IN THE SUPREME COURT OF NEW ZEALAND

SC 77/2010
[2012] NZSC 49

BETWEEN	NORTH SHORE CITY COUNCIL Appellant
AND	THE ATTORNEY-GENERAL AS SUCCESSOR TO THE ASSETS AND LIABILITIES OF THE BUILDING INDUSTRY AUTHORITY` Respondent

Hearing: 1, 2 and 3 November 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: D J Goddard QC, S B Mitchell and N K Caldwell for Appellant
D B Collins QC Solicitor-General, M T Scholtens QC, T G H Smith and S J Leslie for Respondent

Judgment: 27 June 2012

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs of $40,000 and reasonable disbursements in connection with this appeal, as fixed by the Registrar if necessary.

REASONS

Para No

ELIAS CJ

[1] The Building Industry Authority was established by the Building Act 1991 to provide general supervision of the regulatory system for building work. The appeal is brought from a decision of the Court of Appeal, on summary application before trial, holding that the Building Industry Authority did not owe duties of care in the exercise of its statutory responsibilities either to territorial authorities or to building owners.[1] The claimed liability of the Building Industry Authority arose in respect of failures to meet the standards for moisture control set by the building code, which have led to leaks and consequential damage. Such failures have been so widespread as to raise questions about systemic error in the regulatory system, in which the Building Industry Authority's statutory role was key. They have also presented substantial challenges to the New Zealand legal system.

[2] The Grange apartments were developed under a building consent granted by the North Shore City Council on 28 April 1999. The design of the building entailed face-fixed monolithic cladding over untreated timber frames. That method of construction is now known to have been used in very many buildings which failed to meet the performance standard specified by standard E2 of the code.[2] As a result, there have been a significant number of cases where moisture ingress has led to rot in buildings, especially where ventilation was inadequate.

[3] During construction of The Grange, the North Shore City Council inspected the building work for code compliance. It granted the owner a certificate of code

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1 *Attorney-General v North Shore City Council [The Grange]* [2010] NZCA 324, [2011] 1 NZLR 178.

2 The stated objective of E2 (in the Building Regulations 1992, sch 1) was "to safeguard people from illness or injury that could result from external moisture entering the *building*". The "[f]unctional requirement" specified in the standard required "adequate resistance to penetration by, and the accumulation of, moisture from the outside". Performance requirements concerned: the ability of roofs to shed moisture; impermeability of roofs and exterior walls to water that could cause undue dampness, damage to building elements or both; similar impermeability of walls, floors and structural elements in contact with or close proximity to the ground; protection from the adverse effects of moisture entering the space below suspended floors; construction of concealed spaces and cavities to prevent moisture accumulation or transfer causing "condensation, fungal growth, or the degradation of building elements"; capacity to dissipate excess moisture at completion of construction without permanent damage to building elements; allowance in construction for the consequences of failure, the effects of uncertainties resulting from construction or its sequencing; variation in the properties of the materials and in the characteristics of the site. (Emphasis removed.)

compliance on 6 April 2000, on completion of the building work. When the building was later found to have suffered substantial damage through leaks, the owners brought proceedings for damages against the Council, alleging negligence in its inspections and certification. The Council joined the Building Industry Authority as third party claiming indemnity or contribution from it.

[4] The Council claimed that the Authority had breached duties of care arising out of its functions under the Act when it reported in 1995 that the Council's processes were adequate to assess compliance with the building code adopted under the Act. This report (the result of a review by the Building Industry Authority under its statutory responsibilities) is said to have led the territorial authority to believe, wrongly, that its procedures were adequate at the time it issued the building consent and compliance certificates for The Grange.

[5] The Building Industry Authority carried out its functions of review by a rolling survey of territorial authorities. The North Shore City Council was not reviewed again until 2001 (when the report was similar to that received in 1995) and then 2003, after public reports about the incidence of leaks in new buildings (when the report was highly critical of the Council). On its reviews, the Building Industry Authority consultants inspected a relatively small sample of building projects. No complaint is made of this method of proceeding. Rather, the complaint is that the review undertaken in 1995 should have identified the deficiencies in the North Shore City Council's procedures as the subsequent review in 2003 (undertaken after the extent of the problem with leaky buildings had become public knowledge) was to do. The Council seeks under the first three causes of action to recover damages to cover its liability to the building owners but at the hearing in this Court accepts that its claim at trial would be abated to the extent of its own contributory negligence.

[6] The first two causes of action claim negligence by the Building Industry Authority in preparing the 1995 report and negligent misstatement in it. They proceed on the basis that the Council's procedures were not adequate to identify failure to attain the performance measure specified in E2 of the building code and that the Building Industry Authority would have reported the deficiencies had it discharged its duties of care. In that event, the Council would have modified its

approach (as it did following the report in 2003 critical of the Council's procedures) so that it would have identified the failures in code compliance in respect of The Grange.

[7] In a third cause of action it is claimed that the Building Industry Authority had become aware by 1998 of the risks associated with the type of construction used in The Grange and the fact that the failure to meet code standards was widespread (suggesting existing inspection and certification procedures had been inadequate) but failed to alert the Council, which continued to rely on the 1995 report in believing that its system was adequate to identify non-compliance with the building code. The third cause of action differs from the first two in the claim of knowledge on the part of the Building Industry Authority. It is an alternative claim in which the additional circumstance of knowledge is evidently put forward to meet possibilities on which the first two causes of action may fail. Two such are if the combination of the statutory scheme and the 1995 report are held insufficient foundation for a duty of care without more; and if the Council should be unsuccessful in establishing breach of duty (perhaps because the Authority in 1995 could not reasonably be expected to have discovered the deficiencies in the system the Council employed). If the first two causes of action fail on the grounds of insufficient proximity between the Authority and the Council, the additional circumstance of knowledge of risk is then relied on in combination with the statutory responsibilities of the Building Industry Authority and the report earlier provided to establish sufficient relationship of proximity to justify a duty of care. Similarly if the claim fails on the first two causes of action because the Authority is not shown to have acted in breach of duty, then actual knowledge of risk in 1998 may well be significant in establishing breach under the third cause of action.

[8] A fourth cause of action is based, not on duties of care claimed to have been owed by the Building Industry Authority to the Council, but on a duty of care the Authority is said to owe directly to owners of buildings. In this cause of action it is claimed that the Building Industry Authority's knowledge of the risk of failure to achieve the standards set by the code and its statutory functions gave rise to a duty of care to owners to take steps under its statutory powers to address the risk (which included the provision of information), but that it failed to do so. In respect of this

claim, the Council seeks contribution from the Building Industry Authority as a joint tortfeasor under the provisions of the Law Reform Act 1936.

[9] The North Shore City Council has accepted liability and paid compensation to the owners of The Grange in settlement of their claims. The appeal concerns the Council's third party claims against the Authority.

[10] The Building Industry Authority was abolished when the 1991 Act was replaced with the Building Act 2004. Under s 419 of the 2004 Act, the rights, assets, liabilities and debts of the Authority have devolved upon the Crown. The Attorney-General was accordingly named as defendant in the Council's claims. He applied to strike out all claims. The application was unsuccessful in relation to the first three causes of action in the High Court (where Andrews J considered that the claims were not untenable[3]), although succeeded in the fourth cause of action[4] (where Andrews J considered that she was bound by *Attorney-General v Body Corporate 200200* (*Sacramento*)[5]). All four causes of action were struck out in the Court of Appeal.[6]

[11] It is established by the line of authority affirmed by this Court in *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*) that territorial authorities may owe duties of care to owners in the discharge of their statutory responsibilities in respect of building consents and inspections.[7] Whether duties of care were owed in turn in the exercise of its functions by the Building Industry Authority to territorial authorities (as is claimed in the first three causes of action) has not before arisen for determination. Whether the Building Industry Authority owed duties of care to owners (as is necessary under the fourth cause of action) was however a question that arose in the comparable circumstances of a third party claim brought by a private building certifier liable to owners in *Sacramento*, where it was rejected as

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3 *Body Corporate No 195843 v North Shore City Council* HC Auckland CIV-2004-404-1055, 1 October 2008 (Andrews J).

4 At [8].

5 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) [*Sacramento*].

6 *Attorney-General v North Shore City Council [The Grange]*, above n 1.

7 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] at [6] and [25].

untenable in law. Whether *Sacramento* should be followed in this Court is an issue on the appeal.[8]

[12] I have read in draft the reasons of the other members of the Court, delivered by Blanchard J and Tipping J. They would uphold the decision of the Court of Appeal, with the effect that all causes of action are struck out as untenable in law on the basis that the Building Industry Authority did not owe the alleged duties of care to the North Shore City Council or to the building owners. I have come to different conclusions. For the reasons that follow I would allow the appeal and reinstate all claims. I do not think it can be said that the claims are untenable in law and I am of the view that they are not suitable for peremptory rejection. I consider that sufficient relationship of proximity to found duties of care to owners and to territorial authorities arises out of the distinct statutory functions of the Building Industry Authority and that no reasons of policy prevent the recognition of such duties of care. I would decline to follow the approach taken in *Sacramento*, which is I think is not supported by the scheme and purpose of the Building Act.

The scheme of the Building Act 1991 and the functions of the Building Industry Authority

[13] The Building Act 1991 is the context which is relied on as giving rise to sufficient proximity between the Building Industry Authority on the one hand and the territorial authority and owners on the other. The purposes of the Building Act 1991 were to provide for "[n]ecessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire".[9] The "necessary controls relating to building work" were achieved under the Act by requiring all building in New Zealand to comply with the building code enacted under the legislation.[10] A statutory policy of keeping regulation and the costs of complying with it within reasonable bounds was achieved by specifying that building work was not required to conform to standards which

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8 Although this Court refused leave to appeal in *Sacramento*, it was for reasons which do not affect the present claim or prevent reconsideration of the reasons of the Court of Appeal in *Sacramento*: *Ellerslie Park Holdings Ltd v Attorney-General* [2006] NZSC 44, (2006) 18 PRNZ 376 [*Sacramento* (SC)].

9 Building Act 1991, s 6(1)(a).

10 Section 7.

were more onerous than those specified in the code.[11] The principal regulatory mechanisms provided by the Act for achieving compliance with the code were through the requirement of certification of code compliance (which could be undertaken either through private certifiers or through a territorial authority)[12] and through imposing upon each territorial authority the responsibility within its district of ensuring compliance with the code.[13] The responsibilities of the territorial authority were backed up by statutory powers of inspection of building work and to compel compliance.[14]

[14] The Building Industry Authority was a public body set up under the Building Act 1991 with general functions which included "advising the Minister on matters relating to building control", "[u]ndertaking reviews of the operation of territorial authorities and building certifiers in relation to their functions under this Act", "[a]pproving building certifiers", "[g]ranting accreditations of building products and processes", "[d]isseminating information and providing educational programmes on matters relating to building control", and "[g]enerally taking all such steps as may be necessary or desirable to achieve the purposes of [the] Act".[15]

[15] The building code ("for prescribing the functional requirements for buildings and the performance criteria with which buildings must comply in their intended use")[16] and regulations prescribing the procedures to be followed and the forms and documents used in building consents were required by s 48(3) to be made "on the advice of the Minister following the recommendation of the Authority". The Authority itself was empowered by s 49 to approve "document[s] for use in establishing compliance with the provisions of the building code" which could be relied on as achieving code compliance. It was under this power that the Authority approved "acceptable solutions" in respect of some performance standards specified by the code. No such "acceptable solution" was approved in respect of monolithic face-fixed cladding attached to untreated timber. It is claimed in the fourth cause of action that one of the steps available to the Authority (and which it is said it was

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11 Section 7(2).
12 Section 43.
13 Section 24(e).
14 Section 76.
15 Section 12.
16 Section 48(1).

negligent in omitting to use when it became aware in 1998 of the leaky building problem) was to provide an "acceptable solution" which would have addressed the risks and provided a safe harbour for those (including territorial authorities and certifiers) who kept to it. Similarly, the Authority was empowered by ss 58–63 to provide accreditation for building products or processes. Such accreditation was also treated by the legislation as achieving code compliance, if used under the conditions specified.

[16] The Building Industry Authority did not have direct powers of intervention comparable to those of the territorial authority to ensure code compliance in respect of particular building work. Its responsibilities were to supervise the operation of the national system of regulation put in place by the legislation. In that, it fulfilled a central role in the statutory scheme.

[17] Although it operated at a level more abstracted from the day to day supervision of building work by which territorial authorities ensured code compliance within their districts and although the Authority also had responsibilities in setting standards and acceptable solutions, it would be wrong to see the Authority as being concerned with high level policy development. The members of the Building Industry Authority were required by s 11(2) to have relevant knowledge and experience, including of "[b]uilding construction, architecture, engineering, and other building sciences". It operated at a practical level of implementation of the legislative policies, including in relation to actual building work, as is shown by:

- The functions of the Authority provided under s 12(1):

  (a) After consultation with appropriate persons and organisations, advising the Minister on matters relating to building control:

  (b) Approving documents for use in establishing compliance with the provisions of the building code:

  (c) Determining matters of doubt or dispute in relation to building control:

  (d) Undertaking reviews of the operation of territorial authorities and building certifiers in relation to their functions under this Act:

  (e) Approving building certifiers:

(f) Granting accreditations of building products and processes:

(g) Disseminating information and providing educational programmes on matters relating to building control:

(h) Generally taking all such steps as may be necessary or desirable to achieve the purposes of this Act:

(i) Any other functions specified in this Act.

- The mandatory requirement under s 15 that the Authority report to the Minister when of the belief that a territorial authority was "not fulfilling its functions under this Act" and in the statutory function under s 12 to undertake reviews of the operation of territorial authorities and building certifiers in relation to their functions, both of which necessitated review of a territorial authority's judgments of code compliance in the case of performance standards (because such standards entailed judgment and interpretation).

- The duties and powers conferred on the Authority by ss 17–21 in order for it to fulfil its s 12(1)(c) functions of "determining matters of doubt or dispute in relation to building control". These required the Authority to determine the practical application of the code in relation to actual building projects if required to do so by territorial authorities, building certifiers, and owners affected.

- The requirement under s 50(1)(b) for territorial authorities and building certifiers to accept determinations of code compliance by the Authority as "establishing compliance with the building code" and excusing the territorial authority or the building certifier from civil proceedings "for anything done in good faith in reliance" on such determination.

[18] The last two points are important in understanding the role played by the Authority in the scheme of the Act. Three comments of relevance to the matters in issue may immediately be made. First, the Authority is not properly to be seen as remote from implementation of the code in actual building work. When disputes or doubts arose about code compliance (for the purposes of building consents or certificates or more generally), the Authority was given a direct and authoritative

role in establishing whether there was compliance in the particular case.[17] Secondly, the determination procedure could be invoked by owners as well as territorial authorities, establishing a direct connection between the Building Industry Authority and owners.[18] Thirdly, in the context of the code's reliance on performance standards (requiring judgment and interpretation in many cases), the scheme of the Act did not leave territorial authorities, certifiers, or owners adrift and vulnerable in cases of difficulty as to whether "particular matters comply with the provisions of the building code".[19] At their option, they could obtain an authoritative determination from the Authority which established code compliance and which removed their exposure to claim.

[19] This scheme is significant in considering questions of proximity generally under the first and second causes of action. It is also significant in relation to the proximity pleaded to arise under the third cause of action when the Authority became aware of the risk of failure, if such knowledge can be established. Withholding such information, as is alleged in respect of the third and fourth causes of action, could effectively deprive those affected (including territorial authorities, certifiers, and building owners) of the safety of a determination. The possession of knowledge of risk by someone with the statutory responsibilities of the Authority in such circumstances bears directly on whether there is a relationship of sufficient proximity on the facts which makes it reasonable to recognise a duty of care to provide the information.

[20] While determinations of the Authority relieved territorial authorities and certifiers from exposure to liability, it is clear from the limitation defences provided in s 91(3) that civil liability of the Building Industry Authority for its determinations was envisaged by the legislation (although members of the Authority and its employees were shielded from civil proceedings "for an act done in good faith under this Act" under s 89). This explicit acknowledgment of liability forestalled any argument that the function was "quasi-judicial" and thus not appropriately subject to liability in tort and also overcame doubts as to whether the Authority would be liable

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17 Section 17.
18 Section 17(1).
19 Section 17(1)(a).

for determinations expressed in the report of the Commission which preceded the Act.[20] As explained below at [59], however, I do not think the explicit reference to circumstances in which Parliament made it clear that the Authority would be liable in tort sets up a comprehensive scheme of liability, excluding by implication tortious responsibility for other actions of the Authority which cause loss to those to whom it owes on general principles a duty of care.

[21] It seems to me that the Act sets up an interlocking scheme for assurance of code compliance in which owners, builders, certifiers, territorial authorities and the Building Industry Authority have distinct responsibilities. There is nothing in the Act to suggest failure to exercise reasonable care by an agency with responsibility to play its distinct part in checking for compliance, if causative of loss to someone within its contemplation as liable to be harmed, does not give rise to civil liability. Indeed, the generally expressed limitation and immunity defences[21] (which are not confined to liability in respect of determinations or accreditation) suggest such liability was envisaged. This conclusion is consistent with the legislative history to be obtained from the report of the Building Industry Commission which preceded the Building Act 1991.

The legislative history provided by the report of the Building Industry Commission

[22] The scheme of the Act described in [13]–[21] is consistent with that proposed in the report of the Building Industry Commission, on which the legislation was based.[22] The Commission saw the Building Industry Authority as a national body which would provide "a single source for referral and review that does not exist in the present fragmented system":[23]

> It affords a centralised and readily accessible forum to which central and local government, the industry and the public can look for rulings on interpretation of the principles embodied in the Code and the need for amendment of control provisions and procedures.

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20 The Commission's report is discussed at [22].

21 Sections 89 and 91.

22 Building Industry Commission *Reform Of Building Controls: Volume 1 – Report To The Minister Of Internal Affairs* (Building Industry Commission, Wellington, 1990).

23 At [4.29].

[23] The Authority was to have the role of "monitor[ing] and direct[ing] the administration of the code" and approving the new and innovative "techniques and solutions", which were a principal aspiration of the reform.[24] It would have "powers of decision-making in matters of interpretation, approval and monitoring of the control system" rather than being an advisory body to territorial authorities or others affected.[25] It would rule on matters of code interpretation and approval of new products and procedures and techniques. The Commission envisaged that the Authority could be liable in negligence for loss caused to others if its decisions as to approval of new solutions or accreditations of new products and techniques were taken without proper care.[26] It was rather more doubtful as to whether the Authority would be liable in negligence in respect of its determinations as to code compliance**.** As I have indicated at [20], however, the subsequent legislation as enacted made it clear that claims in negligence could be brought in respect of determinations of code compliance.

[24] Not all the recommendations of the Commission were carried through in its draft legislation or adopted in the legislation as eventually enacted. But the system by which the Building Industry Authority was set up as an authoritative source of determinations, including about code compliance, was adopted. The expectation expressed by the Commission (that the Authority could be liable in negligence for loss caused in exercise of its functions without proper care) was adopted in the legislation.

The approach to strike out

[25] It is not necessary to traverse again the approach to exercise of the strike out jurisdiction.[27] It is enough for me to say of the peremptory procedure here adopted that a claim is not suitable for summary dismissal ahead of trial and before discovery unless, even on repleading,[28] it is clearly untenable as a matter of law (in which case the pleadings should be struck out) or unless there is a complete and incontrovertible

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24 At [4.30].
25 At [4.35].
26 At [4.37]–[4.39].
27 I have had occasion to review it in *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [35]–[38] and *McNamara v Auckland City Council* [2012] NZSC 34 at [80]–[82].
28 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31]–[32] and [114].

answer on the facts (in which case summary judgment may also be entered for the defendant).

