IN THE SUPREME COURT OF NEW ZEALAND

SC 85/2010
[2012] NZSC 34

BETWEEN	PETER HARDIE MCNAMARA AND PATRICK STURGEON MCNAMARA AS TRUSTEES OF THE P H MCNAMARA FAMILY TRUST Appellants
AND	AUCKLAND CITY COUNCIL Respondent

Hearing: 19 April 2011

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

Counsel: B O'Callahan and G S G Erskine for Appellants
D J Goddard QC and M A Cavanaugh for Respondent

Judgment: 9 May 2012

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are to pay the respondent costs of $25,000 and reasonable disbursements in connection with this appeal, as fixed by the Registrar if necessary.

REASONS

ELIAS CJ

[1] The appeal arises from summary dismissal of a claim before trial. The claim was brought by the appellants, as purchasers of a new house in Arney Crescent,

Remuera, against the Auckland City Council for breach of duties of care said to have been owed to them by the Council in relation to non-compliance with the building code in the construction of the house. The house failed to meet the weather-tightness standard of the building code, standard E2. It required expensive work to prevent leaks and remedy damage caused by moisture. The statutory duties which provide the background to the claimed duty of care are ones imposed upon territorial authorities by the Building Act 1991. The Act has now been repealed,[1] but was in effect at all material times and its provisions are the context in which the question of duty of care falls to be considered.[2]

[2] As the Act permitted, the developer of the property had chosen to use a private certifier authorised under the Act to certify that the plans and specifications conformed to the code, to inspect and certify building work as code compliant, and to provide a final certificate of code compliance on completion of the building work. In those circumstances, the territorial authority was relieved of the statutory responsibility of itself inspecting the property and certifying for code compliance (although if notified that a certifier could not carry out the functions of inspection and certification, it was required to take them over). The territorial authority was obliged to accept the certificate of the certifier that the work complied with the building code, and had immunity for liability for its own actions taken in reliance on such certificate.

[3] The certifier engaged by the developer was Approved Building Certifiers Ltd, which is referred to throughout as "ABC". It is not disputed that ABC was authorised under the Act to certify compliance with standard E2, the general weather-tightness standard under the code, when it certified in support of the application to the Council for a building consent that the house would comply with the code if constructed according to the plans and specifications which had been supplied to the Council. Under the Act, the Council was obliged to accept ABC's certificate and grant the building consent.

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1 By the Building Act 2004, s 415(1).

2 The Act was repealed from 31 March 2005.

[4] Between the granting of the building consent and before final code compliance certification, however, ABC's authority was limited by the Building Industry Authority. The limitation, which was noted on the publicly available register maintained by the Building Industry Authority and which was notified by newsletter to all territorial authorities, restricted ABC's ability to certify for compliance with standard E2 to a single acceptable solution, E2/AS1. For the purposes of the summary application it was accepted that the Council knew of the limitation. Indeed, after it was imposed by the Building Industry Authority, the Council was obliged to take over a large number of building works in which ABC was the certifier, perhaps several hundred.

[5] The limitation imposed on ABC seems to have been against a background of developing anxiety about failure to achieve standard E2 when monolithic cladding was fixed to untreated timber (the method of construction used in the Arney Crescent property). Such failure has come to be seen as entailing systemic regulatory defect. It has led to substantial litigation on an unprecedented scale. It is not clear what was known of the problem at the time of the events giving rise to the present proceedings. The knowledge of the Council might well be a circumstance to be investigated at trial, since appreciation of risk may be a pointer to the existence of a duty of care because "risk imports relation".[3]

[6] It is accepted that the design of the house did not permit conformity to acceptable solution E2/AS1 and that the final code compliance certificate was beyond the certifying authority of ABC when given and when received by the Council under the provisions of the Act. (It is not clear whether further certificates or inspection reports were provided to the Council by ABC after its authority was limited, but the claim extends to any such as well as to the final certificate of code compliance.)

[7] The claimed duties of care in the present case do not arise out of inspection or certification of code compliance undertaken by the Council itself as was the case in *Invercargill City Council v Hamlin*[4] and *North Shore City Council v Body Corporate*

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3 *Palsgraf v Long Island Railway Co* 162 NE 99 (NY 1928) at 100 per Chief Judge Cardozo.

4 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

188529.[5] Rather, they are based upon the Council's wider responsibilities under the Building Act. They are said to give rise to sufficient relationship of proximity between the Council and owners to cast upon the Council a duty of care to accept and act only on certificates which were within the authority specified for the certifier in the public register maintained by the Building Industry Authority. In addition, it is claimed that the Council's advice to the appellant's solicitors that a code compliance certificate had been issued amounted to negligent misstatement.

[8] Reversing the High Court,[6] the Court of Appeal struck out the claims and entered summary judgment for the Council. It considered that the Council did not owe the claimed duties of care to the owners because, having elected to use a private certifier instead of the Council to certify for code compliance, they could not "enliven" the statutory responsibilities of the Council (and its derivative duty of care in application of the approach in *Hamlin*) without giving notification to the Council under s 57 of the Act that the certifier was no longer able to act.[7] The Court of Appeal allowed that the policy of notification might be sufficiently served to revive the obligations of the territorial authority under the Act if the Council "well knew" that the certificates provided exceeded the authority of the certifier, but thought there was no such suggestion here (despite a pleading that the Council "knew or ought to have known" that the certificates exceeded authority).

[9] Without notice under s 57 (or equivalent knowledge sufficient for the purposes of s 57 to revive the Council's direct responsibilities of inspection and verification), the Court of Appeal considered that the effect of imposing a duty of care would be to make the Council a "long-stop guarantor" of the liability of the certifier, an outcome it thought contrary to the Act.[8] It also considered that the effect of accepting the claim would be to "create a liability for damages in public law" for failure to fulfil the "limited ... functions" of the Council under the Building Act.[9]

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5 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.
6 *McNamara v Malcolm J Lusby Ltd* HC Auckland CIV-2006-404-2967, 3 July 2009.
7 *Auckland City Council v McNamara* [2010] NZCA 345, [2010] 3 NZLR 848.
8 At [25].
9 At [28].

[10] The claim based on negligent misstatement (which has not yet been pleaded but was foreshadowed in the Court of Appeal) was only addressed obliquely in that Court. It seems to have considered that any negligence by the Council was not actionable because of the effect of s 41 of the Local Government Official Information and Meetings Act 1987.[10] If so, such conclusion would be inconsistent with *Marlborough District Council v Altimarloch Joint Venture Ltd*.[11]

[11] On appeal, the other members of the Court would uphold the decision of the Court of Appeal on the first basis of claim, essentially for the reasons given by that Court. I differ from that conclusion. In my view the scheme of the legislation was to impose significant supervisory responsibilities on the territorial authority to ensure that the code was complied with, even where a private certifier was engaged. A point of distinction is that, unlike the Court of Appeal and the majority in this Court, I do not think that there was a fork in the regulatory road, which, if taken by the owner, removed the Council from having any responsibility except when given notice under s 57. Although by s 50 of the Act a territorial authority was not required or even entitled to question the substantive assessment of code compliance by an approved certifier (and had immunity from suit where it acted in reliance on such a certificate in good faith), I consider that its continuing statutory responsibilities are consistent with the claimed duty of care to check that a certificate was within the scope approved for the certifier. The Council's liability for any breach of its own duties of care does not make it a guarantor for certifiers. It is responsible for its own carelessness in discharging its distinct duties of care.

[12] Other members of the Court take the view that the terms of s 50 of the Act exclude any duty of care to check that the certificates provided were within the scope of the certifier's responsibility. This is the basis on which they would also reject the cause of action based on negligent misstatement. I consider that s 50 properly read, textually and contextually, is concerned with the conclusiveness of the substantive assessment of code compliance. It is reliance on that assessment which is the basis of the immunity contained in s 50(3). Such conclusiveness is available only in

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[10] At [23] (footnote 21).

[11] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11. See the analysis of Tipping J at [92]–[98], with which all other Judges of the Supreme Court agreed.

respect of items not excluded by any limitation on the certifier's approval. Nor do I accept that a certificate beyond the certifier's authority is properly described as "valid on its face".[12] Against the publicly available register of limitations, which the statute required the Building Industry Authority to maintain, the excess of authority may indeed be said to appear on the face of the certificate.

[13] In my view the scheme of the Act and its legislative history indicate that territorial authorities may well be under a duty of care to check that certificates are within the scope of a certifier's authority. Without such responsibility there is an unaccountable gap in the regulatory system. In the present case, it was acknowledged that the practice of the Council was to check limitations before granting building consents on a certificate. I see no statutory or other basis for drawing a distinction in the treatment of certificates during the course of or on completion of the building work.

[14] In the appeal the Court is asked to determine without the security of findings of fact that a claim in negligence against a background of statutory duties is untenable. It should be unnecessary again to emphasise the dangers of determining that a cause of action cannot succeed before trial, when there is incomplete knowledge of the facts bearing on the existence of a duty of care.[13] For the reasons developed in what follows, I consider that the existence of a duty of care arising out of the relationship between owners and territorial authorities set up by the statutory scheme cannot be ruled out.

The Building Act 1991

[15] In order to understand the claims and put the facts as known in context, it is necessary to describe the provisions of the Building Act 1991. Because the conclusion I come to is based on the scheme of the legislation, it is also necessary to describe the Act in some detail.

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12 Compare judgment of Tipping J at [179].

13 See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [30]–[40]; *X (Minors) v Bedfordshire City Council* [1995] 2 AC 633 (HL) at 741; and *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) at 557–558.

(i) The responsibilities of territorial authorities

[16] The Auckland City Council was the territorial authority responsible under the Act for the administration of the Building Act within its district. Within its district it had the function of ensuring code compliance.[14] All building work had to comply with the building code established by regulations under the Act.[15] No building within its district could be undertaken except under a building consent granted by the Council.[16] Within its district, the Council therefore oversaw the "[n]ecessary controls relating to building work", which were the principal purpose of the Act.[17]

[17] The "functions and duties" of territorial authorities under the Act were set out in s 24:

> **24 Functions and duties of territorial authorities**
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> Every territorial authority shall have the following functions under this Act within its district:
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> (a) The administration of this Act and the regulations:
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> (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:
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> (e) To enforce the provisions of the building code and regulations:
>
> (f) To issue project information memoranda, code compliance certificates, and compliance schedules:
>
> (g) Any other function specified in this Act.

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14 Section 24(e). Although territorial authorities could transfer their functions under the Act to another territorial authority, they continued to be responsible under the Act for their discharge: s 25(2).

15 Section 7.

16 Section 32. Some building work is exempt under s 32(2).

17 Section 6(1).

[18] In order to carry out their responsibilities, territorial authorities were empowered to fix charges for their work[18] and were under duties "to gather information and monitor":[19]

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

Territorial authorities were also under obligations to maintain information relating to plans and specifications, building consents, and code compliance certificates on a basis which made such information "reasonably available" to the public.[20]

[19] Applications for building consents were required to be made in the form prescribed by regulations and to be accompanied by "such plans and specifications and other information as the territorial authority reasonably requires".[21] The "plans and specifications" required with any application for building consent (and in respect of which building was authorised by the consent) were defined to include "proposed procedures for inspection during construction" to ensure code and consent compliance.[22] The territorial authority had the ability to require "further reasonable information in respect of an application".[23] A territorial authority was required to grant a building consent "[a]fter considering an application ... if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application".[24] (As is described at [30] the certification of a private certifier was required to be accepted by the Council as establishing code compliance under s 50.)

[20] A "building consent" was defined under the Act to include "all conditions to which the consent is subject".[25] Once consent was granted, proper completion in

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18 Section 28.
19 Section 26.
20 Section 27.
21 Section 33(2).
22 Section 2.
23 Section 34(2).
24 Section 34(3).
25 Section 2.

accordance with the plans and specifications was checked both through the "proposed procedures for inspection during construction"[26] (which had been approved as part of the plans and specifications in the building consent) and through eventual provision of a certificate of compliance with the building code under s 43 of the Act.

[21] The territorial authority was empowered to take "all reasonable steps" to ensure compliance with the code and with any inspection procedure endorsed on any building consent for construction and for completed work.[27] It also had power to require rectification of "building work not done in accordance with this Act or the building code" during the currency of a building consent (before a code compliance certificate was given)[28] or, in default of such rectification, to undertake the work itself.[29] It was empowered to cancel a building consent "in whole or in part forthwith" if "[t]here has been a change of circumstances such that the territorial authority believes that the proposed building work may contravene any provision of the building code as in force at the time the work commenced".[30] Completion of the work in that event would depend upon the owner obtaining a new building consent.[31]

(ii) Use of an approved certifier

[22] The Act permitted compliance with the code to be established either by the Council itself or, at the option of the owner, on certificate of compliance by a certifier authorised by the Building Industry Authority under Part 6 of the Act.[32] Building certifiers were approved by the Building Industry Authority in respect of specific provisions of the building code and their approval could be subject to limitations.[33]

[23] Applicants were required to provide evidence that they had insurance in a scheme approved by the Authority "in respect of any insurable civil liability of the

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26 Ibid.
27 Section 76.
28 Section 42.
29 Section 74.
30 Section 41(2)(a).
31 Section 41(4) permitted the consent to be applied for as if for an alteration.
32 Section 50.
33 Section 51: see especially s 51(3)(a)(ii).

applicant that might arise out of the issuing by the applicant of a code compliance certificate under section 43 of this Act or a building certificate under section 56 of this Act".[34]

[24] The Building Industry Authority was required to maintain a "[r]egister of building certifiers" upon which it was obliged to note:[35]

> (a) The date of approval; and
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> (b) The name and address of the person approved; and
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> (c) The specific provisions of the building code in respect of which the person is approved; and
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> (d) Any limitations on the matters in respect of or in connection with which the person may certify compliance with those provisions; and
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> (e) The date of expiry of approval, being the first anniversary of the date of approval or such other date as the Authority may direct, but not later than the second anniversary of the date of approval; and
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> (f) Such other matters relating to the approval as the Authority directs.

[25] The Authority's register of certifiers was available on its website. In addition, changes to it were notified directly to territorial authorities by the Authority's newsletter. It is significant that the register was required to contain the "specific provisions of the building code" in respect of which a certifier was approved and that it was required to record "[a]ny limitations on the matters in respect of or in connection with which the person may certify compliance with those provisions". Section 53(3) permitted the register to identify the "specific provisions of the building code in respect of which the building certifier is approved" in a number of ways: "by reference to the numbering of the provisions, or to a description of the matters covered by the provisions, or to the areas of expertise concerned".

[26] Section 53(4) of the Act provided that certificates could be taken to be "sufficient evidence of the matters therein specified", in the absence of proof to the contrary and without proof of the signature appended to the certificate if "purporting to be under the hand of a person duly authorised by the Authority to issue such a

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34 Section 51(3)(b).
35 Section 53(2).

certificate". The matters "therein specified", which could be taken to be sufficient evidence in the absence of proof to the contrary in my view were the substantive statements of code compliance (in conformity with s 50). The fact that this presumption of validity did not extend to the authority of the certifier is indicated by the single presumption of validity provided for by s 53(4), which made it unnecessary to prove the signature attached, "provided it purported to be under the hand of a person duly authorised by the Authority to issue it". Whether the person purportedly signing was authorised by the Authority to issue the certificate was ascertainable from the register.

[27] The information required to be on the register was information those dealing with certifiers, notably territorial authorities, needed to have for their own purposes and in discharging their own statutory responsibilities – the fact of registration and the name and address of those approved, the expiry date of the approval, and the scope of the certifier's authority. The evidence in the High Court was that changes to the approval of certifiers were not uncommon. The register was notice of such changes.

