IN THE SUPREME COURT OF NEW ZEALAND

SC 27/2010

BETWEEN **NORTH SHORE CITY COUNCIL**
Appellant

AND **BODY CORPORATE 188529**
(SUNSET TERRACES)

First Respondent

AND **S R DEVLIN & ORS**
Second Respondents

AND **R H G BARTON & K BARTON**
Third Respondents

AND **R F COUGHLAN & ASSOCIATES**
Fourth Respondent

SC 28/2010

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BETWEEN **NORTH SHORE CITY COUNCIL**
Appellant

AND **BODY CORPORATE 189855**
First Respondent
(BYRON AVENUE)

AND **P L HOUGH & ORS**
Second Respondents

Hearing:	8-10 November 2010
Court:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	D J Goddard QC, D J Heaney QC, S A Thodey and S B Mitchell for the Appellant (in both appeals) J A Farmer QC, M C Josephson and G B Lewis for the First and three of the Second Respondents (SC 27/2010) and for the First and Second Respondents (SC 28/2010) S C Price and I J Stephenson for two of the Second Respondents (SC 27/2010)

CIVIL APPEAL

MR GODDARD QC:

May it please the Court, I appear for the appellant counsel in both appeals with my learned friends Mr Heaney, Ms Thodey and Ms Mitchell.

ELIAS CJ:

Thank you, Mr Goddard.

MR FARMER QC:

If the Court pleases, I appear with my learned friends Mr Josephson and Mr Lewis for the first and second respondents, or for three of the second respondents, Halford, Parkinson and Blue Sky Holdings in 27/2010, which is the Sunset case, and for the first and second respondents in 28/2010, which is the Byron case.

ELIAS CJ:

Yes, thank you, Mr Farmer.

MR PRICE:

May it please the Court, Price appearing for two of the second respondents in the Sunset case, being the Turner sisters along with Mr Stephenson.

ELIAS CJ:

Thank you, Mr Price. Yes, Mr Goddard.

MR GODDARD QC:

Your Honour, a few housekeeping matters first. The Court issued a minute some time ago, directing that the order of hearing be the Byron appeal first, and then the Sunset Terraces appeal. My learned friend Mr Farmer suggested that we do them both together, and that's the basis upon which he's prepared his submissions. I'm happy with that, as is my learned friend Mr Price, if the Court is happy with that.

ELIAS CJ:

Well, I wasn't aware about the direction. I probably was away. I'm certainly content with that. Anyone else? Yes, that's fine. In fact, I think it would be much more helpful.

MR GODDARD QC:

Thank you, Your Honour. It's much more logical than to have us popping up and down like Jack-in-the-Boxes, I think, for the two different appeals. What I have done, though, since I prepared two separate sets of submissions, is prepare a one page roadmap showing the order in which I propose to work through those two sets of submissions, if I could hand that up to the Court, with a few bits of paper to fix gremlins in the bundle of authorities, and I'll explain what those are. I'll wait until the Court has that. So on the top of this set of papers, there's the one page roadmap in which I go through, first, the issues common to both appeals, then the issues that arise only in Byron Avenue, and then the issues that arise only in the Sunset Terraces appeal. I've indicated the order in which I propose to tackle the various topics, and where I'll go in my written submissions. What the Court then has is – and I do apologise for these gremlins – first of all a table of contents for the Building Act 1991. That's in volume 1 of the bundle of authorities under tab 2. It doesn't have a table of contents, which is quite annoying when you're trying to steer round a long Act. I thought I should remedy that.

Next there's a set of the building regulations. The reason for that is that I realised, working through the bundle, that the version of the regulations which appears in volume 2 tab 9 – and it's important because of the Building Code which is attached to it – is a reprint from about a year ago, which includes amendments that were not current at the time of the building projects in question in these appeals. So there's a

bound set of the regulations as originally made, and the amendments up to the relevant date, and that supersedes volume 2 tab 9.

ELIAS CJ:

I should have come in with my papers better organised. I've got all the evidence beside me, which I probably don't need, and I think way to the back is the volume that I will need.

MR GODDARD QC:

I'll be going to only a couple of the volumes of the case on appeal, unless the Court has specific questions for me that require more detailed reference to the evidence, but I will be working my way pretty systemically through the ten volumes of bundles of authorities. I hope that's not – just as a submission in terrorem. The other thing that's in this collection of paper is a copy of *Pyrenees Shire Council v Day* (1998) 72 ALJR 152. It's difficult to discuss the question of general reliance without reference to that decision to the High Court of Australia. It should have been in the bundle, and that's an oversight for which I apologise.

The last housekeeping point is that I think Your Honours have a memorandum of counsel from me from last week for November, in which I provide a replacement schedule in relation to the Byron Avenue submissions. There's a schedule going through each unit, and certain factual information in relation to it and what the judgments decided. My learned friend Mr Farmer pointed out correctly – and mortifyingly – that there were some errors in that, and I've fixed those. Also –

ELIAS CJ:

Do we have a replacement schedule?

MR GODDARD QC:

Yes, for the Byron Avenue submissions.

ELIAS CJ:

Where do we find those?

MR GODDARD QC:

That was provided last week, Your Honour.

ELIAS CJ:

Well, it's got lost for me. That's all right.

MR GODDARD QC:

That won't be immediately relevant this morning, so that can be sorted out.

McGRATH J:

It replaces what was attached to those submissions.

MR GODDARD QC:

Yes, just the schedule that was attached, that's exactly right, Sir.

ELIAS CJ:

Oh, the 4 November schedule.

MR GODDARD QC:

Yes, Your Honour. Those are the only preliminary matters that I wanted to mention. I can turn, then, to my outline, and there are two recurring themes that crop up in virtually every section of the appellant counsel's submissions. The first is really the question, what does *Hamlin* stand for? What is the scope of the duty of care that was found to exist in relation to the pre-1991 building regulation regime by the Court of Appeal and by the Privy Council, and in my submission, what the scope of that duty of care was, what *Hamlin* stands as authority for – even in relation to the pre-'91 regime – needs to be looked at very carefully in the light of the context of the decision and the rationale that was put forward for the existence of the duty by the Court of Appeal, and on that, the Privy Council simply, at the end of the day, adopted the Court of Appeal's reasoning. So it's the Court of Appeal's explanation of why there was a duty of care, and what its scope was, that's critical there. Second, although there was passing reference to the Building Act 1991 by the Court of Appeal and Privy Council in *Hamlin*, the case was, of course, about a modest home that was built in the early 1970s under the previous regime.

BLANCHARD J:

Well, it was more than just passing reference, wasn't it? Anyone reading the decisions would take it that the Building Act had made no difference.

MR GODDARD QC:

And I'll deal with that point, because obviously that's important. My understanding from Ms Body, who appeared as counsel in that, and who's appearing on this today, is that there was no argument about the 1991 Act –

BLANCHARD J:

Well, that's not really the significant point that you're going to have to deal with. Those who read law reports and advise their clients are not necessarily going to be aware of what was actually said, apart from what they read in the judgments.

MR GODDARD QC:

Yes, and that goes –

BLANCHARD J:

And those judgments do appear to make it pretty clear that in the opinion of both the Court of Appeal and the Privy Council, it was business as usual under the Building Act; in other words, that the decision that was being made would apply under the Building Act, and then you have nobody saying anything different for years. And in the meantime, Parliament happily legislates, apparently on the same basis. And when people are buying properties – and I'm speaking of residential properties – in the 1990s, surely they're entitled to have a general reliance upon that position.

MR GODDARD QC:

Let me answer that in two stages. The first is, of course, that still leaves to be considered the question of what *Hamlin* stands for, and what reasonably could be taken from that. And just two years after it was delivered, Your Honour, for example, in *Riddell v Porteous* [1999] 1 NZLR 1 (CA) was able to identify as unresolved the question of whether the *Hamlin* duty would apply to less modest homes, or commercial buildings, because there an expert could be expected to be employed –

BLANCHARD J:

True, but it didn't occur to me at the time that *Hamlin* was not still the law. There may be a question of what it stood for, but you're going – you're seeking to go back a stage beyond that and say we shouldn't follow *Hamlin* at all.

MR GODDARD QC:

A large part of my argument is about the metes and bounds of *Hamlin*, and really seeks to address the question that Your Honour put in *Riddell v Porteous* and says, for example, well, let's look at the position where a building is less modest, where experts were, or could be, expected to be employed. Is there a duty? Let's look at the situation where the house is not owned by its occupier. You're not talking about an owner/occupier –

BLANCHARD J:

Yes, but that is accepting that *Hamlin* does state the law for the more modest home, and I understood your submissions to be challenging that.

MR GODDARD QC:

Yes, so the first strand of my argument is that even if *Hamlin* is good law, one needs to ask what it stands for, and when it comes to answering the question should it be extended beyond the facts with which it was concerned, plainly, the statutory environment is relevant. But Your Honour is exactly right. I do go further, and what I say that, in fact, there were two very significant changes that were made in 1991, which –

BLANCHARD J:

But what are we to do about the people who've relied on *Hamlin* in a general sense, or may have even had advice on *Hamlin*, and have organised their affairs on that basis? Surely this is the very type of situation in which the Court should not depart from prior law, particularly where Parliament had the opportunity of doing it and didn't.

MR GODDARD QC:

But it's the "didn't" that, with respect, is not, in my submission, correct. Parliament actually did turn its attention to two critical aspects of the building regime and change them, change them in 1991 and –

TIPPING J:

Changed them so subtlely that neither the Court of Appeal nor the Privy Council could see it.

MR GODDARD QC:

When I take the Court through the Act, I hope it will apparent that it's not quite that subtle. It begins, in fact with section 6, and –

TIPPING J:

But nobody knows –

MR GODDARD QC:

– I do want to go through that, because it seems to me, with respect, that expectations arise not only on the basis of the Court's decisions, but also, surely, on the basis of Parliament's legislation.

BLANCHARD J:

Well, not in situations where the Privy Council has said it's still the same under the Building Act. Even if that's wrong.

MR GODDARD QC:

Well, what the Privy Council said was – well, what Justice Richardson said in the Court of Appeal was that the '91 Act might not be understood as a ringing endorsement of the case law that had gone before, but nor, on the other hand, did it explicitly overrule it. That leaves open the question of what scope of interests were protected by it, and whether the Court should or should not continue to develop the common law in a way which is consistent with, sympathetic to, the statutory environment. In the context of the case about a pre-'91 house, the Court did not need to address that.

TIPPING J:

Mr Goddard, in the Privy Council, which is what people would ordinarily look to first, at least, Their Lordships said that Act was passed a year and a half after the decision in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL). "There is nothing in the Act" – 522 – "to average out or amend the existing common law as developed by New Zealand Judges. On the contrary" – say Their Lordships – "a number of provisions in that Act can be only envisaged that private law claims for damages will continue to be made". Now, if one was looking at that, one would think the Act has not changed anything. In fact, it's endorsed it.

MR GODDARD QC:

And one would be wrong.

TIPPING J:

And one would be wrong, perhaps. But how can we possibly undermine people's reliance on it?

MR GODDARD QC:

Again, I think – I can answer that in stages. The first is, of course, reliance on what. What's it authority for. But second –

TIPPING J:

It's authority for saying that *Hamlin* stands for something.

MR GODDARD QC:

Something, yes.

TIPPING J:

Now, you can't now – what it stands for may be contestable. But you're trying to argue that it stands for nothing.

MR GODDARD QC:

Yes. I'm suggesting that properly understood, it stands for a much narrower set of interests that are protected, and it shifted the whole process of building regulation towards a certification-based regime where specific reliance was the key, not general reliance. So one could no longer have general community assumptions; rather, the whole point of the '91 legislation was to make the regulatory function contestable and have a range of people providing certificates of compliance.

TIPPING J:

Aren't you actually arguing for the lack of any duty of care on the part of Councils?

MR GODDARD QC:

No.

TIPPING J:

Well, what is the extent of the duty of care you are prepared to concede?

MR GODDARD QC:

The extent of the duty of care, in my submission, is commensurate with the interests which the 1991 Act sought to protect, and those are, first of all, the interests of users of buildings in relation to health, safety and amenity, and secondly, the interests of owners of other property, because, of course, they have no voice in the extent of expenditure on precaution when a house can be built.

TIPPING J:

So no economic protection?

MR GODDARD QC:

No economic protection for the owners of other property.

TIPPING J:

Other properties, but not of the instant properties?

MR GODDARD QC:

Yes, exactly, and my submission is that the 1991 Act actually went to great lengths to specify what interests would be protected, including the economic interests of the owners of other property, which was actually defined in the Act, but very deliberately excluded from the interests, which the regulatory regime sought to protect.

TIPPING J:

So if you've got a problem which damages someone else economically, they can recover. But if you've got a problem which damages you economically, you can't recover?

MR GODDARD QC:

Yes, because the philosophy of the 1991 legislation was that initial and subsequent owners were responsible for ensuring, through appropriate mechanisms, the value and quality of their own building.

TIPPING J:

Do you accept that that really confines *Hamlin* in a major way?

MR GODDARD QC:

Yes. This is not a modest argument by any stretch, and I absolutely understand that there is a significant hurdle in terms of the statements that were made in my submission obiter about the effect of the 1991 legislation in *Hamlin*. But it's in the nature of litigation of this kind that it just takes time, after new legislation has been introduced, for cases that are squarely about that legislation to arise and make their way through the system to the level of an appellate Court, and there has been no appellate confirmation that *Hamlin* is applicable to houses built under the 1991 Act until these appeals.

TIPPING J:

But you say the Privy Council doesn't, because a) it's obiter, and b) you're going to explain it in some way that you're going to come to?

MR GODDARD QC:

Yes. So I'm going to explain that yes, the Privy Council, Their Lordships, with respect, are quite right that claims for damages against local authorities can continue to be made, but the scope of the duty, in my submission, must adjust to be consistent with the scope of the interests protected under the legislation.

TIPPING J:

The existing common law as developed by New Zealand Judges. That can only mean as then understood in terms of the line of authorities that are ventilated in the arguments.

MR GODDARD QC:

The precedent in the Court of Appeal adopted essentially that approach, and said that on one view, he thought that one should find that essentially the law continued to be whatever the Courts had said it was pre-*Hamlin*, but there have been a number of decisions that have suggested that that can't quite be right, and it's helpful to take *Stieller v Porirua City Council* [1986] 1 NZLR 84 –

ELIAS CJ:

Before you get into that, are you – I'm just going to query your saying that liability must be consistent with the statutory scheme. Surely if the liability at common law is to continue, it must not be inconsistent with the statutory scheme, but why need it be consistent?

MR GODDARD QC:

Well, that's something that I will address at some length later, and it takes a little bit of time to develop, but in essence it comes back to the question of general reliance, and what scope a duty of care can have where it's founded not on specific reliance on something that's been said or done, which is at the heart of the –

ELIAS CJ:

You are arguing against general reliance –

MR GODDARD QC:

Yes.

ELIAS CJ:

Except by owners of adjoining properties?

MR GODDARD QC:

Yes, because – at two levels. First, that the 1991 legislation displayed very clearly an intention to move away from general reliance and particularly general reliance on inspections, as opposed to the issue of certificates. I'll point to a number of indicators. But also secondly – and this is where *Pyrenees Shire Council v Day* come in and Your Honour's observations about general reliance in *Couch v Attorney-General* [2008] 3 NZLR 725 (SC) – there is more caution at the least about the utility of the concept of general reliance today than, perhaps, there was at the time of *Hamlin*. Justice Kirby, for example, describing it, in common with a number of other members of the Court in *Pyrenees Shire Council v Day* as a fiction, and not a very helpful fiction, that tended to obscure reflection on the real policy factors that have been weighed here. And when one drills past it, all that's really being said in most cases about general reliance is that the public could expect the regulator to perform the job that it had been given, and to protect the interests that it was responsible for protecting. If that's right – and in my submission, it really is – what reference to general reliance basically encompasses then focusing on the interests that were to be protected, that a reasonable person could, if they thought about it, expect the regulator to protect is at the heart of the scope of duty issue. And that's very much Justice Kirby's approach, for example, in *Pyrenees Shire Council v Day*, and I understood Your Honour to be indicating some sympathy for it, at least in passing, in *Couch v Attorney-General*.

Can I also clear one – or perhaps a whole school – of red herrings out of the way at an early stage, as well. My argument is not an argument about labels. I'm not trying to affix a label of pure economic loss to something and argue that anything follows from that. The Council's argument in this case is one that looks to the underlying factual statutory and policy factors to feed into the overall question of whether it's fair, just, and reasonable to impose a duty of care using the various conceptual techniques that have been deployed by the Courts as an aid to answering that question, but not in a mechanical fashion. I certainly would like to disown, at the earliest stage, any suggestion that I'm attempting to reason from labels, or to –

ELIAS CJ:

Well, you said pure economic loss. You're not even arguing that economic loss is a particular category, is that what you're saying?

MR GODDARD QC:

I'm really adopting the approach that Justice Tipping adopted, for example, in *Chase v de Groot* [1994] 1 NZLR 613, that the Court of Appeal adopted in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, which is to say that one of the factors that's taken into account in the overall evaluation is the nature of the loss. Sticking a label on it is not especially helpful, but obviously one needs to pay attention to the fact that this is not harm to a person. It's not harm to any interest of a kind protecting by the regulatory regime, and that's more important than the label. It's not harm to an interest protected by the regulatory regime, and that the complaint that's made about the Council is not that it's done anything which has directly damaged the person or the property of any of the plaintiffs, but rather that the Council has failed to prevent other people supplying goods and services in a way which has exposed them to costs in remedying defects in the property which can cause property damage, and can cause health and safety issues. So it's a –

TIPPING J:

It's a nature of loss in suit enquiry, not a categorisation enquiry?