The recognition of duties of care in cases not covered by existing authority

[26] Nor is it necessary to review at any length the principles applied in recognising duties of care in cases not covered by existing authority. They have been recently considered by this Court in *Couch v Attorney-General*[29] and *McNamara v Auckland City Council*.[30] I am content to follow the approach described by Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations*.[31] On that basis, whether a duty of care is owed "depends on a judgment, not a formula", requiring close consideration of all material facts in combination and turning on policy considerations as well as the likelihood and seriousness of foreseeable harm.[32] I do not think it necessary to review all factors that have been influential in other cases[33] because, as I explain at [58] below, I consider the claims are closely analogous to the line of authority confirmed in *Sunset Terraces* in relation to duties and responsibilities under the same statute.[34]

[27] Where a duty of care falls to be considered in a statutory context, the statute may cover "the field to the exclusion of the common law"[35] or it may be inconsistent with a private law claim (perhaps because the remedies provided in a statute leave no room for liability in tort).[36] Where however the statute does not exclude tortious liability, its terms in themselves may well provide sufficient relationship of

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29 At [41]–[72].

30 *McNamara v Auckland City Council*, above n 27.

31 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).

32 At 295.

33 In respect of which Kirby J has described the "cornucopia of verbal riches" that have been employed to identify when a duty of care is owed (invoking concepts such as vulnerability, power, control, generality or particularity of the class, the resources of and demands upon the public authority, the core or non-core functions or whether a matter is one of policy or of executive action "and so on"). See *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540 at [236].

34 *North Shore City Council v Body Corporate 188529*, above n 7, at [6] and [25].

35 *South Pacific*, above n 31, at 297 per Cooke P.

36 As in *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) Richardson J thought to be a consequence of the careful statutory apportionment of civil and criminal liability under the Securities Act 1978: at 530.

proximity between plaintiff and defendant. This is not to invoke "public law concepts".[37] The general principle is that public authorities are liable when they cause harm to others on the same basis as private individuals are liable, except where such liability would be inconsistent with the statutory scheme.[38]

[28] In the end, whether the defendant was under a duty of care to the plaintiff may be incapable of more helpful general encapsulation than that proposed in the High Court of Australia by Kirby J (who acknowledged some circularity) in *Graham Barclay Oysters Pty Ltd v Ryan*: a duty of care is owed if "a reasonable person in the defendant's position *could* have avoided damage by exercising reasonable care and was in such a relationship to the plaintiff that he or she *ought* to have acted to do so".[39]

The pleadings

(i) The first and second causes of action

[29] The first two causes of action, arising out of the Authority's 1995 review, overlap substantially. They differ in that the first is based on the exercise in 1995 of the Building Industry Authority's statutory power to review the Council's operations while the second, alleging negligent misstatement, is based on the Council's reliance on the report of the review, which was sent by the Authority to the Council (although it was not obliged to do so by the statute), in what the Council claims was an assumption of responsibility by the Authority upon which the Council was reasonably able to rely.

[30] The particulars given in the pleadings assert that no material inadequacies were discovered or reported by the Building Industry Authority in the North Shore City Council's processes. There was no recommendation of change in respect to inspection practices for monolithic style cladding construction, no identification of the "inherent danger of allowing fibrous cement sheets to be direct fixed to stud", no

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37 Compare *Sacramento* (CA), above n 5, at [47]–[49] per William Young J for the Court.

38 *The Mersey Docks and Harbour Board Trustees v Gibbs* (1864–1866) 11 HLC 686 at 711, 11 ER 1500 (HL) at 1510; the principle was applied in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1032 per Lord Reid and at 1036 per Lord Morris.

39 At [240].

identification of the "inherent danger of allowing untreated timber to be used in residential construction", no identification of "the inadequacy of allowing face fixed joinery" or the inadequacies "associated with allowing sealant in lieu of mechanical flashings as an acceptable solution under the Building Code" and no identification of "the need for a cavity [for ventilation] in monolithic clad buildings".[40] Nor did the review "identify the need for the Council to have in place a system of inspections that would adequately identify breaches in the building code."[41] These were later matters in respect of which the performance of the Council was subjected to criticism in a subsequent report, written in 2003 after the scale of the leaky building problem had received publicity. The Council claims that, in the meantime (and during the period of construction of The Grange), it reasonably treated the Authority's 1995 review[42] as having given its processes in ensuring code compliance a "clean bill of health". The Council says that, if warned of the inadequacies later identified in 2003, it would have taken steps to set in place appropriate checks which would have revealed the non-compliance that led to its liability to the owners of The Grange.

(ii) The third cause of action

[31] The third cause of action contains the significant additional pleading that:[43]

> Prior to the issue of building consent and/or issue of a code compliance certificate in respect of the Grange, the BIA was aware or should reasonably have been aware of the issues and concerns referred to in paragraph 68.1 to 68.8 above.

[32] The "issues and concerns referred to in paragraph 68.1 to 68.8 above" are those particulars I have summarised in [30].

[33] The allegation of knowledge of deficiencies in achieving code compliance in respect of monolithic face-fixed cladding attached to untreated timber frames lacking adequate ventilation cavities is supported in the affidavits by reference to correspondence and papers supplied to the Building Industry Authority from 24 April

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40 Amended Statement of Claim by First Defendant Against First, Second, Third, Fourth and Fifth Parties at [68.2]–[68.7].

41 At [68.8].

42 Which was consistent with a subsequent report undertaken by the Authority in 2001.

43 At [77].

1998 until 27 July 2000. The pleadings claim that as a result of the information supplied to the Building Industry Authority about leaky buildings "and as a result of BIA's own building knowledge":[44]

> [T]he BIA knew or ought to have known that construction of residential buildings in a manner the same as or similar to The Grange would result in water ingress and/or non-compliance with the building code.

[34] In the third cause of action it is alleged that the Authority failed to advise the Council that its "clean bill of health statements were incorrect in 1998/1999 by which time it was aware or should reasonably have been aware of that fact". As a result it is said that the Council "reasonably continued to rely on the clean bill of health statements ... up to and including the times at which it issued a building consent and code compliance certificate in respect of The Grange" as the BIA knew or ought to have known it would do.[45] In this it is claimed that the BIA "failed to exercise the skill and care that could reasonably be expected of the expert body responsible for the administration of the Act" and that, if the Council is liable to the plaintiffs, such liability arose "or was contributed to by the BIA negligently failing to correct the clean bill of health statements".[46]

[35] By the third cause of action therefore it is claimed that the Authority was aware of the problems arising out of the fixing of monolithic cladding before the building consent was given for construction of The Grange and before a final certificate of code compliance was given for it. Despite having such knowledge, it is claimed that the Authority failed to correct the impression given in its earlier report that the Council processes were adequate to ensure code compliance. The Authority's failures to correct the impression earlier given or to warn the Council are claimed to have been in breach of a duty of care owed to the Council.

(iii) The fourth cause of action

[36] The fourth claim brought by the Council is that the Authority owed the plaintiff owners "a duty to perform its functions with the skill and care that could

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44 At [77.2].
45 At [79]–[80].
46 At [81]–[82].

reasonably be expected of the expert body responsible for the administration of the Act, and to use reasonable skill and care to ensure that its performance of its functions was consistent with the objectives of the Act".[47] In particular such reasonable care and skill was a duty owed to the owners when the BIA:

- Advised the Minister on matters relating to building control (s 12(1)(a));
- Approved documents for use in establishing compliance with the provision of the building code (s 12(1)(b));
- Disseminated information and provided educational programmes on matters relating to building control (s 12(1)(g));
- Conducted reviews of the operations of the territorial authorities (s 12(1)(d)).

[37] It is claimed, again, that the Authority had received the information detailed in the particulars (summarised in [30] above) which identified that it was inappropriate to use untreated timber framing and that there were deficiencies with monolithic cladding systems "of the type recorded on the plans lodged with the council and constructed at The Grange".[48] Because of the Authority's knowledge of the deficiencies as pleaded and because of "the BIA's own building knowledge" it is claimed that the Authority "knew or ought to have known that construction of residential buildings in a manner the same as or similar to The Grange would result in water ingress and/or non-compliance with the building code".[49]

[38] The BIA is said to have breached its direct duty of care to the owners by, among other things:

> 87.1 Failing to advise the Minister that the use of untreated kiln dried radiata timber and monolithic cladding systems such as the cladding system used in The Grange, breached the provisions of the building code and should not therefore be permitted in their then approved form.

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47 At [84].
48 At [85].
49 At [86].

> 87.2 Failing to approve a document which had the effect of ensuring that untreated timber and monolithic cladding systems complied with the provisions of the building code. Such a document could have required that the timber framing be waterproofed and any monolithic cladding system included a dried and ventilated cavity.
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> 87.3 Failing to publish or disseminate information concerning untreated timber and monolithic cladding systems to those parties in the building industry who use such products, with the result that contractors and other affected parties did not change their practices so as to use products which complied with the building code.
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> 87.4 Failing to take all reasonable steps (such as those detailed above) which were necessary to achieve the purposes of the Building Act 1991 and the Building Code.
>
> 87.5 Failing to properly review the practices and procedures of the Council as set out in paragraphs 57 to 68 above.

[39] It is claimed that if it had not been for this breach of the direct duty of care owed to the plaintiff owners, then:

> 88.1 The plaintiffs, the building industry and the territorial authorities would have been made aware of the systemic failure now attributable to monolithic clad building such as the development at The Grange;
>
> 88.2 The Council would not have issued a building consent and code compliance certificate in respect of The Grange;
>
> 88.3 The plaintiffs would not have suffered the loss for which they now claim.

[40] The Council therefore claimed contribution or indemnity for its liability to the owners from the Building Industry Authority pursuant to s 17(1)(c) of the Law Reform Act 1936 on the basis that the Building Industry Authority was, with it, a joint tortfeasor.

The issues on the appeal

[41] The issues for determination on the appeal are whether the statutory scheme and the circumstances of the 1995 report, either alone or in combination, placed the Authority and the Council in sufficient proximity to found a duty of care for the first three causes of action. In the third cause of action, the combination of circumstances relied on also includes the claimed knowledge by the Building Industry Authority by 1998 of the failures in achieving standard E2. The issue in relation to the fourth

cause of action is whether in the circumstances of the statutory scheme, the 1995 report, and the claimed knowledge of the Building Industry Authority as to the risk associated with the type of construction used in buildings like The Grange, a duty of care was owed to owners.

(i) The 1995 review must be treated as materially deficient

[42] The 1995 review examined six sample building works (one of which was a building with monolithic cladding). The reviewers reported that they had not found errors requiring correction before a code compliance certificate was issued and that "compliance to the Building Code had been satisfactorily achieved".[50] It must be accepted for the strike out determination that in the 1995 review the Building Industry Authority carelessly failed to identify material deficiencies in the inspection procedures followed by the Council. Whether that is so cannot be resolved without evidence. The Solicitor-General acknowledged as much in argument.

[43] At trial it might be expected that the conclusions of the report (that there were no errors in the Council's inspections for code compliance) would be tested against actual compliance to check whether the review was adequate. They could also be expected to be tested against the review conducted by the Building Industry Authority in 2003, which was highly critical of the Council and specifically identified the consent scrutiny and inspection for compliance with the weather-tightness standards as being deficient. The 2003 review criticised the checklists used by the Council for building consents and inspections (which were said to be "not robust enough to address current construction methodology"),[51] lack of a clear policy as to "how weathertightness compliance will be verified",[52] the adequacy and frequency of inspections for weather-tightness compliance, inconsistency of approach, and inadequate audit.[53] No doubt there is much in the 2003 review that is prompted by the understanding then current, but the discrepancy with the 1995 report in relation to the Council's processes may require explanation.

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50 Building Industry Authority *Review Of Technical Operation In Relation To The Issuing Of Building Consents: Report For North Shore City Council* (October 1995) at 6.

51 Building Industry Authority *Technical Review Of North Shore City Council* (July 2003) at 4.

52 At 6.

53 At 4–5.

[44] For the purposes of summary disposition, however, the Building Industry Authority's 1995 review must be treated as having passed practices which were not adequate to discover non-compliance with standard E2. It is necessary to accept for present purposes that the pleaded errors were made in the report and that, if a duty of care was owed by the Authority to the Council, the Authority was in breach of any such duty of care.

(ii) Was the Council entitled to rely on reports of the Building Industry Authority under s 12?

[45] All causes of action claim that the Building Industry Authority failed to identify deficiencies in the processes being followed by the Council in inspecting buildings for compliance with the building code. The background is the open-ended performance standards specified by the code under standard E2, in which the judgments being exercised on inspection were critical to achieving the standards.

[46] Whether under the statutory scheme it was reasonable for territorial authorities to treat the Authority's reports as some assurance for the purposes of their own functions bears on proximity (and therefore duty of care) and may be critical to causation of loss. It is the crucial issue on the appeal. For the reasons given in [58]–[74] I conclude that the statutory scheme is supportive of a duty of care imposed on the Authority to territorial authorities in undertaking reviews and in reporting on them. The purpose of such reviews must be seen in the context of the open-ended performance standards provided by the legislation and the setting up of the Authority as the expert body to provide national standards instead of the earlier fragmented approach referred to by the Commission. Since performance standards entailed judgment, assurance that the territorial authority was approaching such assessments correctly and in conformity with the approaches of other territorial authorities will have been of great importance to each territorial authority.

(iii) Could the 1995 report reasonably have provided assurance to the Council?

[47] In addition to their view that there was insufficient relationship of proximity in relation to the report between the Authority and territorial authorities based on the statutory responsibilities of each, other members of this Court consider that the

report in its terms could not reasonably have been relied on by the Council as indicating that its procedures were adequate. This consideration properly seems to be directed at a conclusion that any deficiency in the 1995 review was not causative of the claimed loss. I do not think it is possible to be confident that this question of fact can properly be resolved without any contextual inquiry. More importantly, I do not think the terms of the report exclude the reasonable inference that the Council was fulfilling its statutory responsibilities adequately.

[48] It is true that the 1995 report identified some areas in which the Council's discharge of its responsibilities could be improved. It recommended an internal audit system to monitor performance in ensuring code compliance and it commented that the field inspectors appeared to be "short of resource".[54] It also identified some shortcomings in respect of inspection of compliance with manufacturers' installation instructions and approved documents.[55] It may therefore be an overstatement to say, as the pleadings do, that the report on the review provided the Council with a "clean bill of health". But it certainly did not ring any alarm bells about the critical question in issue (inspection for compliance with standard E2) and, overall, the outcome of the report was reassuring and may well reasonably have been taken to suggest to the Council that it was on track. Nothing flagged any issue around deficiencies in inspection which might have averted the catastrophic failures that ensued in relation to weather-tightness and which were identified in the 2003 report. I do not think the claimed reliance on the report as providing reassurance to the Council can be summarily rejected. Whether it was reasonable in the particular circumstances is not something we are called upon to decide ahead of trial.

[49] Whether the Council could reasonably have continued to rely in 1998 on the report as giving it assurance that its approach was adequate is a subject for investigation on the evidence at trial. It may ultimately turn on what was known by the Council itself in 1998 about failures to comply with standard E2. For present purposes it is sufficient to say that I do not think the question can be peremptorily

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54 Building Industry Authority *Review Of Technical Operation In Relation To The Issuing Of Building Consents: Report For North Shore City Council*, above n 50, at 10.

55 At 10.

decided against the Council on the basis of the terms of the report. It is I think arguable that the report created or contributed to the risk that eventuated.

(iv) The claimed duty of care to owners

[50] The issue in relation to the fourth cause of action is whether in the circumstances of the statutory scheme, the 1995 report, and the claimed knowledge of the Building Industry Authority as to the risk associated with the type of construction used in buildings like The Grange, a duty of care was owed to owners. For the reasons given in [85]–[89] I conclude that such duty cannot be excluded. In reaching a different view, the Courts below followed the recent decision of the Court of Appeal in *Sacramento* and added little additional reasoning. It is therefore necessary to deal directly with that decision. Since the reasoning adopted in *Sacramento* also impacts on the first three causes of action and was relied on in respect of those claims by the Court of Appeal, it is convenient to refer to *Sacramento* before dealing with the reasons why I would reinstate all causes of action.

Sacramento

[51] In *Sacramento* the claim was brought by a building certifier against the Building Industry Authority for damages arising out of the certifier's liability to building owners of a leaky apartment building. The issue, as in the fourth cause of action here, was whether the Building Industry Authority owed duties of care to the owners. The Court of Appeal took the view that, if it owed a duty of care, it was "at least arguable (on the basis of what we have seen) that the BIA was negligent".[56] It accepted that the Authority "could have foreseen that adoption by the building industry of defective building systems had the potential to cause substantial economic loss".[57] It accepted further that the Building Industry Authority had the ability to:

> put an end to (or at least limit) practices which were producing outcomes which did not conform to the building code. It could have achieved this in

[56] *Sacramento* (CA), above n 5, at [59].
[57] At [58].

> various ways, either by its use of its specific statutory powers (for instance, by promoting an amendment to the building code, under its s 17 jurisdiction to determine disputes or perhaps by way of review of the operation of building certifiers) or alternatively by disseminating information under its general s 12(g) power.[58]

It might well have been the case that the Building Industry Authority could and should have acted more promptly. Nevertheless, the Court of Appeal took the view that the Authority was under no duty of care to building owners, considering that there was insufficient proximity for four principal reasons:

- The relationship between the Building Industry Authority and the building owners was "extremely limited".[59]

- Responsibility rested "far more directly" on the developers, designers, builders and code compliance certifiers than on the Building Industry Authority.[60]

- The report of the Building Industry Commission (on which the 1991 Act was based) envisaged building owners being responsible and it was "difficult to see building owners as being particularly vulnerable to inaction on the part of the BIA".[61]

- Inaction on the part of the BIA in relation to a particular building system could not fairly be taken as amounting to a warranty that the building system produced code-compliant outcomes. Where such a warranty (in substance) was to be given, specific statutory processes (as to approved solutions or accreditation) were provided for.

- Analogous cases were against the imposition of a duty of care. The closest analogy was thought to be the decision of the High Court of

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58 At [58].
59 At [61(a)].
60 At [61(b)].
61 At [61(c)].

Australia in *Graham Barclay Oysters*.[62] It was said that "the drift of judgments in that case are very much against the body corporate".[63]

[52] The Court of Appeal also considered that policy reasons would militate against liability, even if sufficient proximity had been found:

- Many of the roles of the Building Industry Authority under the legislation were "of a quasi-legislative or quasi-judicial nature", "largely off limits in terms of imposing duties of care" and in the case itself a "strong pointer against the imposition of a duty of care".[64]

- The Act set up a division of responsibilities. Where building certifiers were involved, "their certificates were conclusive"[65] (as, here, the certificate of the territorial authority was conclusive):

> There is no indication in the 1991 Act, or in its precursor report, to suggest that the BIA had a long-stop liability where building certifiers had negligently certified compliance. The imposition of such long-stop liability would have incentivised the BIA to adopt a vigilant approach to the approval of certifiers and their insurance arrangements which may have made it impracticable for building certifiers to operate. Such a consequence would have been contrary to the purpose of the Act.

- Since the primary complaint was of lack of action, "[a] positive duty of care extending to general superintendence over the building industry in New Zealand would have significant resource implications which would, in all probability, require the Courts to review the reasonableness of the resources allocated to the BIA by the responsible ministers".[66]

[53] Dealing with what it described as "[t]he alleged situational duty" (in which it was contended that the Authority's knowledge of the leaky building syndrome created or contributed to the existence of sufficient proximity, in similar manner to

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62 *Graham Barclay Oysters Pty Ltd v Ryan*, above n 33.
63 At [61(d)].
64 At [62(a)].
65 At [62(b)].
66 At [62(c)].

the claims in the present case in respect of the third and fourth causes of action)[67] the Court of Appeal acknowledged that if the Building Industry Authority was on notice of the failure to meet the code "but just sat on its hands":[68]

> [T]his would have involved a significant error of judgment and a major departure from legitimate expectations as to how even a light-handed regulator might be expected to behave.