[28] Under the Act authorised certifiers were able to certify:

- for the purpose of building consents under s 34(3), that work properly carried out in conformity with the plans and specifications (including the specified method of inspection) would comply with the code (the building certificate required before the territorial authority could grant a building consent);[36]

- for the purposes of demonstrating compliance with any particular provision of the code (which was required to be specified in the certificate), that at the date of the certificate the work complied (a building certificate given before final code compliance certificate);[37]

[36] Section 56(2)(a).
[37] Section 56(2)(b).

- for the purpose of s 43 of the Act, that the building work authorised by the consent had been completed in conformity with the code (a code compliance certificate).

[29] Building certificates issued by a building certifier were required by s 56(1) to:

> (a) Be in writing; and
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> (b) Identify the specific item or items that are the subject of the certificate, being items not excluded by any limitation on the building certifier's approval; and
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> (c) Identify the specific provisions of the building code with respect to which those items are certified, being specific provisions in respect of which the building certifier is approved; and
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> (d) Be signed by the building certifier; and
>
> (e) Be accompanied by any relevant project information memorandum.

(iii) Effect of building certificate provided by approved certifier

[30] Section 50 of the Act provided that a territorial authority "shall accept" a building certificate or code compliance certificate issued by a building certifier "as establishing compliance with the provisions of the building code".[38] For the purposes of granting a building consent, therefore, the territorial authority had no need (and had no business) to satisfy itself under s 34(3) that the plans and specifications, if properly carried out, would comply with the code. It was obliged to give effect to a certificate to that effect. Similarly, a certificate by a certifier that work carried out complied with a particular provision of the code could be relied upon by the territorial authority in discharge of its default responsibilities to inspect during the course of construction and in granting a code compliance certificate under s 43 on completion of the work authorised under a building consent. Where a certifier had provided a code compliance certificate under ss 43(3) and 56, the territorial authority was obliged to accept the certificate "already" provided and did not itself have to form an independent opinion as to code compliance. Section 50(3) provided "[f]or the avoidance of doubt" that "no civil proceedings may be brought

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[38] Section 50(1)(a).

against a territorial authority or a building certifier for anything done in good faith in reliance on [such certificates]". Where a territorial authority accepted a building certificate (and was thereby relieved of the responsibility for making its own assessment of compliance with the code), it was required to reduce its charges "accordingly".[39]

[31] Apart from excusing acts taken in good faith reliance on certificates given by building certifiers under s 50(3), the Act did not grant to territorial authorities or building certifiers in civil proceedings any immunity or partial immunity. By contrast, under the Act members or employees of the Building Industry Authority or members or employees of territorial authorities were immune from civil proceedings in respect of "an act done in good faith under this Act".[40] Indeed, provisions of the Act specifically envisaged that territorial authorities and building certifiers could be liable in tort.[41]

[32] The liability of territorial authorities which is referred to in these provisions is in its terms a corporate liability. Whether the information available to the corporate entity is properly treated as the sum of the information available to its officers is not a point that it is necessary for me to determine because of the view I take that the immunity contained in s 50(3) does not arise. I do not think however such aggregation can be excluded peremptorily, as other members of the Court would exclude it. The duty of care alleged is one owed by the territorial authority itself, on the terms of the statute. In the absence of any system for effective checking that certificates were within scope (such as might entail collection of material information known to its officers), I also think it well arguable that all knowledge held by its officers is properly treated as information available to the territorial authority for the purposes of considering whether it breached its duty of care. Any other result would provide immunity in cases where the Council simply shrugged off

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39 Section 28(3).

40 Section 89.

41 Civil liability of building certifiers was assumed by the insurance requirements in authorising them and was explicitly recognised in s 90 (which provided that proceedings against a building certifier in respect of the "statutory function" of issuing a building certificate or code compliance certificate "are to be brought in tort and not in contract"). Section 91, dealing with "[l]imitation defences", looked to civil proceedings being brought against a "territorial authority, building certifier, or the Authority" arising out of "the issue of a building consent, a building certificate, a code compliance certificate, or an Authority determination".

its responsibilities. I think it well arguable that the Council cannot claim to be acting in good faith in the absence of any system for checking that certificates accepted were within the scope of the certifier's authority, as notified by the register. That was the view taken in *Mid Density Developments Pty Ltd v Rockdale Municipal Council*,[42] a case I do not think to be readily distinguishable.[43]

(iv) The responsibilities of a territorial authority after engagement of a building certifier

[33] The engagement of a building certifier did not release the territorial authority from its functions under ss 24 and 26 of the Act. Section 50 simply relieved the territorial authority of the need to form its own view as to code compliance when provided with a certificate of compliance with specific provisions of the building code, "being items not excluded by any limitation on the building certifier's approval" and "being specific provisions in respect of which the building certifier is approved".[44]

[34] The engagement of a building certifier "to inspect specified items while building work is being undertaken" was subject to a statutory requirement to "report to the territorial authority in the prescribed manner".[45] Regulation 8 of the Building Regulations made under the Act required building certifiers to make "inspection reports" to the territorial authority under s 57(3)(a) "at least once each calendar month from the date of the building certifier's engagement":[46]

> ... until either—
>
> (a) The building certifier has issued, in respect of all of the building work in respect of which the building certifier was engaged, either a building certificate under section 56(2)(b) of the Act or a code compliance certificate under section 56(3) of the Act; or

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42 *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 (FCAFC) at 300.

43 See also, on the meaning of "good faith", the judgment of French J in *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16, (2004) 135 FCR 105 at [85]–[88].

44 **S**ections 56(1)(b) and 56(1)(c).

45 Section 57(3)(a).

46 Building Regulations 1992, reg 8(1).

(b) The building certifier has ceased to act as a building certifier in respect of that work, whereupon the building certifier shall make a final inspection report.

[35] Both the building certifier and the owner were under statutory obligations to notify the territorial authority if the certifier became or expected to become unable to inspect all or any of the specified items for any reason.[47] In that event, the territorial authority was required to "amend the building consent accordingly, and shall make such inspections and issue such notices to rectify as it considers necessary".[48] Both the Court of Appeal and other members of this Court treat notice under s 57(3)(b) and (c) as the only way in which the obligations of the territorial authority would "enliven" again after the appointment of a certifier (although the Court of Appeal was prepared to consider that the purpose of s 57 would also be served if the territorial authority "well knew" that the certifier was unable to certify). I am unable to agree with this interpretation of s 57(3), for reasons it is necessary to explain.

[36] First, s 57, as its heading makes clear, is concerned with the "terms of engagement of building certifiers", not with the responsibilities of territorial authorities. Section 57(3) imposed standard obligations on building certifiers engaged "to inspect specified items while building work is being undertaken". Paragraphs (b) and (c) imposed duties of notification, but para (a) also imposed a duty on the certifier to report to the territorial authority "in the prescribed manner". While notification of incapacity under subss (3)(b) and (c) imposed a mandatory obligation on the territorial authority to amend the building consent and make "such inspections and issue such notices to rectify as it considers necessary" (as would inevitably be the case where there was incapacity),[49] it is not to be expected that a territorial authority was powerless in respect of any deficiency in the prescribed reporting. Self-reporting of incapacity by certifiers or owners was not the only way under s 57 to prompt the territorial authority to intervene despite the engagement of a certifier.

[37] More importantly, the functions of the territorial authority under s 24, including the function under s 24(e), within its district, "to enforce the provisions of

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47 Sections 57(3)(b)(i) and 57(3)(c).
48 Section 57(4).
49 Section 57(4).

the building code and regulations" and the duties under s 26 to "gather such information ... as is necessary to carry out effectively its functions under this Act" were affected by the appointment of a private certifier only to the extent provided by s 50. The provisions of s 41 of the Act, dealing with the lapse and cancellation of building consents, applied irrespective of the appointment of a certifier. Where building consents lapsed because of lack of commencement or reasonable progress, the territorial authority had discretion to allow further time. Under s 41(2) the territorial authority "may cancel a building consent in whole or in part forthwith if —"

> (a) There has been a change of circumstances such that the territorial authority believes that the proposed building work may contravene any provision of the building code as in force at the time the work commenced; or
>
> (b) The rectification work required to be done by a notice to rectify under section 42 of this Act has not been commenced within a reasonable time, or there has been a breach of a condition of any such notice.

Rectification notices were required by s 43(6) and (7) where a territorial authority "considers on reasonable grounds that it is unable to issue a code compliance certificate" or where a building certifier notified the territorial authority that particular building work did not comply.

[38] Under the miscellaneous provisions in Part 9 of the Act, territorial authorities were empowered by s 76 to carry out inspections (the "taking of all reasonable steps to ensure ... [t]hat any building work is being done in accordance with a building consent" and that the inspection provisions of the compliance schedule were being complied with). Under s 76(2) the power of inspection by the territorial authority was deemed to be included in the compliance schedule on which the building consent had been granted. The building consent granted to ABC in respect of the Arney Crescent property limited its certification to items "not excluded by any limitation on the building certifier's approval".[50] Moreover, under s 76(3)(a)(ii) it was a statutory condition of every building consent "that the territorial authority's authorised officers shall be entitled, at all times during normal working hours or while building work is being done ... to inspect any building work that has been or is

[50] Section 56.

being done on or off the building site". Such powers of inspection were therefore available if notification of the limitation on ABC's approval reasonably gave rise to doubt as to whether its certificates were within the scope of its authority and that the building work did not comply with the building consent. These powers confirm the continuing supervisory authority of the territorial authority during the course of construction and despite the engagement of a certifier.

[39] These continuing powers of territorial authorities were limited when a certifier was engaged only to the extent that s 50 required the territorial authority to accept a certificate of code compliance in respect of the items specified "being items not excluded by any limitation on the building certifier's approval".[51] In addition, under s 41(3)(a) of the Act the territorial authority was empowered "to cancel a building consent in whole or in part forthwith if ... [t]here has been a change of circumstances such that the territorial authority believes that the proposed building work may contravene any provision of the building code as in force at the time the work commenced".

(v) Charges by territorial authorities

[40] By s 28 of the Act, territorial authorities were empowered to fix charges of a number of "kinds". They included charges payable not only by applicants for building consents but also "holders of building consents" for "the carrying out by the territorial authority of its functions under this Act". In addition to such fixed charges, the territorial authority was empowered by s 28(2) to "require" a person liable to pay a standard charge "to also pay an appropriate additional charge" where the fixed fee was "in any particular case, inadequate to enable a territorial authority to recover its actual and reasonable costs in respect of the matter concerned". This provision is of significance because one of the reasons given for denying the existence of a duty of care to check that certificates are within scope is that it would impose costs which would be irrecoverable upon territorial authorities. Section 28(3) also makes it clear that when a private certifier's certificate was accepted by the territorial authority, it was still entitled to charge a fee (consistently with its ongoing responsibilities) but the charge was "reduced accordingly".

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[51] Section 56(1)(b).

(vi) The ability of the territorial authority to obtain an authoritative determination in cases where scope of the certifier's authority was a matter of doubt

[41] It is suggested that whether a certifier was keeping within the limitations imposed by the Building Industry Authority and noted in the register may have been difficult to assess in particular cases from the plans and specifications (although that is not the case here). In that connection, it is relevant to refer to s 17 of the Act which set up a mechanism by which the territorial authority was entitled to refer a matter of doubt in respect of, among other things, the issuing of code compliance certificates or building certificates to the Building Industry Authority for an authoritative determination. The evidence of Mr de Leur acknowledged that this was a procedure the Council could have used if it had appreciated that the code compliance certificate might have been outside the limitation imposed on ABC.

The history of the litigation

[42] The trustees of the McNamara Family Trust purchased the house property in Arney Crescent, Remuera, from the developer, Carmel Properties Limited, under an agreement for sale and purchase entered into on 7 April 2004. The purchase price of the property was $3.65 million. The purchase was settled on 29 April 2004 after the purchasers had obtained a land information memorandum from the Council (which said that no certificate of code compliance had then been received) and subsequent correction by an officer of the Council to advise that in fact ABC had certified compliance with the code in a certificate provided to the Council on 16 April. Before settlement, the purchaser's solicitors were sent a copy of the certificate of code compliance completed by ABC by the solicitors for the vendor.

[43] The house turned out to leak and had suffered consequential damage. It is claimed that it did not comply with the provisions of the building code. Both Carmel and ABC were in liquidation.

[44] The trustees issued proceedings against the Auckland City Council as the relevant territorial authority, claiming breach of a duty of care owed to them, arising out of its statutory responsibilities and powers to ensure compliance with the

building code in its district. Such duties are said to have been breached by the Council in a number of ways all of which depend on the trustees succeeding at trial in their contention that the Council knew or should have known that ABC became unable in accordance with the Act to certify compliance with the building code in respect of moisture-proofing before the certifier's final code compliance certificate was accepted by the Council. In particular, it is pleaded that:[52]

> The Council knew, or in all circumstances was on sufficient notice or should have known:
>
> (a) of the limitations imposed on ABC's approval to certify items of the building works as complying with the building code, including further to notice given on the register of building certifiers; and accordingly
>
> (b) that ABC issued one or more building certificates and the code compliance certificate without approval to do so, further to the limitations imposed.

[45] Once ABC no longer had approval to certify part of the building works, the Council is said in the pleadings to have been in breach of a duty of care owed to the plaintiffs in failing to refuse the certificates received from ABC, in failing to "advise or warn" the owners that ABC no longer had approval, in failing to take such steps as were reasonably necessary to establish that the building works complied with the code, and in "wrongfully" accepting one or more of the building certificates and the code compliance certificates as establishing compliance with the Act.

[46] The Council applied to the High Court for orders striking out the claims against it and for summary judgment upon the grounds that:[53]

> The amended statement of claim does not disclose any cause of action against the [Council] that might succeed; and/or
>
> None of the causes of action in the plaintiff's statement of claim can succeed.

[47] The application was opposed on a number of bases. It was said that relevant and material facts or evidence had not been the subject of disclosure through

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52 Third Amended Statement of Claim, dated 16 February 2009, at [5.10].

53 Notice of Application by the Fourth Defendant for Orders, dated 14 November 2008, at [7]–[8].

discovery and that procedural requirements had not been complied with.[54] More substantively, it was said:

> 4. The [Council] cannot show that the plaintiffs' claim does not disclose any cause of action that might succeed:
>
> The claim against the [Council], in summary, is that it was negligent in circumstances when it knew or was on sufficient notice that the private building certifier, "ABC", no longer had authority as a building certifier to issue building certificates and a code compliance certificate which it did, but the Council still accepted them and failed to take any steps such as inspection when the responsibility to do so fell back to the Council.
>
> 5. The matter can only be properly be determined at trial;
>
> 6. In respect of any summary judgment application by the [Council]:
>
> (a) There are credible and material disputes of fact;
>
> (b) Such claim in negligence is unsuitable for summary judgment determination ...

[48] For the purpose of the peremptory application ahead of determination of the facts at trial, argument in the High Court proceeded on three assumptions, some or all of which may be contested at trial:

- the limitation on ABC's authority imposed by the Building Industry Authority on 4 December 2002 was known to the Council;[55]

- once the Building Industry Authority limited the authority of ABC, construction and completion of the house as designed was outside the scope of ABC's authority to certify compliance with E2 in respect of moisture protection;[56]

- the fact that the method of construction used in the house in respect of moisture protection was outside the limited authority within which ABC was authorised to certify after 4 December 2002 was reasonably

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54 Notice of Opposition to Application by Fourth Defendant for Orders, dated 5 February 2009, at [1].

55 Indeed, the High Court judgment records at [55] that the Council accepted that it knew or was on sufficient notice or should have known of the limitation, for the purposes of its strike out application.

56 See [5.9(e)] of the Third Amended Statement of Claim.

ascertainable from the plans for which the building consent had been granted.