MR GODDARD QC:

Yes, exactly, Your Honour. It's the nature of the loss, and whether it's within the scope of the interests protected by the regulatory regime, and also the way in which

the Council is said to be responsible for that loss. This is not a case where the Council inspector, driving to inspect it, drove the van into the garage and broke it. That's easy. It's a much more complicated situation where the plaintiffs are saying, we were entitled to rely on the Council to ensure that certain things were done in a way which would have avoided exposing us to the remedial costs which we now face.

ELIAS CJ:

It's *Stovin v Wise* [1996] AC 923 (HL), except if you're going to apply labels, you'd say that that was a case of physical harm.

MR GODDARD QC:

Yes, that was a case of physical harm.

ELIAS CJ:

But you're not –

MR GODDARD QC:

But Your Honour is exactly right. It was a case of whether one could rely on the Council to do something about the bank. That was perhaps a little closer – again, if one's into labels – to omission than action. The Council have gone a little way towards doing something about it, but was still able to characterise the problem as essentially one of omission. Here, it's accepted that the Council carried out inspections, and it's been found that carelessly it failed to identify, at each property, certain defects. So, again, I don't think – I understand the factual context is very important. Affixing labels to it is not especially helpful. But I have to acknowledge that on the facts, the Council went further here than the Council in *Stovin v Wise*.

ELIAS CJ:

It had more direct obligations.

MR GODDARD QC:

It had more direct obligations, and indeed, I think I already accepted, in answer to a question from His Honour Justice Tipping, that there was a duty of care to the persons whose interests the Council was responsible for protecting, and in respect of the interests which it was responsible to protect.

ELIAS CJ:

Well, you will go on to elaborate the important point in your submissions that in a case where structural integrity is in issue, there is anything inconsistent with the statute in imposing a duty to achieve structural repair.

MR GODDARD QC:

Yes, and –

ELIAS CJ:

Because that is directed, ultimately, at health and safety.

MR GODDARD QC:

In two ways, firstly, by saying, with respect, that that's not the right question, that it's not the nature of the defect which is the focus, but rather the nature of the loss sought to be recovered. That's really one of the critical –

ELIAS CJ:

Isn't that a label?

MR GODDARD QC:

No, that's actually a substantive issue, and that was most clearly examined in *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

ELIAS CJ:

Well, you are going to have to go into that.

MR GODDARD QC:

I will spend quite a bit of time on that.

ELIAS CJ:

Yes.

TIPPING J:

What I don't quite understand, perhaps it would be helpful to clear it in my mind, is that you say there is a duty to protect people against adverse health and safety risks. You acknowledge that duty?

MR GODDARD QC:

A duty owed to building users.

TIPPING J:

Building users. Well, now, if the building is rotten, for example, isn't that just as much a health issue as an economic issue?

MR GODDARD QC:

Not for a plaintiff that, for example, is a company that can't possibly suffer a health or safety harm.

TIPPING J:

That's a fairly unappealing distinction.

MR GODDARD QC:

No, I don't think so, Your Honour, because – and this is a distinction that becomes relevant when, for example, we consider commercial building owners.

TIPPING J:

So if I own it myself, personally, I can recover, but if I own it and it's through a company, I can't?

MR GODDARD QC:

Well the question really becomes, again, one of identifying the link between the interest to be protected and the claim for recovery that's now made and if we look at commercial buildings for example, take an office building in which people spend many of their waking hours, obviously there'll be health and safety implications for the users of that building if it suffers from structural defect, to take Your Honour's example, there could be a risk there, but the effect of the decision of the Court of Appeal in *Queenstown Lakes District Council v Charterhall Trustees* Ltd [2009] 3 NZLR 786 (CA) and in *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA) is that the owner of that building is not entitled to recover the cost of remedying that defect and that's because, and with respect I think this is a point that was made in both *Murphy* by the House of Lords correctly and also in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 by the High Court of Australia. It's a non sequitur to leap from harm to health and safety of

users to the conclusion that it's appropriate to allow recovery for the cost of averting that risk. That differs from the approach that the Supreme Court of Canada –

TIPPING J:

That means there's a duty – it's a duty with no substance if it's a duty to protect against health and safety but you can't get the cost of putting it right.

MR GODDARD QC:

The people whose health and safety is harmed would have a right of action.

TIPPING J:

But not if they're a company.

MR GODDARD QC:

Well the health and safety of a company can't be harmed but a user, an inhabitant, regardless of whether they're an owner or not, is owed a duty and has a claim.

TIPPING J:

They may have no – I mean if they don't own the building, they're in there as a tenant. Do you say there's a duty to them –

MR GODDARD QC:

Yes.

TIPPING J:

– and they can recover –

MR GODDARD QC:

In respect of health and safety –

TIPPING J:

– the money necessary to put the flat right?

MR GODDARD QC:

No because the money necessary to put the flat right first of all is not a loss that would normally be suffered by a tenant but when – and when it comes to the owner –

TIPPING J:

Well I'm just worried and you'll have to help me on this, it sounds very splendid but when you get down and really analyse it you're setting up all sorts of extremely odd anomalies.

MR GODDARD QC:

I think actually what I hope to persuade Your Honour is that when you get down and analyse it the anomalies sit in the glide from health and safety harm to recovery by an owner and the speeches of Their Lordships in *Murphy* and the judgments of the Court in *Woolcock Street* I think tease that out and I'll go to those later.

TIPPING J:

Well perhaps I'll let it develop.

MR GODDARD QC:

And I absolutely accept again that in relation to the basic question of duty of care a conscious decision was made not to follow *Murphy* which I think might have been what Your Honour was about to put to me.

TIPPING J:

It was rather what I was about to but I backed off Mr Goddard because I thought you should have a fair chance to develop this before you get further.

MR GODDARD QC:

And the question is one that I'm very conscious I'm going to need to tackle. The settled expectations question is a critical one here obviously for the appellants and so too is the question of whether harm to health and safety of users can justify recovery of remedial costs by building owners. Let me leave Your Honour with one thought on that which is, actually the flat situation in *Murphy* is quite a nice illustration of that. That was a situation where the owner at the time the damage appeared had sold at a discount of, I think, £35,000 to what would have been the market price in the absence of the defects and was seeking to recover that loss. And we have one plaintiff, Mr Devlin, who is in a similar position here, I think I've got the right one, who sold to a company and suffered – with a $40,000 allowance for remedial costs. There's no link, obviously, between recovery by a former owner of that sort of amount

and the carrying out of work to address the health and safety issue and that's why when Justice Baragwanath in *Te Mata Properties* suggested precisely the same sort of rationale for recovery that Your Honour has just put to me, His Honour went on to add, capable perhaps with a statutory regime that requires the recovery to be applied to the carrying out of the remedial work but of course the Court can't do that. The Court, and His Honour recognised him saying, legislation would be needed and in the absence of anything like that there's absolutely no logical connection between recovery of the loss and value caused by the need for remedial work and the carrying out of that remedial work. So one can't reason from recovery to the work being done and indeed where the work needs to be done to ensure health and safety there are a number of statutory mechanisms for insuring that it's done whether or not there's any recovery of damages. The Council has powers to require that which I'll take the Court to when I go through the Building Act which I'm going to do in gruesome detail shortly.

ELIAS CJ:

Can the Council then require remedial work?

MR GODDARD QC:

Yes.

ELIAS CJ:

Why is that, why doesn't that close the circuit?

MR GODDARD QC:

It does in the sense that the remedial work will be done whether or not there's recovery of damages. The harm then is loss to pocket as the Privy Council said in *Hamlin* and again if –

ELIAS CJ:

I thought you weren't using those labels?

MR GODDARD QC:

I'm not using the labels. I'm analysing the underlying substance and pointing out that by the – the risk to health and safety will be addressed whether or not there's liability in tort. We're not dependent on the law of tort to ensure that health and safety risks are removed. What we're then left arguing about is the financial consequences of

addressing those health and safety risks. That's what comes before the Courts and at that point – and this, for example, is what *Hamlin* Privy Council, which is being relied on by people for – and Your Honour put it to me – nearing 20 years now, explained was the key driver of the limitation provision in relation to these claims, that it's loss to pocket and therefore it suffered not when the defects come into existence the entire building but rather when they are discovered because that is when the value of the house is reduced and one can't have *Hamlin* in bits. If it's a continuing authority for something then it must be a continuing authority for the proposition that some owners, and we need to work out who, can recover some losses, need to work out which ones, which are losses to their pocket that arise when the defects are discovered because that's when the value of the house takes a hit.

This was – the intimate relationship between the nature of the duty and the loss that it applies to and the time at which the course of action accrued were emphasised by the President in the Court of Appeal in *Hamlin*. The President said, "Sometimes it's useful to discuss these sequentially but I'm going to discuss them together because they're so intimately linked together. The proposition about one is apt to have implications for the other." Just so. Same in the Privy Council, and this Court's decision in *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) exploring the question of reasonable discoverability as a trigger for the point at which time begins to run, emphasised that *Hamlin* was an orthodox application of the rule that a cause of action accrues when all the elements have occurred and wasn't a special case of reasonable discoverability because it was discoverability that triggered the harm which was sought to be recovered, loss of value of the building.

TIPPING J:

There was no loss until it was discovered?

MR GODDARD QC:

Yes.

TIPPING J:

Difficult issue about discoverable.

MR GODDARD QC:

Yes I'll come to that. That was something which the Privy Council somewhat glided over in *Hamlin* but yes.

TIPPING J:

They turned a blind eye, which is perfectly fair in the context –

MR GODDARD QC:

Of that case.

TIPPING J:

– of the way that case developed, yes.

MR GODDARD QC:

But we're going to need to tackle it rather more head on in this one, in *Sunset*. But Your Honour's judgment in *Murray v Morel* explaining –

TIPPING J:

I don't think you should hammer this, quite frankly, Mr Goddard. I think you'd be wiser to move onto the substance of this case.

MR GODDARD QC:

I'm happy to do that Sir. So let me just, before I move off the two recurring themes, identify briefly what I'm going to say about each of those, well the main points I'm going to make. In relation to what does *Hamlin* stand for, the key point is that *Hamlin* was a case about an owner-occupier who purchased a modest home from a cottage builder in circumstances where, to echo Justice Richardson, the owner could not reasonably be expected to take full responsibility for ensuring compliance with the bylaws and could not reasonably be expected to employ experts to do so. It accorded with the spirit of the times for the Council to step in, provide expertise and take responsibility, so one needs to consider in asking what *Hamlin* stands for, just what the important parts of that reasoning were, and in my submission integral parts of it were focused on the vulnerability of – and His Honour actually used the phrase, "small person," but I don't know that that's – it's not quite how I'd like to put it, but of an owner-occupier making what, for them, would be probably be the largest investment of their lives, purchasing a home to live in. A modest home where neither the original owner nor subsequent owners could be expected to take responsibility for ensuring compliance, where the original owner could not be expected to employ

experts who would ensure that the house was properly built and that's why it accorded with the spirit of the times for the Council to step in.

So this is what I refer to in places in my submissions as, "the expertise vacuum concept" coupled with a vulnerability of owner-occupiers making the largest investment of their lives and that those features were important, I think, is reflected for example, the question raised in *Riddell* about whether *Hamlin* extended to less modest homes, to buildings where experts could be expected to be employed. So in my submission, *Hamlin* doesn't properly understood, extend to claims, for example, by investor-owners who are not buying a home to live in but are simply buying an investment – they could as well have bought a commercial building or shares in a property company and if they bought shares in the property company, then they couldn't sue either the Council or in fact, even if the shares had been unlawfully advertised and the Securities Commission had been told about told about, the Securities Commission based on *Fleming* – it seems. And secondly *Hamlin* properly understood, does not extend to substantial developments where the original owner-developer could be expected to take responsibility for ensuring the building is properly constructed and could be expected to retain appropriate experts. In such cases, the original owner-developer relies on the builder and the on experts they retain. Subsequent purchasers are not well placed to identify defects in foundations or defects in construction of the kind that are covered over, that's clear. In that sense they're exposed to risk, but they can't manage it by investigating physically those risks. And that's the sense in which, it's sometimes said, that subsequent purchasers are more vulnerable than original owners, but it's important to think about vulnerability in tandem with its conceptual partner, reasonable reliance, to the extent they're vulnerable – on whom do they reasonably rely?

Suppose for example that rather than buying 12 of 17 units in Sunset Terraces, an investment company had bought all 17 and operated as an apartment hotel, in what sense could it sensibly be suggested that that commercial purchaser of the development as a whole was vulnerable, in the sense that they were reasonably reliant on the Council to protect their interests in the value of their commercial venture.

TIPPING J:

Are you attempting to draw the circle, so as to exclude a duty to people who could reasonably be expected to employ their own experts?

MR GODDARD QC:

Where it's a building of the kind where the original owner-developer could be expected to employ experts, because there I say first – they're not owed a duty and second, subsequent purchasers look not to the Council, because if they thought about it they would know that the Council wasn't filling any expertise vacuum at the time of construction.

TIPPING J:

How easily administered would that drawing of the line or the circle be, Mr Goddard, I would have thought it could be pretty difficult to administer?

MR GODDARD QC:

There is no line here that is going to achieve the aspirations for brightness that the Court of Appeal discussed in *Sunset* and the line that that Court put forward also raises many difficult issues in relation to mixed use buildings and change of use, the Court of Appeal is hearing next week, an appeal on Sunset on Byron which is the 23 storey building on the North Shore with 21 floors of hotel and two floors of penthouse apartments – and there are a number of other difficult boundary cases which emerge from that. In applying the underlying concepts of the law of tort, bright-lines have tendered to prove elusive and every time that one Judge puts forward a sharply defined test, it tends to be followed by a number of judgments dismissing it as a holy grail, by which liability can be ascertained, to pick up a phrase of Justice Kirby's. So yes there will be evaluative considerations, there will be matters of judgment in drawing this line Sir, that's the everyday business of the Courts.

TIPPING J:

But the Court is – could be expected to employ experts?

MR GODDARD QC:

The test is whether the building's of a kind where the original owner-developer could reasonably be expected to take responsibility and employ experts.

TIPPING J:

So the answer's yes?

McGRATH J:

To do what?

MR GODDARD QC:

To ensure that the building is properly constructed.

McGRATH J:

Because it's just the problem then arises to whether the experts are in fact engaged to do something minimal.

MR GODDARD QC:

And the answer to that is easy in relation to original owner-developers because one can say, as the Court said in *Charterhall* and *Te Mata Properties* that they have made that choice and if they choose not to protect their own interests properly, they shouldn't be able by doing that to shift the risk to the Council and its ratepayers, that's their choice. Obviously that has an immediate appeal which is not as obvious, in relation to subsequent purchasers, but again what one can say, I think, is well, who are the subsequent purchasers looking to and if one buys an immodest home, if that's the opposite of a modest one, a cliff-top residence in Takapuna clinging to the hills with – that obviously involved any amount of engineering and architectural expertise to construct, one knows that experts will have been engaged and if one turns one mind to it, a reasonable person would say, am I really relying on the Council to ensure this stays on the cliff-top or am I relying on the original owner and the experts and builder that they retained to ensure this? And in my submission that's who they are relying on.

ELIAS CJ:

But what's wrong with simply dealing with that as a matter of contribution or in terms of causation, is it correct to say as you've said, this is all about shifting the risk and where the risk is to fall, where you have a Council that has control. And control was what was stressed in *Hamlin*.

MR GODDARD QC:

Control coupled with reliance.

ELIAS CJ:

Control coupled with reliance and you're beating reliance here, but surely you can't separate the two?

MR GODDARD QC:

I think that one can and one can separate it in two ways. Firstly, again I'll come to this in a moment, it's important to bear in mind that post-1991 it was no longer possible to simply assume that the Council had control. The 1991 legislation made the regulatory function contestable, it introduced building certifiers, so there were many projects where the Council had nothing at all to do with this, didn't exercise control and that, in my submission, goes to the heart of the argument that people can just assume that the world was as before and that if a house was built within the area, in particular a local authority, that local authority had had control and had ensured compliance, that is one of the factors relevant to the need to make an enquiry about who inspected, who certified, did they certify – I'll come back to that.

ELIAS CJ:

I think Mr Goddard we should stop interrupting you and you should take us to the legislation, if that's where you were going, next. Is that right?

MR GODDARD QC:

I was going to –

ELIAS CJ:

Because you're making assertions which we really need to check –

MR GODDARD QC:

Check against the legislation, absolutely.

ELIAS CJ:

– against – in particular on this question of control.

MR GODDARD QC:

I'd been going to go to one other thing first, but I think Your Honour's right, that because I keep answering the Court's questions –

ELIAS CJ:

Yes.

MR GODDARD QC:

– by reference to the legislation, there's really no substitute for going straight to that. So if I could take the Court to the Act which is in volume 1 of the bundle of authorities, under tab 2, and this is where the table of contents slots in, that I handed up earlier, and we just work through the important provisions of this Act because it really did fundamentally change the way in which construction was regulated in New Zealand in ways that, with respect, the Court of Appeal and Privy Council did not properly appreciate in *Hamlin*.