[54] Although it was "tempting" in those circumstances to conclude that the conduct attributed to the Authority was outside the scope of what the legislature intended (so that a duty of care would not be inconsistent with the Act), the Court considered that it was "'trite' that maladministration by a public body is not in itself a ground for awarding damages".[69] The Court considered the proximity considerations already referred to were applicable to the situational duty as well as to the alleged "overarching duty".[70] It added that similar argument as to situational duties would not be confined to face-fixed monolithic cladding over untreated timber but "could be raised in relation to any building system (or product, builder, territorial authority or building certifier for that matter) about which (or whom) complaint had been made to [the Authority]. As well, the ability of the BIA to respond to concerns about the use of face-fixed monolithic cladding systems over untreated timber framing was limited and would have required decisions to be made as to the allocation of resources".[71] The Court of Appeal drew heavily on the majority judgment in *Fleming v Securities Commission* in this connection[72] and in concluding that the argument as to the "situational duty alleged" was untenable.[73]

[55] I am able to summarise here my disagreement with the reasons given in *Sacramento* (as it is necessary for me to return to the points in support of my eventual conclusions below):

- As will be apparent from the discussion of the statute (and as is further developed at [85] below), I do not agree that the relationship between the

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67 At [67].
68 At [68].
69 At [69].
70 At [69].
71 At [69].
72 *Fleming v Securities Commission*, above n 36, at 525–533 per Richardson J.
73 At [70]–[71].

Building Industry Authority and owners is "extremely limited".[74] I consider that the statute sets up a system of assurance which establishes proximity between building owners and those with responsibilities under the Act (as was recognised by this Court in *Sunset Terraces*).[75]

- The fact that others (such as developers, designers, builders and certifiers) may have primary responsibility or (in the case of certifiers who are part of the statutory assurance scheme) prior responsibility does not preclude recognition of a relationship of sufficient proximity.[76]

- The report of the Building Industry Commission (as discussed at [22]–[24]) envisaged that the Authority would owe duties of care in respect of its formal determinations, which could be sought by owners as well as territorial authorities and certifiers. The Act also recognises, more generally, that common law remedy in tort is available against the Authority.[77] Here, the claims are concerned with actions taken by the Authority in reviewing the performance of the Council and inaction by failure to correct its 1995 report when it knew of the particular risk (pleaded in respect of the third and fourth causes of action). Neither set of claim (with or without knowledge of the risk) seeks to hold the Building Industry Authority to a "warranty" of code compliant outcomes.[78]

- *Graham Barclay Oysters* is not an authority in point in respect of the present claims. In *Graham Barclay Oysters* the claim against the local authority was for failure to exercise a wide statutory power conferred for general protection of the public and in circumstances where there was no known risk.[79] It does not compare with the detailed responsibilities, including supervisory responsibilities in respect of territorial authorities,

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74 Compare *Sacramento* (CA), above n 5, at [61(a)].

75 See above n 7.

76 *City of Kamloops v Nielsen* [1984] 2 SCR 2 [*Kamloops*] at 15 per Wilson J. See also *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 758–759 per Lord Wilberforce and 767–768 per Lord Salmon. And see [60] below.

77 Section 91.

78 Compare *Sacramento* (CA), above n 5, at [61(c)].

79 There had been no previous outbreak of hepatitis to suggest risk to those consuming oysters. See below n 128, at [10] per Gleeson CJ. See also [40] per Gleeson CJ, [99] per McHugh J, [154] per Gummow and Hayne JJ, [250] per Kirby J, and [327] per Callinan J.

imposed on the Building Industry Authority here. Nor did the statute in *Graham Barclay Oysters* contemplate liability in tort, as the Building Act 1991 did.

[56] Similarly, I do not agree with the policy reasons upon which in *Sacramento* a duty of care would also have been rejected:

- I doubt whether classifying the functions performed by a public body as "quasi-legislative" or "quasi-judicial" is the right way to approach questions of duty of care.[80] Indeed, the functions conferred on the Building Industry Authority which arguably would attract those labels are ones in respect of which the legislation specifically provides for tortious liability (determinations and accreditation, which may be seen to have overtones of adjudication and legislation respectively). It seems to me preferable to avoid such classification and the view that there are "no go" areas for tortious liability.[81] But, more importantly, I do not think the functions and powers of the Authority, and particularly those in issue in the pleadings, are properly so classified. The Authority itself was an important part of the system of checks adopted by the legislation. And its functions are operational and routine, rather than involving high policy development.

- The division of responsibilities under the Act overlapped, but that is not inconsistent with the distinct liability of each of those with responsibilities. The liability of the Authority for its own actions did not impose on it "long-stop" liability for the negligence of others,[82] for the reasons discussed at [60]. This is in substance the same argument as is made in relation to proximity and is contrary to the authorities I have cited in footnote 76.

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80 *Sacramento* (CA), above n 5, at [62(a)].
81 As Lord Nicholls suggested in *Stovin v Wise* [1996] AC 923 (HL) at 938.
82 *Sacramento* (CA), above n 5, at [62(b)].

- The duty contended for here does not extend to "general superintendence over the building industry in New Zealand".[83] Moreover, if a duty of care is otherwise appropriate, the cost of liability is not reason to reject it in the case of a public authority such as the Building Industry Authority. Such costs must be borne by private tortfeasors and, under the Building Act, by territorial authorities. (A similar point was made by Cooke P in *Fleming*,[84] and by Gleeson CJ in *Graham Barclay Oysters*.[85])

- This is not, as is suggested, in *Sacramento*, to impose liability for "maladministration".[86] It is liability in tort for loss carelessly caused by a body with statutory responsibilities that bring the plaintiff into sufficient relationship with the statutory body.[87]

The causes of action are not untenable

[57] I consider that the scheme of the Building Act and analogy with existing authority make it impossible to reject any of the four claims as untenable. I refer first to the general considerations common to the three causes of action based on duties owed to the Council before referring to the additional claim of knowledge in relation to the third and fourth causes of action and the additional circumstances applicable to the claim based on duty of care owed by the Authority directly to owners. I consider that the claim of knowledge of risk on the part of the Building Industry Authority, which is cumulative on the considerations attaching to the first and second causes of action, adds to the strength of the claimed duty of care under the third and fourth causes of action. I also take the view that the claim based on a duty to owners is closely analogous to the recognised duties of care owed by territorial authorities to owners and properly attaches to the Building Industry Authority's distinct functions under the Act. I deal separately with these distinct additional considerations which are cumulative on the considerations applying to all causes of action. I address them in this section under nine subheadings.

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83 At [62(c)].
84 *Fleming*, above n 36, at 519.
85 *Graham Barclay Oysters*, above n 33, at [14].
86 At [69].
87 Of the kind accepted in *Couch*, above n 26, and *Sunset Terraces*, above n 7.

(i) The liability in negligence of the Building Industry Authority is analogous to the established liability of territorial authorities within the same legislative framework

[58] The regulatory scheme of the Act has not been held to be in itself inconsistent with the tortious liability of public authorities acting under it in supervising building work. Claims by those owners affected by the careless discharge of the statutory responsibilities of territorial authorities were confirmed by this Court in *Sunset Terraces*.[88] Under the Building Act 1991, responsibilities for assuring code compliance are distributed between the Building Industry Authority and territorial authorities. If, as is established, territorial authorities are in sufficient relationship of proximity to owners affected in the exercise of its functions to be under a duty of care to them, there is little stretch from existing authority if, similarly, the Building Industry Authority may be in sufficient relationship of proximity to those foreseeably harmed by careless discharge of its functions. Such functions are directed to the same end as the functions discharged by territorial authorities: achieving code compliance. I deal in what follows with the view that the relationship between the Building Industry Authority and territorial authorities and owners is not comparable to the relationship between territorial authorities and owners, but the present point is that the recognition that those with statutory responsibilities are under duties of care is not novel in this statutory context. It can therefore be contrasted with those cases in which claims by individuals or classes of the public have foundered because the statute relied on as establishing a relationship of sufficient proximity has been held to be concerned with protection of the public as a whole and for which public agencies exercising powers under it are accountable only through the political processes or under distinct statutory regimes of accountability.[89] The Building Act 1991 is not such a statute.

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88 Above n 7, at [6] and [25].

89 See, for example, *Fleming*, above n 36, at 530.

(ii) The statute does not expressly or by implication exclude liability in tort

[59] The Building Act, unlike for example the securities legislation considered in *Fleming*,[90] does not exclude liability in tort by setting up a system of criminal and civil remedies which leaves no room for tortious claim. Indeed, so far from excluding liability, the Act specifically envisages and provides for liability in tort for those discharging responsibilities under it: the Building Industry Authority, territorial authorities, and certifiers.[91] While specific provisions indicate that the Building Industry Authority may be liable for breach of care in accreditation of products and in determinations of code compliance (on referral in cases of doubt), such specific reference removes doubt about the appropriateness of subjecting those particular functions to liability in tort. They do not detract from the general reliance on tortious responsibility assumed by the limitation provisions and in the immunities (which in the case of the Authority are not confined to liability in respect of determinations or accreditation, suggesting wider exposure).[92] Nor is there any obvious policy which might make it appropriate for the Authority to be liable in respect of its determination and accreditation functions (those most analogous to judicial and legislative functions) and not others.

(iii) The claim against the Authority is in respect of its own functions

[60] The claims do not seek to impose on the Authority a "long-stop liability" for the carelessness of the Council or certifiers or owners, as the Court of Appeal in *Sacramento* suggested.[93] It is the consequences of its own acts or omissions which are claimed to make the Authority liable for the materialisation of harm reasonably foreseeable. For the same reason, the liability of the Authority does not cut across the functions or responsibilities (and separate liability) conferred upon territorial authorities, even where there is overlap. Despite the territorial authority's powers and responsibilities to make inquiries and intervene to ensure code compliance within its district, it was entitled to look to the Authority to co-ordinate national

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90 Securities Act 1978.
91 See s 91(3)(a).
92 Section 89.
93 At [62](b)].

information and standards, as the Building Industry Commission report had envisaged[94] and as the scheme of the statute required. I do not overlook the fact that the legislation does not require report by the Building Industry Authority to territorial authorities reviewed. Such report is however implicit in the function contained in s 12 and consistent with the scheme of the Act. In the present case, of course it was a responsibility assumed by the Authority. The terms of the report described its purpose as being to establish how selected territorial authorities were "coping with the Building Act requirements" and proposed "results and conclusions of the review work would be made available to the Territorial Authorities to assist them in evaluating their own internal procedures and to assist with the achievement of national uniformity and the increased efficiency envisaged by the Building Control Reforms".[95]

[61] Nor does it matter that the primary responsibility for achieving code compliance may have been that of a third party, the builder. The statute sets up a system of assurance so that deficiencies by builders are picked up and corrected. The point was made in the Supreme Court of Canada by Wilson J in *Kamloops*.[96] There, too, a public body was liable in tort to the owner for errors discharging its responsibility to vet the work of the builder and protect the owner from the builder's negligence:[97]

> The builder's negligence, it is true, was primary. He laid the defective foundations. But the City, whose duty it was to see that they were remedied, permitted the building to be constructed on top of them. The City's negligence in this case was its breach of duty in failing to protect the plaintiff against the builder's negligence.

[62] In the same way, I do not think the fact that the territorial authority itself owes a duty of care to owners absolves the Authority of its own responsibilities. If they are imposed to guard against the very eventuality which occurs, breach of the duty properly gives rise to liability to those who suffer it. The fact that others may be liable does not absolve the Building Industry Authority of liability for its part

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94 Building Industry Commission *Reform Of Building Controls: Volume 1 – Report To The Minister Of Internal Affairs*, above n 22, at [4.29].

95 Building Industry Authority *Review Of Technical Operation In Relation To The Issuing Of Building Consents: Report For North Shore City Council*, above n 50, at [1.02].

96 See above n 76.

97 *Kamloops*, above n 76, at 15.

under a statutory system of checks. If they are imposed in part to provide reasonable assurance to territorial authorities and ultimately to owners (as the scheme of the statute and the legislative history here suggest), overlapping liability is consistent with the statutory purpose and sets up the relationship of proximity between those with responsibilities.

(iv) The Building Industry Authority had operational responsibilities

[63] It cannot be determinative, in the interlocking assurance provided by the scheme of the Act, that the Building Industry Authority, unlike territorial authorities, had no powers to intervene in particular building work. It had the powers to support its own statutory functions which included providing information[98] and which were sufficient to discharge its duty of care. The scheme of the Act gave the Authority powers in relation to the provision of information and supervision of the discharge of the statutory functions of the territorial authorities,[99] which did have such powers to intervene. Careless supervision which allowed territorial authorities to believe that the inspection regime they had adopted was adequate to ascertain non-compliance with the performance standards of the code or failure to pass on information relevant to the exercise of the powers of intervention conferred upon territorial authorities could well deprive territorial authorities of information they needed to discharge their own functions. Depriving them such information or giving them a wrong steer on compliance with the performance standards of the code was inconsistent with the system of interlocking assurance provided by the scheme of the Act and could foreseeably cause loss to territorial authorities and ultimately owners.

(v) Failure to perform its functions with care precluded recourse to code determinations

[64] Territorial authorities, certifiers, and owners were able to obtain authoritative determinations from the Building Industry Authority where there was doubt about code compliance.[100] This was important because the building code contained a number of performance standards, in which detailed prescription of materials and

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98 Section 79.
99 See ss 12(1)(g) and 12(1)(d). See also s 79.
100 Section 17.

methods (such as had been the approach of earlier statutory regulation of the building industry) was replaced by statements of specified outcomes. The Building Industry Authority supplemented this regulation through its power to specify "acceptable solutions", compliance with which was accepted to achieve the more general performance standards of the code and which could be relied upon by territorial authorities, certifiers and those responsible for building work without the need for further assessment.[101]

[65] Both performance standards set by the code and some of the "acceptable solutions" set by the Building Industry Authority entailed the exercise of judgment in assessing compliance with specified outcomes. Checks of the performance of the territorial authority's inspection responsibilities as required by s 12(1)(d) therefore in turn required some assessment of the judgments being made by the territorial authority and in respect of which it was entitled on the system set up by the Act to look to the Authority for authoritative direction. This is not to suggest that the Authority was responsible for giving general advice to territorial authorities (a function the Commission had rejected). It meant, however, that in discharging its formal statutory functions it could be relied upon. And in cases of doubt, the territorial authority or the owner could obtain a determination which absolved it of responsibility for assessing code compliance.

[66] A careless report that the territorial authority was assessing the performance standards appropriately (as is arguably the effect of the 1995 report) could conceal questions of doubt which, if acknowledged, might have enabled the territorial authority to seek a determination.

[67] It is not correct to say that the Building Industry Authority was remote from actual building work. Its decision-making powers meant that it was concerned with code compliance in actual cases where questions of doubt arose.[102] And its powers to prescribe acceptable solutions were practical powers not rightly seen as high level policy development such as might properly inhibit imposition of a duty of care.[103]

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101 Section 12(1)(b); see also s 50.
102 Section 17.
103 Sections 12(1)(b) and 49.

The Authority did have control of what mattered. The allegations in the present claim are of failings in respect of its operational duties and responsibilities.

[68] The present case is very different from the Securities Act regime under consideration in *Fleming*, an authority relied upon in *Sacramento*[104] (and in the reasons of the Court of Appeal).[105] In *Fleming*, the argument for liability (that the Securities Commission should have intervened to prevent publication of non-complying public advertisements) would have turned the Commission into a guarantor of the "general probity of advertisements" in the absence of any statutory foundation for a specific responsibility in relation to such advertisements owed to potential investors.[106] The scheme of the Building Act is different because of the nature of the controls and functions exercised by the Building Industry Authority over an area of specialist knowledge and directed at the administration of code compliance in building work.

(vi) If the Building Industry Authority owes no duty of care there is an unaccountable gap in responsibility

[69] If the Building Industry Authority does not owe a duty of care in the exercise of its functions to those directly affected (and who are specifically contemplated by the statute as being directly affected), there is a gap in the system of accountability in the Act. No legislative policy suggests that territorial authorities and the Building Industry Authority should be treated so differently for the purposes of liability arising out of the exercise of their statutory responsibilities under the Building Act. As discussed at [20]–[21] above the liability of the Building Industry Authority in tort for its determinations is envisaged in the limitation and immunity provisions of the Act.

[70] The fact that the Act contemplates the Authority will be liable in tort for carelessness in its determinations[107] (while shielding territorial authorities, certifiers,

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104 At [45]–[46] and [70].

105 *Attorney-General v North Shore City Council [The Grange]* (CA), above n 1, at [51] (footnote 81) and [58] (footnote 87).

106 *Fleming*, above n 36, at 530 per Richardson J.

107 Section 91(3)(a).

and owners if they rely in good faith on the Authority's determination)[108] is an indication that the statutory scheme treats owners, certifiers, and territorial authorities as being in a relationship of proximity with the Authority arising out of that function sufficient for the purposes of a duty of care. It is difficult to see any basis on which liability can be said to be clearly untenable on strike out if foreseeable harm is occasioned to any of these affected people through discharge of the other functions of the Authority. The statute sets up the necessary proximity.

(vii) Liability of the Building Industry Authority sets up no conflict with the purposes of the Act

[71] Nor would liability set up a conflict with the purposes of the Act. Here, the Act requires code compliance, to the end that there is assurance of the structural integrity of the building work undertaken to that standard. Given that all with responsibilities under the Act are working to the same end, there is no question of the Building Industry Authority being inhibited through exposure to tortious liability in carrying out its statutory responsibilities, including that of reporting on the discharge of the responsibilities of territorial authorities.[109]

[72] The Act requires code compliance, but no more than is necessary to achieve it.[110] A duty of care on the Building Industry Authority in playing its part does not therefore set up a clash with the purpose of the Act in minimising regulatory cost. Liability in tort in such circumstances is wholly consistent with the statutory purpose. Indeed, without such liability, territorial authorities might be pushed to excessive caution, substituting effectively an additional layer of local regulation. That would be contrary to the policy of the Act that a national code would supply the standards, and would potentially add to the costs of regulation, duplicating effort, and undermining the role envisaged for the Authority by the Commission in providing "a single source for referral and review that does not exist in the present fragmented system".[111]

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108 Section 50.
109 *Attorney-General v North Shore City Council [The Grange]* (CA), above n 1, at [53].
110 Section 7(2).
111 See [22] above.

(viii) The Authority was set up to protect against the very risk that eventuated

[73] The risk of damage through failure to achieve code compliance for moisture was a real risk, not one that would not influence the mind of a reasonable person.[112] Although in *Sacramento* such consideration was deprecated as "reasoning backwards" from breach,[113] I do not think such criticism is valid.[114] The fact that the risk was not fanciful and was the very type of eventuality the Act and the functions assigned to the Building Industry Authority were designed to guard against is I think a factor pointing towards the existence of a duty of care. The duty and the statutory purposes are consistent with responsibility and liability.

(xi) Policy considerations

[74] I touch on some additional considerations which weighed with the Court of Appeal in holding that a duty of care was untenable. Some factors could equally or preferably be considered as bearing on breach. As I mentioned in *Couch*, where liability for negligence is determined at trial it may not matter whether questions of policy are considered as going to duty of care or its breach.[115] On strike out on a threshold question of duty of care, however, it may matter a great deal.[116] The policy factors held by the Court of Appeal to count against a duty of care[117] are factors which may well be best assessed when considering breach. In referring to policy factors some repetition is inevitable because of the overlap between factors bearing on proximity and policy.

- The imposition of a duty of care and potential liability in negligence does not cut across established principles of law in fields other than negligence

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112 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 (PC) at 642 per Lord Reid.

113 *Sacramento* (CA), above n 5, at [43]–[46].

114 *Couch v Attorney-General*, above n 28, at [42].

115 At [43].

116 *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) at 586–587 per Lord Hutton; see also Sir Nicholas Browne-Wilkinson VC in *Lonrho Plc v Tebbit* [1991] 4 All ER 973 (Ch) at 985, affirmed by the Court of Appeal in [1992] 4 All ER 280 at 287.

117 At [53]–[58].

or statutory defences or alternative provisions for relief (as was the case in *Fleming*[118] and in *South Pacific*[119]).