[49] In the High Court, Associate Judge Christiansen declined the Council's applications to strike out the proceedings and for summary judgment. He rejected the Council's argument that it could not be said that a duty of care was owed by it to a purchaser in circumstances where a private certifier had been engaged. Judge Christiansen did not accept the Council's contention that it had no supervisory or enforcement powers once a building owner elected to use a private certifier. He considered that "[t]he Act was not intended to supplant but rather to complement a [territorial authority's] statutory obligations":[57]

> Unless a private certifier is expressly authorised to certify items of building works comply with the building code then the duty remains with and reverts to the [territorial authority]. A private certifier is either authorised to certify items of building work or not and if not, the duty remains with the [territorial authority].

Since the Council had accepted for the purposes of the strike out application that it knew or should have known of the limitations imposed on the certifier's approval, there was "sufficient reason" to doubt the certificate.[58] Judge Christiansen therefore concluded that the claim must proceed to trial.

[50] The Court of Appeal, in a unanimous judgment, allowed the appeal by the Council.[59] It considered that the functions of the Council under the Act "did not in terms include monitoring information as to the scope from time to time of the authority of the certifier or whether a particular building work fell outside the certifier's authority".[60] Despite proceeding on the basis of the assumptions of fact referred to at [48] above,[61] the Court nevertheless considered that the claims could not succeed.[62]

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57 At [49].

58 *McNamara* (HC), above n 6, at [56].

59 Review of the strike out determination was removed by consent directly into the Court of Appeal, to be heard with the Council's appeal against refusal of summary judgment: see Minute of Venning J in *Body Corporate 185960 v North Shore City Council* HC Auckland CIV-2006-404-3535, 10 August 2009.

60 *McNamara* (CA), above n 7, at [23].

61 At [20] and [22].

62 At [29]–[30].

[51] It took the view that "[t]he clear pattern of the Act" was to give the owner "an election between the use (in whole or in part) of a certifier and the use (in whole or in part) of the territorial authority". Where, as here, the owner had chosen to use a certifier for all inspections and certificates of compliance, the Council's role "was limited to the administrative function of receiving and, no doubt retaining at least a record of, the owner's advice of completion at the end of the works together with the certifier's [certificate of code compliance]".[63] The claim was said to seek imposition of a "residual liability"[64] or "backstop" responsibility[65] on the Council for the negligent performance of the duties of an independent certifier. The Court considered that the responsibilities of the territorial authority under the Act would revive only where the owner or the certifier notified it,[66] as they were obliged to do under s 57(3) of the Act when they became aware that the certifier was unable to continue:[67]

> The owner, having turned its back on the territorial authority and chosen and paid another certifier, and thereby freed itself from the obligation to pay the authority the charges it would otherwise have received for assuming the inspection obligation, cannot reverse that election without giving the statutory notification under s 57.

[52] The Court of Appeal acknowledged that "[n]o doubt" the case "could be different if a council well knew that a certifier was issuing certificates which it had no right to do" because, in that case, "[t]he purpose of the notification under s 57 would have been served and the territorial authority might be expected to set about performing the obligations cast upon it by that section". It considered however "that scenario is not suggested in this case".[68] This comment seems to have come as a surprise to the plaintiffs, who applied for recall of the judgment on the point. The application ran into some procedural difficulties because of the retirement of the judge who had delivered the judgment of the Court and the inability to reconvene the same bench. In the result, however, a new panel held that the point was more properly one for appeal (leave to appeal to this Court having by then been applied

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63 At [24].
64 At [1].
65 At [25].
66 At [24].
67 At [26].
68 At [27].

for).[69] The view that it had not been suggested that the Council knew that ABC was issuing certificates in respect of the Arney Crescent house which were beyond the scope of its authority is therefore disputed on the appeal to this Court. The Court of Appeal's conclusion is inconsistent with pleading [5.10] in the amended statement of claim, quoted above at [44].

[53] The Court of Appeal considered that a common law duty of care which treated a territorial authority as a "long-stop guarantor to certifiers" would be inconsistent with the scheme of the Act and with the lack of assumption of responsibility by the Council, given the owner's election to use a private certifier, "in direct competition with the [territorial] authority for the business of inspection and issue of [certificates of code compliance]".[70]

The facts as known

[54] Because the appeal arises out of summary disposal of the claim, the factual background available to the Court is incomplete. It must be taken from untested assertions in the pleadings, from concessions made for the purposes of argument in the strike-out application, and from the limited material put before the Court in affidavits for the purposes of summary judgment. The information available as to the Council's conduct of the building file relating to the Arney Crescent property is especially sparse. The Court has little information about the Council's file and the knowledge of those who maintained and supervised it (including as to the inspection reports it received under s 57 of the Act and reg 8 of the Regulations as part of its ongoing responsibilities in relation to the building consent). Evidence given by affidavit on behalf of the Council was largely limited to information about the Council's usual practices by Mr de Leur, who had no personal knowledge of the file and annexed extracts only from it. The statement of the facts compiled from the material available to the Court in what follows must therefore be regarded as tentative.

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69 *McNamara v Auckland City Council* [2010] NZCA 553 at [12]. The Court of Appeal's judgment on this point was given on 25 November 2010; the Supreme Court granted leave to appeal on 30 November 2010: *McNamara v Auckland City Council* [2010] NZSC 144.

70 At [25].

(i) The application for building consent and the engagement of ABC

[55] As has already been explained, certification under the Building Act that plans and construction complied with the building code was the responsibility either of the territorial authority or, at the option of the owner, could be undertaken by private certifiers approved for the purpose by the Building Industry Authority.[71] The developer of the property at Arney Crescent chose to engage ABC to certify the plans for consistency with the building code, to inspect for compliance with the provisions of the code during construction, to report to the territorial authority on a monthly basis as required by the regulations (in accordance with the schedule of inspections), and to certify final compliance with the building code on completion of construction. The Council was notified of the engagement of ABC as certifier in the application for project information memorandum in respect of the property and in the subsequent application for building consent. If the Council practice deposed to by Mr de Leur was followed, officers of the Council would have checked that the certificate was within the scope of the certifier's authority against the register maintained by the Building Industry Authority. At the time ABC was engaged and at the time it applied for a building consent on behalf of the developer it was not subject to any material limitation of its authority to certify. There is accordingly no claim that there was any error in relation to the issue of the building consent.

[56] ABC first applied on 1 August 2001 to the Council for a project information memorandum in relation to the proposed development.[72] With its application for a project information memorandum, ABC supplied the Council with the plans and specifications for the proposed building work.[73] Although these plans and specifications may not have been necessary for the purposes of the project information memorandum (which was concerned with land use matters outside the scope of the Building Act),[74] it seems not to have been unusual for plans to be supplied at the project information memorandum stage, with later cross-reference being made to them under the subsequent building consent application. The forms specified under the Regulations for building consents and the Council's form as used

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71 Section 43.
72 Second Affidavit of Robert de Leur, dated 3 March 2008, at [14].
73 As noted by Mr O'Callahan in oral argument.
74 It is arguable that provision of the plans and specifications was required under s 30(3)(b).

by ABC expressly adopted such cross-reference. On the basis of the forms, it seems that plans were provided with the application for building consent only if they had not previously been provided with the application for project information memorandum.[75] The forms completed by ABC indicate that course was followed here. Provision of the plans and specifications was necessary for the purposes of the building consent. They were necessary for code compliance purposes.

[57] The project information memorandum for the house was issued by the Council on 6 August 2001. ABC then applied to the Council on 10 August 2001 for a building consent, making cross reference to the project information memorandum application and the plans and specifications supplied with it.[76]

[58] The building certificate completed by ABC under s 56 of the Act, dated 9 August 2001, was attached to the application for building consent. ABC, referring to the project information memorandum number in respect of 19 Arney Crescent, certified:

> The building certifier has been engaged to certify specified building work in relation to listed provisions of the building code as detailed in the page headed "Scope of Building Certifier's Engagement No P2563" attached to this notice.
>
> The building certifier is satisfied on reasonable grounds that:
>
> > The proposed building work would comply with the listed provisions of the building code if properly completed in accordance with the listed plans.

This certificate can only have been understood as referring to the plans earlier supplied with the project information memorandum application, to which cross-reference was made on the completed form by reference to the project information memorandum file number.

[59] ABC also provided a "Scope of Engagement" under s 53(4) of the Act which was referred to in and attached to the building certificate. The Scope of Engagement specified "[a]ll building work" and "[i]ssue of Code of Compliance certificate" as within scope and that "[t]he construction plans are in accordance with the PIM plans

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75 See the second option described below in [60].

76 Second Affidavit of Robert de Leur, dated 3 March 2008, at [17]–[18].

submitted. PIM No: AM/01/02750". Such specification of the method of inspection of the building work was treated by the Act as part of the necessary "plans and specifications".[77]

[60] The linkage of project information memoranda and building consents was also indicated by s 30(3) of the Act. If a project information memorandum was not applied for under s 30(1), an application for building consent under s 33 was deemed to include an application for a project information memorandum. Although the information required to be supplied for the purposes of the project information memorandum was information required for decisions under any Act "other than the Building Act", the linkage in the Act, the Regulations, and the forms makes it clear that plans and specifications had to be supplied for any building for which a consent was sought and that such necessary information for the purposes of the building consent could have been supplied with the project information memorandum. That was the course followed by ABC.

[61] The building consent for the house was granted by the Council, apparently in August 2001. The exact date is not established on the material before the Court.

(ii) The Council's practice in processing consent applications

[62] There is no evidence of the actual processes followed by the Council officers in granting consent for the building work at 19 Arney Crescent beyond that which can be seen on the face of the consent. Mr de Leur, the Council's manager of Building Policies, who provided affidavits for the Council in the High Court hearing, gave evidence of the usual practice of the Council on receipt of an application for building consent:[78]

> 27. At the time ABC applied on behalf of the owner of the property for a consent it was the council's practice to firstly; review the information that was supplied and secondly; *to check the building certifiers scope of engagement against the Building Industry Authority's register of approved building certifiers*.
>
> 28. *If the building certifier making the application was acting within the scope of any limitations as shown [in] the register at that time* the

[77] Sections 33 and 2.
[78] Affidavit of Robert de Leur, dated 14 November 2008 (emphasis added).

> council would accept and rely upon the document that had been submitted.
>
> 29. It was the council's understanding that it had no ability to question the authority of a building certifier *in those circumstances*.

Mr de Leur gave evidence that "at the time of processing the consent (August 2001) none of the limitations in effect impacted upon the processing of the consent".[79]

[63] In a second affidavit made in reply to expert evidence provided on behalf of the plaintiff, Mr de Leur accepted that if the council officers "knew that ABC was acting outside the scope of its certification powers",[80] then building certificates should not have been accepted:[81]

> I would expect a responsible member of my staff to alert me or another senior member if they knew a private certifier had abused its powers or otherwise acted without authority when it issued a certificate. If that occurred, the Building Division may have questioned the certificate and the matter would be referred to the [Building Industry Authority].

He accepted, too that any certificates that were "'defective' at face value" would "of course" be "rejected by the Council", but explained "to articulate more clearly some of the statements ... made in my previous affidavit" that, although it was implicit in the legislation that the certificates should be checked for compliance with s 56(1), his opinion was that this entailed only checking the certifier's name on the certificate "and did not require the Council to enquire behind the certificate".[82] Indeed, he expressed the view that the Council staff "did not know the intricate details of individual projects to the extent they impacted on particular compliance requirements" and that documents received consisted "generally only ... of the building certificates and documentation given in support of the building consent application", which "did not generally include the plans and specifications".[83]

[64] Although the matter was untested and cannot be resolved in the present proceedings, the two statements made by Mr de Leur are not easy to reconcile: in

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79 Ibid. The limitations then in effect were concerned with compliance with fire access issues and food and hygiene restrictions. They did not impact on the provision of the building certificate.

80 Second Affidavit of Robert de Leur, sworn 3 March 2008, at [37].

81 At [38].

82 At [43].

83 At [39]–[40].

the first he acknowledges that acceptance of a certificate was predicated on it being within the scope of the certifier's limitation "as shown [in] the register", and in the second he says any check was limited to whether the name of the certifier was on the register. It is not explained why it was simply the name of the certifier that was checked when it was only one of the matters required to be kept on the register. The suggestion made in the second affidavit that the building consent application material "did not generally include the plans and specifications" does not acknowledge the cross-referencing to the project information memorandum material permitted by the legislation and adopted in the present case.

(iii) The limitation of ABC's authority to certify

[65] At the times ABC applied for and obtained the building consent, it was authorised by the Building Industry Authority to certify for compliance with all provisions of the building code engaged in the construction of the house in accordance with the plans and specifications. On 4 December 2002, 14 months before a certificate of compliance on completion of the construction was provided by ABC to the Council in April 2004, the terms of ABC's authorisation as a building certifier were limited by the Building Industry Authority.[84] The limitation was noted on the publicly available register maintained electronically by the Building Industry Authority and was separately advised by the Authority to all territorial authorities.

[66] The limitation imposed on ABC's capacity to certify by the Building Industry Authority in December 2002 concerned moisture control, then emerging as a significant problem in application of the performance standards specified by the then current building code. The code had replaced earlier more prescriptive specifications under the preceding legislation. The principal standard in the building code for moisture control was cl E2, a performance measure. The limitation imposed on ABC in December 2002 permitted ABC to certify for compliance with E2 only through observance of standard E2/AS1. Unlike E2, E2/AS1 was prescriptive. It specified more traditional methods of ensuring weather-tightness than were enabled by the more general performance measure in E2, entailing minimum roof pitch, use of

[84] ABC was ultimately removed altogether from the register of authorised certifiers on 7 September 2004, but during the period material to this appeal it was an approved certifier, subject however to the limitations imposed in December 2002.

external gutters, and the use of eaves (extending the roof beyond the wall-claddings). Monolithic claddings, concealed gutters, and flush connections between roof and wall cladding, such as were specified in the plans for the Arney Crescent house, were outside the standards contained in E2/AS1.

[67] The upshot was that ABC could not inspect or certify for compliance with E2 in respect of work carried out under the design for the house after 4 December 2002. The lack of authority clearly applies to the final certificate of code compliance provided by ABC in April 2004. It is not clear whether ABC similarly exceeded its limitation in relation to the monthly inspection reports it was obliged to provide to the Council during the period of construction.[85] ABC's schedule of inspections for code compliance, which were produced to the High Court, suggest that at least part of the inspection for compliance with standard E2, that concerned with cladding, was not undertaken by ABC until after its authority to inspect had been limited to compliance with E2/AS1. It shows a date in late December 2002. Details of compliance with the reporting obligation are not however in the evidence before the Court and it is not possible to be certain of the position.

(iv) The Council's knowledge of the restriction on ABC's authority to certify

[68] Mr de Leur, the officer who gave evidence for the Council on affidavit for the summary judgment application, acknowledged that the Council would have known of the limitation on ABC's authorisation (with the other evidence showing that this was likely to have been known in April 2003 at the latest). That concession appears to have been inevitable, given the availability of the information on the register maintained by the Building Industry Authority from December 2002 and its specific notification of the restriction to territorial authorities through communication in April 2003. Indeed, as a result of the limitation imposed on ABC in December 2002, the Auckland City Council (at the instigation of the Building Industry Authority) took over supervision of a substantial number of other building projects then in train for which ABC was certifier, perhaps amounting to several hundred.[86]

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85 Under s 57(3)(a) of the Act and reg 8 of the Building Regulations 1992.

86 The Council took over a total of 1100 files from a number of certifiers whose authority to certify had become limited. The evidence suggests that ABC had a large number of the building consents not completed at the time.

(v) The Council's knowledge that ABC was exceeding its authority in respect of the construction inspections and certification for the Arney Crescent property

[69] E2/AS1 was not a solution adopted in the plans and specifications for the house on which the building consent was granted by the Council in August 2001. For the purposes of argument on the strike out and summary judgment applications, it was accepted that non-conformity of the plans with acceptable solution E2/AS1 would have been apparent (at least to a reasonably informed eye). There is material before the Court which supports that concession. The plans and specifications show parapets, internal gutters and monolithic cladding which, according to expert evidence before the High Court, were all outside the scope of E2/AS1.