So section 1 came into force on the 1st day of July 1992. Section 2, the interpretation provision, there is a couple of aspects of this that are worth noting on the way through. The first is the definition of "amenity" which is defined to mean, "An attribute of a building which contributes to the health, physical independence, and well being of the building's users but which is not associated with disease or a specific illness." The relevance of that will become relevant shortly. The Court will see reference to building certifiers, part 7, a little bit further down, code compliance certificates, "A certificate to that effect issued by a territorial authority or a building certifier." Because both could issue them.

Turning over the page, household unit, this is a concept that is referred to in the submissions in particular of the respondents and also by the Court of Appeal, "Any building or group of buildings… used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but not a hostel or boardinghouse or other specialised accommodation."

There's a reference to intended use of buildings, I'll come back to that. Other property, this is a very important definition because it's a concept that's used in a number of places in the Act. "Other property means land or buildings or part thereof which are not held under the same allotment or not held under the same ownership and includes a road."

There are various responsibilities imposed on the Council to protect the owners of other property because of course they don't retain the builders. They don't have

direct control of the building projects. They're exposed to risk which, under this regulatory regime, was accepted they couldn't manage.

There's a reference over the page in plans and specifications –

ELIAS CJ:

Sorry what section?

MR GODDARD QC:

Sorry still in section 2, page 75 of the stamped numbers, plans and specifications. I just wanted to draw attention to the fact that as well as the drawings and things which one might expect to be included in that there's also paragraph A, the intended use of the building, is one aspect of the plans and specifications.

ELIAS CJ:

Well what do you take from that?

MR GODDARD QC:

That becomes important because that was one of the things that had to be disclosed to the Council and which informed the type of requirements that applied under the Building Code and the Courts have said, for example in *Charterhall* and *Te Mata Properties* informed whether the Council owed a duty of care or not and which, in these two cases the Court of Appeal said, was a critical factor, the decision factor in the bright-line test so I'm drawing attention to it really mainly because of the use the Court of Appeal made –

ELIAS CJ:

Yes.

MR GODDARD QC:

– of the concept.

ELIAS CJ:

But you're not, you're accepting that it's against your argument?

MR GODDARD QC:

I think I'm saying that's essentially neutral in relation to the argument, to the main argument, but becomes very relevant to the fallback argument about the scope of *Hamlin*. The meaning of allotment is defined in section 4, we don't need to go into the detail of that, but suffice to say that at the time work was done on both of these developments they were, of course, on a single allotment owned by the original owner-developer so there's no issue about other property that arises here.

Turning over then to section 6, "Purposes and principles. The purpose of the Act are to provide for necessary controls relating to building work and the use of buildings, and for ensuring buildings are safe and sanitary and have mans of escape from fire." And (2), "To achieve the purpose s of this Act, particular regard shall be had to the need to," and this is where the interests that are to be protected are set out. The need to firstly, "Safeguard people from possible injury, illness or loss of amenity in the course of the use of any building." So the focus is on "use" and on harm to injury, illness and loss of amenity.

TIPPING J:

We're not constructing – I'm sorry to intervene because I agree we should let you develop this, but this specific focus on the purposes of the Act doesn't, of itself, trench on the, whether the Act amends the pre-existing common law, does it?

MR GODDARD QC:

It does to the extent to which the rationale for the pre-existing common law survives. For example in *Chase v de Groot*, as Your Honour pointed out, one of the major reasons for the difference between the common law in New Zealand and in England was the different scope of statutory protection in the two countries. So what I'm taking the Court through is how that changed in 1991. An integral part of my argument is that prior to 1991 a broader set of interests, including interests in quality of the building, and sound construction, were protected by the statutory regime. The Court said so in *Stieller v Porirua City Council*, *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA), Your Honour expressly noted that in *Chase*. It was an important part of the reasoning in *Hamlin*. One of the reasons for a divergence between the English cases and the New Zealand cases was that the English statutory regime was about health and safety whereas ours encompassed a broader set of interests. That changed in 1991, not completely, it's not just about health and safety but when it comes to property it's very clear that what's protected is other property and when we look at the Building Industry Commission report, what the

Court will see is a deliberate choice being made not to protect the interests of the owner of the property on which the building work was done. That was seen as involving unnecessary intrusion into contractual arrangements as a regulatory regime straying into areas where risk could be managed other than by public regulation.

TIPPING J:

So you're saying that the Act removed an essential underpinning of the previous common law –

MR GODDARD QC:

Yes.

TIPPING J:

– is that the proposition?

MR GODDARD QC:

Yes that's exactly what I'm saying. That it stood on a couple of legs and what we're seeing here is –

TIPPING J:

And one leg was removed.

MR GODDARD QC:

– one of those legs being pulled away.

TIPPING J:

Right.

MR GODDARD QC:

The other one is also gone and I'll come back to that.

McGRATH J:

And you're coming back to the relationship between 6(2)(a) amenity and the definition of "amenity" I presume?

MR GODDARD QC:

Yes and –

McGRATH J:

The well-being element of amenity?

MR GODDARD QC:

That's well-being of users and that's the first point so it's not the financial interests of owners, it's the well-being of users and we'll see in the Building Industry Commission report a discussion of what they understood by amenity. It's basically harm from smells, noise, vibration, things like that, which don't necessarily produce an identifiable illness but nonetheless have an adverse impact on the well-being.

MCGRATH J:

So all of that is, you say, clarifies the meaning of well-being, is that right?

MR GODDARD QC:

Yes. The focus on users, first of all, is important but secondly it's got to be an attribute which contributes to health, physical independence and well-being and that overall flavour is very much of the person.

ELIAS CJ:

If one starts with 6(1), because (2) is only a particular regard, 6(1) is concerned with controls to ensure that buildings are safe?

MR GODDARD QC:

Yes. Safe is not the same thing as valuable. I'll come –

ELIAS CJ:

No but if you have an unsafe building, that's the area of dispute. It's not about cosmetic defects?

MR GODDARD QC:

Well see, in saying that Your Honour I think is immediately saying that *Stieller*, for example, can no longer be good or post-1991 because that's weatherboards with no health and safety implications at all. I'm very comfortable with starting on that

process and what I'm going to do is work through what other implications for the pre-1991 case law this has but, "Safe and sanitary, and has means of escape from fire." And also very important in (1)(a) is the word "necessary" Your Honour because one of the main drivers of this legislation was to remove what was seen as about 10% of unnecessary cost from the cost of building a new home in New Zealand imposed by unnecessarily rigid and demanding standards. Now one might think, with the benefit of hindsight, that that wasn't the greatest policy choice of all time but, of course, the legislation has to be interpreted and applied by the Courts in the light of what it set out to achieve. That hindsight can't be brought to bear.

ELIAS CJ:

Well, and I'm not inviting you to get into the case law, I'm just picking you up as you go through the statute and asking what comment you have on it. 6(1)(a) also seems to me to be significant in referring to building work separately from the use of buildings.

MR GODDARD QC:

Yes because you have to control building work in order to ensure that the building is subsequently safe.

ELIAS CJ:

Is safe.

MR GODDARD QC:

Yes of course and that's why, for example, working through (2) I've gone to safeguarding people from injury, illness or loss of amenity in (a). "(b) protection to limit the extent and effects of the spread of fire," and there you see reference with regard to, "Household units and other residential units (whether on the same lane or on other property) and to other property." So there is a particular risk in relation to fire where household units on the same property are to be protected.

Then we come to, "(d) Provide for the protection of other property from physical damage resulting from the construction, use and demolition of any building." And that is important both because it identifies an interest which consistent with the underlying economic policy of legislation the Council was responsible for protecting and also because of the care which has been taken to limit it to other property, a defined term, this is not a broad, fuzzy test. The concept of the other property which

is to be protected from physical damage is the subject of careful definition in terms of the same allotment and same ownership. The definition of allotment which feeds into this very deliberately. One of the – the interests that was not to be protected was protection of the same property, the property on which the building work was being done, from construction use, from physical damage resulting form construction use and demolition. That was not one of the objectives of the Act and there's extensive discussion of that in the report which I'll come to.

ELIAS CJ:

Are there further provisions in the Act which meet the objective of subsection (2)(d) or is this the high water mark of this submission?

MR GODDARD QC:

When we come to the Building Code Your Honour will see that some of these performance based standards were designed to protect other property. Others were designed to protect particular users so there's a whole cascade of provisions at different levels.

ELIAS CJ:

But in terms of the Act I had understood you to say the Act makes a careful division between protecting other property from damage and the particular property.

MR GODDARD QC:

This is the high water mark of that.

ELIAS CJ:

This is the high water mark, thank you.

MR GODDARD QC:

Yes, Your Honour's exactly right.

ELIAS CJ:

It doesn't seem very high.

MR GODDARD QC:

It's coupled with the definition of other property and of allotment which were clearly designed to put a fence around what property was to be protected from other damage.

BLANCHARD J:

I think that's stretching rather a long bow. I would have said it was simply in there because of the need to protect other property from building work.

MR GODDARD QC:

Except, Sir, that one would then expect to see some reference to protection of the property in question and yet –

BLANCHARD J:

I wouldn't have.

MR GODDARD QC:

– and yet that's very carefully been excluded.

BLANCHARD J:

I wouldn't have expected that. This seems to me to be a provision which extends the reach of the Act.

ELIAS CJ:

Yes.

MR GODDARD QC:

What we see though, for example, in relation to one particular risk in (b) spread of fire is explicit identification that that's a risk that's to be managed by reference to household units and other residential units on the same land or on other property, and other property, and there are two things that I think leap out from that. The first is that where a particular risk that causes physical harm is to be protected against in relation to the property in question, there is a reference to the same land as well as other property. The second is that it's only particular types of same property that are to be protected, household units and other residential units, and that would – the express reference to that being on the same land or on other property would be unnecessary on Your Honour's reading of the way subsection (2) is constructed.

ELIAS CJ:

Well isn't it again an expansion because it's not just – it's all other property?

MR GODDARD QC:

Well no it's not Your Honour because what about commercial buildings on the same lane, they're out. So if we look at that there's no particular – the particular focus is on household units and residential units whether they're on the same land or on other property and then on other property so the other property includes, for example, a commercial building –

ELIAS CJ:

But it also could include chattels.

MR GODDARD QC:

No because other property, if you go back to it it's defined –

ELIAS CJ:

I see, the definition.

MR GODDARD QC:

That's my point Your Honour is that other property is not being used in a general sense.

ELIAS CJ:

Yes.

MR GODDARD QC:

So this is not just a very general purpose provision. Considerable thought has gone into what interest has been – the only purpose of the other property definition in section (2) is to feed into this and –

ELIAS CJ:

Well it includes goods.

MR GODDARD QC:

No Your Honour. "Other property" means land or buildings or part thereof which are not held under the same allotment or not held under the same ownership and includes any road.

ELIAS CJ:

Sorry I was just looking at the definition of "property".

MR GODDARD QC:

No "other property" is a separately defined term Your Honour that's why it's so important. It's on page 74 of the stamped numbers.

ELIAS CJ:

Sorry I missed that, yes.

MR GODDARD QC:

So that is very important because that, this is the only function of that "other property" definition, it's to feed into the objectives and great care has been taken to limit it to land and buildings and to exclude land held under the same allotment or under the same ownership and that's because of a particular economic approach to the design of this regulatory regime which, whether the Court's sympathetic to it or not, must be given effect when interpreting and applying this Act.

TIPPING J:

And that regulatory approach, you say, is to exclude economic interests per se?

MR GODDARD QC:

It's to exclude protection of – prevention of damage or harm to the property on which the building work is done. So it's not – and that is thought of as a form of economic harm in –

TIPPING J:

Except where it trenches on the safety or sanitary nature of the building. It must be the same building in 6(1)(a)?

MR GODDARD QC:

Absolutely and what one's trying to protect there is the safety of users. This was, and the Court will see this when we come to the Building Industry Commission report, the reports starts by saying there are all sorts of risks which need to be managed in relation to a building. There are all sorts of interests, all sorts of risks. Some of them can be managed by private transactions, others cannot. The purpose of a regulatory regime is to protect the interests that cannot be managed by private transactions. What are those interests? Well –

TIPPING J:

Well safety and sanitary should –

MR GODDARD QC:

Of users because people come into the building without any ability to contract for a particular type or safety of construction and also other property because again the owners of other property are not involved in decisions –

TIPPING J:

But are you saying this is directed to people who come to the building but who don't live there?

MR GODDARD QC:

No they can come or who live there but it's directed to whether or not they own. It's not the ownership interest which is protected.

McGRATH J:

Mr Goddard, is it fair to say that this argument is really an argument by comparison? You say it is a detailed policy that can be deceived in relation to other property and if you compare that with the gap in the way that property that's not other property is dealt with, as a matter of necessary implication, the policy in relation to other property does not apply?

MR GODDARD QC:

Yes and also that that's reinforced by two things. Firstly the Building Code, when we look at that, and the interests which it identifies as being protected by particular limbs

of that and in the other direction the Building Industry Commission report which its common ground was the genesis of this, which explains exactly that.

McGRATH J:

They may be other aspects of legislative history but insofar as you're relying on an argument by comparison it's sometimes said to be not a particularly useful tool, sometimes an illusory indication of meaning?

MR GODDARD QC:

And sometimes very helpful and the question is, always depend on the structure of the particular legislation and what other assistance one can bring to bear because of course, as this Court has said in cases like the *Commerce Commission v Fonterra*, we don't read legislation in a vacuum or look first at the narrow words, then separately in context, rather they must all be taken into account together text and purpose are equally important.

McGRATH J:

You've got to reach the standard of necessary implication in the end don't you?

MR GODDARD QC:

I think I just have to reach the point that it's the better reading of the Act, paying attention to its purpose and in its context.

McGRATH J:

Right.

ELIAS CJ:

How does 2(f) fit in with your argument?

MR GODDARD QC:

Well that identifies another objective for the purpose of which there can be regulation. So you've got the reference to necessary controls, then you've got particular ends that can be pursued and if we move onto, we'll talk about the Building Code in a moment, but then subsection (7) for example makes the point that all building work has to comply with the Building Code and except as it's specifically provided to the

Act, no person undertaking any building work shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the Building Code.

So you have some particular purposes for which a Code can be made, and then a prohibition on insisting on higher standards than that, so really what (2) is identifying is the objectives by reference to which it's legitimate to regulate and then there's an absolute prohibition on going further because one of the key objectives of this legislation was to drive unnecessary cost out of building work because that was harming New Zealand consumers, they were paying too much for their homes. And it otherwise wouldn't have been comprehended in safety, sanity, sanity sorry – safety, sanitary facilities and amenity – that the legislation was bad for sanity, there's not really any doubt about that. The reference to avoiding unreasonable delay in section 9, again is part of the drive for lower cost and more efficient regulation.

Then part 3 establishes the Building Industry Authority which was the national body responsible for building matters, recommended the Code – that was a significant shift sway from Councils making their own bylaws. So in section 12, the Court will see that the authority had functions which include advising the Minister, approving documents for use in establishing compliance, determining matters of doubt or dispute in relation to building control, (e) approving building certifiers. The important ones – certain powers.

Section 17 deals with matters of doubt or dispute relating to building control, and I note that only because the Council refused to supply a code compliance certificate in relation to Byron Avenue, that was referred to the Building Industry Authority, which upheld that under section 17.

We can move through the rest of part 3 in relation to the Authority and part 3A in relation to the levy which funded the Authority's. Then we come to part 4, "Functions, Powers and Duties of Territorial Authorities. Section 24, territorial authorities have the following functions under this Act and its district, administration of the Act and the regulations, and the regulations of course include the Building Code. Receive and consider applications for building consents, approve or refuse those applications within the prescribed time limits. Those were set in the regulations, it was 10 working days for projects worth less than $500,000 and 20 working days for more substantial projects. To issue project information memoranda,

code compliance certificates and compliance schedules and other functions specified in this Act. Now there's a limit to how much can be taken from this but I just note in passing that there's reference to issuing consents, issuing code compliance certificates. Inspection isn't identified as a separate function and we'll see later that that's only carried out to the extent that it's necessary in order to be able a code compliance certificate at the end. So the –

TIPPING J:

Well wouldn't to enforce the provisions of the Code and regulations – (e) of necessity in some instances, it requires inspection?

MR GODDARD QC:

Will require inspection, Your Honour's exactly right. Although, where for example, a builder certifier is retained –

TIPPING J:

Oh yes.

MR GODDARD QC:

– that will be after the – normally the work's done, not prior.

TIPPING J:

Yes. But the duty is on the territorial authority –

MR GODDARD QC:

To do those things.

TIPPING J:

– to do those things and how does that – or are you going to come to this, how does that relate to the building certifier?

MR GODDARD QC:

Yes I will because that –

TIPPING J:

You will, all right. Leave it till then.

MR GODDARD QC:

Section 28 is the charging provision which enabled local authorities to fix charges under Local Government Act and subsection (2) where those charges were inadequate to recover the actual and reasonable costs in respect of the matter concerned, so this was to be a cost recovery regime.

ELIAS CJ:

Does *Hamlin* affect the charges? Does reliance on *Hamlin* affect the charges?

MR GODDARD QC:

That is –

ELIAS CJ:

Does it –

MR GODDARD QC:

– a very – actually that's a really difficult question. The actual and reasonable costs, if one could –

ELIAS CJ:

Well does it cover the local authority's insurance?

MR GODDARD QC:

Well if it were possible to insure and that was a cost that was incurred in relation to this sort of work, then I think yes, subsection (2) would allow that recovery but –

ELIAS CJ:

Well don't we need to know this sort of fact if we're going to turn *Hamlin* on its ear?