- As already indicated in [71], I am unable to accept the view expressed by the Court of Appeal that the imposition of a duty of care should be declined for policy reasons because the prospect of liability would inhibit the free flow of advice from the Authority to the Minister.[120] The review and reporting functions of the Building Industry Authority are a practical check on the exercise of the functions of the territorial authority, directed to the same end as the functions undertaken by the territorial authority: code compliance. There is no conflict in the ends pursued which might inhibit proper review or reporting. And a principal feature of the role of the Authority in the system of administration provided by the Act is to provide assurance to owners and to territorial authorities in the performance of their functions.

- Nor do I accept the significance the Court of Appeal attached to what it described as the "quasi-judicial functions" of the Building Industry Authority,[121] in application of a characterisation adopted in *Sacramento*.[122] I do not think such characterisation should mark off a "no go" zone for liability in tort.[123] But in any event I do not think it accurate in its application to the Authority which was set up to have a central role in the operation of the Act (as the Building Industry Commission had envisaged)[124] and with the functions of disseminating information and providing authoritative determinations and acceptable solutions. The tortious liability recognised by the Act in respect of determinations and accreditations is contrary to such immunity for reasons of policy.

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118 A point made there by Richardson J, above n 36, at 529–530.
119 Above n 31, at 304: where liability would have cut across defences in the law of defamation.
120 At [53].
121 At [53].
122 At [62(a)].
123 *Stovin v Wise*, above n 81, at 938 per Lord Nicholls.
124 Building Industry Commission *Reform Of Building Controls: Volume 1 – Report To The Minister Of Internal Affairs*, above n 22, at [4.29].

- Although there was speculation in the reasons of the Court of Appeal about the cost implications of liability, I do not consider that such consideration could be determinative in the circumstances. In *Fleming* Cooke P regarded as unconvincing the argument that Parliament could not have intended liability in such a case because the Commission "consisted only of a full-time chairman and four part-time members and had a total staff of only seven".[125] While the resources available to a public body may be relevant if the body is operating at a level of high policy, the Building Industry Authority was not in that camp, for the reasons already given. And, as explained by Gleeson CJ in *Graham Barclay Oysters*, as is referred to in ☐ above, private individuals and organisations, too, operate under budgetary constraints and with lack of resources.[126] Any financial constraints upon the Authority may indeed perhaps be better considered as bearing on breach, as Cory J suggests in *Just v British Columbia*.[127]

- Nor would liability set up incentives contrary to the purpose of the legislation or necessarily entail resources beyond those available to the Authority. It is only in the discharge of its own functions that the Building Industry Authority could have liability. Those functions do not entail discretion to impose higher compliance than is required by the code. And they might have been discharged in the particular case simply by the provision of information.

The claim of knowledge made in the third and fourth causes of action

[75] In addition to the factors common to all causes of action, some specific additional considerations are in play when it is alleged that, from 1998, the Authority knew of the problems with weather-tightness associated with methods of construction such as those used in The Grange. In *Graham Barclay Oysters* (a case where the claimed liability of the local authority arose out of the contamination of oyster beds) a factor in rejection of the claim was the fact that there had been no

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125 *Fleming*, above n 36, at 519.
126 *Graham Barclay Oysters*, above n 33, at [14].
127 *Just v British Columbia* [1989] 2 SCR 1228 at 1244.

recorded outbreak of hepatitis A before the outbreak that gave rise to the claim.[128] Implicit in this reasoning is the view that, for a regulator charged with protection against the very eventuality which results, knowledge of actual risk is a significant pointer to sufficient proximity. Thus the fact that the danger of fire from a defective chimney had been drawn to the notice of the local authority's officers in *Pyrenees Shire Council v Day* was a factor which weighed in the finding of duty of care.[129]

[76] The facts in the present case have yet to be investigated. Discovery has not yet been given. It may be that the Council will not be able to make good its allegation of knowledge. It may be that the information available to the Authority during 1998–2000 was too flimsy for it to act on or pass on. If however it is found that the Authority did appreciate that there was a significant question about code compliance in respect of weather-tightness associated with monolithic cladding, then, against the background of the 1995 report, its failure to share that information placed the Council at a disadvantage if it thought it was adequately discharging its responsibilities and exacerbated the risk to the owners recognised in *Sunset Terraces*.[130]

[77] If, as is alleged in the third and fourth causes of action, a reasonable person in the position of the Building Industry Authority would have appreciated the risk, I do not think it could reasonably shrug or sit on its hands. Given its statutory responsibilities (particularly those of providing information),[131] it was only reasonable to expect that the Authority would take steps to eliminate the risk, as it is claimed it could have done by provision of information to the territorial authorities and others affected (including the owners).

[78] In the pleadings it is claimed in respect of the third and fourth causes of action that the statutory duties of the Authority gave rise to a reasonable expectation that its practice would be careful, sufficient in itself to support a duty of care. Such proximity may arise when those who suffer harm have no choice but to rely on

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128 *Graham Barclay Oysters*, above n 33, at [47] per Gleeson CJ; [72], [89], [105] and [113] per McHugh J; [123], [176], and [202] per Gummow and Hayne JJ; and [323] per Callinan J.

129 *Pyrenees Shire Council v Day* [1998] HCA 3, (1998) 192 CLR 330 at 342 per Brennan CJ; 372 per McHugh J; 392 per Gummow J; 420 per Kirby J.

130 Above n 7.

131 Section 12.

others to exercise reasonable care and skill. This is the thinking underlying Mason J's reference to "general reliance" in *Sutherland Shire Council v Heyman*.[132] It is consistent with New Zealand authority.[133] Cooke P in *South Pacific* expressed a similar approach when he emphasised "indirect reliance on the carefulness of a general practice ... at least if the factors point otherwise to a duty of care".[134] It is not necessary to adopt the terminology of "general reliance" to give effect to this common sense approach: indeed Kirby J suggested in *Pyrenees Shire Council v Day* that "general reliance" might better be seen as a metaphor for "proximity".[135]

[79] The Authority, which had the functions of keeping building standards under review and providing information, may well have been under a duty of care to pass on information clearly relevant and material to territorial authorities and owners in any event. Here, however, against the background of the 1995 report (which heightened the risk if the Council proceeded under the misimpression that its inspection regime was adequate), a duty of care to warn or exercise its statutory powers to meet the risk cannot be excluded once the Authority became aware of the incidence of failure to meet the performance standard.[136] These are questions for trial.

The third cause of action

[80] Information about the prevalence of failure in achieving code compliance in the case of monolithic face-fixed cladding (the information pleaded to have been available in 1998 to the Building Industry Authority) was information highly material to the discharge of the Council's own functions under the Act, as the Building Industry Authority must have appreciated. The Council was another public agency in the same regulatory system and subject to the statutory review of the Building Industry Authority, exercised in 1995.

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132 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 470–471.

133 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 519 per Lord Lloyd and see the judgment of the Court of Appeal, [1994] 3 NZLR 513 at 519 per Cooke P.

134 *South Pacific*, above n 31, at 297.

135 *Pyrenees*, above n 129, at 410–411.

136 See discussion in *Stovin v Wise*, above n 81, at 929–930; *Kamloops*, above n 76, at 30; *Sutherland Shire Council*, above n 132, at 460 per Mason J; and *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL) at 272–273.

[81] The pleading claims at [78] that the Building Industry Authority "failed to advise the Council that the clean bill of health statements were incorrect in 1998/1999, by which time it was aware or should reasonably have been aware" that construction of residential buildings similar to The Grange would result in non-compliance with the building code. The essence of the claim is that even if the statements in the 1995 report were not originally misstatements (as is claimed in the first two causes of action), they became misstatements in 1998/1999 in light of the new knowledge available to the Council. A fair reading of the pleadings makes it clear that the gravamen of the complaint is the position as it was understood by the Council in 1998, when it certified compliance for The Grange.

[82] If such information had been provided to it, the Council had adequate powers of investigation and to compel rectification.[137] If it withheld from the Council information it could use to fulfil its statutory responsibilities, the Building Industry Authority would have undermined the effectiveness of the statutory system of checks. Given the distribution of functions under the Act and the responsibilities of the Authority as a national standard-setter and source of information, it is well arguable that the Council was entitled to expect to be alerted by the Authority to anything significant which was material to its own functions especially if that information was inconsistent with or caused doubt about the 1995 report as to the adequacy of its processes. It is difficult to see any basis on which it could have been consistent with the statute to withhold the information from the Council.

[83] The withholding of material information also deprived the Council of the opportunity to invoke the determination mechanism under s 17 which could have provided it with a safe haven under the Act. The information available to the Authority was highly material to the Council's ability to invoke the statutory protection under a system by which ultimately it was for the Authority to determine achievement of code compliance in cases of doubt. With the knowledge it is alleged to have had as to failures of buildings with monolithic cladding to comply with the code and the knowledge it had as to the Council's existing practices, I consider it is well arguable that there was sufficient proximity between the Authority and the

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137 Section 76.

Council to give rise to a duty of care. Certainly, it is not an appropriate case for exclusion of such a duty on peremptory application.

[84] Matters of relative responsibility between the Council and the Building Industry Authority will have to be assessed at trial. They will include consideration of the Council's own knowledge or knowledge it should reasonably have obtained for itself. But at this preliminary stage the Council's own statutory duties and powers (which put it under an obligation to inform itself) cannot in my view be relied on to reject a relationship of proximity arising out of the statutory scheme and the knowledge alleged to have been available to the Authority, which made its own earlier report potentially misleading if not corrected.

Fourth cause of action (liability of the Building Industry Authority to owners)

[85] The liability of territorial authorities to building owners in respect of building work carelessly approved or inspected was established before enactment of the Building Act 1991.[138] In part such duties of care are owed in recognition of the fact that owners lack the ability to protect themselves adequately from building errors. The scheme of the Building Act, in providing for inspection and certification and in recognising that the discharge of such functions gives rise to duties of care actionable in tort, adopts the same approach. As already described, it sets up a system of assurance. In that system both territorial authorities and the Building Industry Authority set up to bring a national focus and end fragmentation of building regulation have distinct parts to play. Is the Building Industry Authority insufficiently proximate to owners to be liable to them in negligence if it fails to discharge its distinct responsibilities with reasonable care? I do not think it can be said on summary application to owe no duty of care for reasons which have been foreshadowed and which can be summarised here.

[86] The Building Act set up a hierarchy of responsibilities in which more than one authority had responsibilities to ensure code compliance, breach of which it was foreseeable would cause the loss to owners which has been suffered. Once it is accepted that one authority within the hierarchy may be liable to owners if it fails to

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138 See *Hamlin*, above n 133.

take reasonable care, the recognition that another in the same system may also be liable in respect of its responsibilities is hardly to adopt an entirely novel category of negligence. The Building Industry Authority, like territorial authorities, obtained fees from owners, set according to the value of the building work.[139] The fees brought the Building Industry Authority and owners into a comparable relationship of proximity to that of territorial authorities and owners.[140]

[87] The liability is not as backstop for other agencies also liable but is in respect of its own responsibilities. The Authority was part of the legislative response to the vulnerability of owners, established with responsibility to prevent the very type of harm suffered here. Owners cannot but rely on those set up by the Act to provide its system of assurance. They are entitled to expect that those who provide the statutory system of assurance are careful in discharging their responsibilities.

[88] Section 17 enables owners as well as territorial authorities and certifiers to seek the determination of the Building Industry Authority of any matter of doubt or dispute concerning code compliance. The Act provides explicitly for liability in tort, should such determination be carelessly made.[141] The scheme of the Act therefore sets up a direct relationship between owners and the Authority through the ability to obtain such determinations. In the present case the ability of the owners to seek a determination would have been directly impacted by withholding from them the information that there was doubt about the existing practices and the risks of achieving compliance with standard E2 where face-fixed monolithic cladding was used. The knowledge the Building Industry Authority is alleged to have possessed as to the prevalence of weather-tightness failure associated with monolithic cladding was information material to the ability of owners to protect themselves. It was also information material to the exercise by the owners of their ability to seek an authoritative determination (in respect of which the Authority would be liable directly to them if carelessly made and if loss resulted).

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139 Part 3A and s 23.
140 See *McNamara*, above n 27, at [40].
141 Section 91(3)(b).

[89] For these reasons, I am of the view that the claim that the Authority was liable to the owners of The Grange cannot be dismissed as untenable and should go forward for trial.

Limitation

[90] On appeal to this Court, the Attorney-General was given leave to raise a defence to the first three causes of action based on s 393(2) of the Building Act 2004. It sets up a long-stop limitation period of 10 years (ousting the regime under the Limitation Act 1950 which otherwise applies and which runs off the date when damage is suffered) where claims are based on acts or omissions "relating to building work", relevantly defined in s 7 of the Act as "work ... for, or in connection with, the construction ... of a building". It was argued for the Attorney-General that the first three causes of action concerned "building work", but that the relevant "act or omission" was the 1995 report, which had occurred more than ten years before the filing of the proceedings. I have had the opportunity to read the provisional view taken by Blanchard J for rejecting the approach taken for the Attorney-General. I, too, prefer to express no concluded view on the application of s 393 to the claims in the present case. Since my opinion is a minority one, the claims will not proceed and the question of application of s 393 is now moot. My tentative view is that the third party claims, like the claim of the owners against the territorial authority on which they are parasitic, arise out of building work (as is made clear in relation to the owners' claims against the territorial authorities by s 393(3)) but that the relevant "act or omission" is the continuing and uncorrected representation that the Council's procedures were adequate at the time The Grange was constructed. On that basis, the third party notice is within the limitation period of ten years. As with Blanchard J, I am not prepared to express even a tentative view on the different question (in respect of which no leave was granted) whether the third party notice complied with the High Court Rules and, if not, with what consequence.

Conclusion

[91] I would allow the appeal and reinstate all four causes of action. Since the other members of the Court are of the contrary view, the appeal is dismissed.

BLANCHARD, McGRATH AND WILLIAM YOUNG JJ

(Given by Blanchard J)

Introduction

[92] A body called the Building Industry Authority (BIA) was established by the Building Act 1991 (the Act), which implemented the recommendations of the Building Industry Commission in a report delivered in January 1990. The functions of the BIA under the Act included advising the Minister of Internal Affairs concerning building matters, approving documents for use in establishing compliance with the national building code, determining certain disputes between builders and territorial authorities, undertaking reviews of the operations of territorial authorities in relation to their functions under the Act, and disseminating information and providing educational programmes on matters relating to building control.

[93] It is now notorious that building and territorial authority supervisory practices adopted under the Act have proved to be most unsatisfactory. Many building owners have suffered considerable losses from flaws in the way in which their properties were constructed during the period while the Act was in force.[142] This has in turn led to the making of many claims against territorial authorities, in particular in relation to damage caused by incursions of water – a phenomenon which has become known as leaky building syndrome. Many such claims relate to construction methods using face-fixed monolithic cladding where timber has not been treated before being used for framing.

[94] This Court has previously held that territorial authorities continued under the Building Act 1991 to owe a duty of care, in their approval and inspection roles, to owners of premises designed to be used as homes.[143] In the present proceeding the owners of residential apartments in a block known as The Grange, built under a consent granted by the territorial authority, the North Shore City Council, on

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142 The Act has now been repealed and replaced by the Building Act 2004.

143 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289, a case which has come to be known as *Sunset Terraces*.

28 April 1999 (and the subject of a code compliance certificate from the Council issued on 6 April 2000), claimed against the Council that it had been negligent in the issuance of the consent and in its subsequent supervision of construction. That claim has now been settled by the Council for a substantial sum of money. But while it was on foot the Council made a third-party claim against the Attorney-General as successor to the BIA, which had been dissolved by s 418 of the Building Act 2004.[144]

[95] The third-party claim was not covered by the settlement between the Council and the plaintiff owners. Under it the Council asserts, first, that the BIA was in breach of a duty of care owed to the Council when carrying out in 1995 a review of the Council's operations under the Act. Second, it claims that the BIA was in breach of a duty of care in negligent misstatement in a report on that review sent to the Council. The report is said to have given the Council a "clean bill of health" and lulled it into a false sense of security about its existing practices which were later found to be negligent. A third alleged breach of a duty of care is the failure by the BIA to correct that misstatement in 1998/1999, by which time the BIA is said to have been made aware of serious problems consequent upon the faulty installation of monolithic cladding. In respect of all of these alleged breaches the Council claims to recover from the Attorney-General damages for its loss suffered by reason of having paid the plaintiff owners. Mr Goddard QC said that the claim, realistically, would have to be regarded as one for a contribution rather than for full reimbursement. By this he appeared to accept that the Council would face a defence of contributory negligence on its part.

[96] The Council's third-party statement of claim also alleges as a fourth head of claim a breach of a duty of care said to have been owed directly by the BIA to the plaintiff owners. Effectively it is being said that the BIA is a joint tortfeasor against whom the Council is entitled to contribution under s 17 of the Law Reform Act 1936.

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[144] Section 419 provides that all rights, assets, liabilities, and debts that the Authority had immediately before the commencement of the section must be treated as those of the Crown on that commencement.

[97] The Attorney-General has applied to strike out the Council's claims. The High Court declined to do so[145] but the Court of Appeal has struck them all out.[146] The Council now appeals to this Court seeking reinstatement of its claims.

The pleadings

[98] The plaintiff owners claimed against the Council that it failed to exercise reasonable skill and care by issuing a building consent for The Grange when the plans and specifications were not sufficient to allow it to be satisfied that the works would comply with the building code, by failing to carry out sufficient or sufficiently thorough inspections, and by failing to clearly identify construction defects which were present when the code compliance certificate was issued. The defects specified by the plaintiffs included inappropriately formed flashings and waterproof membranes, unfinished cladding, timber directly fixed to walls without spaces at junctions, various penetrations through cladding without proper sealing, cladding laid hard to paving and the ground, and other defects relating to lack of weather-tightness. As a result, it was pleaded against the Council, there had been extensive water ingress leading to decay of timber framing requiring extensive remedial work.

[99] The Council has pleaded in its third-party claim against the Attorney-General that territorial authorities relied on the BIA to inform, educate and assist them in connection with the performance of their duties under the Act. These included dissemination of information relevant to their functions and conducting reviews of their operations and reporting on issues identified. The Council pleads as its first head of claim that the BIA breached a duty of care owed to the Council to carry out the 1995 review and the provision of the report to the Council with reasonable skill and care. It alleges that their purpose included assisting the Council in evaluating and strengthening internal procedures relating to building control. The review included the Council's methods in satisfying itself that compliance had been achieved for buildings with monolithic-style cladding. It is alleged that the review and report did not identify any serious failures or defects in the Council's processes.

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145 *Body Corporate No 195843 v North Shore City Council* HC Auckland CIV-404-1055, 1 October 2008 per Andrews J.

146 *Attorney-General v North Shore City Council [The Grange]* [2010] NZCA 324, [2011] 1 NZLR 178 per Hammond, Arnold and Randerson JJ.

The Council says that it understood from the review and/or the report that its consenting and inspection regime and procedures were satisfactory for the purpose of monitoring the use of "acceptable solutions" for complying with the code;[147] that if its building consent team continued to operate with its practices and procedures as reviewed, it would be adequately fulfilling its functions; and that there were no material failures or defects in its processes or in its approach to assessing compliance with the code. The Council pleads that it reasonably relied on the special expertise of the BIA and so did not change its practices or commission other external reviews or seek other expert advice. It says that if the BIA had identified significant concerns it would have taken appropriate steps to address them. The Council's liability to the plaintiffs is thus said to have arisen as a result of, or to have been contributed to by, the BIA's breach.

[100] As a second head of claim, the Council pleads that the 1995 report conveyed and was intended to convey to it that its consent team was performing its functions properly; that if it continued to operate in the same way it would adequately be fulfilling its statutory obligations; and that there were no material failures or defects in its processes or approach to assessing compliance with the code. These are called the "clean bill of health" statements of the BIA and are alleged to have been incorrect. In making them, it is claimed, the BIA was in breach of a duty of care owed to the Council.