[70] There is no direct evidence of the Council's administration of the building consent after it was granted in August 2001 on the application of ABC on behalf of the developer. It is not clear whether any building certificates were provided after 4 December 2002 until the code compliance certificate under s 43 was provided in April 2004. Nor is it clear what reports it received from the certifier. Although under the Building Act the inspection procedures had to be provided to Council with the application for building consent and monthly reports made to the Council throughout the construction in accordance with the procedure specified (as is discussed at [34]), on the material before the Court it is not known what reports were received by the Council.

[71] ABC's schedule of inspections for code compliance (which may or may not have been supplied to the Council in that form) indicates that some seven inspections by ABC took place after 4 December 2002. In particular final inspection for the cladding of the house (a significant aspect of compliance with approved solution E2/AS1, and in respect of which the design of 19 Arney Crescent did not comply with E2/AS1) did not occur until later than 4 December, after ABC's authority to certify for compliance with E2 outside the standard of E2/AS1 was revoked.[87]

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[87] Because of the preliminary stage the proceedings have reached, it is not possible to be confident of the position. There is evidence, however, that ABC's internal records indicate that inspection for compliance with the standard of the code for the cladding of the building was not undertaken until 17 December 2002, after the limitation was imposed.

[72] It is not known when the house was completed. Although there was some speculation that it might have been towards the end of 2002 (on the basis of evidence of the usual period of construction of dwellings), there is no basis for thinking such expectation was fulfilled in respect of the Arney Crescent property. The schedule of inspections obtained from ABC, although not explained, leave room to doubt that effective completion was achieved by December 2002. Whatever the position in relation to the inspection reports and any additional certificates that may have been provided, ABC's final certificate of code compliance on completion was not provided until April 2004. For the purposes of the appeal, it must be taken to have exceeded ABC's certification authority.

[73] The monthly reports may be of some importance. If ABC reported to the Council compliance with the code on the basis of cladding which did not conform with approved solution E2/AS1 (after its ability to certify compliance with E2 was restricted to that solution), the inspection report itself would have been notice to the Council that ABC was carrying out inspections beyond the scope of its authority after 4 December 2002 (if, as I think to be the case, the Council may have been under a duty of care to check that such certificates were within the scope of limitations noted on the register). If, on the other hand, no reports were made in accordance with the procedure specified in the consent application (defined in the Act as part of the "plans and specifications"),[88] then their absence may have been notice to the Council that the conditions of the consent were not being fulfilled and could have been sufficient to put it on inquiry as to code compliance. At trial, matters such as these may be important in considering whether the Council owed a duty of care to the owners and, if so, whether it was breached.

(vi) The Council's knowledge of risk

[74] Important to the claimed duty of care is the more general background, including the Council's knowledge of risk in relation to the weather-tightness of the method of construction employed in the Arney Crescent property. If there was a background of developing concern about weather-tightness (either in general or in relation to the files the Council had taken over from ABC), as seems not unlikely,

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[88] Section 2.

then that too may well have a bearing on the existence of a duty of care and its scope.

[75] The evidence does not disclose whether the many files resumed by the Council when the approval for ABC was limited in December 2002 put it on notice of deficiencies in ABC's inspections in relation to compliance with standard E2 of relevance to the present case. Nothing in the materials before the Court on this summary application deals with the extent to which problems with moisture control and compliance with the code standard in E2 featured in the resumed files and whether the Council had, before April 2004, knowledge of risk which should have alerted it to its statutory responsibilities in the present case and which might bear on the question of duty of care. Facts such as these impact upon the actual knowledge possessed by the Council and the arguments it makes on appeal that it was unnecessary or impractical for it to resort to the plans and specifications to ascertain whether ABC continued to have authority to carry out inspections under the building consent and to certify for final code compliance.

[76] Similarly, it may be relevant to understand the extent to which limitations to the approval of certifiers were known to occur. There is some evidence that the register maintained by the Building Industry Authority was known to be subject to continuous changes. It may be the case that such limitations had picked up with growing appreciation of the regulatory risks of non-compliance with the performance measure of E2. The evidence suggests that while ABC may have been one of the largest certifiers to be placed under restriction in relation to E2, others were also similarly restricted during 2002. If that proves to be the case, it may indicate heightened knowledge of risk which itself may be relevant both to the existence of sufficient proximity to found a duty of care and questions of breach.

(vii) The claimed impracticality of checking the plans and specifications against the limitation

[77] The Council contends that it would have been impracticable and unreasonable to expect it to review the plans to ascertain whether or not ABC's inspections and certificates continued to be within its authority. Such plans were, it was said, held in the department of the Council that deals with resource consents,

because they had been supplied not with the application for building consent but at the earlier stage of application for a project information memorandum (which is concerned principally with matters relating to land use). It was said that the building consent department of the Council had no occasion to consider the plans and specifications as part of the consent application once ABC had certified that they conformed to the building code and a building consent was granted.

[78] I do not think such speculation should be determinative on strike out ahead of findings of fact. The suggested impracticality may prove to be without foundation in reality. The information available to date does not provide any secure basis for the submission. As indicated, the plans and specifications were integral to the building consent process and cross-reference to the project information memorandum file (when such plans had been provided at the earlier stage) was both provided for in the legislation and adopted here.[89] I do not therefore think it is right to accept in these preliminary proceedings suggestions that the plans were held in another division of the Council and that it was impractical to require the building consent division to look at them.[90] Nor is there evidence from any Council officer who processed the consent to say that the plans were not viewed in the consent process and in the administration of the consent once granted or that it would have been impractical to do so. There is an indication that the Council maintained some of its records electronically, although whether the plans and specifications were available in that form is not disclosed. The Council did, however, have statutory duties to maintain the plans and specifications for record purposes in a form "reasonably available" to the public which does not suggest that accessing them would be unduly onerous, particularly given the cross-referencing in the application for building consent.[91] As already indicated at [62], Mr de Leur in his first affidavit acknowledged that it was Council practice to review the supplied information and to check the scope of the certifier's engagement against the register maintained by the Building Industry Authority. If this suggests that the plans and specifications were routinely considered in deciding whether an application for building consent was "within the scope of any limitations as shown [in] the register", it does not indicate impracticality in accessing

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89 Building Regulations 1992, sch 2, form 3.

90 That point was implied, but not made explicit, in Mr de Leur's second affidavit.

91 Section 27(1).

plans already submitted as part of the project information memorandum procedure when accepting subsequent building certificates and the code compliance certificate.

[79] Again, these are not matters able to be resolved on preliminary inquiry without the facts being established. They are however clearly open for consideration at trial, if bearing on the existence of a duty of care. The better view may be, indeed, that they are principally significant in relation to breach.

Approach

[80] A claim cannot be struck out on the basis it discloses no cause of action unless there is clear legal impediment to its succeeding at trial.[92] Care is necessary in strike out or summary judgment because "it is a serious thing to stop a plaintiff bringing his claim to trial unless it is quite clearly hopeless".[93] In novel cases, especially where the law may be developing, consideration of legal duties may require the context provided by facts found at trial to provide sufficient perspective.[94] As Cooke P stressed in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, it is "a truism" that where existing authority does not clearly cover the case, whether or not liability should be imposed for breach of a duty of care is a question of mixed fact and law, turning on close examination of "all the material facts in combination".[95] There are dangers in deciding whether a duty of care is properly to be imposed "in the abstract for all acts or omissions of a statutory authority".[96] Liability in negligence arising out of the exercise or non-exercise of statutory powers or duties is an area where the law is unsettled and where especial care is required.[97]

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92 *Couch v Attorney-General*, above n 13, at [40].

93 *Jones v Attorney-General* [2003] UKPC 48, [2004] 1 NZLR 433 at [10].

94 In relation to strike out see: *Couch* at [33], [35] and [38]. The same approach was adopted by McGechan J in the context of a summary judgment application in *Bank of New Zealand v Maas-Geesteranus* (1991) 4 PRNZ 689 (CA). See also *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515 at [123]–[124] and [138] per Kirby J (dissenting).

95 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 293.

96 *Barrett v Enfield London Borough Council*, above n 13, at 574 per Lord Slynn of Hadley.

97 *X (Minors) v Bedfordshire County Council*, above n 13, at 741 and *Barrett v Enfield London Borough Council*, above n 13, at 557–558. See also *Couch*, above n 13, at 742–743.

[81] It is not usually appropriate to have recourse to the summary judgment procedure where a claim is untenable on the pleadings as a matter of law. Striking the proceedings out under r 15.1 of the High Court Rules is sufficient for such cases[98] and the creation of an issue estoppel by judgment on pleadings alone would not generally be warranted.[99] The procedure by way of summary judgment under r 12.2, rather, permits a defendant "who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed".[100] If there is dispute on the facts which is material to the result, the case is not suitable for summary judgment.[101]

[82] The Court of Appeal held that the cause of action could not succeed on the basis of the scheme and purpose of the Act.[102] If correct in that assessment, the claim was untenable as a matter of law and strike out was appropriate. It is not clear why the Court of Appeal considered it appropriate to enter summary judgment for the defendant.[103] Although some evidence was put before the Court, it was not evidence that was determinative of the facts in issue (being incomplete, untested, and controversial) and is more properly regarded as the sort of evidence sometimes admitted in strike out hearings when "helpful as providing background and indicating the likely real range of dispute if the proceeding goes to trial".[104] The application before the Court is in substance to be considered on strike out principles which, in a case like this, turns on whether the pleaded facts give rise to an arguable cause of action in law. Because of the conclusion I reach that the proceedings should not have been struck out, it is unnecessary to consider further whether, had I been of the view that the claim was untenable in law, summary judgment was properly entered.

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98 Judicature Act 1908, sch 2. RA McGechan (ed) *McGechan on Procedure* (looseleaf ed, Brookers) at [HR12.2.07].

99 *Westpac Banking Corp v M M Kembla New Zealand Ltd*, above n 94, at [60].

100 Ibid, at [60]. Examples, cited in RA McGechan (ed) *McGechan on Procedure* (looseleaf ed, Brookers) at HR12.2.07(2), are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.

101 *Jones v Attorney-General*, above n 93, at [5].

102 At [24]–[25].

103 At [29].

104 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, above n 95, at 288–289 per Cooke P.

[83] The claims are closely analogous to those in the *Hamlin* line of authority[105] affirmed by this Court in *North Shore City Council v Body Corporate 188529* in respect of statutory duties undertaken by territorial authorities.[106] In those cases the territorial authorities were liable in tort in respect of their exercise of the functions of inspection and certification which were carried out in the present case by a certifier. In principle, however, such liability is not readily distinguishable from that arising out of the exercise or discharge by territorial authorities of other powers or responsibilities which the scheme of the Act imposes directly on them, irrespective of the engagement of a certifier. In the case of statutory responsibilities not able to be transferred to certifiers, it is therefore well arguable that existing authority supports there being sufficient proximity between territorial authority and owner to justify the recognition of a duty of care not excluded for reasons of policy when careless exercise of powers by the territorial authority causes loss. Subject to any exclusion of liability on proper construction of the Act (the subject of the next section of these reasons), therefore, I do not think it can be said on peremptory consideration that the causes of action in relation to the acceptance of certificates which exceeded ABC's authority or the advice that a certificate of code compliance had issued are untenable as a matter of law.

A duty of care to check that certificates are within the scope of what is authorised is consistent with the scheme of the Building Act 1991

[84] I have already indicated, in discussing the provisions of the Act, the place occupied by territorial authorities in its administration. In this section I draw on that review and give my conclusions.

(i) Nothing in the Act excludes liability

[85] If a statute sets up remedies, they may leave no room for liability in tort. Depending on the legislative context, absence of a remedy may also point away from liability. The Court of Appeal seemed to consider the Building Act was in the second category when it characterised the claim as one which seeks to impose "a liability for

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105 *Invercargill City Council v Hamlin*, above n 4.

106 *North Shore City Council v Body Corporate 188529*, above n 5, at [1] and [24]–[26].

damages in public law".[107] Such concern did not prevail in the *Hamlin* line of authority. It is, in any event, inconsistent with the terms of the Building Act which specifically envisage liability in tort, as is discussed at [31] above.

[86] It is suggested, nevertheless, that the liability of the Council to owners in tort is inconsistent with the terms of s 50 and, more generally, with the scheme of the Act which gives owners the choice between relying on the territorial authority or on a building certifier to ensure compliance with the building code. I consider that both suggestions are misconceived.

(ii) Section 50 does not preclude liability

[87] I have described the meaning and effect of s 50 in [30]–[32] above. In my view, the requirement that a territorial authority must accept building certificates and code compliance certificates from a building certifier "as establishing compliance with the provisions of the building code"[108] deals with substantive compliance with the code. The territorial authority was relieved from any responsibility and indeed had no business to check for substantive compliance with the code on receipt of such certificates. As a result, the territorial authority has no liability if it relied on a certificate of code compliance, as s 50(3) made clear "[f]or the avoidance of doubt".

[88] Section 50(1) did not however suggest that a Council could accept a certificate from someone not authorised to give it. Section 50(3) is not expressed in terms which relieve the territorial authority from a responsibility to accept certificates only from those authorised to provide them. Given the circumstance that certifiers were authorised under the Act for particular purposes and that limitations on their authority to certify (such as applied to ABC from December 2002) were required to be maintained on the register,[109] there is no statutory basis for the view that if the certifier is registered for some purposes, the Council was obliged under s 50(1)(a) to accept its certificates for all purposes. Nor is there any basis in s 50(3) for immunity from liability if a territorial authority accepts a certificate which exceeds the authority to which the certifier was limited on the register.

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107 At [28].
108 Section 50(1).
109 Section 53(2).

[89] As further discussed at [92], I consider that it is well arguable that the scheme of the Act obliged territorial authorities to check that a certificate was within the scope of any limitation noted on the register. For present purposes, however, it is sufficient to point out that the terms of s 50(1)(a) do not require a territorial authority to accept a certificate by someone who is not authorised to provide it and the terms of s 50(3) do not provide an immunity for a territorial authority which carelessly accepts such certificates. A purported certificate is neither within the scope of the obligation under s 50(1) nor within the "avoidance of doubt" immunity under s 50(3).

[90] Because of the view I take that s 50 is not engaged when the claim is based on the negligence of a territorial authority in accepting a certificate beyond the authority of a certifier, it is unnecessary to consider the appellant's fall-back argument that the Council cannot claim to have been acting in "good faith" (as is required by s 50(3)). Had s 50(3) applied, however, I do not think the appellants' fall-back argument that the Council did not act in good faith because it had no system of checking in place can be peremptorily rejected. Such a conclusion could only be reached against the statutory background of the responsibilities of territorial authorities, the certification provisions (which were envisaged to be specific and subject to limitations), and the register maintained by the Building Industry Authority after consideration of the evidence, including any relevant evidence of the Council's practice and the practice of other territorial authorities. If the Council is found to have failed to set up any system to check the authority of certifiers to certify for specific code compliance, despite maintenance of the register, then it is I think arguable that such abdication of responsibility conferred for the public good could not found reliance in good faith, for the reasons already touched on in [32].[110] The fact that the aggregated knowledge of Council employees may have enabled the conclusion that the certificate of code compliance exceeded the limitation indicates that requiring a system to enable the information to be obtained would not be onerous. That circumstance itself supports sufficient relationship of proximity to justify the imposition of a duty of care. And it is certainly material to the negation of reasonable care and in establishing breach.

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[110] See *Mid Density Developments Pty Ltd v Rockdale Municipal Council*, above n 42, at 300.