MR GODDARD QC:

The – let me come back after the morning adjournment –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to provide precisely correct information in relation to the insurance position, but –

ELIAS CJ:

I mean it may be that you will say that we don't need that information but it stands out a bit as a question because if local authorities have been proceeding on the basis that they're entitled to charge in order to insure against *Hamlin* liability, then we may have a structure –

MR GODDARD QC:

The difficulty of insuring against risks of this kind was one that certifiers encountered virtually immediately and Councils were in no different position and there's quite a lot of information about the insurance position in the Court of Appeal's decision in *Body Corporate 200200 v Approved Building Certifiers Ltd* 2/2/05, Williams J, HC Auckland CIV-2003-404-512, there were some assumptions made in the course of designing this legislation that it would be possible to obtain insurance on a claims arising basis for a 10 year period in relation to certification work which were in fact simply wrong and no –

ELIAS CJ:

But that was for certifiers.

MR GODDARD QC:

But the difficulty they ran into was that no one was prepared to underwrite cover on that sort of basis and indeed, the vast bulk of these costs fall on the local authorities themselves, not on insurers, but I just want to give an exact answer to that.

ELIAS CJ:

But are there – yes I just wonder whether –

TIPPING J:

Can I just develop that point a little further –

ELIAS CJ:

Yes, yes.

TIPPING J:

– leaving aside the insurance dimension for the moment. If there is this part charge actual and reasonable cost and they've been charged on the basis presumably, well perhaps presumably, I can't say, but how does this relate to the extent of the cost that the Councils have been undertaking, in other words have they been saying, oh well you know this *Hamlin* we don't need to take much notice of that, therefore we won't charge very much or have they been hitting everyone with the full costs and now retrospectively want to make a profit out of it, putting it extremely crudely, Mr Goddard?

MR GODDARD QC:

Well I can assure Your Honour that that's not the position, but in order to provide a detailed factual answer to that, I just want to check with Mr Heaney over the morning adjournment because he knows more about this than anyone, certainly more about it than I do. But can I say, of course, that at the time this came into force, this was pre *Hamlin*, so no one was behaving initially in the light of *Hamlin*.

TIPPING J:

But it wasn't pre that the –

MR GODDARD QC:

The original cases.

TIPPING J:

No, and you would have thought that the costs that were charged would have been commensurate with the duty which those previous cases imposed?

MR GODDARD QC:

If insurance was obtainable and could be factored in.

TIPPING J:

Well never mind insurance.

ELIAS CJ:

No never mind it.

TIPPING J:

Never mind insurance.

MR GODDARD QC:

I just wonder whether actual and reasonable costs could include an allowance for possible future claims, when those costs hadn't been incurred and couldn't have been estimated.

TIPPING J:

Not a sinking fund, simply you'd take so much care and charge accordingly in proportion.

ANDERSON J:

Sort of contingency element of the costing.

ELIAS CJ:

Well not even that.

TIPPING J:

No not even that. Simply saying, well we have these duties so we must do X, Y and Z to satisfy them and we can charge accordingly.

MR GODDARD QC:

But of course Your Honour, you will charge different amounts depending on whether you're funding doing the work carefully, to what you understand to be the correct standard, doing the work carefully and paying compensation for harm to health safety and other property. If you understand that to be what you're responsible for or if you're also trying to provide for harm to the property in question. So there would need to be an understanding of what the interests to be financially underwritten were in order to charge on that basis.

ELIAS CJ:

But if it's on the *Hamlin* basis, being careful against *Hamlin* liability, that may require the collection of reasonably, of higher fees than would be the case if a –

MR GODDARD QC:

Only if you're providing for liability. It becomes rather circular because the standard that you exercise care to, it's not suggested that you have to be more careful

because of *Hamlin* than the statute would require, what is suggested is that you have to be careful to the standard of the statute and in addition, in those cases where it's found that you haven't been, and for a large organisation like a Council, as with any – for example a large firm of accountants, there will be some cases where negligence occurs. It's impossible to eliminate it completely and the question is what level of cost you expect to incur, how do you provide for that. Now that turns on the legal rule of liability and what interest you have to compensate where your negligence harms someone. Again it's like, if you think about, vehicle insurance, you pay more for insurance if you're insuring against the third party liability to cars than if you're not, and you pay more again if you insure for first party as well. And that was really the question, in my submission, a local authority could reasonably answer by looking at this Act and saying well what interests are we now responsible for, what therefore do we need –

TIPPING J:

But per *Hamlin,* they were responsible to owning, they had to cover the ownership interest didn't they as per the earlier line of authorities?

MR GODDARD QC:

The ownership interest in modest homes.

TIPPING J:

In modest homes. Now if we have the difficulty as to how far one expands that or not, but that is quite a different problem from the first step that you're inviting us to take isn't it?

MR GODDARD QC:

It is.

TIPPING J:

Yes, now that's the first step that I'm wondering about, because if you've got the duty – I agree – how extensive the duty is but it seems somewhat unsatisfactory for people to say we've paid for this, we've paid for what we might expect a la *Hamlin*, but we're not actually going to get it.

MR GODDARD QC:

That all depends on whether it's been paid for or not, which is not something the plaintiffs established in this case –

TIPPING J:

It depends what you've paid for I suppose.

MR GODDARD QC:

And the plaintiffs haven't shown that they paid for that and they haven't called that evidence.

ELIAS CJ:

But this is where general reliance or assumptions are stemming from control and from a culture, described in the earlier New Zealand cases, is very important if you're asking us to throw the whole thing into reverse.

MR GODDARD QC:

I think one needs to be very clear about what one means about general reliance. If all one means is what could be reasonably expected based on the scope of statutory responsibilities were just taken back to the legislation, if one means New Zealand practices, then the question becomes –

ELIAS CJ:

Well it's the common law, that's what Justice Tipping has put to you and is the question I have too, that the pre existing common law permitted liability in the *Hamlin* circumstances, I would have thought that the question for you is to demonstrate that the statute is inconsistent with that liability?

MR GODDARD QC:

No Your Honour, because this is not a case where there was common law entirely independent of statute and the question –

ELIAS CJ:

No it's part of the background, yes.

MR GODDARD QC:

The only reason that there was a common law duty beforehand was because there was –

ELIAS CJ:

Of the statutory control.

MR GODDARD QC:

– a statutory control and a statutory protection of a range of interests, including the interest of the owner in having a soundly built home and it was explicitly recognised by our Courts, *Chase v De Groot*, only one example of that, that that statutory scope extending to the interest of the owner in a soundly built home, was one of the critical reasons that our common law was broader than the common law of England on this point and so an informed careful reader of this Act, in the light of the judgments that had been given, including *Chase v De Groot*, an essential part of anyone's careful reading, would say, ho ho, one major reason for the difference has been removed, what does that mean, we better look at the other reasons and I'll come to those in a moment.

TIPPING J:

But they'd also have the complication that if they chose to read the Court of Appeal and the Privy Council in *Hamlin*, they've have a totally different signal.

MR GODDARD QC:

It would be invidious for me to suggest who might have read the position more carefully but –

TIPPING J:

It think they're more likely to – quite honestly I think your average practitioner is much more likely to have gone on *Hamlin* than the Privy Council and the interstices of this legislation we're now going through. The Privy Council –

MR GODDARD QC:

If that's the right test I'd be struggling to suggest anything different.

TIPPING J:

Well I'm not saying it's a test –

MR GODDARD QC:

No.

TIPPING J:

– I'm just saying this question of how we're going to disturb people's expectations as a result of what they read in Privy Council in *Hamlin*.

MR GODDARD QC:

And in my submission the expectations can't be formed based on reading one judgment, they have to formed against the backdrop of the entire statutory and common law framework.

BLANCHARD J:

But you'd expect them Mr Goddard, surely you'd expect that if the people responsible for framing this legislation and advising the Government, had seen in the Privy Council decision in *Hamlin* something that simply wasn't right, to their knowledge, as the people responsible for the drafting of the 1991 Act, they would have said something and promoted amending legislation, but there's a deafening silence and everyone takes it for granted that the *Hamlin* decision, insofar as it referred to the 1991 Act, was correct, and you're asking us to tip all that over.

MR GODDARD QC:

That's one strand of my argument, yes.

BLANCHARD J:

Yes well, frankly I just think that that's a totally unacceptable position. There may be a lot of merit, I'm not saying there is but there might be a lot of merit in the argument that *Hamlin* shouldn't be extended beyond cottage builders and so on, but the fundamental argument seems to me to collapse under the weight of what the Privy Council said and the fact that Parliament didn't respond.

TIPPING J:

And didn't respond in 2004 as I understand it, or is it a bit more complicated?

MR GODDARD QC:

It's a little bit more complicated than that, because in 2004, for example, there was explicit introduction of a transmissible warrant of quality, on the part –

TIPPING J:

Well we'll be looking at –

MR GODDARD QC:

– of people responsible for building works –

TIPPING J:

Subject to 2004.

MR GODDARD QC:

Yes, subject to 2004 but there was a silence in relation to Councils. The direct response to that Your Honour is to say, in my submission, if this matter had arisen as a matter of first impression under the 1991 Act and the orthodox reasoning deployed by the Courts in cases like *Carter* had been applied to a health and safety regulator which granted certificates for certain purposes but not for others, then the result that would have been reached is that there was no liability. The question then becomes whether what, in my submission, was an inadequate and incorrect analysis of the effect of the 1991 legislation in a case where that was not directly in issue, because the work was done under a previous regime, should now preclude the Supreme Court from providing a principled and accurate answer. Now Your Honour is saying yes it does, but in my submission the responsibility of the Court to develop the law in a principled and coherent way is an important pull in the opposite direction and ultimately it's a matter for the Court to decide how those balance out.

BLANCHARD J:

Why can't we just say this is one of those cases where it's for Parliament to deal with the situation, which it won't do retrospectively?

MR GODDARD QC:

Which it won't do retrospectively. Because in my submission, –

BLANCHARD J:

You're asking us to do something that Parliament simply wouldn't do.

MR GODDARD QC:

I'm asking the Court to declare now the consequences of something that Parliament very deliberately and very consciously did in 1991 but which was not properly appreciated earlier. Parliament enacted legislation which did two main things, three maybe. First, it restricted the interests protected by the legislation and to be safeguarded by the regulator. Second, it made the regulatory function contestable so that different people could grant all the consents, all the certificates needed to build a house and third, partly as a consequence of that contestability, it introduced a regime for the issue by whoever was responsible for supervision, regulation I should say, of the building work, of a code compliance certificate and it introduced provision for land information memoranda which enabled purchasers and others with an interest in property to ascertain whether a local authority is satisfied that the building complies with the Code or whether a certifier was satisfied or whether no one was satisfied, so there was a shift away from consent and inspection and a working assumption that if a building existed, it must have been inspected by the Council and the Council must have been happy to a contestable certification based regime, which to the extent that anyone could rely on performance by the Council on its functions, when making for example investment decisions, must in my submission depend on specific reliance not general reliance because –

BLANCHARD J:

Well all this is fairly subtle and you have to go to the provisions of the Act and look at them with considerable thought to find all these things that you say are there. Was anything said during the Parliamentary debates about the big shift away from *Hamlin*?

MR GODDARD QC:

There was nothing in the debates that's at all illuminating about the intended scope of civil liability.

BLANCHARD J:

Wouldn't you expect the pre-*Hamlin* situation more correctly –

MR GODDARD QC:

Yes I understand, I understand.

BLANCHARD J:

Wouldn't you have expected that if those promoting the legislation did intend that all those cases were to effectively go out the window, that would have been said and very explicitly said, not leaving a situation where even the Privy Council gets it wrong, as you're putting it to us, and they misunderstand?

MR GODDARD QC:

The fact that significant changes were being made to the regulatory regime and that it was going to be much less prescriptive and focused on regulating risks that couldn't be managed through private transactions, was very much at the forefront of the overall –

ELIAS CJ:

Mr Goddard, is the answer to the question that there wasn't anything in the Parliamentary debates relating to –

MR GODDARD QC:

Civil liability?

ELIAS CJ:

Yes.

MR GODDARD QC:

Of a kind that's illuminating at all, yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

I said that I think, and absolutely that's the position.

ELIAS CJ:

All right, we'll take the morning adjournment now.

COURT ADJOURNS: 11:33 AM
COURT RESUMES: 11.52 AM

MR GODDARD QC:

Your Honour, I was working through the building legislation and I think it's helpful to continue doing that because notwithstanding indications of a certain lack of sympathy on the part of at least some members of the Court for the most far-reaching of my submissions, an understanding of the statutory scheme is of course important when it comes to considering whether it's appropriate to, as the plaintiff seeks to expand *Hamlin* out beyond, for example, a modest home, so I will continue to work through that I think and then deal with the various issues that arise in the two appeals.

I was about to turn to Part 5 of the Act which is on page 93 of the stamped numbers in the bottom right-hand corner, "Building Work and Use of Buildings." We don't need to look at the provisions on project information memoranda. Turning over to "Building Consents," section 32, "Buildings not to be constructed, altered or demolished without consent. Not lawful to carry out building work except in accordance with a consent to carry out building work issued by the territorial authority in accordance with this Act." That ties obviously into the control point that the Court was putting to me earlier.

ELIAS CJ:

The, 32 and 33 are the principal sources of control, aren't they?

MR GODDARD QC:

It's a little bit more complicated than that because if the Council is told, for example, that a certifier is going to carry out the inspections and grant the certificate, then that control is much reduced. The Council is not supposed to go and do any inspections at all. It's obliged, by a section I'll come to, to accept the certifier's certificate as conclusive so it's part of the picture but not the whole picture.

ELIAS CJ:

All right, thank you.

MR GODDARD QC:

So you have to have a building consent issued by territorial authority. Section 33 provides, as Your Honour has said, for applications to the territorial authority, it must be in the prescribed form. Subsection (5) refers to a territorial authority at its discretion accepting from the applicant a producer statement establishing compliance with all or any of the provisions of the Building Code. There are two ways in which third parties could provide assurance in relation to compliance with the Code. One is through a producer statement and it was a matter of discretion for the territorial authority as to whether or not it accepted that as providing reasonable grounds for satisfying it of the matters that it was required to consider. The other was where a building certifier, approved by the building industry authority, issued a certificate and the Council, as we'll see under section 50, was obliged to accept those. It couldn't second guess them. So you've got two forms of third party assurance. One, a discretionary one that informs the Councils decision. The other, an alternative to the Council forming a view which the Council just had to accept.

Section 34, "Processing building consents." I mentioned earlier the prescribed period. Subsection (3), an obligation, this is the critical thing, the test on the, "Territorial authority to 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." So a forward looking test. If the work is done in accordance with this, will it be satisfied? And then 35, to be issued to the applicant the consent in a prescribed form on the payment of any charge fixed and the building industry levy. "Limitations and Restrictions on Consents," and then turning over to section 40(1)(c), what happens, "If the territorial authority fails to decide within the prescribed period to grant or refuse a building consent." And in fact strikingly, "it was deemed to be approved in respect of building work that is to be inspected by a building certifier and it was covered by a building certificate from a building certifier." So even if the territorial authority did nothing, if a building certificate in respect of the plans and specifications saying if the building is constructed in this way it will comply with the Code has been provided, then the territorial authority is deemed to have consented and that will become more apparent, I think, as we move through a few more provisions in relation to certifiers.

Over the page, "Notices of Rectification". This comes back to Your Honour the Chief Justice's question about whether there are mechanisms to enable the Council to require things to be fixed.

Section 42 is part of the set of provisions addressed to that issue. "The territorial authority can issue to the owner or person undertaking the building work a notice to rectify, requiring any building work not done in accordance with the Act or the Code to be rectified." And the specific provisions in relation to those notices is set out below.

Then 43, "Code compliance certificate". This is a new animal introduced by the 1991 legislation and it plays an important part in the scheme of the legislation. "Owner must as soon as practicable advise the territorial authority that the building work has been completed to the extent required by the consent and the owner must include any building certificates issued by building certifiers." That certificates – that particular items comply with specified provisions of the Code. So subsection (2)(a) applies where certain specific matters are the subject of certificates from a certifier or, "(b) A code compliance certificate issued by a building certifier under this section and section 56(3)." So one of the options available to a building owner was to ask the building certifier to give the code compliance certificate and subsection (3) follows on from that. "Except where a code compliance certificate has already been provided pursuant to subsection (2) the territorial authority shall issue to the applicant in the prescribed form, on payment of the charge, a code compliance certificate, if it is satisfied on reasonable grounds that (a) the building work to which the certificate relates complies with the Building Code."

So a few important things to note about that. First, if a code compliance certificate from a certifier, a building certifier is provided subsection (3) doesn't apply. The Council doesn't do anything. The Council does not issue a code compliance certificate. It simply puts the code compliance certificate from the certifier on its file. So where the project is being inspected by a certifier and where a certifier grants the code compliance certificate the Council is not carrying out day to day inspections and is not required by the legislation to take a view on whether or not the construction complies with the Code. But where that's not the case, either because the certifier is not engaged at all or because the role of the certifier is confined to specific aspects of the building or specific Code provisions, then the territorial authority issues a code compliance certificate if it's satisfied on reasonable grounds that the building work to which the certificate relates complies with the Building Code. It's not an absolute assurance, it's satisfaction of reasonable grounds.

Subsection (4), "Interim code compliance certificates can be issued but," third to last line, "those interim certificates shall be replaced by the issue of a single code compliance certificate for the whole of the building work at the time the work is completed to the extent required by the building consent." So it's very much focused on ending up with a certificate that the whole building complies with the Code. "Where a building certifier or a territorial authority refuses to issue a code compliance certificate the applicant must be notified in writing specifying the reasons."

