anybody who they delegated. They could've, for example they could've said no –

O'REGAN J:
But they didn't. I mean they could've done lots of things but they didn't. I mean, you know, I know what your point is but it seems pretty peripheral really.

MR RING QC:
Okay, well I'll move on from it. Second, Your Honour, Justice Glazebrook in relation to the inspections raised issues about the word "generally" and as you might have expected that was the subject of some cross-examination, so if I

can just give you the references in case that's of any particular interest, that's at 660, line 50 to 662, line 15 and that would be in 2C, in volume 2C. That's cross-examination of Mr Tonkin.

The council's point here seems to be that if you don't ask for or specify for any inspections you can somehow as a council take yourself out of the inspection role and if you can take yourself out of the inspection role, you can take yourself out of general reliance and you can then take yourself out of duty. And the point that, well first of all in my respectful submission the Court ought not be countenancing ways in which the council can unilaterally narrow or exclude its duty just by choosing to operate in a particular way because we know from past experience that that's exactly what they'll do and the purpose of the legislation will then be utterly defeated.

The second point is, just from a logical and legal perspective, the duty must exist to exercise reasonable care at the time that the code compliance certificate is issued even if there no PS4 in existence. In relation to the foreseeability point, my learned friend's submission was that while the duty might be justifiably recognised in relation to a subsequent purchaser, it shouldn't be recognised in respect of the commissioning owner. The claim by a commissioning owner for the benefit of the duty is stronger than the claim by the subsequent purchaser because the commissioning owner not only has the same foreseeability factors running in his or her favour but he or she has paid the fee for the regulatory services and that's the point that was specifically recognised by both Justices Tipping and Justice Chambers in the cases.

In relation to the statutory regime, my learned friend acknowledged that the statement that the work had been completed had been provided by ABL. This is going to happen in every case. It can't be an exception, a factual exception, that someone on behalf of the owner has told the council the work has been completed. And the fact that somebody, on behalf of the owner, has told the council that the work has been completed doesn't mean that the council, in accordance with the statutory framework, doesn't mean the council owes no duty. What it means is that that's exactly when and how the duty arises,

because the purpose of the duty is to not take that statement at face value but to make an independent assessment in order to prevent non-compliant building work from remaining undetected and unremedied.

In relation to the policy considerations, my learned friend relied on the proposition from *Anns* that there's no duty in respect of the owner, or by the owner, who is the source of their own loss, which was of course the guiding principle for the majority judgment in the Court of Appeal. And the point that I wanted to make here was just in relation to the further comment. He referred to a cheaper option being adopted in the construction, where the gauge of the boxed sections for the trusses were reduced to save cost. Just so that Your Honours have the proper context for that, the undisputed evidence from the trust about that was that that was not instigated by the trust, that was done by Mr Major on his own motion when dealing with the tenderers without the trust's knowledge and certainly the trust was never asked, "Do you want to have this sized boxed section and be sure of safety or do you want to go to something less and take the risk?" or anything like that. So, yes, the boxed section was reduced, yes, it was a cost factor, but it was purely by Mr Major and not by the trust. And, again, that just highlights the need to separately consider what conduct and states of mind can be attributed to the trust and what can't.

My learned friend spent a bit of time talking about what the trust knew or didn't know when the code compliance certificate was issued and, in particular, whether it knew that the conditions on the building consent had or had not been satisfied. I don't want to say anymore about that part of the evidence, but I just wanted to remind Your Honours, if I may, that the issue of the code compliance certificate was not a once only representation made on the 20th of November 2000, it was a continuing representation in the sense that it post-dated 2001, November 2001, when the council did purport to be, or was satisfied, negligently satisfied, but was satisfied that the two conditions had been fulfilled. So while all of those arguments I don't accept but even if they were accepted it would still leave the council justifiably relying on the code

compliance certificate from November 2001 onwards without any argument to the contrary.

O'REGAN J:
The trust relying on it.

MR RING QC:
I'm sorry the trust relying on it. And of course that lines up with the council's own evidence in Mr Tonkin's brief where he says on several occasions, "As far as I was concerned the building was safe when it was opened in March 2000."

In relation to the 1999/2000 contributory negligence, that's the last page of my hand up. I'm just going to let that speak for itself and just make comment if I may. My learned friend has essentially told what I think I foreshadowed at the beginning of my submissions and that is in trying to submit to Your Honours that by running the duty argument he was really also running contributory negligence in 1999/2000 period. Well that's, with the greatest of respect, logically and legally inconsistent. The duty argument, his duty argument is because of the fault of the trust, that is the trust's own trust and the fault that is attributable to it by its building contractors, no duty is owed. That is fundamentally inconsistent with the proposition that because of the fault of the council, of the trust and its contractors, contributory negligence is justified and hence the words "contributory negligence" in the 1999/2000 context never appeared in any written submissions in the High Court, in any oral submissions in the High Court, any written submissions for the Court of Appeal, any oral submissions for the Court of Appeal.