(iii) The territorial authorities retain continuing responsibility under the Act

[91] I do not accept that the responsibilities of territorial authorities under the Act after engagement of a private certifier were as limited as the Court of Appeal treated them. Territorial authorities remained central to the enforcement and administration of the Act and possessed the authority and power to ensure compliance with the building code where they knew or should reasonably have known that the inspection and certification provided for by the Act were not being carried out, even where private certifiers were engaged by the building owner. Their responsibilities are described in [16]–[21] above, and need only be referred to here.

[92] Although territorial authorities were relieved from making their own substantive assessment of code compliance where they received a certificate by an authorised building certifier that the provisions of the code had been complied with in building plans or in construction work undertaken, they remained the body to which reports, including monthly inspection reports, were made by certifiers. Irrespective of the engagement of a private certifier, territorial authorities continued to have statutory responsibilities and functions in relation to monitoring and gathering information under s 26, processing and supervising compliance with the terms of building consents (including in relation to inspection reports under s 57(3)(a)), cancelling building consents for change of circumstances under s 41(2)(a) (if such change might lead to contravention of any provision of the building code), issuing notices to rectify under s 42, maintaining records under s 27, carrying out "any work on or in connection with any building" by default under ss 42 and 74 (with the ability to recover the costs of doing so), and inspecting "to ensure ... [t]hat ... building work is being done in accordance with a building consent" or that the inspection regime was being fulfilled under s 76. It was consistent with their statutory obligation of oversight within their districts[111] that territorial authorities were the bodies to which certificates of private certifiers were required to be given.

[93] The Court of Appeal took the view that the responsibilities of the territorial authority to ensure code compliance were suspended by the engagement of private certifiers and "enliven[ed]" only on notification by the owner or certifier under s 57

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[111] Section 24.

of the Act that the certifier was unable or unwilling to carry out the certification.[112] I consider that s 57 imposed an obligation to report on certifiers and owners which did not detract from the continuing independent responsibilities of the Council. The Court of Appeal did acknowledge that the position might be different if the Council became aware from information other than s 57 notification that the certifier was issuing certificates beyond its authority. In that case, it considered "[t]he purpose of the notification under s 57 would have been served" so that the territorial authority would be obliged to "set about performing the obligations cast upon it by that section".[113] It seems to me, however, that the obligations cast upon the territorial authority under s 57 were part of a more general responsibility which continues whether or not a certifier is engaged. In particular, the powers under s 41(2)(a) (to cancel a building consent on "change of circumstances"), to give notices to rectify under s 42, and to inspect under s 76 (including for compliance with the compliance schedule approved in the building consent) did not depend on formal notification under s 57 "enliven[ing]" the territorial authority's general supervision of the regulatory regime under the Act.

[94] Against the substantial responsibilities given to territorial authorities by the Act, which were key to the effectiveness of the regulatory regime it imposed, I consider the Court of Appeal was wrong to treat the Act as providing the owner with an election which, if taken, relieved the territorial authority from responsibility, except in respect of the filing of information. The role of the territorial authority under the Act was not then "limited to the administrative function of receiving and, no doubt retaining at least a record of" the documents filed, including the certificates.[114] Rather, the responsibility of territorial authorities to administer the Building Act within their districts and to ensure compliance with the building code was modified by the engagement of a private certifier only to the extent that the territorial authority was entitled to rely on the assessments of code compliance contained in certificates given under the Act. The scheme of the Act is that the territorial authority remained responsible to supervise compliance with the Act. Its powers enabled it to do so effectively, including the power under s 41 to cancel a

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112 At [24].
113 At [27].
114 At [24].

building consent if a change of circumstance gave reason to believe that proposed work (which included the system of inspections which was part of the building consent) might contravene the code. It was obliged to pick up the responsibilities of inspecting and certifying in default of performance by the certifier as envisaged. The regulatory system of the Act would have an unaccountable and unacceptable hole in the middle if the engagement of a private certifier had the effect of relieving the territorial authority from continuing supervision for observance of the legislation.

(iv) The legislative history indicates that the territorial authority was responsible to check that certifiers stayed within the scope of their limitations

[95] The duty to check which I consider is consistent with the scheme of the Act and the responsibilities it imposed on territorial authorities is also consistent with the legislative history. The Building Act was based upon a 1990 report of the Building Industry Commission.[115] In proposing that private certifiers should be able to certify compliance with the building code, releasing the territorial authority from its default responsibilities where that course was taken by the owner, the report looked to the territorial authority as having responsibility to check the "validity" of certificates. The report envisaged that, although territorial authorities "would accept at face value" certificates from approved certifiers, the territorial authority would discharge its own "duty of care" in cases where such certificate was received by "checking the validity of the certificate with respect to" both the fact that the certifier was "currently on the BIA register" and that "the work certified as complying with Code requirements [was] within the scope of competence listed for the Approved Certifier".[116] The report directly observed that "[t]he TA is responsible for checking that the Certifier's field of expertise covers the elements for which the certificate was issued."[117] When a certifier was engaged, the report observed that the responsibility which otherwise "rests firmly with the TA" could "only be offloaded in part".[118]

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115 Building Industry Commission *Reform of Building Controls: Volume 1 – Report to the Minister of Internal Affairs* (Building Industry Commission, Wellington, 1990).

116 At [4.99].

117 At [4.80].

118 At [6.17].

(v) Arguments relied on to negate any responsibility to check authority against the register

[96] It has been suggested that it is unreasonable to expect such checks to be carried out by a territorial authority. Three points are made: that it would impose on the territorial authority costs which it could not recover; that requiring such check would be impractical because it would entail review of the plans and specifications; that requiring such check would be impractical because conformity with any limitation could require an assessment of some difficulty, not able to be easily resolved by comparing the limitation with the plans and specifications.

(a) Costs

[97] The Court of Appeal placed some stress upon its perception that the territorial authority would be unable to recover its costs of monitoring and checking that a certifier was acting within the scope of its authority.[119] It is suggested that such checks might entail obtaining the plans and specifications from another office of the Council (speculation I discuss at [77]–[79]) or might require inspection of the building work. It is said by William Young J that it is unlikely that such costs could be recovered under the charging provisions of the Act discussed at [40].

[98] I do not accept that the Act does not permit recovery of reasonable costs. The territorial authority was required by s 28(3) to reduce its charges "accordingly" where it accepted "a building certificate under s 56". Such reduction does not however suggest there is not scope for charges to cover the costs of ensuring compliance with building consents. It is significant that the reduction is on "acceptance" of a certificate, rather than on engagement of a certifier (as might have been expected if the Court of Appeal were right in suggesting that the election to use a certifier changed the statutory responsibilities more profoundly). To the extent that the Council was obliged to check that certificates were within the limits imposed by the Building Industry Authority, the task was facilitated by the register maintained by the Authority, by the information provided to and held by the territorial authority for the purposes of its approval of the building consent (which included the plans and

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[119] At [26].

specifications), and the inspection reports required to be provided during the course of construction.

[99] Where limitations were imposed after building consents were granted (surely in itself a red flag), conformity of certificates to the limitation might entail no more than checking the face of the certificate against the limitation (as where an item under the code was excluded). It might, as in the present case (where E2 could be certified for only if within the acceptable solution E2/AS1) be checked by reviewing the plans and specifications held by the Council. In some cases checking might have entailed inspection. The costs of such checking may have been within the fee charged by the Council on grant of building consents or where certificates are accepted. If not, however, I do not think it can be assumed in the present hearing that appropriate cost recovery could not have been obtained by the Council under its powers to charge fees, either through general fee-setting under s 28(1) or through the ability provided by s 28(2) to make a one-off additional assessment where a fixed fee is inadequate in a particular case. The question of the fees properly charged by the territorial authority for any monitoring cannot prompt peremptory dismissal of the claim and even on full inquiry is unlikely to be determinative, given the wide responsibilities of territorial authorities under the Act and the essentiality of their supervision to the legislative scheme.

(b) Suggested impracticality in requiring check

[100] It is said that a duty to inquire whether a certificate is within the certifier's authority would be unreasonable. Counsel for the respondent seemed to acknowledge in argument that the Council could be liable if it accepted a certificate from someone not in fact on the register maintained by the Building Industry Authority, but suggested that requiring a check on compliance with any restriction was not reasonable. Given that the Act required certificates to be specific for code requirements and required limitations on the authority of certifiers to certify to be publicly notified on the register, I can see no basis to suggest that territorial authorities might be under an obligation to check that a certifier is on the register in some capacity but not to ensure that the certificate is within the scope of his actual authority. It is the latter that is the purpose of the certification process and the

maintenance of the register. And the name of an approved certifier is one element only of the information required to be notified.

[101] To the extent that the suggestion of impracticality turns on speculation about the accessibility of the plans and specifications (which are accepted for the purposes of the appeal to have shown non-conformity with the restriction placed on ABC), I have pointed out in [64] that it seems to be based on a misunderstanding about the statutory basis on which such plans and specifications are received by territorial authorities and that such evidence as there is does not suggest the impracticality pointed to by the respondent. Indeed, the evidence that the Council routinely checked that building consent applications were within scope does not suggest that a similar check is unreasonable on application of subsequent certificates. What is reasonable may also be affected in the particular case by the notice Council had about the limitation imposed on the certifier's scope following the grant of the building consent. Questions of practicality in operation are not capable of determination in these proceedings,[120] but such evidence as there is before the Court does not support the submission.

(c) Suggested impracticality in cases where the limitation may be a matter of judgment against standards that are not easily ascertained

[102] It is suggested that whether a certificate is within the scope of authority of a certifier may be difficult to decide in some cases, especially where the standards of the code are generally expressed, for example by a restriction to what is "usual".[121] For the purposes of summary determination of this case it is enough to point out in response that it has been acknowledged for the hearings in this Court and in the lower courts[122] that examination of the plans and specifications here would have revealed to a reasonably informed person, such as it is appropriate to assume the building officers of the Council would be, that certification on the design of the building at Arney Crescent could not have been undertaken by ABC after December 2002. In another case, it may be that any difficulty of assessment would bear principally on breach, rather than duty of care. I do not think such speculation

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120 As noted above at [77]–[79] these matters are better considered in relation to the question of breach of duty.

121 Compare judgment of William Young J at [165]; see also [152].

122 See *McNamara* (HC), above n 6, at [7], and the *McNamara* (CA), above n 7, at [22].

should prevent the case going forward for trial. But, in any event, I consider that the ability to obtain an authoritative determination of the Building Industry Authority in a case of doubt, as described at [41], is sufficient response here.

Conclusion

[103] As indicated in [83], I consider that the claims based on the Council's acceptance of certificates beyond the authority of ABC are closely analogous to existing authority, as affirmed by this Court in *North Shore City Council v Body Corporate 188529*.[123] There is no statutory impediment to tortious liability under the Building Act once it is appreciated that the s 50(3) immunity has no application to the appellant's claim, which is not concerned with the Council's reliance on the certification of code compliance but with the Council's acceptance of a certificate the certifier was not authorised to make. It is not necessary for the purposes of the present preliminary appeal to determine whether the powers undoubtedly available to the Council under the statute were ones it had a duty to use to check that the certificates provided by ABC were within the scope of its authority and that ABC continued to be authorised to carry out the inspections in terms of the building consent. It seems to me well arguable in the context of the statutory scheme that the Council was obliged to make reasonable checks before accepting certificates or inspection reports.

[104] The statutory responsibilities of the Council which point to such duty were not high-level policy determinations or discretions, but were operational responsibilities it was obliged to fulfil within its territory for the purposes of the regulatory regime set up by the Act. In such circumstances reasonable exercise of its statutory powers (including the powers of investigation and inquiry) to achieve the purposes of the legislation was not optional. The scheme of certification depended on certificates being accepted as demonstrating code compliance only if within the authority of the certifier. The maintenance of the register, including as the statute required the information as to any limitation on a certifier's ability to certify in

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123 *North Shore City Council v Body Corporate 188529*, above n 5.

respect of particular aspects of the code,[124] provided the essential information against which check could be made. The territorial authority was given powers which enabled it to make such checks. Only the territorial authority was set up to ensure conformity between certificate and authorisation of certifiers.

[105] I am of the view that the Court of Appeal's characterisation of the claims as seeking to impose a "residual liability"[125] or "backstop" responsibility[126] on the Council for the negligent performance of the duties of an independent inspector is not accurate. The claims are stand-alone causes of action against the Council for breach of duties of care it is claimed to owe directly to the owners through performance of its continuing statutory functions in accepting certificates, through failing to intervene when on notice that the certifier was exceeding its authority, and in misstating the correct position as to certification. Liability in tort for the claimed wrongdoing would march in step with Council's statutory responsibilities.

[106] Significant questions of fact which cannot be resolved at this stage of the proceedings also bear on any duty of care and its breach. They include the knowledge held by the Council about matters of risk which, in combination with its statutory responsibilities, might properly have put it on inquiry and which may support recognition of a duty of care on the facts. Such questions of appreciation of risk and knowledge, as has already been suggested, are not suitable for determination on the limited material on summary application before full discovery and testing of the evidence. Nor on interlocutory hearing can such assessment be arrived at on a balance of the available evidence, such as is appropriate at trial.

[107] Whether a duty of care arises turns on a wider context than the legislation alone. In the context of the Council's statutory responsibilities, its knowledge that ABC's authority to certify had been limited is itself an additional special circumstance supporting the imposition of a duty of care to check that the certificate supplied was within the scope of the certifier's authority. It may be highly relevant to investigate what was known to the Council concerning both the limitation of ABC's authority and any heightened appreciation of the risk posed by leaky

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124 Section 53(2)(d).
125 At [1].
126 At [25].

buildings and ABC's performance in relation to them. Direct evidence of the Council's handling of the Arney Crescent building file and any inspection reports obtained in respect of the building consent, largely absent on the material before the Court, would have to be considered. All of these circumstances are relevant to the extent to which the Council was put on reasonable inquiry or should have appreciated risk of non-compliance with the code, ensuring observance of which was within its general responsibilities.

[108] At this stage of the proceedings discovery has not been obtained and almost nothing is known about the Council's conduct of the particular file. It cannot be assumed that the plaintiffs will be unable to make out their pleading that the Council knew or ought to have known that the certificate or certificates it accepted were beyond the authority of the certifier. Although there was much speculation at the hearing about whether it was reasonable to expect Council officers to check the plans or whether the information available to different officers of the Council could be aggregated, these questions require findings of fact and their significance for scope of duty or its breach is speculative on what is so far known. The facts when known may show, for example, that there was no gap in knowledge but simply oversight or blunder in its application. If appreciation that the certificate exceeded the authority of the certifier could only have been obtained through review of the plans, evidence that failure in this case to review them was contrary to general practice of territorial authorities (particularly following notification that the certifier's authority had been limited) may be important to scope of duty and is likely to be critical in deciding whether there was breach. The limited evidence available to the Court indicates that the Council did check that certifiers were authorised to provide certificates against the scope of their authority as disclosed in the register before building consents were granted. It is not clear why any distinction should be drawn by the Council in relation to subsequent certificates. It is not even known whether any such distinction was made by the Council in practice, the evidence of Mr de Leur on the point being inconsistent. The practice of other territorial authorities may well be relevant. Matters of fact such as these cannot be resolved on preliminary inquiry.

[109] For the purposes of this summary determination, I think it must be assumed that the appellants will be able to make good their allegation that the certificates

accepted by the Council were known or should have been known by it to be outside the scope of the certifier's authority as limited, to the Council's admitted knowledge, in December 2002. In my view, the Associate Judge was right to say that the scheme of the Act was not inconsistent with civil liability in negligence for the Council's failures, in responsibilities the Act imposed on it not as a "backstop"[127] to private certifiers, but directly. Applying established principles applicable to strike out and summary judgment, I consider that the case was not an appropriate one to be dealt with except after investigation of the facts at trial. I consider that the approach taken in the High Court was correct and that the Court of Appeal was in error. I would allow the appeal with the effect that the claims would proceed.