And subsection (6), "Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate because the building work does not comply with the Code, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act."

Just pausing there, it's suggested in the respondent's submissions that we never, the territorial authority declines to issue a code compliance certificate. It must issue a notice to rectify. What we think that overlooks is the possibility that insufficient evidence has been presented to the territorial authority to enable it to be satisfied on reasonable grounds that the building work complies but without it necessarily, for example if foundations have been covered over and it was wrongfully denied the opportunity to inspect, having the ability to identify a particular defect that has to be fixed. It also overlooks, of course – so one option is to say, we can't be reasonably satisfied based on the information you've provided. For example, the certificates that you've provided don't cover all the things that you say they do and we can't now inspect this but we can't also identify any specific defect to be rectified so there is a middle ground.

ELIAS CJ:

So there's no refusal. You say the Act permits no outcome?

MR GODDARD QC:

No, a refusal of a code compliance certificate but it doesn't necessarily follow that subsection (6) applies and that a notice to rectify will be issued because it also may not be possible to identify specific defects which don't comply with the Code which are to be rectified.

ELIAS CJ:

Wouldn't the requirement of specification of the reasons – oh you say that that could simply say, we don't know?

MR GODDARD QC:

We are not satisfied on reasonable grounds.

ELIAS CJ:

Yes.

McGRATH J:

Mr Goddard, can I just go back to the situation in which a certifier issues a certificate for certain items.

MR GODDARD QC:

Yes.

McGRATH J:

I take it that the Council may then issue a final code compliance certificate for the whole of the building work which accepts as valid on its face, on your argument anyway, the certificate for part of the work that the certifier has given?

MR GODDARD QC:

Exactly Your Honour. If Your Honour jumps across to section 50 now, just to see how that works.

McGRATH J:

If you're coming up to it, that's fine.

MR GODDARD QC:

I am. Section 50 is the bridge to that but I'll come to that in just a moment. So that's provision 4, issue of a code compliance certificate. Section 47, "Matters for consideration by territorial authority in relation to exercise of powers." Various factors to be taken into account which Justice Baragwanath has described as essentially a proportionality text in *Dicks v Hobson Swan* and in the Court of Appeal in these cases which I think is quite a helpful way of thinking about it.

Then moving over to part 6, the National Building Code, "The Governor-General can by ordering Council, make regulations to be called the Building Code for prescribing the functional requirements for buildings and the performance criteria with which buildings must comply in their intended use." So this of course was one of the critical policy shifts from the old very prescriptive bylaws, which said what sort of wood you had to use and how big the knots could be and how long the nails had to be, to saying the building must not leak basically and leaving it to territorial authorities to work out how that would be achieved. Rather leaving it to building owners and their designers and builders to work out how that would be achieved and territorial authorities to form the view on whether they were reasonably satisfied that the outcome would be achieved. And that's those regulations, subsection (3), "Made on the advice of the Minster following the recommendation of the Authority," and a process for consultation of a familiar kind in relation to the Authority's development of the Building Code for recommendation to the Minister for inclusion in regulations.

ELIAS CJ:

I'm sorry, I'm just thinking about this so-called proportionality assessment that's required under section 47. What does that mean? Does that mean if it's a small building and the work is not reasonably practicable given the cost and the value of the building one imagines that that is something that the Council can take into account?

MR GODDARD QC:

The Council was required to weigh all those things so in deciding how often to inspect and what sort of inspectors should go out to a property, yes it had to look at things like size and complexity and other things being equal one would expect a larger and more complex building to be the subject of a wider range of issues or a house on a steep cliff in Wellington or Takapuna to attract the attention of, you know, geo-technical engineers in a way that something on flat land might not. But also involved in this necessarily would be the extent to which the building owner was providing, for example, building certificates, because there the Council positively shouldn't inspect and it was an integral part of the scheme in this legislation that people wouldn't pay twice for a building certifier to do the inspections and the Council to do the inspections. So if the Council was told a building certifier will be looking at issues A, B and C then the Council would have to take that into account in deciding what to do.

If the Council was given producer statements it could take that into account although there that's a matter of discretion so we it would also have to consider, can I be satisfied that a producer statement from this producer in relation to this type of issue is sufficient for me not to send someone out to look at it. So there's a whole range of things that go into the mix the net effect of which was supposed to be a decision about what the Council would do that was proportionate to the size, complexity, risk and particularly the risks that it's responsible for managing, to health and safety and other means of getting assured, or being given comfort that those risks would be managed apart from it, for example, inspecting.

ELIAS CJ:

I just wondered how it impacts on, if *Hamlin* is right or if your argument that *Hamlin*, your fallback argument that *Hamlin* is to be confined to cottage construction is right, what that would mean under this provision?

MR GODDARD QC:

It would certainly mean that the Council could take into account the nature and reputation of the builder in deciding how to inspect so that a major reputable building company with in-house expertise on matters of engineering and design would require less frequent inspection –

ELIAS CJ:

A cottage –

MR GODDARD QC:

Than a cottage builder.

ELIAS CJ:

A cottage builder might require an awful lot of inspection on this basis.

MR GODDARD QC:

I think I stumbled a little late on what Your Honour was asking me which is that, yes, the range in between size is not necessarily proportionate.

ELIAS CJ:

No.

MR GODDARD QC:

Bigger doesn't always mean more inspection.

ELIAS CJ:

No.

MR GODDARD QC:

Smaller might actually mean more if in addition what you had was a particular lack of expertise. If one had a situation where the owner of the building was simply doing it themselves and had obtained a consent, one to do quite small – any Council confronted with an application for a building consent by me to do building work on my house would immediately need to come and live with me to watch me do it –

BLANCHARD J:

How unexciting.

MR GODDARD QC:

– which is why I don't but –

ANDERSON J:

But if say it's Keith Hay or an established builder with a long track record of excellence, for example, type of product, you'd say well that really bears on whether there's been negligence or not in relation to how they go about inspecting.

MR GODDARD QC:

Yes, exactly Sir.

ELIAS CJ:

The fees, however, reflect price don't they?

MR GODDARD QC:

The way the charging provision is expressed here, there's the general –

ELIAS CJ:

It's all right Mr Goddard. Don't –

MR GODDARD QC:

No, there's the general provision made under section 150 of the Local Government Act which would be a fairly mechanical fee setting process based on the size –

ELIAS CJ:

I was thinking of 23(b) is it?

MR GODDARD QC:

But then the ability to recover the reasonable costs and expenses, that if more inspection is required than in the standard case you can recover that from the person.

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

So Part 6, the Building Code made on the recommendation of the Authority. 49 documents the use of establishing compliance with the Building Code. One of the things the Building Industry Authority could do was issue what were called acceptable solutions. The Authority approved, "Documents for use in establishing compliance." And (2), "Any document prepared or approved by the Authority under subsection (1) shall be accepted for the purposes of this Act as establishing compliance with those provisions of the Building Code to which it relates, but it shall not be the only means of establishing such compliance." So you have performance standards. The building must not leak. You have the ability of the Building Industry Authority to issue acceptable solutions which are more detailed prescriptions of particular ways of achieving that function or outcome, that performance standard, and one of the ways you can establish compliance with the Code is by complying with that more prescriptive statement to use materials of a particular kind, use them in accordance with particular guidelines, don't let David Goddard anywhere near it, that sort of thing. And it remains open, however, to someone building a building to establish compliance with the performance standard in any other way, and those were sometimes referred to as alternative solutions.

So this was a safe harbour. If you did this more detailed thing, prescribed by the Authority, then that was determinative, the performance standard had been met and

the territorial authority had to accept that otherwise whether the performance standard was met had to be considered. And we see that same idea coming through in section 50, which I referred to a moment ago, "Establishing compliance with Building Code. A territorial authority shall accept the following documents as establishing compliance with the provisions of the Building Code. First, a building certificate or a code compliance certificate to that effect issued by a building certifier under section 43 or section 56." So that's Your Honour's question. If you get a building certificate that says the lift in a building is fine, the territorial authority can't second guess that and they're all, we don't think so. If a territorial authority gets a code compliance certificate saying the whole building meets the requirements of the Building Code, the territorial authority can't second guess that. That must be accepted as establishing compliance. Likewise a determination by the Authority and certain other matters, accreditation certificates, compliance with, (d) is compliance with acceptable solutions issued under section 49. Certain specific provisions in relation to energy work.

Also a provision in subsection (2) for building certifiers to accept certain documents as establishing compliance so they too were required to accept certificates from certain other people as decisive and subsection (3), "For the avoidance of doubt, no civil proceedings may be brought against a territorial authority or a building certifier for anything done in good faith in reliance on a document set out in subsection (1) or (2)."

ELIAS CJ:

What's the present use of building certifiers?

MR GODDARD QC:

They don't exist.

ELIAS CJ:

Yes.

MR GODDARD QC:

That was not a successful innovation.

ELIAS CJ:

No. Well why does this matter then?

MR GODDARD QC:

Because it provides useful information about the way in which this regime was meant to work and it's a certification nature, the focus on the issue of particular certificates and in my submission reliance on those rather than on the inspection process.

ELIAS CJ:

But it doesn't happen.

MR GODDARD QC:

Well it happened for the – it did happen for a time in relation to some buildings under the 1991 Act. It collapsed really –

ELIAS CJ:

With the leaky building –

MR GODDARD QC:

With the leaky building issue in 2002-3 so across the period when these were built these buildings with which these appeals are concerned there were certifiers. They weren't involved in these buildings but part of the argument for the appellant is that the regulatory landscape was more complex in relevant ways than the very simple landscape that confronted Mrs Williams for example in *Williams v Mt Eden Borough Council* (1986) 1 NZBLC 102,544 (HC) where she was able to say, "But I was buying a house in Mt Eden. That Council was the toughest." Mrs Williams couldn't assume, from 1992 through to 2003 that the Council had been anywhere near the house she was buying. But she could apply for a LIM and find out who had been near it and whether or not they'd given a certification and if she did and she found that ABC Building Certifiers had granted a certificate then she would be relying on ABC, not the Council. One of the questions, really, for the Court is what happened if she didn't even make that enquiry, can she say, "I was relying on the Council." Well no it can't be as simple as that, because the Council might have been nowhere near the house. Can she say, "I was relying on whoever did it." That's a possible argument and it's the argument advanced by the respondents but what I say in response to that is before you can say that you were reasonably relying you must have found out who it was you were looking to for this purpose. Also relevant is the question of what the scope of their responsibility was because there's no reason to think that Councils were liable for more than certifiers. That would have been inconsistent with the contestability goal of the legislation and also you should ask yourself, and what

interests were they protecting again for whose benefit but the Court, I think, has more reservations about the last of those three steps.

But the first one is really important. That Mrs Williams could no longer assume, simply because she bought a house in Auckland, that the Auckland City Council had anything to do with the construction process and that really goes to the heart of the idea that there can be a leap from the building as in the area of this local authority to reasonable reliance on the local authority.

ELIAS CJ:

You need to go to the argument put up by the respondent which is that the general reliance is on the certifier and if in the particular case, as is the case in all the cases with which we're concerned, it's the local authority then you have a claim.

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

And that everything I'm saying is really just a distraction.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes and I will deal with that. There are two aspects to that. One is the who but critically also in this case, and in particular as in Byron Avenue, there is the question of what is the trigger for that ability to look to whoever did the regulatory work and as we go through what I will endeavour to show is that the trigger is the issue of a certificate under the 1991 legislation. There was no code compliance certificate pre-1991. That's a new innovation. The 1991 legislation introduced these code compliance certificates and it introduced LIMS, land information memoranda, so you could find out whether a code compliance certificate had been granted and if so, by whom. And what's quite clear is that one of the working assumptions of the drafters of this legislation was that liability could be triggered by the issue of a building

consent, if you shouldn't have been reasonable satisfied that the building would comply with the Code when built, in advance, and liability could be triggered by the issue of a certificate. But there's no contemplation here that liability could arise from inspections that were directed towards the eventual issue of a certificate, but did not result in the issue of the certificate. That's very important, obviously, for Byron Avenue where no certificate was issued.

BLANCHARD J:

Can you just remind me why it was that no certificate was issued in Byron Avenue?

MR GODDARD QC:

Because the owner/developer wrote to the Council, drawing its attention – they'd retained one unit, and they'd have an ongoing dispute with the builders, and before a code compliance certificate was issued, they wrote to the Council drawing its attention to concerns about moisture ingress, and the Council carried out an inspection, as a result of which it decided that it was, indeed, concerned about that very issue, and it refused to issue a consent.

BLANCHARD J:

And what else did it do?

MR GODDARD QC:

It suggested to the owners that they should obtain expert advice on what work needed to be done in order to address the issue, and that if they were dissatisfied with the Council's refusal to issue a code compliance certificate, they should go to the building industry authority under the matters of dispute provision. Both of those were done by the owners.

TIPPING J:

Did it go on the LIM, that there'd be no certificate issued?

MR GODDARD QC:

The absence of a certificate is always apparent from the LIM. So if we look, for example –

ELIAS CJ:

So there is a document – I'm not inviting you to take us to it, although you might need to at some stage – somewhere in here in which the Council declines to issue a certificate –

MR GODDARD QC:

Yes.

ELIAS CJ:

And gives reasons?

MR GODDARD QC:

Yes.

McGRATH J:

Even after remedial work was done?

MR GODDARD QC:

Yes, even after remedial work was done. It was not satisfied that that was adequate, and that, in fact, was the point – so initially it wrote saying we're concerned about moisture ingress, you should get expert advice and you should deal with these issues. They took steps, and then Mr O'Hagan – and Your Honour is exactly right – said, I've dealt with the issues, please come in and inspect. A code compliance certificate should now be issued. The Council inspected, but still was not reasonably satisfied that the work complied with the Code. It said we're not comfortable on this one, and if you disagree with us, then you have the ability to go to the BIA, the national expert body, which the owners did, and it, also –

BLANCHARD J:

Did it issue a notice to rectify?

MR GODDARD QC:

No.

BLANCHARD J:

And did the LIM – and I assume there was a LIM here, where there were purchasers – did the LIM refer to the fact that the Council was not satisfied?

MR GODDARD QC:

All the LIMs that are in the case on appeal obviously identify that a code compliance certificate was not issued, and some contain an additional annotation about referring to correspondents attached. Others don't. They're silent. So the answer is, that's variable, Your Honour.

TIPPING J:

But they all demonstrate, on their face, the absence of a certificate?

MR GODDARD QC:

Yes. The way the LIMs were set out is that there's a list for building consents and code compliance certificates. The consent number is identified, the work to which it relates, and then there's a column for code compliance certificate, and it either has a date where one has been issued, or it says, "not issued". There's also a provision for notes like note E, certifier. But obviously where's there's none, it just says, "not issued".

ELIAS CJ:

I'm sorry, you might have answered this, but I was thinking. Did the Council then require remedial work?

BLANCHARD J:

No.

MR GODDARD QC:

No.

TIPPING J:

In the case where no certificate was issued, or cases, what was the operative negligence?

MR GODDARD QC:

The allegation is negligence in inspection. There was a complaint about negligence in issuing the building consent, but that was not accepted by the High Court Judge, except in a very minor respect in one case which caused no loss. So the consent issue is irrelevant here.

TIPPING J:

So the negligence was in faulty inspection?

MR GODDARD QC:

Yes.

TIPPING J:

Yet that was not, as it were, verified by a certificate?

MR GODDARD QC:

Exactly, Your Honour. And one of my submissions about the scheme of the '91 legislation is that it moved from being a regulatory regime where what the territorial authority did was grant a consent, then inspect, and you could assume from the mere existence of the house that it had been happy, to a regime which was designed to result in the issue of a certificate of code compliance where, in fact, whoever was performing the regulatory function was satisfied, and that it was no longer reasonable to assume satisfaction without checking that there was such a certificate.

TIPPING J:

How would you know what the result of the inspection was, other than via a certificate?

MR GODDARD QC:

Exactly, Your Honour.

TIPPING J:

That shows a negative result, if you like, if there's no certificate?

MR GODDARD QC:

Exactly.

TIPPING J:

And a positive result, one could infer, from the giving of a certificate?

MR GODDARD QC:

Exactly, Sir. That's my submission.

TIPPING J:

Oh, is it?

MR GODDARD QC:

Yes.

TIPPING J:

Well, I knew part of your argument was the absence of this certificate, but that's the essence of it?

MR GODDARD QC:

Yes, that nothing could reasonably be taken under the '91 regime from the absence of a certificate. One could no longer –

TIPPING J:

You have to ask what negligence caused the loss.

MR GODDARD QC:

Yes.

TIPPING J:

And it can't be said the negligent issuing of the certificate, because there wasn't any.

MR GODDARD QC:

Exactly.

TIPPING J:

So it has to be the negligent inspection, per se.

MR GODDARD QC:

Yes. And that has two consequences. The first is that, in my submission, if there's no certificate, there can be no liability arising out of the post-consent events. Second, that raises the question of whether a plaintiff can succeed in circumstances where a certificate was issued, but they made no enquiry about that, so they weren't aware of that.

TIPPING J:

Well, that's another point.

MR GODDARD QC:

So it's quite a distinct point.

TIPPING J:

It's quite a distinct point, it's just that my attention has been triggered by the absence of the certificate, which, of course, I was aware of, but I see now where you've put it in.