[101] The third claim by the Council pleads that prior to the issue of the building consent in respect of The Grange in 1999, the BIA was aware or should have been aware of issues and concerns about the use of untreated timber for framing and monolithic cladding systems. In particular, reference is made to communications from Prendos Ltd to the BIA beginning in April 1998. It is alleged that as a result of these communications, and from its own building knowledge, the BIA knew or ought to have known that construction of residential buildings the same as or similar to The Grange would result in water ingress and/or non-compliance with the building code. It is alleged that the BIA failed to advise the Council in 1998/1999 that the clean bill of health statements were incorrect. The Council pleads that it reasonably continued

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[147] The BIA had power under the Act to issue documents approving methods whose use would comply with the provisions of the code: s 49. These were known as acceptable solutions.

to rely on them when it issued the building consent and the code compliance certificate in respect of The Grange.

[102] The fourth head of claim is that the BIA owed directly to the plaintiff owners a duty to use reasonable skill and care in performing its functions under the Act; that it had received the Prendos materials and knew or ought to have known that construction of residential buildings the same as or similar to The Grange would result in water ingress and/or non-compliance with the building code; and that it breached its duty of care to the plaintiffs by:

> (a) Failing to advise the Minister that the use of untreated kiln dried radiata timber and monolithic cladding systems such as the cladding system used in The Grange, breached the provisions of the building code and should not therefore be permitted in their then approved form.
>
> (b) Failing to approve a document which had the effect of ensuring that untreated timber and monolithic cladding systems complied with the provisions of the building code. Such a document could have required that the timber framing be waterproofed and any monolithic cladding system included a dried and ventilated cavity.
>
> (c) Failing to publish or disseminate information concerning untreated timber and monolithic cladding systems to those parties in the building industry who use such products, with the result that contractors and other affected parties did not change their practices so as to use products which complied with the building code.
>
> (d) Failing to take all reasonable steps (such as those detailed above) which were necessary to achieve the purposes of the Building Act 1991 and the Building Code.
>
> (e) Failing to properly review the practices and procedures of the Council.

[103] It is pleaded that if the BIA had not breached that duty of care, the plaintiffs, the building industry and territorial authorities would have been made aware of the "systemic failure now attributable to monolithic clad buildings" such as The Grange, and the Council would not have issued the building consent and code compliance certificate and the plaintiffs would not have suffered the loss for which they claimed against the Council.

The Building Industry Commission's Report

[104] The BIA's alleged duties of care are said to arise out of the provisions of the Act, or to be at least not inconsistent with those provisions. As the legislation in very large measure followed recommendations and draft provisions framed by the Building Industry Commission, the thinking of the Commission as recorded in its report is informative concerning the intended statutory roles of the BIA and of territorial authorities. The main features of the reform advocated by the Commission were summarised at the outset of the report. They included:[148]

> (a) A building code to apply nationally and to bind the Crown. It was to be "performance based and confined to essential safeguards for the users of buildings and those directly affected by them". The means whereby "performance criteria for the resulting behaviour in use of [a] building and its component parts" would be met were not to be prescribed and would be "open to innovation of new technology and practices";
>
> (b) The code would take the form of regulations under the Act;
>
> (c) The BIA would be a new national body appointed as "the one source of referral and review of the building control system";
>
> (d) Territorial authorities would be charged with the administration of the code;
>
> (e) Greater emphasis would be placed on the building owner and producers to ensure compliance with the code.

[105] Part 2 of the Report contained proposals for a new building control system to apply uniformly throughout New Zealand. The Commission identified ten building control tasks.[149] Part 3 dealt with the development of a national building code. The Commission provided a draft. The subject of external moisture was covered briefly, and in only the most general terms, in E2 of the draft code. Draft verification methods and acceptable solutions were also provided.

[106] Part 4 contained proposals for the management of the control system and assigned the control tasks identified in Part 2. The Commission said that the public interest and the building industry would be best served by placing responsibility for

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148 Building Industry Commission *Reform Of Building Controls: Volume I – Report To The Minister Of Internal Affairs* (Building Industry Commission, Wellington, 1990) at i and ii.

149 At [2.74].

implementing the code in the hands of individual territorial authorities, subject to monitoring by the BIA.[150] It proposed that the BIA, set up to manage the systems at a national level, should be "a small body with a core of technical and administrative staff".[151] It would "draw on persons and organisations in government and industry as required to carry out its assigned duties".[152] It would:[153]

> ... provide a single source for referral and review that does not exist in the present fragmented system. It affords a centralised and readily accessible forum to which central and local government, the industry and the public can look for rulings on interpretation of the principles embodied in the Code and the need for amendment of control provisions and procedures.

[107] The Commission then summarised the responsibilities which it intended the BIA to have. These included:[154]

> (a) recommending to the Minister the adoption of controls for inclusion in the Code and the regulations associated with it, to achieve the purposes of the Act that could not be achieved by non-regulatory means;
>
> (b) recommending the amendment of building controls from time to time;
>
> (c) interpreting control documents, resolving difficulties and overseeing performance modifications and waivers;
>
> (d) approving new products, techniques and solutions, including accreditation procedures;
>
> (e) monitoring and directing the administration of the code;
>
> (f) disseminating control information on developments and new techniques among interested groups, "with a corresponding invitation for comment and advice"; and
>
> (g) fixing charges for its services.

[108] On the status of the BIA, the Commission said:[155]

> [The] BIA would not be an advisory body, except to the Minister. It would be inconsistent with its powers of decision-making in matters of interpretation, approval and monitoring of the control system, for BIA also to have the lesser status of an advisory body to territorial authorities or any

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150 At [4.21].
151 At [4.27].
152 At [4.27].
153 At [4.29].
154 At [4.30].
155 At [4.35].

> organisation in the building industry. Any person would nevertheless have rights of access to its records, but BIA would not express opinions (as opposed to announcing decisions on matters referred to it for a ruling).

[109] The Commission recommended that the BIA would be the final source of referral and would give rulings on matters of code interpretation and product or type approvals "referred to it".[156] It would be exempt from claims that it had erred in matters of fact in reaching a decision in circumstances requiring interpretation.[157] But there would be liability for not exercising proper care in making decisions on approval procedures for new products, techniques and solutions, thereby causing loss to third parties.[158]

[110] Another recommendation was that there should in each district be a single "on-the-spot" control authority responsible for coordinating building control and assuring compliance with the regulatory control system.[159] Amongst the control tasks so assigned to territorial authorities was that of ensuring that a procedure was in place that would result in a building being constructed in accordance with code requirements.[160]

[111] On the subject of monitoring of the control systems by the BIA, the Commission said:[161]

> [The] BIA is to be responsible for monitoring the control system in operation nationwide and the performance of these control functions at the local level. Checks would be made by [the] BIA to ascertain whether a [territorial authority] was administering the Code in accordance with the Act and proper practices, and to require correction if it was not. ...

But it did not include in its draft legislation any power to require correction, nor was that subject further mentioned by the Commission or included in the legislation. If a territorial authority were found to be acting in a manner that was open to "severe criticism", the BIA would "report to the Minister accordingly".[162] The Minister would have power to transfer the role of a territorial authority to a Commissioner.

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156 At [4.34].
157 At [4.36].
158 At [4.37] and [4.38].
159 At [4.47].
160 At [4.48].
161 At [4.51].
162 At [4.52].

[112] Then followed recommendations for the BIA to have interpretation and approval powers and for the authorising of persons to act as approved building certifiers in competition with the territorial authority. Certificates from such persons, engaged by the owner of a building, would have to be accepted by territorial authorities.[163] Territorial authorities were also to have enforcement procedures available to them to obtain compliance by building owners with the building code.[164]

[113] The Commission also included in its report (as Appendix 7) a proposal for a compulsory home guarantee scheme operating independently of the Act and the code. It was intended to provide a means for ensuring that dwelling units were built and rendered fit for occupation measured against the relevant provisions of the code on which the building consent was based. It would provide indemnification without recourse to the courts up to a capped limit of the guarantee, for which the owner would pay a one-off premium. The guarantor would be an independent statutory body. This proposal was never implemented.

The Act

[114] Section 6(1) of the Building Act 1991 set out its purposes, namely providing for:

> (a) Necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire; and
>
> (b) The co-ordination of those controls with other controls relating to building use and the management of natural and physical resources.

In keeping with the philosophy of dispensing with much of the regulation which previously applied in the construction industry, subs (3) said:

> In determining the extent to which the matters provided for in subsection (1) of this section shall be the subject of control, due regard shall be had to the national costs and benefits of any control, including (but not by way of limitation) safety, health, and environmental costs and benefits.

Similarly, in s 7 there were statements that building work must comply with the

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163 See *McNamara v North Shore City Council* [2012] NZSC 34.
164 At [4.118].

code, but that:

> Except as specifically provided to the contrary in any Act, no person, in undertaking any building work, shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the building code.

[115] Part III established the BIA and set out its functions, powers and duties. It was to consist of not more than eight members with:[165]

> ... a mix of knowledge and experience in matters coming before the Authority, including knowledge and experience in—
>
> (a) Building construction, architecture, engineering, and other building sciences:
>
> (b) Economic, commercial, and business affairs:
>
> (c) Consumer affairs and the provision of facilities for people with disabilities:
>
> (d) Local government and resource management.

[116] In the Act as originally passed the BIA was to be funded out of the Consolidated Fund. But by amendment in 1993 that was changed. Under a new Part IIIA, provision was made for the BIA to be funded by a building levy, payable by persons applying for building consents. It was originally fixed at a rate of $1 for every $1,000 of the estimated value of the work. But the levy rate was subject to annual review by the Minister and in 1994 it was reduced by Order in Council to 80 cents.[166]

[117] Section 12(1) contained the functions of the BIA:

> **12 Functions of Authority**
>
> (1) The Authority shall have the following functions under this Act:
>
> (a) After consultation with appropriate persons and organisations, advising the Minister on matters relating to building control:
>
> (b) Approving documents for use in establishing compliance with the provisions of the building code:

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165 Section 11.
166 Sections 23B and 23H.

(c) Determining matters of doubt or dispute in relation to building control:

(d) Undertaking reviews of the operation of territorial authorities and building certifiers in relation to their functions under this Act:

(e) Approving building certifiers:

(f) Granting accreditations of building products and processes:

(g) Disseminating information and providing educational programmes on matters relating to building control:

(h) Generally taking all such steps as may be necessary or desirable to achieve the purposes of this Act:

(i) Any other functions specified in this Act.

Its powers were given by s 13 in general terms. The particular powers listed in subs (2) throw no light on the current issues.

[118] Section 15 was as follows:

15 Reviews by Authority

(1) The Authority may, of its own motion or at the request of the Minister, undertake a review of the operation by a territorial authority of the territorial authority's functions under this Act.

(2) In undertaking a review under subsection (1) of this section, the Authority shall give the territorial authority the opportunity to make written submissions to it.

(3) If the Authority believes that a territorial authority is not fulfilling its functions under this Act it shall make a written report to the Minister.

[119] In s 17 there was provision for doubts or disputes about code compliance and decisions of a territorial authority thereon to be referred to the BIA for a determination. Its determination was made binding on the parties by s 20.

[120] Part IV dealt with territorial authorities. Their functions were found in s 24:

24 Functions and duties of territorial authorities

Every territorial authority shall have the following functions under this Act within its district:

(a) The administration of this Act and the regulations:

(b) To receive and consider applications for building consents:

(c) To approve or refuse any application for a building consent within the prescribed time limits:

(d) To determine whether an application for a waiver or modification of the building code, or any document for use in establishing compliance with the provisions of the building code, should be granted or refused:

...

A specific duty was imposed on them by s 26:

> **26 Duty to gather information and monitor**
>
> Every territorial authority shall gather such information, and undertake or commission such research, as is necessary to carry out effectively its functions under this Act.

[121] Under s 29(1) the Minister was given power to appoint a person or persons to exercise or perform all or any of the functions, powers or duties of a non-performing territorial authority, after consultation with the Minister of Local Government. Before making any such appointment the Minister was required to give the territorial authority at least 20 days' notice in writing of the intention to do so.[167]

[122] The Act then made provision for the issue of building consents and code compliance certificates.[168] The BIA was given no role in this, except where a dispute was referred to it.

[123] Part VI of the Act provided for regulations for a national building code[169] and for the BIA to prepare or approve documents for use in compliance with it, which had to be accepted.[170] Part VII dealt with approval by the BIA of persons to act as building certifiers and complaints against them.

[124] Part VIII established a process whereby the BIA could grant accreditation for proprietary items relating to building work. Under Part IX the BIA had the role of

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167 Section 29(2).
168 Sections 34 and 43.
169 Section 48.
170 Sections 49 and 50.

responding to a request by a District Court for a report on the exercise by a territorial authority of its powers relating to dangerous or insanitary buildings.

[125] Section 79 conferred on the BIA some special powers:

> **79 Special powers of Authority for monitoring performance of functions under this Act**
>
> (1) For the purpose of monitoring the performance by territorial authorities and building certifiers of their functions under this Act, the Authority—
>
> (a) Shall have full access at all reasonable times to all records and documents of every description in the possession or control of any territorial authority or building certifier that relate to the performance of functions under this Act, and, subject to subsection (3) of this section, to any place where such records or documents are kept:
>
> (b) May require any territorial authority or building certifier to supply any information or answer any question relating to the performance of functions under this Act:
>
> (c) May, by notice in writing, require any person having possession or control of any information, records, or documents of any description relating to the performance by any territorial authority or building certifier of functions under this Act, to supply to the Authority, in a manner specified in the notice, all or any such information, records, or documents:
>
> (d) Subject to subsection (3) of this section, may enter and re-enter any land or building, with such appliances, machinery, and equipment as are reasonably necessary, to—
>
> (i) Make such surveys, investigations, tests, and measurements as are reasonably necessary for the purposes of this section; and
>
> (ii) Generally do all such other things as are reasonably necessary to enable such surveys, investigations, tests, and measurements to be carried out.
>
> (2) Nothing in subsection (1) of this section shall—
>
> (a) Derogate from any Act that imposes a prohibition or restriction on the availability of any information; or
>
> (b) Authorise the Authority to enter any household unit being used as such without the permission of the occupier of the household unit.

[126] Section 89 protected members and employees of the BIA, but not the BIA itself, from civil proceedings and s 91 contained limitation defences making specific mention of the BIA.[171]

The 1995 review

[127] The BIA engaged in a programme of reviewing each year the performance under the Act of a small number of territorial authorities. This seems to have been done on its own initiative without any request from the Minister. In 1995 the North Shore City Council was one of seven chosen for review. The BIA commissioned consultants, Joyce Group Ltd, to undertake the reviews. Three out of the four sections of its report, dated October 1995 – namely an introduction, a commentary on findings and a table of comparative performance – covered all the reviewed authorities. There was one part which reported on the reviewer's visit to the North Shore City. It forms the basis of the Council's negligent misstatement claim.

[128] The review document is entitled *Building Industry Authority Review Of Technical Operation In Relation To The Issuing Of Building Consents – Report For North Shore City*.[172] In [1.01] it is made clear, however, that it is a review under the terms of s 15(1) of the Act. In [1.02] the purpose of the review is stated:

> To review procedures within the selected Territorial Authorities to establish how they are coping with the Building Act requirements so that the Authority can advise on operating methods and consider any legislative changes that might be helpful. It was also proposed results and conclusions of the review work would be made available to the Territorial Authorities to assist them in evaluating their own internal procedures and to assist with the achievement of national uniformity and the increased efficiency envisaged by the Building Control Reforms.

[129] Paragraph [1.05] outlined a methodology adopted by the review team:

> The review team visited each Territorial Authority to establish how each operation was structured to process consent applications and to control achievement of code compliance during the construction process. To assist with the process four houses, an industrial building and one apartment

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[171] Under the 2004 Act the current limitation defence section is s 393, which is set out and discussed in the last part of these reasons.

[172] Building Industry Authority *Building Industry Authority Review Of Technical Operation In Relation To The Issuing Of Building Consents – Report For North Shore City* (1995).

> building were inspected (the availability of industrial and apartment buildings to meet the criteria were difficult to find so alternative type buildings with similar features were chosen) to establish how code compliance had been achieved.

The report then summarised the structure of each visit to a territorial authority, including a series of interviews with key people, collection of standard documents used by the territorial authority, site inspection**s** and an exit meeting to discuss findings and proposed recommendations with the staff.

[130] The second section of the report dealt in just ten pages with the visit to the Council. It described the building consent processing system used by the Council with particular concentration on times taken to process applications, with reference to statistics from June–August 1995. It also briefly mentioned how the durability performance of materials/components was considered during the consent vetting process and the use of acceptable solutions, accreditations and producer statements, listing issues considered in acceptance of producer statements. It also referred to the way in which field inspections were handled by consent staff and the managing of the Building Warrant of Fitness issuing process. It then set out the review process for six sample buildings, which involved a study of relevant documents held by the Council, an on-site inspection "to establish what had actually been constructed on-site" and an analysis of findings on-site "to establish why there may have been variances between consent processing documentation and as built construction detail on-site".[173]

[131] The report commented that, with the exception of some anomalies noted in the section reporting on those inspections, "compliance to the Building Code had been satisfactorily achieved":[174]

> No instances were found of errors or omissions occurring during the consent processing or inspection process having to be corrected before a code compliance certificate could be issued.

[132] Under the heading "Overview of Operation" the report described how a new system for processing building consents had only very recently (on 25 September)

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[173] At 7.
[174] At 7.

become operational, with staff having to cope with its complexities. It said that fully detailed documentation for the new system had not been viewed during the visit, but commented favourably on acceptance criteria for producer statements and checklists for documents and vetting procedures. It very briefly mentioned staff skills and training. It commented that the new system should eliminate backlogs and improve processing times. "Performance should therefore be closely monitored to establish if the current structure is sufficiently resourced to cope with the workload."[175]

[133] In regards to site inspection, the report counselled that "a close watch must be kept to ensure the control officers have time to complete a thorough inspection on-site or the code compliance checking regime may be compromised".[176] It noted that, even though evidence of items of non-compliance on-site were few in number, one in particular was serious, and "building control officers should be more careful in making these on-site inspections".[177]

[134] The report also observed that:[178]

> No formal independent review system to monitor performance of the building consent process and code compliance is in place, although we have been advised a system will be introduced.

[135] The second section finished with a one-page list of ten recommendations of a very general kind. They included:[179]

> (a) that an internal reviewing system be implemented to monitor performance with respect to the building code;
>
> (b) that there be continued monitoring of both the vetting and field inspection processes, with comment that the field inspectors group appeared to be "short of resource";
>
> (c) that during site inspection there be more careful attention to installation details of materials to the manufacturer's recommendations with particular reference to durability; and
>
> (d) that field inspectors ensure that the as-built construction on-site is as per the approved documents.

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175 At 9.
176 At 9.
177 At 9.
178 At 9.
179 At 10.

[136] Summary reports on the six selected buildings were attached. Each building appears to have been complete or near completion at the time of the BIA's inspections, as in five cases there were already final code compliance certificates issued and, in one, an interim certificate. So there does not appear to have been any inspection of a partly completed building. Some criticisms of work done were made. One of the buildings was constructed using monolithic cladding in a manner similar to The Grange.

[137] The third section of the report was a nine-page commentary on findings from the overall review of the seven selected territorial authorities. It was general in nature and, where specific criticisms were recorded, the authority in question was not identified.

[138] The fourth section was a three-page table of comparative performance of the territorial authorities.

Later reports

[139] Although they were made after The Grange had been issued with a code compliance certificate, two further reviews of the Council's performance of its functions were mentioned in argument. The first in 2001 was generally approving of its operations, including things it had done in response to the 1995 report.[180] However a further report in 2003, after leaky building syndrome had received considerable publicity, was highly critical of past practices, saying that the Council had insufficient building control staff; they were not properly trained; its checklists were inadequate; it had not examined the right things; and inspections had not been frequent enough.[181]

The High Court judgment

[140] Andrews J concluded that the facts were reasonably capable of supporting a finding that it was foreseeable that the Council would rely on and use the findings of

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[180] Building Industry Authority *North Shore City Council – Technical Review Of The Building Control Group For The Building Industry Authority* (August 2001).