BLANCHARD, McGRATH AND WILLIAM YOUNG JJ

(Given by William Young J)

Introduction

[110] This leaky building case, like so many others, arises out of the regulatory regime introduced by the Building Act 1991. The Act provided for building certifiers approved by the industry regulator – the Building Industry Authority (BIA) – to provide certification and inspection services. These services had previously been the sole preserve of territorial authorities. Central to this aspect of the scheme was provision for certificates, by certifiers, that proposed building work would comply with the building code (thus providing a basis for the issue of building consents by territorial authorities) and the issuing by certifiers of code compliance certificates for completed building work.[128] Under s 50(1) of the 1991 Act, territorial authorities were required to accept such certificates as relevantly establishing compliance, and under s 50(3) territorial authorities were protected from civil liability if they acted in good faith in reliance on such certificates.

[111] The house in issue is in Arney Crescent, Auckland. The building consent for it was based on a building certificate issued by a certifier, Approved Building

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127 See *McNamara* (CA), above n 7, at [25].
128 Discussed below from [133].

Certifiers Ltd (ABC). ABC later issued a code compliance certificate. The appellants say that they purchased the house on the basis of, inter alia, the ABC-issued code compliance certificate. They maintain that this certificate should never have been issued as:

(a) the house did not comply with cl E2 of the building code (which addressed moisture control) and thus with the building consent; and

(b) ABC's approval to operate as a certifier did not encompass certification of this house, given the way in which it was built.

With ABC and the developer of the property in liquidation, the appellants seek to impose liability in negligence on the Auckland City Council (the Council), the territorial authority in whose district the house was built.

[112] The Council unsuccessfully applied to the High Court for an order striking out the claim for summary judgment[129] but its appeal to the Court of Appeal was successful, with that Court entering summary judgment in favour of the Council.[130] The appellants now appeal.

The facts in a little more detail

[113] The house was built between late 2001 and, it appears, late 2002. The building owner was Carmel Properties Ltd (Carmel). It engaged ABC to obtain the building consent, carry out inspections and issue a code compliance certificate.

[114] On 1 August 2001, ABC applied to the Council for a project information memorandum (PIM) in relation to the then proposed house.[131] The PIM procedure did not involve checking compliance with the building code. This was made clear by s 30(3)(b) which provided for PIM applications to be accompanied by information reasonably required by the territorial authority in relation to authorisations and requirements under any Act other than the 1991 Act. The

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129 *McNamara v Malcolm J Lusby Ltd* HC Auckland CIV-2006-404-2967, 3 July 2009.
130 *Auckland City Council v McNamara* [2010] NZCA 345, [2010] 3 NZLR 848.
131 Pursuant to Building Act 1991, s 30.

documents ABC submitted nonetheless included building plans; this because some of the information required by the Council could be gleaned from these plans. The provision of plans as part of a PIM application was sufficiently routine to be provided for in the forms prescribed under the Building Regulations.[132] The application for the PIM was processed on 6 August 2001 by the Planning and Development Engineering divisions of the Council and a PIM was duly issued.

[115] The next step in the process was that ABC lodged an application for a building consent dated 9 August 2001.[133] This was accompanied by a building certificate and attached Scope of Engagement, of the same date, which certified that the proposed house would comply with the building code if completed in accordance with the listed plans. This was a reference to the plans already submitted with the PIM application. The building certificate also noted that ABC was to certify compliance with the building code (save in respects which are not material to this case). From the outset, therefore, it was envisaged that ABC would be certifying as to, inter alia, compliance with the moisture control requirements of the building code. This application was processed by the Council's Building division. A building consent was duly issued.

[116] It is not entirely clear when the house was completed. This was probably towards the end of 2002 although it may have been a little later. Given this uncertainty, we approach the case on the basis that the house was not completed prior to the BIA, on 4 December 2002, amending ABC's approval so that its ability to certify compliance with cl E2 of the building code was limited to compliance achieved through E2/AS1. At this point, a brief diversion from the narrative is necessary to explain what this meant.

[117] Clause E2 of the building code was generally expressed. Its primary requirement was that buildings should be constructed to provide "adequate" resistance to penetration by, and the accumulation of, moisture from the outside. And there were a number of performance requirements which were also generally

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132 The forms used by the Council and as prescribed by the Building Regulations 1992 contemplated that plans would be supplied with a building consent application unless earlier provided with a PIM application.

133 Pursuant to the Building Act 1991, s 33.

expressed; for instance that roofs and exterior walls should prevent the penetration of water that could cause undue dampness, or damage to building elements. The BIA was authorised to issue what it called "acceptable solutions" – that is, documents which identified building systems and mechanisms which, if utilised as stipulated, would establish compliance with particular provisions of the building code. E2/AS1 was such an "acceptable solution". The effect of the limitation on the certifying ability of ABC was that it was authorised to certify compliance with cl E2 only where such compliance was achieved in a way which was provided for in E2/AS1. We should also record that ABC was, at this time, made subject to other restrictions. It was relevantly limited to "ordinary residential buildings" and its competence expressly did not extend to:

> Buildings ... involving unusual use of materials, or involving unusual methods of design or construction, and
>
> Unusually complex buildings … .

[118] The 4 December 2002 amendment to ABC's approval became a matter of public record (because it was notified on the BIA's website[134]). Subsequently officers of the BIA attended at ABC's premises where, in conjunction with ABC's staff, they reviewed ABC's files with a view to identifying building projects for which ABC had been retained but no longer had appropriate certifying capacity. Similar exercises were carried out with other certifiers whose approvals were also made subject to limitations. The upshot was that approximately 1,100 files of ABC's and other certifiers (who were also subject to competence restrictions) were referred to the Council so that it could take direct responsibility for inspections and, by implication at least, certification.[135] Relevant to this is the legislative context provided by s 57(3)(b)(i) of the Building Act which we will discuss later.

[119] By an agreement of 7 April 2004, the appellants, as trustees of the PH McNamara Family Trust, agreed to purchase the house from Carmel. The purchase price was $3.65m. The appellants' solicitors obtained a Land Information

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134 The BIA was obliged by s 53 of the 1991 Act to establish and maintain a register of building certifiers. This took the form of a web-based public registry, but the BIA also notified every territorial authority in writing when a certifier's scope of work approval was changed in its newsletter – "BIA News".

135 See below at [139]–[140].

Memorandum (LIM) from the Council on 26 April 2004 which indicated that no code compliance certificate had been issued. In fact ABC had completed a code compliance certificate in respect of the house and on 16 April 2004 lodged it with the Council. On 29 April 2004, a Council officer told the appellants' solicitors that a code compliance certificate had been issued. On the same day, Carmel's solicitors supplied a copy of the code compliance certificate to the appellants' solicitors. Settlement then occurred.

[120] In issuing the building consent, the Council relied on the certificate given by ABC and took no steps independently to determine whether the house, as designed, complied with the building code. On the other hand, there would have been some assessment as to whether ABC was competent to certify compliance. The evidence is not explicit as to what this entailed.[136] The building consents officer may have either (a) gone to the plans and specifications and checked them against any relevant competence restrictions affecting ABC or (b) seen it as sufficient that the application was for a house and relied on his or her awareness that ABC was competent to certify in relation to houses. We see this uncertainty as immaterial in the present context because it is not in dispute that ABC was competent to certify in relation to the house at the time the building consent application was received.

[121] The code compliance certificate was issued by ABC and all the Council did in relation to that document was to retain it in its records and later inform the appellants' solicitors that it had been issued. This was in accordance with the usual practice of the Council, which had no system in place for checking, on receipt of a code compliance certificate, that the certificate was within the competence of the certifier. The absence of such a system is not remarkable. Competence was assessed when a building consent was issued. And, as we will see, the possibility of a certifier subsequently losing competence to inspect or certify as to compliance was addressed by s 57(3)(b)(i) of the Act. As already noted, after the 4 December 2002 amendment to ABC's approval, a large number of what had been ABC's projects were referred to the Council. If the BIA/ABC exercise which preceded this step had been accurately

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[136] The affidavit evidence on the point is set out in the reasons of the Chief Justice at [62]–[64].

carried out, the only projects which ABC retained ought to have been within its competence.[137]

[122] Leaks to the house became apparent. The appellants maintain that the reason the house leaked is because it did not comply with cl E2 of the building code. Having effected repairs, they now seek to recover their losses incurred against a number of parties, including the Council.

The formulation of the claim against the Council

[123] The appellants have no complaint in relation to the approval of the building consent as there is no dispute that the building certificate on which it was based was within the competence of ABC. Instead, the focus of the appellants' claim is on events which occurred after the 4 December 2002 amendment of ABC's approval and on the actions (or absence of action) on the part of the Council subsequent to that date.

[124] Central to all the formulations is the contention that the design and construction of the house was not in accordance with E2/AS1. Accordingly, maintain the appellants, ABC was not entitled to certify compliance with cl E2. Further, on the appellants' case, the Council could have ascertained that the code compliance certificate had been wrongly given by checking the plans for the house submitted in connection with the request for the PIM. This would have shown that the house, at least as designed, did not conform to E2/AS1. Given that we are dealing with the case on a summary judgment/strike-out basis and there is an evidential foundation for the appellants' contentions as recorded, we will proceed on the assumption that they are correct.

[125] The appellants put their case on two different bases.

[126] First, they maintain that the Council was not entitled to rely on the code compliance certificate as establishing compliance with the building code and is liable

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[137] It follows that we do not accept that the approach we favour means that there was "an unaccountable and unacceptable hole in the middle" of the regulatory regime, see the comment of the Chief Justice at [94].

in negligence for breach of a general duty of care owed to, inter alia, future purchasers of houses constructed within its district. In this regard, Mr O'Callahan, for the appellants, maintained that the general duty of care upheld by the Privy Council in *Invercargill City Council v Hamlin*[138] and confirmed by this Court in *Sunset Terraces*[139] applies, albeit "slightly modified in the circumstances". He contended that with effect from 4 December 2002, ABC was unable to certify that the house complied with cl E2 and that, at that point, the Council was required to step in and assume responsibility for inspections and, if appropriate, certifying overall compliance with the building code. As well, he argued that the Council's duty of care to future purchasers encompassed an obligation not to accept a code compliance certificate from a building certifier without taking reasonable steps to see that the building certifier was authorised to issue it. In deference to the way in which counsel formulated this aspect of the claim, we will refer to this component of the appellants' case as "the *Hamlin* claim".

[127] Secondly, the appellants argue that the Council is liable for processing the code compliance certificate issued by ABC and, in particular, telling the appellants' solicitors that a code compliance certificate had been issued when the Council had negligently not taken steps to ascertain whether ABC was authorised to issue the code compliance certificate. In support of this second head of claim, Mr O'Callahan relied on a *Hedley Byrne* duty,[140] arguing that the Council staff member who told the appellants' solicitors that a code compliance certificate had been issued thereby represented that the code compliance certificate was valid – a misrepresentation which counsel maintained had been negligently given. We will refer to this aspect of case as "the *Hedley Byrne* claim". We note in passing that this claim has not been incorporated in the appellants' pleading and was not the subject of detailed consideration by the Court of Appeal.

[128] Mr O'Callahan also confronted, as he had to, s 50(3) of the Building Act. This section immunised territorial authorities against civil liability in relation to

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138 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

139 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 ("*Sunset Terraces*").

140 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

anything done in good faith in reliance on specified documents including code compliance certificates. He submitted that:

(a) The concept of good faith in s 50(3) can be invoked only by a territorial authority which acted with appropriate diligence and caution and that, in the absence of a system to check the authority of certifiers, the Council did not act cautiously and diligently and thus could not rely on s 50(3).

(b) The Court should aggregate the knowledge of all Council officers, and in particular, aggregate the knowledge of Council staff who knew of the limitations on ABC's certifying competence with those who received the code compliance certificate.

[129] Mr O'Callahan's argument was that territorial authorities were required to be familiar with, and check for, limitations on the certifying competence of certifiers. Applying that requirement in the particular context of the type of limitations to which ABC was subject meant that the Council ought to have gone back to plans it had in respect of the PIM application to see whether the house, as designed, was in conformity with E2/AS1.

[130] As to what the Council should have done, if of the view that the certificate was or may have been beyond the competence of ABC, Mr O'Callahan said that the Council could have referred the certificate to the BIA. And he argued that this is what it should have done in the present case.

The approach taken in the High Court and Court of Appeal

[131] Associate Judge Christiansen rejected the Council's applications for summary judgment and a striking out of the claim against it.[141] He held that:

> [49] The Act was not intended to supplant but rather to complement a TA's [territorial authority's] statutory obligations. Unless a private certifier is expressly authorised to certify items of building work comply with the building code then the duty remains with and reverts to the TA. A private

[141] *McNamara v Malcolm J Lusby Ltd* HC Auckland CIV-2006-404-2967, 3 July 2009.

> certifier is either authorised to certify items of building work or not and if not, the duty remains with the TA.
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> …
>
> [53] Therefore [the Council] could only accept approved certificates; it could not accept just any certificates and it could not accept a certificate for which there was no approval. Therefore a certificate under s 56 can only be that for which approval has been given by the BIA, for items not excluded and for provisions of the building code that are approved.

[132] The application for review of this decision was removed to the Court of Appeal to be heard in conjunction with the refusal of the Council's application for summary judgment. That Court allowed the appeal and entered summary judgment for the Council:[142]

> [24] The clear pattern of the Act is to give the owner an election between the use (in whole or in part) of a certifier and the use (in whole or in part) of the territorial authority. Where the certifier was retained by the owner to perform the whole task, the authority's role was limited to the administrative function of receiving and, no doubt retaining at least a record of, the owner's advice of completion at the end of the works together with the certifier's CCC.[143] Only if the certifier or owner gave notification under s 57(3) did the Act enliven an obligation of inspection on the part of the territorial authority.
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> [25] It is impossible to infer a statutory purpose that territorial authorities should act as long-stop guarantor to certifiers that issue a CCC in respect of building work, here the construction of a domestic dwelling, which, performed in one way, fell within the certifier's authority, but, performed another way, fell outside that authority. Certifiers were issued their authority by the BIA which could amend or withdraw it. The Act stipulated that certifiers be subject to a scheme of insurance approved by the BIA.[144] So a certifier which issued a certificate beyond its capacity or which approved defective work, would be liable in negligence to the owner and that liability would, it was contemplated, be backed by an approved insurer. There is no suggestion in the Act that an authority should provide a further backstop for default by the certifier which was in direct competition with the authority for the business of inspection and issue of CCCs.[145]
>
> [26] Nor are we prepared to create a common law obligation of the kind for which the trustees contend. The owner, having turned its back on the territorial authority and chosen and paid another certifier, and thereby freed itself from the obligation to pay the authority the charges it would otherwise have received for assuming the inspection obligation, cannot reverse that election without giving the statutory notification under s 57. The common

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142 *Auckland City Council v McNamara* [2010] NZCA 345, [2010] 3 NZLR 848.

143 Section 43.

144 Section 51(3)(b).

145 The Council charged $130 rather than the $6,588 it might have charged for inspecting code compliance (*McNamara v Malcolm J Lusby Ltd* HC Auckland CIV-2006-404-2967, 3 July 2009 at [60]).

law seeks to act in accordance with the public policies expressed by Parliament,[146] especially where it is asked to operate within or near the borders of legislation.

[27] No doubt the case could be different if a council well knew that a certifier was issuing certificates which it had no right to do. The purpose of the notification under s 57 would have been served and the territorial authority might be expected to set about performing the obligations cast upon it by that section. But that scenario is not suggested in this case.