MR GODDARD QC:

Yes, that's exactly right, Sir. That's where it goes in. And we see how this plays out when we come to the provisions on building certifiers, and the provisions on liability.

TIPPING J:

Right, well, let's move on, then.

ELIAS CJ:

It's not, of course, a complete answer, is it, because it's perfectly possible at common law to accept a duty in respect of the inspection.

MR GODDARD QC:

It would be possible to accept one, and a private engineer who contracted to carry out inspections from time to time would be accepting –

ELIAS CJ:

Yes.

MR GODDARD QC:

– exactly that. But we don't have a contract, or any sort of explicit arrangement between these plaintiffs and the Council about what the Council would do independent of the legislations. When we asked what the Council accepted responsibility to do, we were driven back to the legislation, and we have to look at that, and that's where the guidance comes from.

TIPPING J:

My point – and it may be easily answered – is simply how do you know what the result of the inspection is until you either get told that it's not good, therefore, we're not going to issue a certificate, or it's okay, and we will issue a certificate?

MR GODDARD QC:

So what is the consequence of silence, that's the key question, and in my submission, the consequence is that you can't suggest that you were reasonably relying on the Council being satisfied that the building complied.

ELIAS CJ:

But the consequence is that the work progresses and – that is what eventually causes the loss, is it not? Because the defects in the work become less apparent as the work progresses, so the opportunity to identify the problem is on inspection.

MR GODDARD QC:

Generally that will be the case, except where, of course, producer statements or builder certificates –

ELIAS CJ:

Yes.

MR GODDARD QC:

– for part of the building are being relied on.

ELIAS CJ:

Yes.

MR GODDARD QC:

But that's always, of course, an option under this regime, which is one of the reasons why the inspection process –

ELIAS CJ:

But it didn't happen.

MR GODDARD QC:

– assumed less importance.

ELIAS CJ:

But it didn't happen, producer certificates and statements –

MR GODDARD QC:

There were some producer statements, I think.

ELIAS CJ:

Oh, right.

MR GODDARD QC:

But no building certificates.

TIPPING J:

Was it pleaded that the Council had a duty to inform the owner immediately upon the happening of an inspection which resulted in problems?

MR GODDARD QC:

No. What was pleaded was the general negligence in inspection by failing to identify these defects. So I think it proceeded on the basis that there was an implicit duty to do that, but it wasn't expressly pleaded.

TIPPING J:

Because the Chief Justice's point is a good one, because if you can say you were damnified by putting yourself further in the hole as a result of not being told immediately that things were wrong, but I'm not sure that that's the way the case was presented.

MR GODDARD QC:

And that would produce a recovery of a different measure of loss.

TIPPING J:

It would be a different loss.

MR GODDARD QC:

Exactly, which is really important, I think, to bear in mind as to what's being sued for is not the difference between finding out about the defect on day A and day B. It's the whole shebang. Technical building term.

ELIAS CJ:

But that's because what resulted was the whole shebang, because the defect became hidden. The defect not having been picked up by inspection was not able to be picked up.

MR GODDARD QC:

But if, for example, some of the defects complained of had been identified after the defective steps were taken, but before the defective work was covered up, it would have been necessary to undo that work and redo certain things. So the whole of this loss wouldn't be recoverable. For example, take a recent example. Design with no flashings and non-installation of flashings. If, once that's done but before it's plastered over, that's identified, clearly it's going to be necessary to take that work back and build something else which is acceptable. So that loss wouldn't have been avoided, even if the Council did what it said should have happened. The plaintiffs need to get further than that.

ELIAS CJ:

But that's just a – that sounds in reduction of damages, doesn't it?

MR GODDARD QC:

Yes, I think that would be right, but I think what one has to ask here is whether the legislation imposed on Councils and certifiers an obligation of the kind that Your Honour Justice Tipping mentioned a while ago to provide immediate advice to the owner about problems, rather than simply decline a code compliance certificate at a later stage. And in my submission, the legislation doesn't suggest that there's a positive obligation to provide real-time advice of that kind.

TIPPING J:

Well, that's the crunch. It's not entirely self-evident that your submission is correct. Because to be effective, if there is a duty, its performance would have to be sooner rather than later.

MR GODDARD QC:

It's not self-evident. It could work either way, and there are some signals in the Act which I'll come to about what was contemplated by Parliament. For example, the two things that I'll take the Court to which I think provides some guidance on that – although it's implicit rather than explicit – that there's a provision which says building certifiers can't exclude their liability. In fact, if we just jump to that. It's section 57, terms of engagement. Subsection (2), "A building certifier shall not in the terms of engagement limit any civil liability which might arise from the issue of a building certificate or code compliance certificate by that building certifier.' Now, it would be a bit odd if liability for performance at the regulatory role under this legislation could give rise to civil liability in connection with an inspection, and it was permissible to limit that.

ELIAS CJ:

What are you suggesting that it's possible to limit?

MR GODDARD QC:

What I'm suggesting is that the legislation assumes that there are two possible triggers for civil liability here. One is the issue of a building certificate and the other is the issue of a code compliance certificate. There's no suggestion that liability could arise independently of having actually issued a certificate. We see that again, that assumption, in section –

ELIAS CJ:

But that's all the building certifier does, doesn't it?

MR GODDARD QC:

They were doing inspections in exactly the same way as the Council, so if there could be civil liability associated with inspection, and a failure to give timely information that there was a defect, then one would expect to see a prohibition on exclusion of liability for that. Councils can't limit their liability –

ELIAS CJ:

Well, they can't contract out of liability, but I don't see that that means that they're not liable for inspections. Is that what you're saying?

MR GODDARD QC:

Well, this assumes they're not liable for inspections, because otherwise you prohibit it contracting out.

ELIAS CJ:

Well, they can't – that's because the contract is about the provision of the compliance certificate or the building certificate. And it simply says you can't contract out, but I'm not sure that it has anything to do with liability for torts committed.

MR GODDARD QC:

If it was an integral part of the regulatory role to give notice in the course of inspection of defects that were identified in the course of inspection, and if a failure to do so could trigger civil liability, then one would have expected Parliament to say that certifiers were in the same position as Councils and can't contract out of liability for that. So there's a working assumption – I can't put it any higher under that – that the trigger for liability for a certifier is the actual issue of a certificate, and that's also apparent from section 90. When we look at section 90, which is on page 138 –

ELIAS CJ:

Sorry, I'm just trying to understand the submission, and I may be being slow. Are you saying that section 57 doesn't assume an independent duty in relation to care in inspection?

MR GODDARD QC:

Yes. And that's, I think, reinforced by section 90. In fact, section 90 is probably a more logical place for me to start, if I could take Your Honour to that now. It's on page 138 of the bundle.

TIPPING J:

It might be helpful to say that performance of the duty is met by declining a compliance certificate, rather than by reason of any earlier statement.

MR GODDARD QC:

That's another way of putting it. It might be much – yes, I think Your Honour is right. It's clearer.

TIPPING J:

It's easier to see it that way, I think.

MR GODDARD QC:

Yes. And that is also apparent, I think, from section 90. That also ties very nicely into that way of putting it. There was a concern that civil proceedings being brought against certifiers in tort, so that contribution would be available for certain limitation purposes, as well. So section 90 deals with civil proceedings against building certifiers and says, "Civil proceedings against building certifiers for an exercise of statutory function in issuing a building certificate or a code compliance certificate are to be brought in tort, and not in contract". So again, what are the triggers for civil liability? They are the issue of a building certificate or a code compliance certificate.

TIPPING J:

Of course, these two sections don't exactly help your argument in relation to the position of Councils, because it would be very odd if a certifier was liable but not a Council –

MR GODDARD QC:

Yes.

TIPPING J:

- for failure in the same sense.

MR GODDARD QC:

Absolutely. But, of course, I'm not suggesting that there's no tort liability. What I'm suggesting is that there's tort liability. What I'm suggesting is that there's tort liability for both Councils and certifiers in relation to the interests sought to be protected under the regulatory regime. So, for example, I say that the certifier under this regime was entitled to read *Attorney General v Carter*, although I'm getting ahistorical, I suspect, or the cases that led up to it, and say, well, I'm in exactly the same position as Mr Peter Chard issuing a safety certificate in respect of a building here. I can be liable to the people whose interest I'm supposed to be protecting, users of the building whose health and safety is harmed, and also I'm supposed to be keeping an eye out for other property, but I'm not responsible to the owner of the building for harm to their financial interests. If a certifier could read this legislation

and read *Attorney General v Carter* and conclude that that was the proper scope of their liability, it would be really odd if Councils had a wider liability.

TIPPING J:

I agree the two must march together.

MR GODDARD QC:

Yes, I say they must march together.

ELIAS CJ:

Well, they must not march differently. And I'm not – I'm still not persuaded that there is no tortious liability where there is a – there's a duty of care arising in the circumstances of the statutory obligations. That's part of the background. If there is, I don't see why carelessness in the inspection which leads to loss cannot be recovered in tort. What's the prohibition in the statute?

MR GODDARD QC:

I think this comes to really Justice Tipping's point. The question is whether when you inspect, all you're required to do is note your concerns and in the fullness of time, refuse to issue a code compliance certificate, or whether there's a duty of care to take immediate action to notify.

ELIAS CJ:

Well, maybe you are into *Stovin v Wise*. Maybe it is omission that you're talking about there.

MR GODDARD QC:

Yes, I think on this aspect it is. The complaint is of an omission to exercise the notice to rectify power, in fact, at an earlier stage.

TIPPING J:

Not necessarily the notice to rectify part, but at least speak and say, you've got a problem here. You'd better not proceed. That might be enough to satisfy the duty of care, without having to go as far as the notice to rectify. You've only got to be reasonably careful to advise the building owner that there's a problem.

MR GODDARD QC:

If there's a duty.

TIPPING J:

If there's a duty.

MR GODDARD QC:

But then when you're asking, is there a duty to take interim steps like that, one has to ask, where would that come from.

ELIAS CJ:

It doesn't have to be a statutory duty. It doesn't have to be co-extensive with the statutory duty, because what you're postulating is the very unattractive position that in the worst possible cases where there is gross negligence in inspecting but eventually the certifier says, oh, well, actually, I'm not going to give you a certificate because months ago it was quite obvious that this was never going to be able to fulfil the performance requirements, there would be no liability.

MR GODDARD QC:

Looking at the intermediate case, which I think is quite informative here, what Your Honour presupposes in saying months ago there was a problem, is that actually the inspections may have been very careful so let's consider the situation where inspections are carried out very carefully and a problem is identified but the inspector says nothing at the time, work continues. Eventually the building owner says the work is complete, I'd like a code compliance certificate please and the certifier or Council says no I'm not going to give you a code compliance certificate because there is a defect with aspect X of the building. The question then is has there been a breach of any duty by that person. So the inspections are perfectly careful but nothing is said –

TIPPING J:

That's why it's a separate –

MR GODDARD QC:

Yes, that's –

TIPPING J:

That's why –

MR GODDARD QC:

– that's Your Honour's point.

TIPPING J:

– exactly right.

MR GODDARD QC:

So there has to be a separate duty to speak before silence can cause loss.

BLANCHARD J:

Isn't it implicit? Surely you don't set up a regime under which there are inspections with a view to permitting a Council which does spot something wrong to say nothing in the meantime, knowing that building work will go on.

MR GODDARD QC:

Again –

BLANCHARD J:

It's again a very unattractive argument.

MR GODDARD QC:

Yes I can see that, the respect in which it's unattractive. That, I think, links back to the interest which is affected by work continuing. It would certainly be the subject of legitimate criticism if there was a danger to the health and safety of people working on the building site as a result of a structural defect and the Council did nothing. Plainly in the discharge of their public law responsibilities under the Act one would expect them to do something about that. Similarly if a danger was created to other property, a next door building or a road, then the Council, the certifier is charged with responsibility and powers, and that power, a magistrate's right to do something about that. But where the impact is not on an interest that the regulator is expected by the statute to protect, then it seems to me that the same doesn't follow.

BLANCHARD J:

But that comes back to your original anti-*Hamlin* argument.

MR GODDARD QC:

Yes.

McGRATH J:

Mr Goddard can I just –

TIPPING J:

Please don't think, Mr Goddard, that I'm wedded to this proposition. I just wanted to tease it out with you.

MR GODDARD QC:

Absolutely Your Honour but one takes glimmers of light where one finds them.

McGRATH J:

Mr Goddard, can I just say that it seems to me it's not necessary to read section 90 in the way you do. The words "in issuing a building certificate" may not be narrowing the scope of the words "statutory function". It may be just generally descriptive of the statutory function so that the negligence in inspection, even if it doesn't go on to lead to a building certificate being issued, may be enough. I mean I think there is a statutory interpretation that really the whole of your argument has got to cope with when you start taking some of these narrow perceptions of the meaning of a statute. Or literal perceptions if I can put it that way.

MR GODDARD QC:

I don't think the same broad reading, which I understand is an available reading of section 90, is possible in relation to 57(2) and I think when you read them together it's clear that they are meant to be coextensive. You can't limit this liability and the liabilities in tort and 57(2) is pretty clear, "Liability which might arise from the issue." So the language there, I think, is only susceptible of that narrow reading Your Honour and I think you've got to read the two together.

ANDERSON J:

Is the conduct of inspection, an act in respect of the exercise of the statutory function?

MR GODDARD QC:

That, I think, is what His Honour was putting to me and I can see that that's one way one might read 90 –

ANDERSON J:

It's the natural way to read it.

MR GODDARD QC:

– although it's not, in my submission –

ANDERSON J:

It's the natural way to read it.

MR GODDARD QC:

– the more – well no I consider it is not more natural but if one were left in doubt about which was intended, one would look at 57(2) which is about the same issue, civil liability.

McGRATH J:

Well there your argument is that this is complete. That there is no, sort of, gap in the words to cover a situation in relation to negligence that doesn't involve the issue of a certificate. I mean it's a –

MR GODDARD QC:

Because it would be very odd if they were able to limit liability in relation to a significant area of negligence liability.

TIPPING J:

Mr Goddard, I think on reflection the answer must be this, mustn't it, that if there's a duty to inspect carefully, and a failure to inspect carefully, the question is what loss does that lead to? What loss is within the scope of the duty?

MR GODDARD QC:

Once that –

TIPPING J:

It's a quantum point.

MR GODDARD QC:

– axiom, if there's a duty, is accepted then Your Honour is right but what I am raising is the more fundamental question of what this tells us about whether there's a duty in connection with inspection. But if the answer is yes there is a duty of care in relation to inspection owed to the owner of the building at that time, and if the Act is not rather saying –

TIPPING J:

Well you're accepting there is some duty.

MR GODDARD QC:

Not owed to the owner at the time of construction.

TIPPING J:

Not owed to the owner at all. Not in any shape or form.

MR GODDARD QC:

Yes.

TIPPING J:

Because the owner's interests at that stage can only be outside the scope –

MR GODDARD QC:

Yes.

TIPPING J:

– of the statutory scheme.

MR GODDARD QC:

Exactly. So you're not – and that's actually very consistent with the philosophy underpinning this legislation which is that you are not regulating for the benefit of the owner because they can contract for whatever protections they want, you are regulating for the benefit of people who don't have the same ability to control the construction process so you're regulating for people who potentially years later will come into the building and be exposed to harm from falling masonry or you're

regulating for the benefit of the neighbours who don't get to say whether you will retain experts and how much you'll pay them and what you'll ask them to do so the whole thrust of the 1991 scheme, and one has to remember, I think, the economic policy environment in which it was enacted was that regulation was for the benefit of people who did not otherwise have control over the activity and the ability to choose how much they would pay to have it done properly and that the people who were in control of the activity were responsible for spending whatever they saw fit on protection of their own interests.

TIPPING J:

So the Hamlins, under this legislation, should not have recovered?

MR GODDARD QC:

I'm just trying to remember in what order the construction happened and whether they bought – I think, yes, they bought the section before it was built and then it was constructed.

TIPPING J:

Bought the section and then built?

MR GODDARD QC:

Yes.

TIPPING J:

So they –

MR GODDARD QC:

On the purest version, yes, of this argument. The philosophy of this legislation, in my submission, was that they would pay and when one reads the report that line of thinking is very clear but –

TIPPING J:

You needn't develop it –

MR GODDARD QC:

– as the Court of Appeal has, for example, said –

TIPPING J:

– but it is the necessary corollary.

MR GODDARD QC:

Yes.

TIPPING J:

– of your argument –

MR GODDARD QC:

Yes it is.

TIPPING J:

That the Hamlins would not have succeeded.

MR GODDARD QC:

Of this strand of the argument which although it is logically prior to the others may not, in fact, be the strongest of the structural elements –

TIPPING J:

And if *Hamlin* is upheld, at least to that extent, the question is how much more ground it covers. Is that really – the two points are one, we shouldn't uphold it at all vis a vis onus.

MR GODDARD QC:

Post-'91.

TIPPING J:

Post-'91 and secondly, if we uphold it we should confine it very closely.

MR GODDARD QC:

To the integral elements of its reasoning which are, yes, confine it to the vulnerable owner-occupier for whom it's a major investment in an expertise vacuum.

McGRATH J:

Mr Goddard, to the extent that you're saying in section 57(2), that there is – it indicates there should be no liability if no certificate issues, is that what you're –

MR GODDARD QC:

That the working assumption of –

McGRATH J:

A working assumption.

MR GODDARD QC:

– the designers of the scheme was that liability –

McGRATH J:

I mean it could be just one of those omissions. That they're – I suppose we're really wondering that if there's a gap in section 57(2) we may have to be thinking in interpretation terms of how it should be filled. It might be a *Northern Milk* type of situation perhaps.