[181] Building Industry Authority *Technical Review Of The North Shore City Council* (July 2003).

the 1995 review to guide its building consent, inspection and certification processes.[182] She also took the view in relation to the claim of negligent misstatement by the BIA that the facts were capable of supporting a finding of assumption of responsibility and reliance.[183] There was therefore sufficient proximity for a duty of care. She said that the strongest policy factors against imposing such a duty were that it might go further than was intended by the statutory regime; that the 1991 Act imposed on the Council, rather than the BIA, obligations in relation to the administration and enforcement of the Act; and that it was neither reasonable nor appropriate for the Council to shift responsibility to the BIA for its own statutory responsibilities.[184] However, proceeding on the basis of an observation in the reasons given by Tipping J in *Couch*[185] that a claim should be struck out on the grounds that policy militates against a duty of care only if, at that stage of the proceedings, it could be said that this is undoubtedly so, Andrews J concluded that the Court was not in that position. Both proximity and policy factors were equivocal as to whether a duty of care should be imposed.[186] The Council's claims were therefore not so untenable that its third-party notice should be set aside.

The Court of Appeal judgment

[141] The Court of Appeal disagreed. It accepted that it was arguably foreseeable that if the BIA was negligent in the way it monitored or reported on the operations of a territorial authority, the Authority might suffer loss as a consequence. But that was not of itself sufficient.[187] The degree of control that the BIA had over the Council in terms of preventing the harm that eventuated was relevant. The BIA's statutory function of monitoring the performance of territorial authorities was noted. Importantly, however, the BIA's powers in relation to territorial authorities were limited. The Court saw the BIA's role as essentially regulatory or supervisory in nature.[188] Territorial authorities had a statutory responsibility for the administration of the Act and the regulations, and the enforcement of the building code, within their

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182 At [52].
183 At [53].
184 At [76].
185 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [126].
186 At [77].
187 At [42].
188 At [44].

districts. The BIA did not. Territorial authorities had the statutory powers necessary for this and a statutory duty under s 26 to gather such information, and undertake or commission such research, as was necessary to carry out effectively their functions under the Act. The Council was well able to protect itself against the risk of its own negligence in performing its statutory functions. The primary objective of the BIA's review function in relation to territorial authorities was not to assist them but to assist the Minister in performing his or her statutory role, although assisting territorial authorities was an obvious by-product of that.[189]

[142] The Court referred to its decision in the case which has become known as *Sacramento,*[190] where a claim by building owners against the BIA relating to its supervision of the operations of a building certifier was struck out because of the absence of a duty of care. It said that the BIA had greater control over building certifiers than it did over territorial authorities, and that it would be surprising if no duty arose in the context of the BIA's review function in relation to building certifiers but a duty did arise in relation to territorial authorities.[191] Responsibility for the defects in a complex such as The Grange rested more directly on those who developed, designed, built, inspected and certified it than with the BIA. Many of the defects in The Grange that formed the basis of the claims of the owners seemed far removed from matters for which responsibility could sensibly be attributed to the BIA, examples being inappropriately installed deck membranes and lack of adequate water-proofing at particular locations.[192] Given its statutory responsibilities, the Council was not entitled to treat the outcome of the BIA's review as, in effect, a quality assurance certificate in respect of its processes. The potential scope of the claimed liability was also very wide. As a consequence, the losses for which the BIA would be liable might be far removed from its allegedly negligent conduct – that is, too remote. That pointed to a lack of proximity.[193]

[143] Turning to issues of policy, the Court said that in *Sacramento* it had treated the BIA's power to review the operations of building certifiers as being quasi-judicial

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189 At [44].
190 *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95.
191 At [43] and [44].
192 At [48].
193 At [50].

– an aspect of the BIA's overall regulatory or supervisory role. It was difficult to see why the BIA's review function in relation to territorial authorities should be treated differently. The BIA had an obligation to report to the Minister if it considered that a territorial authority was not fulfilling its functions under the Act. Arguably, imposing a duty of care would create an impediment to the free flow of advice to the Minister either by making the BIA too cautious in its assessments or by rendering it unwilling to carry out reviews of its own motion. It was not consistent with the statutory policy to incentivise the BIA to refuse or neglect to monitor territorial authorities out of a concern about incurring liability in negligence to them in the process. Nor was it consistent with the statutory policy to incentivise the BIA to take a detailed, hands-on approach to the operational work of territorial authorities. Given that the BIA was a small organisation with limited resources, this would have had significant resource implications, and the broad objective of the regime introduced by the Act was to loosen, not tighten, regulatory restraints.[194] The duties alleged were inconsistent with a review function of a regulatory or supervisory nature carried out by the BIA for the benefit of the public rather than for the benefit of territorial authorities.[195]

[144] The Court of Appeal allowed the BIA's appeal and set aside the Council's third-party notice.

Strike out principles

[145] Rule 4.16 of the High Court Rules enables a person served with a third-party notice to apply to the court to have it set aside. The principles applicable under r 15.1 to the striking out of pleadings apply to the setting aside of a third-party notice. The ground asserted in this case is that the Council's pleading against the Attorney-General discloses no reasonable cause of action against it. By this is presumably meant, to use the actual language of r 15.1(a), that the pleading "discloses no reasonably arguable cause of action" against the Attorney-General.

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194 At [55].
195 At [57].

[146] The principles are well settled. The statement of them by Richardson P in *Prince and Gardner* is authoritative:[196]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed ... ; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material ... ; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction ...

To this can be added the cautionary remark of the Chief Justice and Anderson J in this Court in *Couch*[197] that particular care is required in areas where the law is confusing or developing.[198] They identified liability in negligence for the exercise or non-exercise of a statutory duty or power as just such an area, and stressed the desirability of determining whether a duty of care exists in cases of this kind on the basis of actual facts found at trial, rather than on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out. Even in such cases, however, the range of the factual possibilities which could be established at trial may be sufficiently limited as to remove the danger of relying upon assumptions about what may be able to be proved. McLachlin CJ observed for the Court in the very recent Supreme Court of Canada case, *Imperial Tobacco*: "A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven".[199]

Duty of care – methodology

[147] The courts of this country, like those of England and Wales, Australia and Canada, have struggled to formulate an entirely satisfactory methodology for determining whether a duty of care exists in a novel situation where it can be shown that the defendant's carelessness has in some degree caused or contributed to a loss

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196 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

197 At [33].

198 "The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed": *R v Imperial Tobacco Canada Ltd* [2011] 3 SCR 45 at [21] per McLachlin CJ for the Court.

199 At [22].

suffered by the plaintiff. In large measure this is because of the amorphous nature of the concepts employed.

[148] In England the approach at one time appeared to be settled in a manner outlined by Lord Wilberforce in *Anns v Merton London Borough Council*.[200] It involves two stages – first, consider whether there was a sufficient relationship of proximity between the carelessness of the defendant and the plaintiff's loss (a concept involving the foreseeability of the resulting harm and the closeness or remoteness of the connection between the defendant's act or omission and the loss) and then, second, consider whether there are any features which, despite proximity being established, should negative, reduce or limit the scope of the duty or the class of persons to whom it was owed or the damage to which a breach might give rise.

[149] A difficulty with a staged formulation is that some matters may be relevantly assessed at either stage, or may even need to be examined at both. They cannot always be pigeonholed into one or the other. Nevertheless, the usual approach in this country has increasingly been to look first at factual and policy aspects of the relationship between the parties and, after that, at external considerations. The latter may, however, require a re-visiting of some matters already considered at the first stage. For example, where the defendant is exercising a statutory function the relationship may in whole or part derive from it. But the nature of the function will also be relevant to the second stage of the inquiry. As Glazebrook J remarked in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*,[201] echoing Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*,[202] the focus is on two broad fields of inquiry but they provide only a framework rather than a straightjacket.

[150] In the United Kingdom concerns developed over what Lord Bridge called, in *Caparo Industries plc v Dickman*,[203] the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether

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200 *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 751–752.

201 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].

202 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294(i).

203 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 617.

a duty of care is owed and, if so, what is its scope. Lord Bridge said that what emerged from cases after *Anns* was that:[204]

> ... in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

[151] So the courts in England have come, after *Caparo*, to look first at foreseeability, second at proximity, and then to ask the further question whether it is fair, just and reasonable to impose a duty of care in the particular kind of case – effectively a three-stage test. As Professor Todd points out, however, the language of *Anns* and *Caparo* is fundamentally similar and on occasion the English courts have appeared to revert to something like a two-stage inquiry.[205] The concern expressed there about *Anns* was that it gave too much emphasis to foreseeability but the New Zealand courts have seen the first-stage inquiry as much broader than that, encompassing all facets of the relationship between the particular parties.

[152] The Canadian courts, like our own, have never repudiated *Anns*. But they have, like us, sought to refine it. The leading authority is now the decision of the Supreme Court in *Cooper v Hobart*.[206] The judgment of McLachlin CJ and Major J for the Court confirmed that at the first stage of the *Anns* test, concerned with the relationship between the parties, both foreseeability and proximity must be established. There is then a prima facie duty of care. But the question still remains, at the second stage, whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.[207] Sufficiently proximate relationships are identified through the use of categories but the categories are not closed.[208] That is essentially the way in which the problem is approached in New Zealand.

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204 At 617–618.
205 Stephen Todd (ed) *Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 5.2.02.
206 *Cooper v Hobart* [2001] 3 SCR 537.
207 At [30].
208 At [31].

[153] The Canadian Court said that "proximity" describes "the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed". It is a term used to describe a relationship of such a nature that the defendant may be said to be under an obligation to be mindful of a plaintiff's legitimate interests in conducting his or her affairs. Residual policy considerations, considered at the second stage, are not concerned with the relationship between the parties, but with the effect of recognising a duty of care on other legal obligations, the legal system and society more generally. Again, we take the same approach.

[154] It comes as no surprise to find Kirby J of the High Court of Australia affirming the view of observers that the Canadian approach looks remarkably familiar to that "re-adopted" in House of Lords cases such as *Caparo*.[209] Nevertheless, disagreeing with Kirby J, the High Court has rejected both *Anns* and *Caparo* in favour of an unstructured assessment of what have been called "salient features". The concern of the Court expressed in *Sullivan v Moody*[210] is that if the *Caparo* three-stage approach is followed, judges and practitioners, confronted by a novel problem, will seek to give the methodology a utility beyond that claimed for it by Lord Bridge. There is said also to be a danger that, the matter of foreseeability having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, just and reasonable as an outcome in the particular case. Proximity is said to give little practical guidance in cases which are not analogous to those in which a duty has been established;[211] and what is fair, just and reasonable is said to be capable of being misunderstood as an invitation to formulate policy rather than to search for a principle.[212]

[155] Whilst there is some force in these criticisms, it is doubtful that the concerns expressed by the High Court of Australia have been borne out in cases in the other jurisdictions over the last decade, where there is little sign that the courts have adopted a formulaic approach. Certainly the salient features to which the Australian courts have paid particular attention (including the nature of the harm, the plaintiff's vulnerability, the defendant's control over the situation, the generality or particularity

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209 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540 at [233].
210 *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562.
211 *Sullivan v Moody* at [48].
212 *Sullivan v Moody* at [49].

of the class of plaintiff, whether there has been an assumption of responsibility by the defendant, the resources of and demands upon a defendant public authority and its functions and powers), or such of them as are relevant in an individual case, have been regarded as providing valuable assistance and have been addressed in the other jurisdictions in much the same way as in Australia. But it is helpful to address them in the context of an *Anns/Caparo/South Pacific* framework.

[156] As to that framework, it seems to us that it must amount to the same thing whether stated as having two stages (one of which has two parts) or as three stages. The important insight found in Canadian and New Zealand cases is that when a court is considering foreseeability and proximity, it is concerned with everything bearing upon the relationship between the parties and that, when it moves to whether there are policy features pointing against the existence of a duty of care – that is, whether it is fair, just and reasonable to impose a duty – the court is concerned with externalities – the effect on non-parties and on the structure of the law and on society generally. But, as already remarked, aspects of some matters may require to be considered more than once.

[157] Where the person who has suffered an injury or loss asserts that the defendant owed a duty of care in a novel situation – one which falls outside an established category – it will naturally remain necessary to satisfy the court that the loss was a reasonably foreseeable consequence of the plaintiff's act or omission. But that will rarely, if ever, be determinative in such cases. McLachlin CJ observed for the Court in *Imperial Tobacco* that:[213]

> not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

Foreseeability is in such novel cases at best a screening mechanism, to exclude claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss. The law would then regard the loss as such an unlikely result of the plaintiff's act or omission that it would not be fair to impose

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[213] At [41].

liability even if that act or omission were actually a cause, or even the sole cause, of the loss.

[158] Assuming foreseeability is established in a novel situation, the court must then address the more difficult question of whether the foreseeable loss occurred within a relationship that was sufficiently proximate. This is usually the hardest part of the inquiry, for as Lord Bingham said in *Customs and Excise Commissioners v Barclays Bank plc*, the concept of proximity is "notoriously elusive".[214] He was speaking of claims for economic loss but, in New Zealand at least, because of our no-fault accident compensation scheme, the majority of novel claims are of this character and those that are not will be sufficiently unusual as to raise comparable difficulties. Lord Oliver said in *Alcock v Chief Constable of South Yorkshire* that the concept of proximity is an artificial one which depends more on the court's perception of what is a reasonable area for the imposition of liability than upon any logical process of analogical deduction.[215] An examination of proximity requires the court to consider the closeness of the connection between the parties. It is, to paraphrase Professor Todd,[216] a means of identifying whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff.

[159] Richardson J has observed that the concept of proximity enables the balancing of the moral claims of the parties: the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected from an undue burden of legal responsibility.[217] A particular concern will be whether a finding of liability will create disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff. Another concern is whether it will expose the defendant and others in the position of the defendant to an indeterminate liability. The latter consideration may, however, be better examined at the second stage of the inquiry: whether the finding of a duty of care will lead to similar claims from other persons who have suffered, or will in the future suffer, losses of the same kind, but who may not presently be able to be identified.

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214 *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 (HL) at [15].
215 *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (HL) at 411.
216 At 143.
217 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 532.

[160] In a relatively small number of cases, at the final stage of the inquiry the court will find no duty of care exists notwithstanding that the loss was foreseeable and the relationship sufficiently proximate. It will do so because a factor or factors external to that relationship (perhaps indeterminate liability) would make it not fair, just and reasonable to impose the claimed duty of care on the defendant. At this last stage of the inquiry the court looks beyond the parties and assesses any wider effects of its decision on society and on the law generally. Issues such as the capacity of each party to insure against the liability, the likely behaviour of other potential defendants in reaction to the decision, and the consistency of imposition of liability with the legal system more generally may arise.

[161] In embarking upon an assessment of whether a duty of care existed or, in relation to a strike out application, may be capable of being shown to exist, it is of the utmost importance to identify and consider the salient features of the case which should properly determine that question. If that is adequately done the exact methodology employed should not be of paramount importance. It is worth remembering Cooke P's precept in *South Pacific*:[218]

> A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.

Duty of care – this case

(a) The nature of the claims

[162] It is important to be clear about what is being put forward as the basis of the Council's claim that the BIA was in breach of a duty of care owed to it. It is not asserting in its first and second heads of claim that the BIA should have alerted it to leaky building syndrome in general and certainly not to specific problems arising from the use of monolithic cladding. Such a claim would be unsustainable in relation to the 1995 report, if only because it does not appear that such problems had

[218] At 294(i).

then emerged – the BIA itself is not said to have been alerted to them before 1998. Nor is any claim of liability made in relation to the promulgation of the code on the advice of the BIA, or of any acceptable solution. Again, it is to be remembered that the use of untreated timber was permitted by a standard published by the Standards Institute only in September 1995 – at about the time the BIA's report was done.

[163] What the Council claims, instead, in relation to the first and second heads of claim is that the BIA had special expertise but failed to alert it to the fact that its consenting and inspection regimes were seriously deficient.[219] It says that, if it had been warned by the BIA in 1995 of the inadequacies of its consenting and inspection processes – if there had not been negligent misstatements or omissions in the report – it would have taken steps to remedy them, and it would not then have allowed buildings like The Grange to be constructed as they were. It says that, instead, the report lulled it into a false sense of security, thereby causing it to fail to detect the flaws in the design and construction of The Grange, and that this failure to correct the 1995 report was a cause of the losses suffered by the plaintiffs, and thus of the loss the Council itself has suffered by having to compensate the plaintiffs for its own negligence. As the plaintiffs would not in law have succeeded in their claims against the Council unless the Council was proved to have been negligent in its consenting and inspection processes, this is a claim that the BIA owed the Council in law a duty to protect it against its own negligence.

[164] The Council says the duty of care arose in two possible ways. First, it says that the duty existed either expressly or by implication under the statutory scheme of the Building Act, which placed on the BIA the responsibility for carrying out the review in 1995 in the interests of the Council with reasonable skill and care. But additionally, and whether or not there was such a duty under the Act, the Council says that by the BIA's interactions with it in 1995, in particular by sending the report to it intending it to be relied upon, the BIA assumed a responsibility towards it and thus came under a legal duty to it to carry out the review and make the report with reasonable skill and care, which it failed to do.

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[219] Although there are claims separately pleaded in respect of the review and the report on the review, they can be considered together because both focus on the alleged effects on the Council of the report. It was not contended in argument that the review process in itself caused loss to the Council.

[165] It is said that the duty of care arising from the pleaded interactions is in no way inconsistent with, and therefore negated by, the Act. Mr Goddard cited the decision of the Supreme Court of Canada in *Imperial Tobacco*[220] in which that Court said that an argument of the first kind is that the statute creates a private relationship of proximity giving rise to a prima facie duty of care; and that an argument of the second kind is that the proximity essential to the private duty arises from a series of specific interactions between a government (here a government agency) and the claimant: that it has, through its conduct, entered into a special relationship with the claimant sufficient to establish the necessary proximity for a duty of care. The Supreme Court recognised that it is possible to envision a claim where proximity is based both on interactions between the parties and on statutory duties.[221]

[166] *Imperial Tobacco* involved a strike out motion. The Supreme Court commented that where the sole basis for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation. But:[222]

> On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

[167] The third head of claim asserts a failure by the BIA in 1998 to dispel the false sense of security it had allegedly created in the Council by failing to inform the Council of problems with the use of monolithic cladding once its attention had been drawn to them by Prendos – that it failed to correct its earlier misstatements. One issue concerning this claim can be dealt with immediately. There was a rather sterile debate between counsel over whether this was entirely a claim of negligent omission on the BIA's part.[223] The BIA's silence after 1995, looked at in isolation, was an

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220 *R v Imperial Tobacco Canada Ltd*, above n 198.

221 At [44]–[46].

222 At [47].

223 The courts generally approach claims about allegedly tortious omissions with more caution than they do in the case of acts taken by a defendant: see *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1060 per Lord Diplock and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [80].

alleged sin of omission but, as any obligation to issue a correction arose from its positive act of carrying out the 1995 review and sending a copy of its report to the Council, that is not a matter which could be determinative of the existence or otherwise of a duty of care in 1998.

[168] The fourth head of claim alleges breach of a duty of care owed directly to the plaintiff owners in failing to take steps which would have led to general knowledge of the problems (including knowledge by territorial authorities) and consequent avoidance of unsound building practices. The Council claims contribution as one tortfeasor against another.

(b) Foreseeability

[169] We turn then to consider whether a prima facie duty of care arguably exists in this case. It is, in our view, arguable that it was reasonably foreseeable that if the BIA misinformed the Council in the 1995 report, thereby leading the Council to believe that it was adequately performing its function of enforcing the building code, and later failed to correct that misinformation, the Council might remain unaware that buildings like The Grange were non-compliant in the respects which are alleged. And, if the Council itself was, as a consequence, found negligent in the enforcement of the code, it was reasonably foreseeable that it might be exposed to claims by affected building owners, who were entitled to place general reliance upon the Council in the way described in *Invercargill City Council v Hamlin.*[224] Furthermore, in respect of the fourth head of claim, it can be accepted that it may have been similarly reasonably foreseeable that the building owners would suffer loss if, because of the BIA's failures to detect and advise the Council of the problems, they were negligently issued building consents and code compliance certificates despite their buildings being designed or constructed with defects. The Council's claims thus pass the "screening test" of reasonable forseeability of the harm which it (and the plaintiff owners) suffered.[225]

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[224] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and [1996] 1 NZLR 513 (PC), as confirmed in *Sunset Terraces*.