In relation to the 2006 contributory negligence, my learned friend says that the failure of the trust to follow up is as clear as contributory negligence as you can get. With the greatest of respect to my learned friend, we take issue with that. Two points I wanted to emphasise, one is that much has been made of these deflections, these wind deflections, as being the factual centrepiece of the contributory negligence argument in this case. Your Honour

Justice Glazebrook I think has identified that passage in the HCL report of 9 June, that's at 3B 1085, where HCL expresses themselves to be satisfied based on measurements that had been taken and the design parameters that it had used, that there was o movement or could be no movement beyond acceptable tolerances, beyond code tolerances. Other documents which support that, that pre-date that reference are 3B 1063 which part of the minutes from the council and before that 1061 which are the ABL builder's fax after they'd inspected the building and made the measurements and reported on them. So HCL was asked to provide advice on wind deflections. ABL does actual measurements. It reports those actual measurements and they appear to be within tolerances and there's no problem with the wind deflections, positively no problem with the wind deflections identified, and then Mr Harris finishes that up by saying specifically that at page 1085 in his report.

WILLIAM YOUNG J:

Can I just take you to one or two passages in the report. Page 1084. The first four bullet points, there's a reference to welds in the last one, which could be associated with deflections. "Cyclic load and high stressors and large deflections."

MR RING QC:

Yes.

WILLIAM YOUNG J:

Then over the page, "The strength and trusses were pre-cambered to ensure that truss deflections due to self-weight of the roof did not result in any visible sag. This needs to be checked." Now, that could be a reference to a concern as to whether what was happening was referable, in part anyway, to the pre-cambering not having been achieved. And then the suggestion that, "A visual inspection of the truss welds and support fixings should be carried out to see if there are any signs of deterioration or fatigue that may be associated with deflections." Now was there, as it were, the inner meaning of this report not discussed by any engineer in evidence?

MR RING QC:

I certainly don't remember any evidence where there was an attempt to link these things to the actual cause of the collapse that ultimately emanated. The council's argument, as I understood it, and certainly as the Judge found it, was that in the course of carrying out a recommendation for A they would have fortuitously identified B, being the defects that caused the collapse.

WILLIAM YOUNG J:

Well do I take it there was no evidence at trial then that the factors that led to additional reports being sought, other than anxiety about what had happened in Poland, were not actually referable to what the true problem was with the trusses that resulted in catastrophic failure?

MR RING QC:

That is my understanding and, again, I know Your Honour doesn't like the design construction –

WILLIAM YOUNG J:

Well I don't actually.

MR RING QC:

– dichotomy but the whole focus was on, really on the design, and there was an assumption and indeed described by Mr Acton-Smith in his unchallenged paragraph 45 for example of his brief of evidence as a reliance that it had been constructed properly because the council and his contractors had told him so.

But the other point that I wanted to mention here that my learned friend didn't seem to touch on is even if you can draw that link then we're still in the position where the trust is entitled, in terms of its own negligence, or contributory negligence or not, the trust is entitled to rely on the investigative team that it has tasked with this job. That investigative team includes HCL. This report has gone to the investigative team. The investigative team are construction professionals who have been involved in the original construction

and the trust is entitled to assume that if there's a recommendation in there that ought to be carried through, regardless of finding the cause of the leaks, that these people would do so or that if they regarded that recommendation as not related to the cause of the leaks and for some reason it shouldn't now be done, they would come back to the trust and say, "Well you know we've got the HCL report, we followed the recommendations and found the defects. There's these other two recommendations in there, they're unrelated to the defects, if that's indeed how you would characterise those recommendations, we're not going to follow through on them, is that okay?"

WILLIAM YOUNG J:
So we haven't got a complete set of the documents but was the remedial work in relation to the leaking carried out under the supervision of Mr McCulloch?

MR RING QC:
Yes it was. What you have got –

GLAZEBROOK J:
We have got the document which says what they were going to do, haven't we, and then we've got the board minutes saying it has been done I think, haven't we?

MR RING QC:
Yes you have and Your Honour the Chief Justice, you asked about the timeframe of this, Calder Stewart, the roofing contractor was already onboard prior to May looking at the fixings as a possible cause of the leaks and those related things. That investigation continued, then HCL came along with its letter on the 9th of May, sorry 9th of June, then on the 20th of June Calder Stewart reported in its letter that you have here, saying, "Preliminary investigations look like they're going to be successful, we think we've got it." And then the correspondence and minutes that Your Honour Justice Glazebrook has referred to, then follow that through to its successful conclusion. Your Honours, unless I can help you with anything further, those are our submissions in reply.

ELIAS CJ:

No thank you. Thank you counsel for your assistance. We will reserve our decision on this matter.

COURT ADJOURNS: 12.42 PM