MR GODDARD QC:

Of course that's always a possibility but again I think when we look at the Act and the policy, the context in which it was made in the round Your Honour will see that this was –

McGRATH J:

It comes back to the Building Industry Commission report.

MR GODDARD QC:

A matter of design not accident.

McGRATH J:

I'm really looking forward to this Building Industry Commission report Mr Goddard.

MR GODDARD QC:

It reads, I have to foreshadow, rather absolutely and with a confidence about the workings of the market that with the benefit of hindsight and the leaky building crisis it's reasonably open not to share but of course that's not the relevant test. The

question rather is what was the legislation intended to achieve at the time it was enacted.

So continuing on through the Act, I got a little ahead of myself, but there's a register of building certifiers under section 53. Where there's a complaint regarding building certifiers that goes to the authority under 54 not to local authorities. In other words the local authority has no role in supervising building certifiers. They were its competitors to carry out this function, not its agents or delegates in any way.

Section 56 deals with the issue of building certificates by building certifiers. They must be in writing, identify the items that are the subject and the provisions of the code to which it relates. Subsection (2) deals with building certificates in relation to specific matters. Subsection (3) code compliance certificates. I've already said about may issue a code compliance certificate in the prescribed form. "If the building certifier is satisfied on reasonable grounds that the work complied with the provisions of the code on the date of certification." The ability to accept producer statements in subsection 3(a). (4) "Where a building certifier considers on reasonable grounds that particular building work does not comply with particular items of the Building Code, that certifier shall forthwith notify the territorial authority that a notice to rectify should be issued in respect of that building work." So that's what links back into the party issue notices to rectify because building certifiers don't have those, that's just the Council.

Must have insurance, subsection (5). Again, "The building certifier shall not issue a building certificate or a code compliance certificate unless a scheme of insurance… applies in respect of any insurable civil liability of the building certifier that might arise out of the issuing of the certification." This also ties into the scheme that I was talking about. What is prohibited, the issue of a building certificate. What must you have, a scheme of insurance in respect of any insurable civil liability that might arise out of the issuing of the certification. If civil liability could arise out of inspection before that then in the design of this scheme one would expect to see an obligation not to carry out any inspections unless you have approved insurance in respect of the carrying out of those inspections. So this is another signal that the civil liability trigger is a certificate and the whole scheme is designed around that.

There's some issues about conflict of issue we don't need to look at. Section 57, I have already looked at subsection (2). Subsection (3) engagement to inspect

specified items subject to certain provisions and including a requirement that the building certifier notify the territorial authority if they are not going to be able to inspect or believe there's a contravention of provisions of the code. Have directed the person carrying out the work to rectify the contravention but that person has not done so within a reasonable time. And then 3(c), again the responsibility is on the owner or the person undertaking the work to notify the territorial authority if it appears to that person that the building certifier is no longer willing or able to inspect. So responsibility –

TIPPING J:

Doesn't (3)(b)(ii) give us the answer to our earlier problem?

MR GODDARD QC:

It imposes a contractual term in the terms of engagement as between the certifier and owner.

TIPPING J:

True but –

ELIAS CJ:

But implicit.

MR GODDARD QC:

It's implicit that they should say well you should fix this and if they don't then you must tell the territorial authority and in fact I think that also appeared from 56(4), although the timing of that is perhaps –

ELIAS CJ:

Forthwith notify?

MR GODDARD QC:

Yes.

ELIAS CJ:

I mean surely this is very significant and is, in terms of a duty, an implicit duty to blow the whistle and surely it refers back to really what is expected also of the local authorities in cases where there isn't a certifier.

MR GODDARD QC:

Again in my submission one has to ask why is this requirement present and it's to protect the interest that the Act is concerned with because if you don't –

ELIAS CJ:

I understand that argument but that's not the point here.

MR GODDARD QC:

It's –

TIPPING J:

The interests that are protected by this duty may be limited but there is undoubtedly a duty to speak up.

MR GODDARD QC:

There's certainly a public law obligation at least to speak up. Yes.

ANDERSON J:

What if the building certifier is so negligent it doesn't have reasonable grounds to consider? So it just doesn't even turn his mind or her mind to it?

MR GODDARD QC:

And –

ANDERSON J:

The duty under section 56(4) is triggered by a state of mind.

MR GODDARD QC:

Yes so if they don't identify it at all –

ANDERSON J:

Which is odd, isn't it, it means that the conscientious person who doesn't notify could be liable but the absolutely careless person who doesn't even come to the view that there's something wrong can't be.

MR GODDARD QC:

Yes and that's also the case under (3)(2) because again the obligation is triggered by a belief that there's a contravention so yes, Your Honour is right. In my submission that links neatly into the provisions that assume that the civil liability, civil liability for negligence will be triggered by the issue of a certificate and not by some prior conduct.

ELIAS CJ:

Is that convenient Mr Goddard?

MR GODDARD QC:

It is Your Honour.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.15 PM

MR GODDARD QC:

I'm going to very quickly finish my review of the relevant legislation and then look at the subordinate legislation. Look at the Building Industry Commission report and then turn to *Hamlin*, look at that carefully and look at what it decided and I'm hoping in the course of this session to look at two particular aspects of *Hamlin* and whether in particular it should be extended to substantial developments where experts could be expected to be employed by the original owner and the position of investment owners. And then there are some issues specific to one or other of the appeals which I hope to turn to first thing tomorrow. I've discussed timing with my learned friends and the expectation is that I should finish by the morning adjournment tomorrow and that then leaves time within the three days allowed for the argument.

So in the legislation I can turn now to part 9, "Legal Proceedings and Miscellaneous Provisions". Page 122 of the stamped numbers. Section 64 is one of the group of provisions I referred to that enables Councils to take immediate steps to prevent harm to health and safety and harm to other property and if we look at subsection (1) of section 64, "Building deemed to be dangerous for the purpose of the Act if it's a building which in the ordinary course of events, excluding earthquakes, is likely to cause injury or death to any persons in it or person on other property or damage to any other property." So again this idea that the concern is harm to persons and damage to other property. A building is not dangerous merely because it's going to cause damage to some other part of the building and that's important because it

restricts the circumstances for intervention. And then a reference to fire hazards, which I don't think we need to look at.

Section 65, "The powers of territorial authorities in respect of dangerous or insanitary buildings." Prevent access or subsection (1)(b), "Give notice under section 71 requiring work to be done on the building to reduce or remove the danger." It is the risk to persons or the risk to other property within a time specified in the notice and a procedure for applying to the District Court for an order authorising the territorial authority to carry out the work if the building owner doesn't do it. Then there are a number of provisions on earthquake prone buildings.

Turning over to section 70 on page 126, there are measures to avert immediate danger or rectify insanitary conditions where there is immediate danger to the safety of people or immediate concerns about insanitary conditions and the ability of a territorial authority to take measures immediately.

Section 71, the provision that was referred to earlier. Notices in respect of dangerous or insanitary buildings. How one gives them. They've given to the owner or the occupier. Certain other persons.

"Territorial authority may carry out work" section 74. This deals with the situation where a person's required to do work on or in connection with a building. The person makes default in doing so. For example where a notice to rectify has been issued but it's not, the building is not dangerous or insanitary so those other earlier provisions aren't triggered. If that action is not taken the territorial authority can enter on the land, do the work, and recover the costs.

"Inspections by territorial authority", section 76, defines "inspection", 76(1) "The taking of reasonable steps to ensure that building work is being done in accordance with a building consent… (c) That buildings remain safe, sanitary and have means of escape from fire… that buildings which… are likely to be deemed dangerous or insanitary… come to the attention of the local authority." So "inspection" includes ensuring that work has been done in accordance with a consent, which is –

BLANCHARD J:

Mr Goddard, I'm sorry to interrupt, but can we go back to section 64? You may have mentioned this and perhaps I didn't keep up with you but I've just mentioned section

64(4)(b), "Deeming a building insanitary if its provisions against moisture penetration are so insufficient or in such a defective condition as to cause dampness in the building or in any adjoining building." And then the Council is given powers under section 65 to require work to be done to fix the problem. What are we to make of all that?

MR GODDARD QC:

That there is provision for ensuring if a building is sanitary because otherwise health will be harmed, sanitation is directly linked to human health so –

BLANCHARD J:

Well that's not what this says.

MR GODDARD QC:

Well that links back into the purpose provision which –

BLANCHARD J:

Well (4)(b) is very clear. "A building shall be deemed to be insanitary if its provisions against moisture penetration are so insufficient or in such a defective condition as to cause dampness in the building."

MR GODDARD QC:

Yes because it that has the potential to cause serious health effects. That's precisely why there is that power. There's no issue, Your Honour, but that external moisture entering a building raises significant issues, can raise significant issues, in relation to the health and safety of users of the building. That's –

ANDERSON J:

So the two buildings in question here are obviously insanitary in terms of the definition?

MR GODDARD QC:

That depends on the extent of the issue in each case and it's a timing case. One has to ask –

ANDERSON J:

But there was dampness behind the exterior cladding so it's penetrated the building. So it must be insanitary in terms of the definition?

MR GODDARD QC:

Yes I think Your Honour is right. And so – but that still leaves open the question for whose benefit is the power being exercised and what are the interests being protected.

ANDERSON J:

I understand that that's why my next question was going to be, "Where is this leading?"

MR GODDARD QC:

Yes. All I was seeking to draw attention too again was the organisational scheme of the legislation and the particular risks that are the focus of the Council's attention and for example if we consider issues that have no health and safety implications, that are just going to damage property, the danger that the local authority is concerned with is danger to other property so it's just part of that picture.

BLANCHARD J:

Well that's not what section 64(4)(b) appears to be dealing with.

MR GODDARD QC:

That's because, Your Honour, the whole concept of an insanitary building is one where there's a risk to health and safety. Insanitary is about sanitation, it's about human health, and so the concern that's being addressed here is the implications to human health of a lack of proper sanitation.

BLANCHARD J:

Well it's strange that in (a) and (c) it's clearly dealing with that because in (a) it's talking about a state of disrepair as to be likely to be injurious to health and (c) it's talking about potable water and that in itself is referable to health but it doesn't say that in (b).

MR GODDARD QC:

The whole –

BLANCHARD J:

And it's a deeming provision. It's treating something that wouldn't otherwise be insanitary as being insanitary.

MR GODDARD QC:

Yes but one still has to ask what does the concept of insanitary mean and it means deemed or actual.

BLANCHARD J:

I just said it was a deeming provision.

MR GODDARD QC:

And the reason for the existence of the power to intervene in relation to actual or deemed insanitary buildings is to address the risks that the legislation is directed to in section 6.

BLANCHARD J:

Well why did they bother to deem something to be insanitary?

MR GODDARD QC:

Because –

BLANCHARD J:

When it wouldn't otherwise have been insanitary?

MR GODDARD QC:

In order to create a clear basis for intervention without the need to prove –

BLANCHARD J:

Where there was no risk to health but it was being deemed insanitary.

MR GODDARD QC:

Without the need to separately address the question of whether the level of dampness created a health risk because that would create difficult boundary issues. So in my submission that's why one has a deeming provision. Here it's to enable an intervention where the risk exists without having to enquire into whether or not there is an immediate risk to health or safety because of – it's a precautionary provision is

perhaps a good way to put it. so where the risk, or the potential for a risk exists, there is a proper basis to intervene. And –

ELIAS CJ:

Why is it against the policy of the legislation to impose a duty of care so that insanitary buildings don't exist? I know you say that there's no statutory purpose but you will have to come on to say –

MR GODDARD QC:

Yes.

ELIAS CJ:

– why the common law should not build out of all of this a duty of care.

MR GODDARD QC:

And I will do that and I will do that –

ELIAS CJ:

Because it's consistent with the policy of the Act. What possible policy can there be in allowing insanitary buildings to continue?

MR GODDARD QC:

I think here we're in the – the distinction that's critical here is the distinction between the responsibility for identifying and avoiding certain types of defect and responsibility for compensating certain types of loss. Again if we look at, a classic example I think, *Attorney-General v Carter*, plainly it was the responsibility of the Maritime Safety Authority to identify safety risks in relation to the vessel but when I appeared before this Court in relation to the *Charterhall* appeal, His Honour Justice Blanchard put to me a question in relation to *Carter* which is, "What if after the certificate had been given, the owner had sailed out into the harbour and the ship had sunk and it had sunk because of a safety defect in the hull?" And plainly it would have been within the remit of the Maritime Safety inspector to identify that defect. They ought to have done so and a certificate should have been refused. But what the Court said there was that a separate question is whether it's consistent with the policy of the legislation for compensation for particular losses to be paid to particular persons and

there the owner of the vessel was not within the class of persons intended to be protected and their financial interests in the vessel were not intended to be protected.

This legislation, in my submission, is precisely the same. Of course it's addressed to those risks and of course where there are safety risks or sanitation risks those may have implications both for the people who use the building and in terms of remedial costs or loss of value for the owner. The two usually go hand in hand but what the Courts have said in *Carter* and *Stovin v Wise* is that there's a separate question, a further question, about whether it is consistent with the policy of the legislation to impose liability on the relevant regulator to compensate for particular types of loss in circumstances where the legislation has not provided for such compensation. In circumstances where the legislation cannot be read as creating a statutory duty, and this is not a statutory duty case –

ELIAS CJ:

I would not want you to think that for me citing the authority of *Carter* or the majority in *Stovin v Wise* is necessarily a complete answer which is not to doubt the result, at least in *Carter*, but whether it might – I think you need to convince us on this point.

MR GODDARD QC:

The principle, in my submission, is that there are – plainly the only reason that there could be any argument for liability here is the existence of the legislation and the role that the Council has under it. That's what creates a relationship, it's what gives rise to any involvement at all on the part of the Council in these matters. There are then basically, the Courts have said, three categories of statute. Statutes that provide for or possibly point towards –

ELIAS CJ:

I think I understand where the argument is, I'm just pointing out to you that there was a very powerful dissent in *Stovin v Wise*. It is possible that the same result in *Carter* might have been achieved without a finding that there was insufficient proximity, might have been reached as a matter of policy in terms of that legislation. But a different policy has, so far, applied in New Zealand in respect of the building legislation.

MR GODDARD QC:

Not least because the Court's discerned in the previous legislation an intention to regulate for the benefit of soundly built houses and property values and I'll come to the cases that say that.

ELIAS CJ:

Yes I understand that, yes.

MR GODDARD QC:

And – so my submission is that at the least this legislation is neutral in relation to the protection of owner interests and that's what the Court of Appeal said for example in *Rolls-Royce New Zealand v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA), but in fact my submission is that it goes further and that it is inconsistent with the statutory framework which is focussed on necessary controls and on minimising cost incurred for purposes other than those to which the legislation is directed, to imposed additional costs, additional liabilities and that's a brief foreshadowing of the argument.

I was at 76, the inspection provision and noted that that's a power which is conferred to ensure among other things, the building work's been done in accordance with the consent and that the buildings remain a safe, sanitary and have means of escape from fire, sub-section 3 a condition of every building consents that the territorial authorities authorised officers are entitled to inspect the land and the buildings. Section 80 provides that it's an offence for a person to do any building work or permit any other person to do building work otherwise than in accordance with the current building consent. So that's in the end, the responsibility of the owner and the persons carrying out the work, to ensure that the work is done in a manner that complies with the legislation.

Turning then to page 138 there's the heading "Civil Proceedings and Defences". And they're a group of provisions which the Courts said in *Hamlin* and the Court of –

ELIAS CJ:

I'm sorry, can you go back to section 76 inspection, 76(1)(c) and (d), (d) in particular, one of the purposes of inspection is to take reasonable steps to make sure that territorial authorities have brought to their attention buildings deemed to be – likely to be deemed dangerous or insanitary.

MR GODDARD QC:

Yes, absolutely. Because of –

ELIAS CJ:

Well I'm just thinking about the discussion we were having before lunch about whether there was an obligation on whoever is doing the inspection, to report conditions which would lead or are likely to lead to the building being deemed insanitary.

MR GODDARD QC:

I think that the scheme of section 76 is broadly chronological, and that (a) is focussed on the building process and what's happening there, because of course to comply with the building consent, one needs to be building in accordance with the Code, and that includes certain requirements in relation to moisture and preventing moisture ingress and (b) then deals with compliance schedules once the building is built. (c) of course applies not only to new buildings, but also to existing buildings.

ELIAS CJ:

Yes.

MR GODDARD QC:

Old ones for example. So it's a much broader power and it applies throughout the whole of the life of a building and (d) is the same.

So there's a continuing responsibility on the part of the territorial authority for carrying out appropriate inspections directed to the risk that a building is dangerous and we've seen the definition of dangerous, it involves risks to people and risks to other property, or in sanitary and the scope of the term insanitary, or deemed insanitary, as Your Honour pointed out, and addressed in 64(4) and in my submission again that ties back to human wellbeing, human health, that's in the nature of the concept of insanitary, but the deeming provision deals with the risk –

BLANCHARD J:

Leaky homes.

MR GODDARD QC:

Yes. That still of course Your Honour, opens the question of in whose interests the leaky home issue is to be regulated, what the objectives of this were and what the harms that the regulator was constructed to –

BLANCHARD J:

I understand the argument.