[225] That is not to say that the BIA's acts or omissions were legally causative of that harm – a question which the Court is not called upon to consider on the present appeal.

(c) Proximity – duty from statute?

[170] The more important issue is whether there was the requisite proximity. The obvious starting point is the Act. A duty of care on the part of a public authority must stem from consideration of its functions and responsibilities.[226] Did it place upon the BIA an obligation to review the Council's systems *and* a duty to report to the Council thereon? It did not do the latter expressly. The BIA's functions, set out in s 12, included advising the Minister on matters of building control, disseminating information and providing educational programmes (which could no doubt include programmes for territorial authorities) and undertaking reviews of the operations of territorial authorities in relation to their functions. The functions of the territorial authorities included the administration of the Act and the regulations (including the code) in their districts and, specifically, the enforcement of the provisions of the code and other regulations.

[171] The review function was the subject of s 15. The BIA could act of its own motion or at the request of the Minister. In the absence of such a Ministerial request (and none was ever made according to counsel), it was for the BIA to choose whether to carry out a review of a territorial authority. But that could not have meant that the BIA had no obligation to make any reviews of its own motion, since it could hardly have performed its other functions, particularly that of advising the Minister under s 12(1)(a), if it was in ignorance of what the territorial authorities were doing on the ground. It was a small body, not equipped to review all of the more than 70 territorial authorities except over time, but it must have been expected by the legislature that the BIA would inform itself about performance generally by regularly carrying out sampling of the work of selected territorial authorities. That is the way in which the BIA, correctly in our view, understood its task, and it went about it in 1995 by choosing seven authorities for examination.

[172] Something was made in argument for the Council of the powers given to the BIA under s 79 for "the purpose of monitoring the performance by territorial authorities" of their functions under the Act. Those powers included obtaining access to the records of the territorial authorities, requiring them to supply

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[226] *Fleming v Securities Commission*, above n 217, at 528 per Richardson J.

information and answer questions, and a power to enter land or buildings for investigative purposes. The reference to "monitoring" is at first puzzling because the BIA was not given any express monitoring function under s 12, or elsewhere in the statute, other than by way of review. The explanation seems to be that Commission's draft Bill, in its equivalent of s 12, would have placed upon the BIA in general terms a function of monitoring performance by territorial authorities. What is now s 79 appeared in the next following clause in that draft Bill. But the reference to monitoring was omitted from s 12 when a Bill was introduced into Parliament in favour of the more limited function of undertaking reviews and, it seems, the opening language of what became s 79 was not consequentially adjusted. It is plain enough, however, that the s 79 powers were intended to operate in support of the s 12(1)(d) review function, conducted under s 15. There was to be no general monitoring function.

[173] Section 15(3) required the BIA to make a written report to the Minister, but only if it believed that a territorial authority was not fulfilling its functions under the Act. (We were told that none was made in relation to the Council, which is consistent with the tenor of the report.) The section did not require the BIA to send a report on its review to the territorial authority.[227] That is suggestive that the sole purpose of the review function was so that the BIA could inform itself about a territorial authority's performance for the purpose of advising the Minister. It is not suggestive of any obligation placed upon the BIA under the Act to comment to the territorial authority on the conclusions it might draw from its review. That may seem surprising but is consistent with a limited role for the BIA, as reflected in the way in which its functions are specified in s 12. It is also reflects the position of the Commission, which had recommended that the BIA "would not be an advisory body, except to the Minister" and said that it would be "inconsistent with its powers of decision-making in matters of interpretation, approval and monitoring of the control systems, for the BIA also to have the lesser status of an advisory body to territorial authorities".[228]

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[227] Contrast cl 10(2) of the Commission's draft Bill, which expressly empowered the BIA to "make reports in writing on the performance by a territorial authority ... and [to] issue any such report to the territorial authority ... to the Minister and to any other person". The reports this draft provision envisaged were related to the proposed monitoring function.

[228] Building Industry Commission Report at 4.35 – see [17] above.

[174] The Commission had recommended that it should be the territorial authorities who would have the responsibility for the administration of the Act in their districts. That was carried into the Act in s 24. The Commission also said that the BIA should be responsible for monitoring the control system in operation and the performance of control functions at the local level: that checks would be made by the BIA to see whether a territorial authority was administering the code in accordance with the Act and proper practices "and to require correction if it was not". But the Commission's draft Bill contained only the provision for the monitoring function (which was dropped) and did not contain any power of correction of a territorial authority except by means of a report to the Minister.

[175] Furthermore, the territorial authorities themselves were not only given primary responsibility for enforcing the code but were also placed, by s 26, under a "duty" to gather such information and undertake or commission such research as was necessary to carry out effectively their functions under the Act. The BIA, in contrast, was placed under no comparable duty in relation to its broader and more high-level functions.

[176] Four further features which count against the existence of the asserted duty of care on the part of the BIA arising from the Act are:

(1) the lack of any provision giving it an ability to exercise control over the day-to-day operations of the territorial authorities;

(2) its separation from the events which gave rise to the loss suffered by the Council;

(3) that the Council had, or should have had, the ability to manage its building control systems so as to prevent the construction of non-compliant buildings, and so was not a vulnerable person; and

(4) that the Council's loss resulted from its own negligent failure to do so.

[177] First, it is significant that the BIA was given no power to control the behaviour of a territorial authority by stepping in and directing it or its employees

how to undertake the function of administering the code. As the Court of Appeal said in *Sacramento*,[229] and confirmed in this case,[230] the further removed the public body defendant is from the day-to-day physical control over the activity which directly caused the loss, the less likely it is that the courts will impose a duty of care. By "physical control" we understand the Court to mean the ability in law to exert control over the activity from or in respect of which the loss is incurred. That can be contrasted with the BIA's powers in relation to building certifiers. In their case, if the BIA received a complaint about or had cause to query their conduct or ability, it had power to instigate an investigation and, if it received a recommendation that there should be an inquiry, to institute one. After a hearing and a finding of negligence or incompetence the BIA had a range of disciplinary powers, including suspension or cancellation of a certifier's approval to act as such.[231] No comparable power was given to it under the Act if a territorial authority misperformed its building control functions. All the BIA had power to do in that event was to advise the Minister of the problem, and it was only if the Minister considered that the territorial authority was not exercising or performing its functions, powers or duties to the extent necessary to achieve the purposes of the Act that the Minister could, after consulting the Minister of Local Government, appoint one or more persons to exercise or perform functions, powers or duties in the place of the territorial authority. Plainly that provision, s 29, was intended to be a last resort for use in a really serious case only, and after a warning notice had been given by the Minister to the territorial authority. The Minister would not be likely to exercise it unless a territorial authority's deficiencies in the consenting or inspection processes were compromising the operation of the Act in its district. But the BIA, and indeed the Minister, had no statutory power to correct less flagrant malpractices.

[178] Mr Goddard submitted that a duty of care could still exist where a defendant lacked power to do more than report misconduct to another person. He referred us to cases in which auditors of law firms had been found to owe a duty of care despite having no recourse on finding malpractice other than to report it to a law society.

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229 At [42].
230 At [32].
231 Sections 54 and 55.

But cases which concern duties of care by auditors of solicitors' trust accounts, such as *Stringer v Peat Marwick Mitchell & Co*,[232] had their own very particular statutory context, which expressly envisaged a responsibility by the auditors to the firm which had directly engaged and paid the auditors. The law society, for its part, had a statutory power to investigate anything brought to its notice and, if necessary, to take disciplinary action against the defaulting lawyer.[233]

[179] The BIA's lack of ability to control the day-to-day operations of the Council is relevant to the second feature. That is the disjunction between the purpose for which the BIA made its review and the immediate causes of the defects in The Grange. The Council's loss arose indirectly from particular matters of faulty design or work by the people who designed or built The Grange. But the BIA was never established in order that it should carry out checks on individual buildings and discover their defects. That was a task entrusted solely to the Council. The BIA randomly selected for inspection a small number of buildings. It did so for the purpose only of informing itself about how the Council was undertaking the process of inspections. It had no duty under the statute to try to detect defects for the benefit of owners of the buildings which happened to have been chosen for inspection, let alone those that were not. There is therefore no sufficient nexus between the kind of loss suffered by the owners of The Grange, which the BIA did not in fact inspect and was never obliged to inspect, and the duty of care said by the Council to be owed to it by the BIA.

[180] The third feature is that the Council was not a vulnerable person. It was well able to protect itself, by putting itself in a position to operate its building control systems in a manner which would detect non-compliance with the code and prevent it from happening. It was the Council, not the BIA, which was given the function of enforcing the provisions of the code in its district and, as we have also seen, it was placed under a duty to gather the necessary information and commission the necessary research in order to be able to fulfil its functions. It was a much larger organisation than the BIA and could employ people who were specialists in building controls and inspections, or engage outside experts for advice. It had the ability

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232 *Stringer v Peat Marwick Mitchell & Co* [2000] 1 NZLR 457 (HC).
233 Law Practitioners Act 1982, ss 85 and 99.

under s 28 to fix the charges it made for building consents and code compliance certificates, so it could increase them to cover additional costs. In contrast, the BIA had a limited budget and therefore a limited capacity to employ[234] or contract personnel to conduct reviews. The quantum of its levy (the only source of its funding) was fixed not by itself but by the Minister, and had already been reduced in 1994.

[181] One of the things the BIA actually warned the Council of in the 1995 report was that it needed to monitor performance closely "to establish if the consent structure is sufficiently resourced to cope with the workload".[235] It also expressed concern about whether building inspectors had time to complete thorough inspections and in its recommendations said that the field inspectors group appeared to be short of resource. The Council was under a legal obligation to remedy such deficiencies. It was obliged to ensure that its officers were sufficiently knowledgeable about the code and acceptable solutions as to be able to discover during on-site inspections whether, for example, monolithic cladding was being installed compliantly – that is, as contemplated by the relevant acceptable solution. That was something which the Council simply could not rely upon the BIA to pick up during a general review being conducted for the purpose of advising the Minister about the Council's standards of performance generally. Because of the Council's own statutory obligations it cannot claim to be a vulnerable person who should have been protected by the BIA in the performance of the latter's different statutory functions.

[182] The last matter is the cause of the claimed loss. In *Couch* this Court emphasised the high threshold for the establishment of a duty of care where the loss suffered by the claimant was immediately caused by a third party.[236] In this case, the loss incurred by the building owners was not only caused by third parties, but it is also the position that the claimant Council must be taken to have contributed to that loss by its own negligence, in the absence of which it would not have had any legal obligation to make any payment of damages to the building owners. Although the

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234 It employed a staff of only thirteen.
235 At 9.
236 At [80]–[81].

possibility cannot be excluded, we are not aware of any case in which a duty of care has been successfully claimed in circumstances in which the asserted duty on the part of one body exercising statutory functions or powers against another such body was to protect the claimant against its own negligence towards someone else, and certainly not one in which that negligence itself consisted of a failure to protect that other person against separate negligence by third parties. The case thus does not fall within any established category of situations in which a duty of care has been recognised. On the contrary, in a case in which a territorial authority sought indemnity from builders on the grounds that they should have foreseen the territorial authority's liability for negligent inspections, Hardie Boys J found that to be "a strange proposition for the Council to advance" and "quite untenable".[237] In *Wellington District Law Society v Price Waterhouse* the Court of Appeal observed that in cases in the building and related fields it has been held that "a duty of care does not extend to protect a person who brings about his or her own loss by negligence".[238]

[183] In *Minories Finance v Arthur Young* Saville J likewise rejected the proposition that a banking regulator owed a regulated bank a duty to protect it from its own negligence by failing to give it any warning, or take preventative action, concerning the imprudent and careless manner in which the bank was operating.[239] He said that principles of common sense and reason did not indicate that such an obligation should exist. In *Bank of New Zealand v Deloitte Touche Tohmatsu*,[240] cited by Mr Goddard, it was claimed by Access Brokerage that NZX should have protected Access against fraud or negligence by its own employees. The background to the case differed considerably from the present. Argument was focused on NZX's regulatory role and the discussion in the case is therefore not of much assistance in the present case. The Court of Appeal did not uphold the claim. It allowed it to go to trial, considering that the extent to which Access was at fault would be an issue there. It commented that the claim would face difficulties.

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237 *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC) at 615.

238 *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767 (CA) at [74], citing *Anns*, *Morton* and *J W Harris & Son Ltd v Demolition & Roading Contractors (NZ) Ltd* [1979] 2 NZLR 166 (SC).

239 *Minories Finance v Arthur Young* [1989] 2 All ER 105 (QB) at 110.

240 *Bank of New Zealand v Deloitte Touche Tohmatsu* [2009] 1 NZLR 53 (CA).

[184] Two particular matters concerning the first two levels of claim which are emphasised by the Chief Justice in her dissenting reasons deserve a response. She is of the opinion that the BIA's statutory role in determining disputes between individual building owners and a territorial authority shows that the BIA was not remote from the implementation of the building code in actual building work. In such cases, she correctly observes, there was a direct responsibility of the BIA. The scheme of the Act, as she puts it, did not leave territorial authorities, certifiers or owners adrift and vulnerable in cases of difficulty as to whether particular matters complied with the code.[241] The Chief Justice also considers that the existence of the limitation and the immunity defences in the legislation suggests that liability of the BIA was specifically envisaged. We do not accept that either of these provisions, found in ss 17–20 and ss 89–90 respectively, reveals the existence of the necessary relationship of proximity or otherwise indicates that there is intended to be a duty of care between the BIA and the territorial authority as the Council asserts. The BIA is brought directly into a relationship between a territorial authority and a building owner under ss 17–20 only when a dispute exists between them and one of them chooses to refer it for determination. The BIA is not called upon under the statute to play any role in relation to the permitting or construction of an individual building unless a dispute occurs and is referred to it. As pointed out elsewhere in these reasons, it is given no power of intervention of its own motion.

[185] Nor does the absence of any immunity for the BIA under s 89 or its express inclusion in the limitation defences in s 90 demonstrate that it is intended to have some general liability not otherwise signalled by the statute. In fact, the signals in the Act are very much the other way. It is clear from s 91(3)(b) (which specified that the date of issue of a determination by the BIA was the date, for the purposes of the Limitation Act 1950, of the act or omission on which proceedings could be brought) that the BIA was intended to have liability for negligently making a determination. Indeed, s 90(4) makes it plain that the BIA could also be liable if it negligently issued an accreditation certificate. But the existence of liability in relation to such actions on its part does not indicate that it was to have any wider liability. The

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[241] At [18].

absence of a more general reference to the BIA in s 91 suggests, if anything, the opposite.

[186] For the foregoing reasons, we conclude that neither expressly nor by implication did the Act place upon the BIA a duty of care when advising the Council concerning its building control systems by way of a report following its review, and thereby to protect the Council from the consequences of its own neglect. It is, in consequence, unnecessary to consider whether, if such a statutorily imposed duty of care had otherwise existed, it could have done so in circumstances where the BIA would then have been required to act in the capacity of a regulator.

(d) Proximity – assumed responsibility?

[187] Although there was no relevant duty under the Act, it would be unrealistic to expect that when the BIA did conduct reviews under s 15, it would not make a record of its findings for its own purposes (even where it deemed it unnecessary to report to the Minister) and supply it to the Council. It would have been very strange if the BIA had thought it appropriate, at least in an ordinary case, to withhold its conclusions from the territorial authority it had reviewed. The Council would naturally be interested to know whether the BIA intended to make a report to the Minister under s 29. Although an express power to supply a copy was omitted from the legislation, there was certainly nothing in the Act obliging the BIA to withhold it. The BIA's evident practice of supplying a copy of the report made by its consultants was therefore not at all inconsistent with the Act.

[188] The question, then, is whether in doing so in the case of the Council in 1995, the BIA assumed a responsibility as a matter of law to use reasonable skill and care in the preparation of its report. In *Attorney-General v Carter* the Court of Appeal said that in relatively rare cases the defendant might be found to have voluntarily assumed responsibility. In most cases, however, there would be no voluntary assumption:[242]

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[242] *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [26].

> The law will, however, deem the defendant to have assumed responsibility and find proximity accordingly if, when making the statement in question, the defendant foresees or ought to foresee that the plaintiff will reasonably place reliance on what is said. Whether it is reasonable for the plaintiff to place reliance on what the defendant says will depend on the purpose for which the statement is made and the purpose for which the plaintiff relies on it. If a statement is made for a particular purpose, it will not usually be reasonable for the plaintiff to rely on it for another purpose.

[189] The requirements which must generally be met before a plaintiff can say that it was entitled to rely upon the maker of a statement or the giver of advice are summarised in Lord Oliver's speech in *Caparo* as follows:[243]

> [T]he necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually on inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive ...

[190] In order to test whether it was objectively reasonable for the Council to rely upon the BIA's report, as it pleads it did, it is necessary to have regard again to the statutory framework which led to the report and to the content of the report itself. As we have seen, the statutory framework is not helpful to the Council. The case for the Council is addressed to interactions between it and another public body (the BIA), both of whom were exercising functions, including regulatory functions, under a single statutory scheme. Any expectation which one could reasonably have of the other was a product of their respective statutory roles. Imposition of a common law duty of care, where the statute itself did not give rise to any duty, would amount to a substantial addition to the relationship between the parties found in the statute and would appreciably alter the ways in which each could be expected to perform its functions. Therefore, if the terms of the report do not plainly support an assumption of responsibility by the BIA – that is, something that could reasonably be relied upon by the Council – the first two heads of claim must fail.

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[243] At 638.

[191] The primary purpose of the report appears from [1.02]:

> To review procedures within the selected Territorial Authorities to establish how they are coping with the Building Act requirements so that the authority can advise on operating methods and consider any legislative changes that might be helpful.

That is entirely consistent with, and goes no further than, the Act.

[192] The consultants also stated in that paragraph, however, that:

> It was also proposed results and conclusions of the review work would be made available to the Territorial Authorities to assist them in evaluating their own internal procedures and to assist with the achievement of national uniformity and the increased efficiency envisaged by the Building Control Reforms.

In other words, the consultants were correctly anticipating that a copy of their report to the BIA would be supplied to the Council. That is also consistent with the title of the review document, which includes "Report for North Shore City". It was intended to be more than just a report about the Council. The advice given in the report would be communicated to the Council.

[193] But is it arguable that the advice in the report was given to the Council in order to be used for the purpose for which the Council now says that it relied upon the report? Can it be said to have been reasonably relied upon by the Council in drawing the conclusion that there were no serious deficiencies in its consenting system? That is, as Mr Goddard submitted, a factual question which must be approached cautiously as long as the asserted interaction could result in a finding of sufficient proximity. But in this case the only relevant evidence would be the contents of the report and we have it before us. A trial court will be in no better position in that regard. We are well able to determine whether the Council's pleading of reasonable reliance, given the purpose and nature of the contents of the report, is sufficiently tenable to go to trial.

[194] On this point, it seems to us, the Council's case is unconvincing to the point of being unarguable. We say this for two reasons. The first is the statutory scheme, of which the Council must have been well aware when it received the report. That scheme gave the BIA limited functions in comparison with the Council's primary

role and duties as administrator of the code within its district. As we have said, the Council was, in keeping with the respective functions, a larger organisation with its own specialist staff and under a duty imposed by the statute to keep itself fully informed on building matters.