[28] The *Hamlin* line of authority was created by the courts to deal with breach by councils of an obligation they had undertaken – inspection and certification of building work where the owner could reasonably expect to rely on its exercise of care when any defects would be covered up as the work proceeded. Here there was no assumption of responsibility by the Council; only by ABC. For the trustees' claim to succeed would require us to create a liability for damages in public law for the failure, in exercise of its limited s 24 functions, to oversee the performance by the certifier of:

(a) its (and the owners') s 27 obligation to notify the Council of the limitation of the certifier's authority; and

(b) the performance of the obligation which the owner had deliberately confided to the certifier instead of to the Council.

[29] Such argument stands on its head the principle that liability in this sphere follows assumption of responsibility. We are satisfied that the trustees' argument is without merit. Rather than simply strike out the claim we have concluded that the Council is entitled to the substantive relief of summary judgment, which is entered in its favour.

Some general considerations affecting both aspects of the appellants' case

The general scheme and purpose of the legislation

[133] The 1991 Act largely implemented a 1990 report to the Minister of Internal Affairs by the Building Industry Commission.[147] This report (and the way in which the 1991 Act followed its general scheme) makes it clear that the legislature intended to create a market for the provision of certifying and inspection services with competition between certifiers and the building departments of territorial authorities. The ability of certifiers to compete with territorial authorities would have been significantly compromised if the latter were ordinarily entitled, or indeed obligated,

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146 See JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 535–542.

147 See *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [7].

to review their work. That this was so was recognised by the Building Industry Commission report. This saw certifiers, in respect of code compliance, as a "competitive alternative" to territorial authorities and, to ensure this alternative's effectiveness, emphasised the importance of territorial authorities being statutorily obliged to accept "at face value" assertions by building certifiers as to code compliance, with an associated reduction in the potential liability of territorial authorities.[148]

[134] Unsurprisingly then, the 1991 Act was structured so as to prevent significant review of certifiers' work by territorial authorities. Thus:

(a) Certifiers were the responsibility of the BIA and not territorial authorities. Certifiers were approved by the BIA, which also dealt with complaints against them.[149] The BIA also had the power to review the operations of territorial authorities.[150] Disputes about building certificates or code compliance certificates issued by certifiers were to be determined by the BIA[151] (and thus not by territorial authorities).

(b) Territorial authorities were required to accept certifier-issued building certificates and code compliance certificates as establishing compliance with the building code.[152]

(c) This meant that territorial authorities were required to issue a building consent on the basis of a building certificate issued by a certifier (acting within any limitations on the relevant approval) that the proposed building work would comply with the code.[153]

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148 Building Industry Commission *Reform of Building Controls: Volume 1 – Report to the Minister of Internal Affairs* (Building Industry Commission, Wellington, 1990) at [4.76], [4.79]–[4.80] and [4.99].

149 See ss 54–55.

150 See s 15. For the Minister's powers which would likely to be exercised if the BIA took an unfavourable view of those operations, see s 29.

151 See ss 16–21.

152 See s 50(1)(a).

153 See s 34(3) and s 50(1)(a).

(d) It also meant that territorial authorities had no functions in relation to certifier-issued code compliance certificates other than those imposed under s 27 to file them and then record them on subsequently issued LIMs.

(e) Section 50(3) (of which more shortly) excluded liability for anything done in good faith in reliance on a certifier-issued building certificate or code compliance certificate.

(f) The 1991 Act required certifiers to carry insurance,[154] indicating an intention that they would be liable for negligent certification and inspections.

The functions of a territorial authority in relation to building consents where certifiers were involved

[135] The functions of territorial authorities were specified in s 24 in general terms and were then more specifically provided for in later sections of the Act. Section 24 relevantly provided that:

> Every territorial authority shall have the following functions... :
>
> ...
>
> (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 :
>
> ...

These functions were then elaborated by s 34 which provided:

> **34 Processing building consents**
>
> (1) The territorial authority shall grant or refuse an application for a building consent within the prescribed period.
>
> (2) A territorial authority may, within the prescribed period, require further reasonable information in respect of the application and, for the purposes of this Act, the prescribed period shall be deemed to

[154] See for instance s 56(5).

have been suspended until the further information is received by the territorial authority.

(3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

The statutory language thus did not distinguish between building consents based on certifier-issued building certificates and those which depended on assessments made by the territorial authority's own staff. It follows that a territorial authority had a statutory function to perform when issuing a building consent based on a certifier-issued building certificate, albeit that this did not extend to reviewing the accuracy of the building certificate. Checks on the competence of the certifier to issue building certificates in relation to the project would have been a legitimate part of the exercise of this function.

The post-building consent statutory functions of territorial authorities in relation to building projects where certifiers were involved

[136] Territorial authorities had general functions under the 1991 Act such as the administration within their districts of the Act and any regulations made under it.[155] There were also obligations:

(a) under s 26, to collect information necessary for the performance of their obligations; and

(b) under s 27, to maintain records associated with their administration of the Act and to make such records reasonably available to the public.

[137] The engagement of a certifier did not, in itself, displace the powers of inspection vested in territorial authorities by s 76. Indeed such inspections might well have been appropriate for reasons other than assessing compliance with the building consent.[156] As will become apparent, the 1991 Act envisaged circumstances in which territorial authorities might take over the responsibilities of certifiers in

[155] See s 24(a).
[156] See s 76(1)(b)–(d).

respect of specific projects (in which case they could be expected to resort to their statutory powers of inspection). That said, in the ordinary situation where a certifier was engaged and it was envisaged that the certifier would provide the code compliance certificate, there could be no justification for territorial authority inspections as to code compliance. Importantly, there was nothing in s 76 which contemplated inspections by territorial authorities to ensure that a certifier's certificates were within competence.

[138] Section 28 provided for territorial authorities to fix particular categories of charges, including[157] charges "payable by applicants for, or holders of, building consents for the carrying out by the territorial authority of its functions under this Act". That wording does not easily encompass charges for checks or inspections to determine whether a certifier was, after the issue of a building consent, continuing to act within its competence. This is because, as we will demonstrate, making such determinations was neither, in a specific sense, a statutory function of territorial authorities, nor necessarily associated with the performance of such functions.[158] A construction of s 28(1) which permitted such charges would have been untenably contrary to the scheme and purpose of the 1991 Act as it would have put certifiers at a competitive disadvantage compared to the building departments of territorial authorities.[159]

[139] The 1991 Act envisaged specific circumstances in which territorial authorities might resort to their statutory powers where building certifiers were involved. These were provided for by s 57 (which dealt with the terms of engagement of certifiers) and provided (in s 57(3)) that such terms of engagement were subject to "the following provisions":

> (a) The building certifier shall report to the territorial authority in the prescribed manner:

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157 The other categories of charge provided for are irrelevant.

158 The qualification is because of the very general functions provided for by s 24(a) and (e) relating to the administration of the Act and enforcement of the building code and Regulations.

159 If territorial authorities had been able to rely on their general function in relation to "the administration of the Act" as warranting charges for inspection and other checks in relation to projects where certifiers were involved, building owners who used certifiers would have been required to pay for two sets of inspections and checks.

(b) The building certifier shall notify the territorial authority if the building certifier—

(i) Becomes or expects to become unable to inspect all or any of the specified items for any reason; or

(ii) Believes that there is a contravention of the provisions of the building code in respect of the specified items, and has directed the person carrying out the work to rectify the contravention, but that person has not done so within a reasonable time:

(c) The owner or the person undertaking the work concerned shall notify the territorial authority if it appears to that person that the building certifier is no longer willing or able to inspect the specified items, and shall give a copy of any such notification to the building certifier if it is practicable to do so.

Section 57(4) provided that where notification was given under s 57(3)(b) or (c), the territorial authority was required to amend the building consent and to "make such inspections and issue such notices to rectify as it considers necessary".

[140] In her reasons, the Chief Justice places some reliance on the s 57(3)(a) obligation on certifiers to provide reports to territorial authorities as to inspections. We, however, see this obligation as irrelevant in the present context. The purpose of s 57(3)(b) and (c) was to provide triggers for the obligation of territorial authorities to take over the inspection (and by implication certification) functions under s 57(4). The purpose of requiring monthly inspection reports was plainly not to permit territorial authorities to review the accuracy of certifier-issued code compliance certificates (including whether they were based on adequate inspections). Instead, s 57(3)(a) was primarily intended to provide for the contingency that a territorial authority might be required later to act under s 57(4), in which case the territorial authority's inspectors would wish to know what had gone before. This is consistent with the structure of s 57(3) and (4). As well, the form of the report specified in the Building Regulations suggests a related purpose of giving territorial authorities advance notice of situations in which they might later be required to act (particularly in relation to s 57(3)(b)(ii)).

Did territorial authorities have statutory functions in relation to certifier-issued code compliance certificates?

[141] The Building Act did not make specific provision for territorial authorities to scrutinise or review certifier-issued code compliance certificates. Their only relevant functions were in relation to their general record-keeping obligations under s 27.

The view of the Building Industry Commission on the liability of territorial authorities where certifiers were involved

[142] There are passages in the 1990 report of the Building Industry Commission which envisage that territorial authorities might be required to check the validity of certifier-issued certificates. By way of example, at [4.99], the Commission observed:

> The TA would accept at face value a certificate from an Approved Certifier. It would discharge its duty of care for the work covered by the certificate by checking the validity of the certificate with respect to:
>
> - Issue by an Approved Certifier ... currently on the BIA register;
> - Work certified as complying with Code requirements within the scope of competence listed for the Approved Certifier;
> - Indemnification insurance held by the Approved Certifier being current.

[143] Although there are other passages in the report to a similar effect, there was no attempt by the Commission to work out the implications of its assumption that territorial authorities might have a duty of care in relation to certifier-issued certificates or to correlate that assumption to the provisions of the draft statute which was part of its report and which, in at least general terms, anticipated much of what was to appear in the 1991 Act.

[144] We accept that the relevant staff of a territorial authority could fairly be expected to know whether a particular person or company purporting to act as a certifier was indeed on the BIA register as proposed by the Commission and later provided for by the 1991 Act. They might also fairly be expected to know the general scope of a certifier's competence, for instance, whether the certifier was confined to residential buildings or could also certify compliance for commercial

buildings. We rather think, however, that the Commission would not have had in mind restrictions on competence in the nature of those to which ABC was made subject – limitations of a kind which meant that a decision whether the certificate was within competence might require either an assessment of the certificate's accuracy or correctness[160] or open-textured building judgments.[161] As to insurance, we find it difficult to accept that a territorial authority could be expected to check the currency and terms of a certifier's insurance arrangements every time it accepted a certificate.

[145] The considerations we have just mentioned may be of at least some significance in relation to the existence (or otherwise) of a duty of care in respect of the issue of building consents based on certifier-issued building certificates. As we have noted, in such cases, the decision to grant or refuse a consent rested with the territorial authority. They are, however, of more significance in the context of an asserted duty of care to scrutinise certifier-issued code compliance certificates in relation to which the only statutory functions of a territorial authority were of a record-keeping nature.

The scope of s 50(1) and (3)

[146] Section 50(1) and (3) relevantly provided:

> **50 Establishing compliance with building code**
>
> (1) A territorial authority shall accept the following documents as establishing compliance with the provisions of the building code:
>
> (a) A building certificate or code compliance certificate to that effect issued by a building certifier under section 43 or section 56 of this Act:
>
> ...
>
> (3) For the avoidance of doubt, no civil proceedings may be brought against a territorial authority or a building certifier for anything done in good faith in reliance on a document set out in subsection (1) ... of this section.

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[160] For instance as to whether a building as designed or built met the cl E2 requirements of the building code via E2/AS1.

[161] As to whether the building involving unusual use of materials or methods of design and construction or was unusually complex.

[147] The appellants' case rests on the proposition that the s 50(1) requirement applied only in relation to certificates which the certifier was authorised by the BIA to issue. According to the appellants, the code compliance certificate issued by ABC was outside its competence (because moisture control was not achieved in the manner contemplated by E2/AS1). On the other hand, the certificate was regular on its face and the fact that it was beyond the certifying competence of ABC could be determined only by checking the plans or inspecting the house. The appellants thus argue that the Council was practically required to go behind the apparently regularly issued code compliance certificate issued by ABC; this despite Parliament having (a) not stipulated for a duty of the kind contended for but (b) having instead provided for an immunity which to our way of thinking negated the expectation of a duty of care.

[148] Mr O'Callahan argued in the High Court and Court of Appeal that s 50(3) could not be invoked in relation to a certificate which was beyond the competence of the certifier and thus not (on his argument) required to be accepted under s 50(1). In this Court, he initially abandoned this argument but later, with some encouragement from the bench, adopted it again. The argument has some obvious literal force because the documents to which s 50(3) applies are defined as being the same as those covered by s 50(1). The reason why Mr O'Callahan was initially reluctant to pursue this argument before us was a concern that a literal approach to s 50(1) and (3) might render s 50(3) redundant.[162] As we will explain, however, we accept that subss (1) and (3) of s 50 are referring to documents of the same class and can operate together on this basis without s 50(3) being redundant.[163]

[149] Associated with this second point is a third issue as to what is meant by "in good faith" in s 50(3). Is the phrase to be construed as the opposite of "in bad faith" or "dishonestly" (as Mr Goddard QC contends) or does it contemplate "a diligent discharge of responsibility" (as argued for by Mr O'Callahan)?

[150] In what follows in this section of the judgment we will address these issues. Before we do so, we observe that the details of the construction argument in relation to s 50(1) and 50(3) should not be allowed to obscure the reality that on any

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[162] This was on the hypothesis that it would have the effect that s 50(3) would protect territorial authorities only against actions they were required to take under s 50(1).

[163] See [156] below.

commonsense reading, the section as a whole strongly supports the Council's argument. This is because the section rests upon assumptions that territorial authorities were not entitled to go behind certifier-issued certificates and could not be sued for acting in reliance on them, provided they did so in good faith.

[151] Mr O'Callahan's argument rested on the premise that there was a critical difference between a certificate which was simply erroneous (that is by certifying that work was compliant when it did not comply) and one which was beyond the competence of the certifier and, in that sense, was ultra vires. It was central to his argument that the ABC-issued certificate of compliance was in the latter category. As will become apparent, we are of the view that the difference between certificates which were merely erroneous and those which lay outside competence is rather less distinct than Mr O'Callahan's argument assumed.

[152] It would obviously be wrong to adopt a construction of s 50 premised on an assumption that territorial authorities could and should have engaged in particular assessment exercises, if those exercises would have been inconsistent with the scheme of the 1991 Act. This consideration is significant in the present context for a number of reasons. In particular:

(a) Accepting as we must that the house did not conform to E2/AS1, the potential reasons why the code compliance certificate came to be issued include the possibility that ABC wrongly thought that the house did comply with E2/AS1. If that is the explanation, the certificate is more easily categorised as being erroneous rather than ultra vires. In this regard, we note that aspects of E2/AS1 turned on questions of judgment (such as the "adequacy" of roof pitch, for instance). Although we acknowledge that on the appellants' case, an inspection of the plans would have made it obvious that E2/AS1 had not been complied with, there might be many instances where compliance or not would involve a shades-of-grey assessment. And as we have endeavoured to explain, an important feature of the 1991 Act was the legislative intention that territorial authorities should not

second-guess building and code compliance certificates issued by certifiers.

(b) In this regard, it is important to note that in some other respects the limitations on ABC's certifying competence involved questions of degree and potentially difficult issues of judgment; for instance around whether buildings were "usual" as opposed to "unusually complex". Any Council challenge to the vires of an ABC-issued certificate as to the "usualness" or complexity of a building would again turn on a second-guessing of the assessment of the certifier which would be contrary to the policy of the 1991 Act.