[195] The second and more important consideration is the nature of the review and what is actually said in the report. The part of the report specifically dealing with the Council is quite brief. It did say that with the exception of some anomalies which had been noted, compliance with the building code had been satisfactorily achieved and no instances of errors or omissions found. But that was in relation to a very limited sample, as the Council knew and as could be seen from the report. Moreover, the BIA recorded that the Council's system for processing building consents had just become operational and said that fully detailed documentation for the new system had not been viewed. It also noted critically that site inspections were being scheduled on a half-hour time slot, which was creating some problems, and recommended that "a close watch be kept to ensure the control officers have time to complete a thorough inspection on site or the code compliance checking regime may be compromised".[244] It pointed to one serious issue of non-compliance and said that inspectors should be more careful. It commented that there was no independent review system enabling the Council to monitor the performance of its building consent process and code compliance, although it noted that it had been told that a system "will be introduced".[245] It also, as already mentioned, warned the Council about its apparent lack of resourcing for the making of inspections. It then made the obviously high-level recommendations which are set out above at [135]. The reports on the inspected buildings, all of which were complete at the time, were in summary form only. That was in keeping with the overtly limited purpose for which those inspections were being made.

[196] Notwithstanding submissions to the contrary, this does not, in our view, come anywhere close to a "clean bill of health", as pleaded by the Council. The review was nothing like a full audit of the Council's processes, nor would it have appeared to a reader to have been intended to be. It could not reasonably have been

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[244] At 9.
[245] At 9.

understood by the Council to be giving an assurance of the quality of its future performance, or even of its performance in 1995, and certainly not in relation to issues of weather-tightness arising from the use of monolithic cladding with untreated timber. Such use had only just been authorised, and then subject to compliance with certain conditions. At that time there would not have been anything to alert the BIA to the problems which later developed. It could not reasonably be taken to have been giving any assurance in relation to the use of cladding with untreated timber. Furthermore, the BIA expressly pointed out that it was reviewing a Council system which was still under development and it made some specific criticisms. Its report may have been of some limited assistance to the Council but it is clearly untenable to say that the Council could reasonably place reliance on it in reaching the conclusion that its control systems were sufficiently robust and would not expose it to the risk of claims by building owners. That was to ignore the cautions and criticisms expressed in the report. Such a report therefore could not arguably give rise to the necessary proximity in the relationship between the BIA and the Council. No duty of care to prevent the harm suffered by the Council could exist in relation to the report.

[197] It is accordingly unnecessary to consider whether, at the further stage of the inquiry, external policy considerations would in any event have ruled out the recognition of a duty of care. Such considerations cannot rescue a plaintiff if the relationship between the parties was not proximate. It suffices to say that there is no reason to dissent from the view of the Court of Appeal that they did not support the existence of a duty of care.[246]

[198] We should add that it is beside the point for the Council to complain that if the BIA could in its 2003 report identify a range of serious problems in the Council's processes, it should have been able to do so in 1995. It may be that the BIA's review in 1995 was inadequate, even for the purpose of advising the Minister, but in the absence of a duty of care owed to the Council arising under the Act or from an assumed responsibility, for the reasons given, that is not something which can be a source of liability in the present proceeding.

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[246] At [53]–[58].

[199] The Court of Appeal was therefore correct to strike out the Council's first two heads of claim. The third must perish with them since, if the BIA was under no duty of care in relation to the 1995 report, on which the Council could not reasonably rely, it cannot have been under any duty in 1998 to issue a correction of that report. The Chief Justice disagrees and would not strike out the third head of claim. In her reasons, however, she appears to contemplate a reformulation of this head of claim. What the Council has actually pleaded, in quite restricted terms, is a cause of action of "Negligent Failure to Correct Misstatement" (in the 1995 report). We have summarised it in [101] above. The allegations are framed in terms of the so-called clean bill of health statements in the report. The Council has never asserted, and did not do so in this Court, that independently of the 1995 report the BIA had a duty pursuant to the statute or otherwise, upon being apprised of the weatherproofing problem in 1998, to advise the Council of the position, that is, to warn it about the dangers of non-compliance with code and the relevant acceptable solution when monolithic cladding was being used with untreated timber. That was not the case being advanced under the third head of claim. Even if it is assumed that, upon repleading, such a case could arguably be made out, it would be an entirely new claim. And it is now far too late for the Court to allow that to be done. It is undeniable by the Council, that from at least 2003, when it received a report from the BIA very critical of its practices in this respect, the Council was aware of all the relevant facts and could then have brought such a claim. Any reformulation of the claim would therefore be made well outside the six-year limitation period under the Limitation Act 1950.[247]

(e) Duty of care to building owners?

[200] That leaves the fourth head of claim, which can be summarised as a claim that the BIA owed a duty of care directly to the plaintiff owners in performing its functions. It was in breach of that duty, it is said, because it failed to make the plaintiffs, the building industry and territorial authorities aware of the problems in the use of monolithic cladding systems with untreated timber. But for that breach,

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[247] See r 7.77 of the High Court Rules: *Smith v Wilkins and Davies Construction Co Ltd* [1958] NZLR 958 (SC) and *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 (CA).

the Council argues, the plaintiffs would not have suffered their losses because the Council would not have issued the building consent and code compliance certificate for The Grange.

[201] It is submitted for the Council that the BIA had a responsibility in law towards the building owners which it shared with the Council, and that allocation of fault between them should be a matter for trial. It is submitted that this responsibility existed because the building owners placed general reliance upon the BIA to fulfil its statutory obligations, just as they did in respect of the Council (as upheld in *Hamlin/Sunset Terraces*). The owners were entitled to do that, it is argued, because the BIA had under the Act taken over from the territorial authorities some of the building control functions that had previously resided with the territorial authorities. It is also said that there was a general reliance on the BIA, and a recognition in the Act of its potential liability, when it accredited building products and processes under Part 8, and that there is no reason to adopt a different approach to its other statutory functions. It is also submitted that there was a direct connection between the plaintiff owners and the BIA because the former were obliged to pay the BIA's building levy as a specified part of the fee they paid to the Council for the building consent (the Council collecting it for, and paying it on to, the BIA). The argument that the BIA had significant control over the performance of the territorial authorities' functions was repeated.

[202] We have already indicated our acceptance that it is arguable that the claimed harm to the plaintiffs was reasonably foreseeable. The case for proximity is, however, even weaker than the Council's case on the other three heads of claim. That is in large part for the reasons given in relation to those other heads concerning the alleged duty arising from the statute, especially the BIA's separation from and inability to control the day-to-day administration of the consenting and inspection processes.

[203] A *Hamlin/Sunset Terraces* general reliance by the plaintiff owners cannot apply in the case of the BIA because under the Act it had neither a responsibility to inspect their property nor any power of inspection in relation to an individual building (save its power with respect to randomly chosen buildings in the context of

carrying out its reviews). The building levies were paid to enable the BIA to fund itself in the performance of the functions it was required to perform under the Act. As those did not include the administration of the code in the Council's district, there could hardly be any general reliance on the BIA in that respect by building owners. The fact that there were specific statutory functions for the BIA to perform in approving building products and processes can have no force when the plaintiffs' claims did not relate to them.

[204] The fourth head of claim was correctly struck out.

A limitation defence

[205] We conclude with mention of a matter to which it has not been necessary to refer in disposing of the appeal. By consent, the Attorney-General was granted leave to raise a ground of opposition to the Council's appeal which was not argued below. It was whether s 393(2) of the Building Act 2004 precluded relief from being granted in respect of the first, second and third heads of claim because they related to building work and the third-party notice was filed more than 10 years from the date of the act or omission on which the claims in it were based. In view of the conclusion already reached that these causes of action were properly struck out, it is not necessary to determine this question. We will, however, express a provisional view.

[206] Section 393 of the Building Act 2004 reads:

> **393 Limitation Defences**
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> (1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

(3) For the purposes of subsection (2), the date of the act or omission is,—

(a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and

(b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

There is a definition of "building work" in s 7 of the Act:

building work—

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes—

(i) sitework; and

(ii) building design

[207] The argument for the Attorney-General was that the three causes of action were "civil proceedings relating to building work" within the meaning of s 393(2).[248] As they all concerned the report in 1995, and the third-party notice was not filed until 30 March 2007, the ten-year period had already expired, it was submitted, and the claims were statute-barred by subs (2).

[208] Adoption of that argument would mean that the time under subs (2) had begun to run in 1995 before any cause of action in tort existed, and indeed before time began to run under the Limitation Act 1950, since The Grange was not granted a building consent and constructed until 1999, so that no loss could possibly have been caused to the Council by any conduct of the BIA before the latter time. It

[248] It was not suggested that the Limitation Act 1950 itself barred the claim.

seems unlikely that Parliament would have wanted to produce such an unusual and unfair result.

[209] In fact, it seems plain enough that when "relating to building work" is read in the context of the whole of s 393, and especially subs (1), it does not extend to a claim made for what the BIA did in 1995. We say this because "building work" in subs (2) is surely the same as the building work referred to in subs (1)(a), namely work associated with "any building" – that is, any *individual* building. That is consistent with the definition in s 7 which also contemplates construction , alteration, demolition, or removal of "a building". It is in fact subs (1)(b) which is applicable to the position of the BIA, with its reference to "performance of a function under this Act or a previous enactment", but the words "relating to the construction ... of *the* building" must be a reference back to the specific building in para (a).[249] It is to be noted also that subs (3) is clearly dealing with a specific building when, for the purposes of subs (2), it makes the date of the act or omission in the cases with which it deals the date of issue of the consent, certificate, or determination. That could relate only to an actual building.

[210] It therefore appears that subs (2) cannot have any application to the BIA's performance of its functions (its acts or omissions) in 1995, since they were not related to The Grange.

[211] The third head of claim concerned the BIA's failure to correct in 1998 the misapprehension allegedly created within the Council by the 1995 report. That again was not something done or omitted by the BIA in relation to any specific building and, even if it had been, the third-party notice was issued within 10 years of 1998.

[212] The Solicitor-General submitted, however, that because the plaintiff owners' claims against the Council were undoubtedly in relation to specific building work, and there are restrictions in r 4.4(1) of the High Court Rules on when third-party notices may be brought, the Council's claim must, for its notice to be valid, also have been brought in relation to that building work. We are not, for the reasons given, persuaded that it was. If it follows that the notice may not have complied with the

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[249] This was even clearer in s 91 of the 1991 Act, where subs (1)(b) spoke of "*that* building".

rule, that would raise a different question concerning its validity that would fall outside what was envisaged by the Court when permitting argument to be advanced on the possible application of s 393(2). We had no written submissions on this further point, which is not without its difficulties, nor did we hear full argument on it. It would not be appropriate to express a view on it in these circumstances, especially as it cannot be determinative of the appeal.

Result

[213] We would dismiss the appeal with costs of $40,000 to the Attorney-General, together with his reasonable disbursements as fixed by the Registrar.

TIPPING J

[214] I have had the advantage of reading in draft the reasons prepared by Blanchard J and the Chief Justice. I do not disagree with the process of reasoning which has led Blanchard J to the conclusion that this appeal should be dismissed. I agree with that conclusion but see the crucial issue as being in a somewhat narrower compass. Before I develop my reasons, I wish to express my agreement with the way Blanchard J has discussed the Chief Justice's articulation of the third cause of action.[250] I, too, do not consider the third cause of action can be allowed to proceed on the basis of the Chief Justice's analysis.

[215] As presently pleaded, the third cause of action alleges a duty to correct misstatements said to have been made in the 1995 report. It presupposes there were such misstatements upon which the Council reasonably relied. The Chief Justice's analysis, as I read it, does not depend on there having been misstatements in the 1995 report which required correction. It suggests an independent duty to provide information; a duty which does not depend on the Council having been misled by its reliance on the 1995 report. Such an approach would allow the Council to raise a new cause of action out of time.

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[250] See his [199].

[216] As a first step in its case as framed, the Council seeks to make the Building Industry Authority liable for negligence in respect of what was said and not said in the report written on behalf of the Authority in 1995. The Council contends that it relied on that report and, as a consequence, did not take steps that it would otherwise have taken and which, if taken, would have prevented it from itself becoming liable to the owners of apartments in The Grange, a building which has suffered from leaky building problems.

[217] At this stage of the proceedings the focus is on whether the Authority owed the Council any duty of care in respect of the contents of the report. If no such duty was owed, the proceedings must be struck out. If a duty was or might have been owed, the duty question and whether any applicable duty was breached and all consequential issues must go to trial.

[218] In the present case the asserted duty of care does not fall within any previous category of case where a duty has been recognised. The ultimate question is therefore whether it is fair, just and reasonable for a duty of care to be imposed on the defendant, in respect of the loss or damage suffered by the plaintiff. The conventional phrase – fair, just and reasonable – could well be shortened so as to inquire simply whether it is reasonable to impose a duty. Reasonableness as the sole criterion is apt and sufficient to include issues of fairness and justice. It could hardly be reasonable to impose a duty of care if to do so would be unfair or unjust.

[219] In order to answer the ultimate question whether it is reasonable to impose the asserted duty of care the court examines two aspects. The first looks at the question from the point of view of each of the parties concerned and the relationship between them. The second looks at the question from the point of view of the wider interests of society generally. These two aspects are conventionally referred to as involving questions of proximity and policy. They could equally be referred to as relating to the parties and to the public interest.

[220] For a duty of care to be reasonable as between the parties, the loss or damage involved must have been reasonably foreseeable. If it was not, it would not be reasonable to impose a duty. But the fact that the loss is foreseeable does not of

itself make it reasonable to impose a duty. In a case involving an asserted liability for words it will seldom, if ever, be reasonable to impose a duty on the speaker or writer, unless that party ought reasonably to have foreseen that the other party would rely on what was said or left unsaid. Furthermore, any such reliance must itself have been reasonable. Hence the concept of foreseeable and reasonable reliance usually lies at the heart of whether it is reasonable to impose a duty of care in a case involving words negligently written or not written, customarily called a case of negligent misstatement. A feature of the foregoing analysis that is particularly important in the present case is that it is not usually reasonable for a party to whom words are addressed for one purpose to rely on them for a different purpose.[251]

[221] The report which lies at the heart of the Council's first three causes of action was written in the circumstances and in the terms more fully discussed in the reasons which Blanchard J has given. It was supplied to a party, the Council, which cannot be regarded as being in a vulnerable position, vis-à-vis the Authority. The relevant legislation does not suggest that the Authority was expected to have any materially greater role in relevant respects than a territorial authority. Indeed the Council was under its own substantial statutory duties and responsibilities to administer the building code in its district.

[222] Specifically it was the Council that was required to deal with individual building consent applications. It, not the Authority, was required to satisfy itself that buildings in its district were constructed in accordance with the national code and acceptable practices. The legislation does not suggest that the Authority had any advisory role as regards the performance by territorial authorities of their statutory functions. This is consistent with the approach of the Building Industry Commission whose report formed the basis of the Building Act 1991. The Commission said that the proposed Authority was not to be an advisory body, except to the Minister.[252]

[223] The problems that were experienced with monolithic cladding were not inevitably inherent in that type of product. It was, however, necessary that particular care be taken, both by way of design and construction, when monolithic cladding

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[251] *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [26].
[252] At [4.35].

was being used. At best, the Council's complaint about the report can only be that the need for particular design and construction steps to be taken, when monolithic cladding was being used, was not drawn to its attention by the Authority in the 1995 report or subsequently until 2003.

[224] This is a case in which the relationship between the parties derives from the statutory framework in which they were each operating. In such circumstances the existence and ambit of any common law duty of care is profoundly influenced by that statutory framework.[253] The same general point was made in *Carter*.

[225] I will not reiterate the statutory provisions set out and discussed by Blanchard J in his reasons. They lead me to the conclusion that the Authority's role, as regards the operations and activities of territorial authorities, was intended to be a limited one. The primary focus was on informing the Minister of any significant deficiencies in a territorial authority's performance of its duties. The Authority had no direct control over the activities of a territorial authority, in contrast to the position which applied in relation to independent building certifiers.

[226] The Authority could be expected to inform a territorial authority of any concern which justified its reporting the matter to the Minister. But the statutory framework does not suggest that the Authority had any general advisory role upon which it would have been reasonable for territorial authorities to rely, so as to shift responsibility, in whole or in part, to the Authority for any breach by councils of their own clear statutory duties in individual cases. Indeed, as I have said, the statutory framework militates against any such conclusion.

[227] It must be accepted, for present purposes, that the Council did rely on the report, on the basis alleged in its statement of claim. But, in view of the legislative scheme, I cannot accept that it was reasonable for the Council to have done so as to shift responsibility for the performance of its own responsibilities in the administration of the legislation. The Council is effectively seeking to do this by

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[253] See *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) at 739 per Lord Browne-Wilkinson.

claiming that the Authority must contribute to the losses it has suffered as a result of its own negligence.

[228] Furthermore, I do not consider that the contents of the report[254] were such that it was reasonable for the Council to rely on the report so as to relieve it, in whole or in part, from its own statutory duties and responsibilities. The report made it clear that the Council still had to carry out the duties placed upon it by the legislation. It was not reasonable for the Council to draw the conclusion from the report's silence on the key issue of monolithic cladding that it gave the Council a "clean bill of health" on that issue into the future.

[229] As it was not reasonable for the Council to rely on the report for the purpose for which it seeks to do so, it would not be reasonable to impose a duty of care on the Authority in respect of the loss or damage the Council claims to have suffered from that reliance. That assessment can properly be made on the pleadings, and in the light of the terms of the report, without the need for the case to go to trial.

[230] This conclusion means that, as between the parties, it would not be reasonable to impose on the Authority a duty of care of the kind and ambit asserted in the three causes of action under consideration. The Authority cannot be deemed to have assumed any relevant responsibility to the Council, whether in respect of the report itself or any correction of it. The result, in conventional terms, is that there is no sufficient proximity between the parties in any relevant respect. The potential, often realised, for some overlap between proximity and policy issues is demonstrated in this case by its being equally possible to say that, in policy terms, it would not be reasonable to impose a duty of care when the reliance a plaintiff seeks to place on a defendant's statement is not, in the circumstances, reasonable reliance. To do so could well have substantial economic and social repercussions.

[231] Either way, it is important for analytical purposes to recognise the different focus of proximity and policy issues. The outcome of any duty inquiry must depend on the court's assessment of whether the imposition of the asserted duty is appropriate both as between the parties and from a wider perspective. That involves

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[254] As discussed in Blanchard J's reasons at [195]–[196].

a value judgment which the court must make on behalf of society after careful consideration of all salient features of the case. Unless the party asserting the duty can satisfy the proximity and policy requirements, it will not be reasonable to impose any duty. My conclusion thus far means that the Council's first three causes of action must be struck out, as the Court of Appeal ordered.

[232] I turn briefly to the fourth cause of action. A comparison between the Council's first three causes of action and its fourth brings out the contrast between specific reliance and general reliance. The first three causes of action are ultimately based on the specific reliance the Council said it placed on the 1995 report. In its fourth cause of action the Council relies on what it claims to be the general reliance which owners of apartments in The Grange were entitled to place on the Authority to give appropriate advice and information to territorial authorities. This is an attempt to extend substantially the basis upon which the *Hamlin* line of authority is founded. In cases of that kind it has been held that home owners are entitled to rely on councils to take reasonable care in their inspection role so as to ensure that the building code and acceptable practices are followed.

[233] It is inherent in the *Hamlin* jurisprudence that the key feature is the Council's direct power of control over the construction process. The same power of control was not given to the Authority, no doubt because of the existence of the power vested in the Council. Duality of control would have been anomalous and awkward, to say the least. The suggested extension of the general reliance doctrine would stretch the present jurisprudence beyond breaking point. In both legal and practical respects the relationship between owners of residential apartments and the Authority is much more remote than the relationship between such owners and their territorial authority.

[234] It would be inconsistent and unpersuasive to hold that the specific reliance which the Council says it placed on the Authority was not reasonable but it was nevertheless reasonable for apartment owners to place general reliance on the Authority. To extend the *Hamlin* reasoning so as to place a duty of care on the Authority to such an owner would be a step too far. By parity of reasoning with the first three causes of action, it cannot have been reasonable for apartment owners to rely on the Authority to protect them from the consequences of their apartments

having been negligently constructed, on the premise that, had the Authority properly informed the Council, it would have done its job better and thus avoided the owners' losses. Furthermore the necessary causation chain inevitably runs up against the same difficulties as arise in respect of the first three causes of action. I therefore agree that the fourth cause of action was correctly struck out.

[235] For these various reasons the Council's appeal should be dismissed with costs as proposed by Blanchard J.

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