(c) To further complicate the picture were the s 56 provisions which made the issuing of building and code compliance certificates subject to the certifier holding appropriate insurance and not having a professional or financial interest in the building. While these restrictions could be applied in a black and white way if all relevant information was on the table, the staff of territorial authorities would not have had access to, nor been required by the 1991 Act to gather, all relevant material, meaning that they were not well-placed to make an assessment as to whether building and code compliance certificates issued by certifiers might be outside their statutory competence in these respects.

[153] In the course of argument, counsel and the bench postulated extreme cases, for instance involving a certificate issued by an imposter (that is someone who was not a certifier at all), or a certificate for what was clearly a commercial building issued by a certifier who was actually known to the Council staff to be approved only in relation to residential buildings. Ideally subss (1) and (3) of s 50 should be construed in a way which would sensibly encompass extreme circumstances but also makes sense in more nuanced situations such as the present.

[154] What is important for present purposes is that there was nothing on the face of the certificate to suggest that it was invalid (in the sense of being beyond the competence of ABC). The Council could have ascertained that the house, as

designed, was not in conformity with E2/AS1 only by checking the plans and it could only have been satisfied that the constructed house complied with E2/AS1 by inspections for which it would not have been paid. Such checking and/or inspecting lay outside the statutory functions of the Council in relation to the receipt of certifier-issued code compliance certificates. Accordingly, the Council was obliged under s 50(1) to accept the code compliance certificate issued by ABC.

[155] In cases where the territorial authority was doubtful as to the validity of a certificate, there was a power to refer those doubts and any associated dispute to the BIA for resolution. In the meantime, pending a decision of the BIA, the code compliance certificate would stand, although the reference of it to the BIA would no doubt be mentioned on any LIM. We accept that if the Council staff dealing with the code compliance certificate issued by ABC were doubtful as to its validity, they could have referred the issue to the BIA. But we are not prepared to accept an invitation from Mr O'Callahan to treat a duty to assess or investigate whether to refer as being the correlative of that ability to refer. This is because imposing an obligation on the Council to go behind an apparently valid certifier-issued code compliance certificate would be incompatible with the scheme of the legislation.

[156] On our view, s 50(1) applies to certificates which, on their face, are not invalid (or do not raise issues of possible invalidity). Such certificates are also the subject of the s 50(3) qualified immunity. We do not see this as rendering s 50(3) redundant. This because "anything done ... in reliance on" a certificate may well go beyond what is necessarily encompassed by the obligation to "accept" a certificate. To be more specific, we treat the obligation that a territorial authority "shall accept … [a certificate] as establishing compliance with the … building code" as intended to exclude challenge, inquiry or – and importantly – any need to take action premised on possible non-compliance, whereas the immunity is in relation to actions done in reliance on certificates, for instance issuing building consents or LIMs containing information about such certificates.

[157] We should also refer to s 53(4) of the 1991 Act which provided:

> A certificate under this Part of this Act purporting to be under the hand of a person duly authorised by the Authority to issue such a certificate shall, in

> the absence of proof to the contrary, and without proof of the signature appended to the certificate, be sufficient evidence of the matters therein specified.

This subsection applied to the code compliance certificate issued by ABC, which, by issuing it, purported to be duly authorised by the BIA to do so. It was therefore, in the absence of proof to the contrary, "sufficient evidence of its contents", namely that the house, as built, was relevantly compliant.[164] No doubt the primary purpose of s 53(4) was to provide an evidential shortcut obviating what might otherwise have been the need for formal proof of authority in relation to certificates issued by certifiers and we do not suggest that it is controlling in the present context. Nonetheless, it is of at least contextual significance because it is consistent with a general legislative assumption that in usual circumstances (that is except where, in the case of a territorial authorities, there was a want of good faith or, in the case of a court, evidence to the contrary) an apparently valid certificate could be accepted at face value.

[158] Central to the argument of Mr O'Callahan on good faith was the Australian decision, *Mid Density Developments Pty Ltd v Rockdale Municipal Council*,[165] a case which dealt with a statutory exclusion of liability in relation to certificates issued in good faith by a local authority as to the risk of flooding. The certificates stated that the Council had no information indicating a risk of flooding when in fact the Council did have such information. The Council officer primarily responsible for the certificates had acted honestly and the problem arose because (a) the Council did not have a system which enabled requests for such certificates to be properly answered and (b) the Council officer concerned did not personally go back to the records. The Court held that the Council was not entitled to immunity as the concept of good faith which was reflected in the statute required a reasonable level of caution and diligence which the Council had not displayed.

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164 As is apparent, our construction of this section differs from that of the Chief Justice in [26] above. To put this more specifically, we think that a certificate from a building certifier would be evidence of its contents without further evidence that the person who purported to give it was in fact authorised to do so. It would thus be for the person challenging the the authority of the person purporting to give the certificate to show that he or she was not in fact duly authorised.

165 *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 (FCAFC).

[159] Although Mr Goddard tried to persuade us that the case is of doubtful authority, we do not see the need to go into the associated arguments. *Mid Density* addressed a statutory scheme under which local authorities were required to give certificates based on the state of their own records. It was not unreasonable to expect them to have a system for facilitating the accurate provision of information. The absence of such a system and the unsystematic approach of the Council officer involved amounted to a distinct lack of diligence which pointed to the absence of a serious effort to administer properly the statutory scheme. In this context it is not surprising that the Court took the view that "good faith" for the purpose of the immunity could be displaced by a want of diligence and not merely by dishonesty.

[160] In contradistinction, in the present case the Council, in accordance with the statutory scheme, was not issuing certificates or in any way accepting responsibility for the certification process. And the sort of diligence which Mr O'Callahan's argument would have required of the Council would necessarily have required the Council to go behind the certificate, a process which we see as inconsistent with the scheme and purpose of the 1991 Act. Where legislation confers an immunity from suit in respect of actions taken in good faith, it can fairly be taken to have excluded a duty of care. Given this, to treat want of diligence (which is really just negligence) as amounting to an absence of good faith deprives the immunity of any real meaning.

[161] Mr O'Callahan's argument that the good faith defence can be circumvented by aggregating the knowledge of different Council officers (in particular those who must have known of the limitations on ABC's certifying authority and those who dealt with the code compliance certificate) cannot succeed. Aggregating knowledge in this way could only be even arguably legitimate if the Council were under a duty to assess the validity of code compliance certificates (and as must be already apparent, we do not see the Council as subject to such a duty). As well, even if the Council officer (or officers) who dealt with the code compliance certificate were aware of the limitations on ABC's certifying ability, they could not have ascertained that the code compliance certificate was outside that ability except by going behind it (for instance, by going back to the plans or carrying out inspections). Again, as is apparent, we are of the view that there was no requirement to do so.

[162] The Chief Justice has adopted interpretations which either confine s 50(1) and (3) to certificates within competence or, in the alternative, conflate want of diligence with absence of good faith. As well, she appears to conclude that it is arguable that the Council's staff who filed the code compliance certificate and later confirmed its existence to the appellants knew that it was outside the competence of ABC.

[163] For the reasons already given, we do not agree with either of the Chief Justice's interpretations of s 50. As well, and despite the "knew or ought to have known" pleading on which she relies, we do not think that it can credibly be suggested that the Council officers who received the code compliance certificate, put it on the file and later confirmed its existence to the appellants, actually knew that ABC did not have authority to issue it. Importantly, this was not the basis upon which counsel argued that the Council "knew" of the lack of authority, which, as we have indicated, was based on an aggregation approach.

The *Hamlin* duty

[164] On the assumption that ABC did not, after December 2002, have authority to certify compliance for the Arney Crescent house and that this was obvious from an examination of the plans, it is reasonably clear that the Council:

(a) after December 2002, could have discovered that ABC did not have sufficient authority by checking the plans and specifications held in relation to all projects in which, according to its records, ABC was involved; or

(b) on receipt of the code compliance certificate, could have checked the plans and specifications for the same purpose.

But had the Council carried out either or both of these exercises, it would have been duplicating (either in whole or in part) the exercise which had earlier been carried out by the BIA and ABC for the purposes of s 57(3).

[165] It must be borne in mind that an analysis of the plans would only have established whether the house, as designed, conformed to E2/AS1. So if the Council was subject to a *Hamlin* duty as contended for, it would also have been incumbent on Council staff to have inspected the completed house to see whether it had been built in a way which conformed to E2/AS1. Presumably those staff ought also to have considered whether the house was unacceptably "unusual" in the materials or building systems employed or in its general complexity. All of this would call for actions on the part of the Council and for the exercise of judgments which we see as well outside what was contemplated by the 1991 Act.

[166] Given the building certificate issued by ABC, the Council had no occasion (or indeed entitlement) when deciding whether to issue a building consent to assess whether the plans for the house were in conformity with the building code. Because that building certificate made it clear that inspections would be carried out by ABC, there was no point in Council staff inspecting the building works. The text of s 57 is inconsistent with an expectation that the Council should have involved itself in this building project in the absence of a statutory notification by either the building owner or ABC. To put this more generally, there is nothing in the scheme of the 1991 Act to suggest that territorial authorities had a roving certifying or inspecting role and nothing happened to trigger the Council's responsibilities under the statute.

[167] At least from the point where the building consent was issued, there was no point in the process at which Council staff were required by the Building Act to exercise their own judgment in relation to the house. This is relevant to whether it is reasonable to impose a duty of care on the Council because the imposition of a duty of care would require the Council to go beyond the exercise of the functions specified by the Act. The same consideration is also relevant for the different reason that it means that there was no practical reason why purchasers could fairly be taken to have relied on the reasonable performance by the Council of its statutory functions; this for the simple reason that the Council had not performed (and had not been required to perform) any relevant function.

[168] Given this statutory scheme, there was no relationship of proximity, no reliance and no assumption of responsibility as between potential purchasers of the

house and the Council. And for these reasons (which in substance are the same as those given by the Court of Appeal), we are satisfied that the *Hamlin* claim against the Council must fail.

The *Hedley Byrne* claim

[169] We accept that a territorial authority issuing a LIM owes a duty of care in relation to its accuracy[166] and we also accept that a similar duty arises in relation to responses to information requests which are associated with the LIM process. We are also prepared to assume, although we have some doubts, that the representation made by the Council officer that a code compliance certificate had been issued was relied on by the appellants. Our reservations as to this turn on the sequence of events already referred to above at [119] which may perhaps suggest that the appellants in fact just relied on the code compliance certificate issued by ABC and copied to their solicitors by the solicitors acting for Carmel.

[170] We are, however, nonetheless persuaded that this claim too must inevitably fail. This is for a number of overlapping reasons:

(a) The code compliance certificate was regular on its face and the Council was required to accept it as establishing compliance, which in this context meant that it was not entitled to take actions which were premised on assumptions of non-compliance.

(b) Given this requirement, it cannot credibly be maintained that receipt of the code compliance certificate by the Council was negligent.

(c) The representation by the Council that a code compliance certificate had been issued was obviously true, in a literal sense.

(d) Such representation could not be construed (or reasonably acted on) as implying that the certificate had been issued in conformity with

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166 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11 at [92]–[98].

limitations on ABC's certifying competence,[167] given that such an assessment was not a necessary part of any statutory functions which the Council was required to perform.

(e) Because there was nothing on the face of the certificate or associated circumstances to suggest invalidity, we can see no escape from the conclusion that the *Hedley Byrne* claim must in any event fail by reason of s 50(3).

Disposition

[171] For those reasons the appeal should be dismissed with costs.

TIPPING J

[172] I have had the advantage of considering in draft the reasons prepared by the Chief Justice and William Young J. Having done so, I prefer to confine my reasons to the good faith defence which territorial authorities had when they relied on a certificate given by a private certifier. The appellants seek to overcome that defence by alleging the Council knew or ought to have known that ABC, the certifier involved, was not qualified to issue the certificate in question.

[173] Proof that the Council ought to have known of the alleged lack of authority would not establish that the Council failed to act in good faith. The "ought to have known" allegation is essentially one of negligence. It is a compressed way of saying that had the Council taken reasonable care it would or should have known of the asserted lack of authority. But negligence cannot, at least in the present context, amount to a lack of good faith. So to hold would rob the good faith defence of most, if not all, of its intended effect and purpose. It is hard to think what civil liability, other than liability for negligence, a territorial authority could incur as a result of relying on a certificate wrongly issued by a private certifier.

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[167] See *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.

[174] When regard is had to the statutory scheme of which the good faith defence is an integral part, it cannot have been Parliament's purpose to leave territorial authorities vulnerable to allegations of negligence in respect of the correctness or provenance of certificates issued by private certifiers. The only basis on which the appellants can defeat the good faith defence available to the Council is by showing the Council knew that ABC lacked authority to issue the certificate. For present purposes it must be assumed that ABC did in fact lack authority, so that is not a problem for the appellants.

[175] What is a problem for them is that they cannot and do not allege that any particular Council employee had actual knowledge of ABC's lack of authority to issue the certificate. What the appellants seek to do in this situation is to say that the actual knowledge possessed by different employees, when added together and then attributed as a whole to the Council, amounted to actual knowledge on the part of the Council. This is a rather artificial way of looking at the matter, both in itself and particularly when the question is whether the appellants can overcome the Council's good faith defence.

[176] For this purpose I do not consider different forms of knowledge, each falling short of actual knowledge of ABC's lack of authority, can be aggregated so as to impute to the Council actual knowledge of that lack of authority. To do so would be tantamount to saying that someone in the Council should be taken to have interviewed the individual employees and worked out from what those individuals knew, that ABC lacked authority. At most this is an allegation of negligence, not one of lack of good faith on the part of the Council.

[177] Let me now relate these conclusions to the terms of s 50 of the Building Act 1991. Section 50(1) and (3) relevantly provided:

> **50 Establishing compliance with building code**
>
> (1) A territorial authority shall accept the following documents as establishing compliance with the provisions of the building code:
>
> (a) A building certificate or code compliance certificate to that effect issued by a building certifier under section 43 or section 56 of this Act:

...

(3) For the avoidance of doubt, no civil proceedings may be brought against a territorial authority or a building certifier for anything done in good faith in reliance on a document set out in subsection (1) ... of this section.

[178] Section 50(1) required a territorial authority to accept a certificate of the specified kinds as establishing compliance with the provisions of the building code. In order to qualify under the section the certificate must have been issued by someone who was a building certifier. A certificate that was issued by someone who was not, but purported to be, a building certifier could not count as a certificate for the purposes of s 50(1). To that extent territorial authorities had a not very onerous checking role. But what of a certificate that was issued by someone who was a building certifier but the certificate was beyond their authority?

[179] I do not read the words "under section 43 or section 56 of this Act" as implying validity. They are simply words of description. Regard must also be had to s 50(3). It refers to "a document set out in subsection (1)". In this way the two subsections are linked. They need to be read together in order to identify Parliament's purpose. When this is done and regard is had to the statutory scheme in relation to private certifiers, I do not consider Parliament can have intended that territorial authorities should be obliged to look behind a certificate issued by a private certifier that was regular on its face. Such a requirement would not be consistent with Parliament's clear purpose to protect territorial authorities from all forms of civil liability unless they failed to act in good faith. A territorial authority that had no actual knowledge of lack of authority, and relied on a certificate that was valid on its face cannot be regarded as having failed to act in good faith by doing so.

[180] For these reasons I consider the appellants' claim must fail. They have not put forward any reasonably possible basis for overcoming the respondent's good faith defence. The Court of Appeal was right to enter summary judgment for the respondent. I would therefore dismiss the appeal on that basis. In the light of this conclusion there is no need for me to engage with the other issues which the Chief Justice and William Young J have addressed. I observe only that the broad thrust of the statutory scheme regarding building certifiers, as described by William Young J,

suggests that his conclusions on both what he has called the *Hamlin* claim and the *Hedley Byrne* claim are correct.

Solicitors:
Carter & Partners, Auckland for Appellants
Heaney & Co, Auckland for Respondent