MR GODDARD QC:

Okay I won't go there. So section 89, civil proceedings, the same as the group of proceedings which clearly contemplate that there will be civil proceedings against Councils and certifiers in certain circumstances. And there's 89, which excludes civil proceedings for acts done in good faith against members or employees of territorial authorities but not the authorities themselves. So clearly there was no intention to prevent all civil plans against territorial authorities. Civil proceedings against building certifiers, positively provided for and provision that they are to be brought in tort and not in contract.

TIPPING J:

Is that a limitation focus? It was the explanation.

MR GODDARD QC:

My understanding is that it was addressed both the limitation and also to contribution.

TIPPING J:

Ah, yes.

MR GODDARD QC:

And 91, "Limitation defences". The Limitation Act 1950 applies, so six years from date of accrual for a claim in tort and in addition the long stock period in subsection (2) civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based, and of course building work, a broad term that encompasses not just the physical construction, but also design and the regulatory functions performed by territorial authorities and certifiers and that is elaborated on in subsection (3) which talks about when the date of act or omission in question is relevant, and what it says is, "Where civil proceedings are brought against a territorial authority, a certifying authority and the proceedings arise out of the issue of a

building consent, a building certificate, code of compliance certificate or an authority determination, the date of the act or omission is the date of the issue of the consent or certificate". So it clearly contemplates that liability can arise from the issue of a consent or certificate, it would be entirely futile to suggest that the Act intended to eliminate all liability and that's not my argument. And the long stock is provided for there.

That's why I need to look at in the Act, I'll move – just in terms of the legislation the Bill, the Building Bill also introduced section 44A into the local government Official Information and Meetings Act, if we look very quickly at that one provision, that's in volume 2 of the bundle under tab 5 and the only provision that we need to refer to in this Act which otherwise broadly speaking replicates for local authorities the Official Information regime, is section 44A, it's on page 285 of the stamped numbers in the bottom right hand corner. "A person may apply to a territorial authority for the issue, within 10 working days, of a land information memorandum," a LIM, "In relation to matters affecting any land in the district of the authority." Then subsection (2) lists a range of matters that must be dealt with in a LIM and the critical ones for the present purposes are over the page, paragraphs (d) and (e) information concerning consent certificates, notices and so forth, affecting the land or a building previously issued by the territorial authority, whether under the '91 Act or the 2004 Act or any other Act and (e), information concerning any certificate issued by a building certifier pursuant to the building legislation.

BLANCHARD J:

Why is the Building Act 2004 there in relation to a building certifier? I thought they'd gone.

MR GODDARD QC:

I'm not sure about that either Sir, I'll have to work that out. I just noticed that at the same time Your Honour did and thought, that's odd. But it may be that a position of more complex, in relation to certifiers, and I indicated in my previous answer –

BLANCHARD J:

It maybe something to do with the transitional provissions.

MR GODDARD QC:

I wondered about that too. But I can't answer that.

BLANCHARD J:

I don't think it's worth your while pursuing that.

MR GODDARD QC:

I'm going to have to get it sorted out for my own satisfaction now Sir, but I don't think it's relevant. So in any event, what we have here is a provision inserted by the same Bill that enacting the Building Act which created this new animal the LIM, which enables people with an interest in land to obtain information about consents and certificates issued by the territorial authority or a certifier. And that's part of the picture I was painting of a certification based regime.

Moving then to the Building Code, which is also – well actually it's better to use I think the new version I handed out this morning, the Building Regulations, because that's the code as it stood at the relevant time.

TIPPING J:

Are we going to find anything very illuminating in the details of this paragraph Mr Goddard?

MR GODDARD QC:

I'm going to take three minutes to find out one thing that's mildly illuminating.

TIPPING J:

Oh right. Because I've had a quick look at it and I couldn't see anything.

ELIAS CJ:

I don't know what I've done with mine.

MR GODDARD QC:

There are two things that I wanted to point out about it. The first, if we go to the Building Code, which –

ELIAS CJ:

Oh this. This volume?

TIPPING J:

Yes, this big, big piece of work.

ELIAS CJ:

Yes.

MR GODDARD QC:

In terms of proportionality the amount of paper is not proportionate to the importance of the issue.

TIPPING J:

No, that's a relief.

MR GODDARD QC:

And I'm not going to spend very long on it at all. So the regulations attached to the Building Code, that's the first schedule to it. I wanted to look first of all at, on page 7, the classified uses. That's important because the Court of Appeal has adopted a bright-line test which effectively turns on this. One of the things that one needs to do, when one seeks a building consent, is identify the intended use of the building and there are seven types of use identified in here and then the ancillary version and what effectively the Court of Appeal approved in Heath J's test appears to have said is that whether or not there is civil liability will depend on whether the intended use is disclosed in the application for consent as falling under either two or three housing or communal residential. That's what they said, is the test is whether it's a residential development. Whether that's what's disclosed in the plans and specifications which include the intended use, as I noted earlier when I was looking at the definitions.

So the first reason that's relevant, is that it's linked to the test approved by the Court of Appeal about which I am submitting should not be adopted and then, its perhaps worth noting, although this is in my report, it's on page 9, the word "adequate" is defined to mean adequate to achieve the objectives of the Building Code and then I'm going to look quickly at the three clauses which are typically in issue in a leaky building case. The first is clause B1 which is on page 16. So what's the purpose of this legislation? Again that's the question I am seeking to answer. Well, the purpose of the regulatory intervention in relation to structure, is to safeguard people from injury caused by structural failure, safeguard people from loss of amenity caused by structural behaviour and protect other property from physical damage caused by structural failure. So there's no objective of protecting the property in

question from physical damage. That's not one of the objectives of the structure LIM of the Building Code.

Turning over to B2 durability. This is really an adjectival provision. It links through to the others. The objective of this provision B2.1, page 19 is, "To ensure that a building will throughout its life continue to satisfy the other objectives of this code." So that isn't a separate stand alone requirement. And then importantly, if we turn over to 38, E2 external moisture. "The objective of this provision is to safeguard people form illness or injury that could result from external moisture entering the building." So the extent to which territorial authorities are permitted and required to impose external moisture related requirements is the extent needed to safeguard people from illness or injury which could result from external moisture.

ANDERSON J:

Why isn't it –

MR GODDARD QC:

Sorry?

ANDERSON J:

Well why isn't it to avoid the risk that they mightn't be safeguarded, where's the standard?

MR GODDARD QC:

The objective's to safeguard people, the functional requirements in 2.2, "Buildings to be constructed to provide adequate resistance to penetration by an accumulation of moisture," and then there's reference – some of these are absolute requirements, like roofs shall shed precipitated moisture, others like 2.3.2, I think pick up that risk idea Your Honour in the reference to "undue dampness". So I think Your Honour is right, it's not that they have to be perfectly dry but that one has to avoid undue dampness.

TIPPING J:

This of course is all consistent for us, for what you have to achieve rather than how you do it?

MR GODDARD QC:

Yes, that's really the main reason I wanted to go to this is that this is a functional aspiration, but it's done by reference to the objectives.

TIPPING J:

But what is so inimical to this scheme to have a common law duty lying alongside this scheme?

MR GODDARD QC:

There's nothing inconsistent with the Building Code as such, but there is an inconsistency with the scheme of the primary legislation which is intended to provide only for necessary controls and to minimise costs.

TIPPING J:

I thought you were citing this as reinforcing the health and safety and other property?

MR GODDARD QC:

Well it's identifying the objectives for which intervention is permitted under the Statute, and what that tends to suggest is that pursuing broader objectives, first of all is not warranted, and that the reason for pursuing these goals is not because of a concern about the property value of the property in question.

TIPPING J:

I understand that but my question is why should not the common law have a concern for that?

MR GODDARD QC:

And my answer is two-fold, firstly because it doesn't follow from responsibility for a task that a regulator is civilly liable for all harm that results where that task is not carefully performed, the Courts have said that many, many times. There needs to be something more. And so in a sense I'm reading the legislation to show that that something more not only is not present, but that some care has been taken to carve it out. Second, –

ELIAS CJ:

Well there doesn't have to be something more in the legislation though –

MR GODDARD QC:

No absolutely.

ELIAS CJ:

– so it just has to fit within the general principles for tortuous liability.

MR GODDARD QC:

So the legislation doesn't provide that pointer and then the question is, is there anything in the legislation which points against it –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and in my submission the answer is yes, in the emphasis on necessary controls, in the emphasis on cost minimisation and the emphasis which pervades the legislation and the policy documents on regulating only to protect those people who do not have effective control over the built environment in question. Let me come now to the building and –

ELIAS CJ:

Well that includes, though, owners you admitted.

MR GODDARD QC:

Not original owner – no original owners do have that control because they can contract for –

ELIAS CJ:

Yes.

MR GODDARD QC:

– the safeguards that they desire and subsequent owners, of commercial buildings, the Courts have said fall into that same category, they can either procure reports or pay a price that reflects the risk of defects that haven't been discovered. The question then becomes, where do subsequent owners of, for example apartments and I'm going to come to that.

So turning then to the Building Industry Commission report which was the genesis of this regulatory regime, that's in volume 10 under tab 68.

BLANCHARD J:

Mr Goddard, just for the sake of completeness, I've just noticed regulation 8, which seems to required a building certifier to report each month to the territorial authority until the building certifier has issued a code of compliance certificate or some other form of certificate, which I'd have to look up. It seems consistent with the idea that there'll be regular inspections and in the case of a building certifier, reporting on what the building certifier has found. This just goes back to the discussion before lunch.

MR GODDARD QC:

Yes absolutely. Turning then to the Building Industry Commission report, in volume 10 at tab 68, it's a lengthy report and I won't be able to go through it in great detail, but beginning for example on page 2086 of the stamped numbers, there's a summary which in various bullet points, pick up the major features including the National Building Code which is performance based, and confined to essential safeguards for the users of buildings and those directly affected by them. Each Code provision establishes the social objectives the building must satisfy, the functions required, performance criteria, the role of the BIA and territorial authorities. It talks about being the officer for building records issuing consents for construction and occupancy, signifying the building owner has provided sufficient assurance of compliance with the code provisions. Last bullet point on page, greater emphasis placed on the building owner and producers to ensure compliance with the Code. Owner required to produce evidence of compliance so the role of the territorial authority becomes more one of checking that appropriate measures and inspections have been undertaken, rather than to conduct those activities itself and provision for building certifiers.

The process that was follows is discussed in section 1 it's not necessary to look at that. Moving across to part 2, the control system which begins on page 2108 there's discussion of the present building control system. Reference on 2109 to, at the very foot of the page, to Councils adopting the New Zealand Standard Model Bylaw. At the top of 2111, concerns with the present system. This complex system of control authorities, agencies and documents, has ensured that buildings which endanger the health and safety of users are rare in New Zealand. All buildings have a potential for causing illness, injury, loss of life and damaged neighbouring property, yet the

incidence of these events through the country is very low. Concerns with the present system stem from other areas. Requirements, complex and prescriptive. A system unresponsive to technological change and inhibits innovation. Absorbs large amounts of resources by central and local Government administration. By building producers and compliance imposing heavy costs on the consumer, which was a key theme. This economic framework for reform.

Over the page, 2112, public expectation. There's a passage which both parties refer to in their submissions, 2.14 to 2.18. 2.14 begins by identifying all the expectations that people have in relation to the buildings they use. People have certain expectations of buildings they use, whether that use is public or private. Because buildings may pose a threat to their safety, health or wellbeing in social and economic terms, people seek assurance through some form of control, that all buildings meet certain essential requirements to safeguard them from risk. So there, the expectations of economic wellbeing are expressly identified. What the Commission then goes on to identify is, which are to be achieved by voluntary private arrangements and what's to be done by regulations.

So 2.15, where voluntary private arrangements by building owners in the industry cannot be relied on to provide this assurance, regulatory controls are imposed by Government to define building performance and procedures for compliance with essential user requirements to an extent that will satisfy reasonable community expectations.

In 2.16 critically, the purpose of a building control system should be to ensure that essential provisions to protect people from likely injury and illness and to safeguard their welfare will be satisfied in the construction and so forth of buildings. And if we move over then to what that was understood to mean in section 3, which begins on 2128, the scope of building control is above 3.3. It's noted in 3.4, many requirements, that is of uses, of buildings fall outside the scope of a Building Code, many others fall within it. To satisfy the objective of the control system as a whole, the New Zealand Building Code requires a rational and consistently applied set of principles, to determine whether a user requirement should be regulated or not.

3.5. The primary purpose of building control in New Zealand should be to preserve the health and safety of people. 3.6. User requirements relating to amenity can also have a place, because amenity can be closely associated with health in situations

where discomfort, smell, noise or inconvenience are accessible, frequent, they can eventually have adverse, mental and physical consequences. 3.7. Protection of the economic interests of people in getting value for money is not a justification for building controls, since value and quality can be supplied through forces of the market. 3.8 deals with the fact that building control measures limit choice and potentially increase costs to the building owner. Building controls should not prohibit owners from making their own economic decisions and then 3.9, the protection or preservation of people's own property is not, by itself, a justification for control. Insurance is an available choice and people should be able to make their own decisions, balancing the risk of loss against the cost of insurance or the cost of incorporating risk reduction measures in a building. However, the property of others, including public property and utility services, must be protected from risks that a building might pose to them. So this is the genesis of the distinction drawn in the legislation between other property and the allotment on which the building work is done. There's a conscious policy choice that protecting or preserving people's own property, the owner's own property, is not a justification for control. And it's a necessary concomitant of that, that compensating people for harm to their own property, would impose a cost through the regulatory system which is not justified, which is not a proper basis for intervention by the law.

Continuing on from there, we see in 3.14 again, application of principles. So what does this mean?

ELIAS CJ:

Is there anything that indicates what is meant by property here? In 3.9?

MR GODDARD QC:

There is a reference somewhere to the property of others. I'm trying to remember where that is. There is a paragraph somewhere which –

ELIAS CJ:

Right. I just wondered if there's anything that indicates what is the scope of para 3.9.

MR GODDARD QC:

No, I'm just remembering that there's – what I'm remembering is paragraph 1.67 on page 2103 terminology, and there there's reference to the building owner being the person who commissions and pays the producers, or any individual organisation

subsequently assigned ownership. Producers covers architects, engineers, so on and so forth. And then over the page, building users refers not only to the occupants of a building, but also visitors, people in the immediate vicinity and those engaged in its construction, maintenance or use. These may include neighbouring owners and users in the community at large. So the –

ELIAS CJ:

So what are you reading from there?

MR GODDARD QC:

Sorry, over the page on 2104, the definition of building users. So there's that dichotomy between building owners and building users, which runs through here.

ELIAS CJ:

2104?

MR GODDARD QC:

Page 2104 at the very top bullet point and that's what I was remembering was the definition of "building users" which again picks up the concept of neighbouring owners. So I understood the reference to property of others to be land and buildings which are adjacent to the building in question.

BLANCHARD J:

Does this report anywhere deal with, or engage with the things that the Courts have been doing in case law –

MR GODDARD QC:

Yes there are discussions –

BLANCHARD J:

– up to this point?

MR GODDARD QC:

– of civil liability which I'm about to take Your Honour to.

BLANCHARD J:

Right.

MR GODDARD QC:

It will be fair to say that it's not a very sophisticated discussion but there's a discussion in there. I was just turning, I think, to 3.14, the application of principles which is not a very important paragraph so I don't want to skip over that. In apply these principles to a code that will satisfy the control system objectives the Commission has determined that regulatory intervention should be limited to, firstly the provision safeguarding people's health, safety and amenity where there's insufficient assurance that voluntary arrangements such as market forces, self-regulation or self-interest will satisfy the public interest. 2, provisions protecting other people's property, including public property, that might be subject to threat by a building or building activity. So again I think, Your Honour, that ties into that concept of what the other property is. And then –

ELIAS CJ:

No it wasn't to the property, it was property, people's own property in 3.9 which – because 3.9 is quite consistent with a concern for furniture or – I'm just trying to see what you're relying on to say that concern with the building itself is not –

MR GODDARD QC:

It's the reference to people's own property that you don't regulate to protect the building owner's own property.

ELIAS CJ:

Yes but it goes on to say you can insure and you can incorporate risk reduction measures in a building not in buildings. So that looks to be a reference to things like sprinkler systems and that sort of thing.

MR GODDARD QC:

And a range of –

ELIAS CJ:

I'm just not sure that 3.9 taken by itself is as strongly supportive of your submission that the thrust of this report is not concerned with the building itself.

MR GODDARD QC:

I should perhaps, although I was –

ELIAS CJ:

You've referred to the quality issue.

MR GODDARD QC:

Issue and again I think 3.14 points in the same –

ELIAS CJ:

Yes.

MR GODDARD QC:

– direction. Obviously it's a report it's not a statute –

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

– and one has to read it as a whole for its thrust and also perhaps helpful on that, but it's not included here, would have been volume 2 which was the draft legislation prepared which points to other property having the same meaning that I took the Court to I think, from memory, as the Act. The Act is very close to the recommended legislation. There were some changes but it was very close. And then 3 in 3.14 was national interest issues, for example, accessibility issues, sustainability issues.

Then I can move, I think, to section 4 and paragraphs 4.44 and following, so that's page 2153, responsibility for building performance and quality assurance. The Commission emphasises the control of all names to clarify the responsibilities of all those involved in the building process and the performance of buildings in use. Discussion about contractual obligations. There's control tasks. 4.46, "Assurance of compliance with code requirements, which is all that the law will demand, is not a substitute for owners and producers managing their own quality assurance procedures. Any deficiencies in the arrangements that owners make for their own requirements must not result in increased control activities to ensure the Code requirements are met. Assurance of quality requirements in performance outside the scope of the code is not a public expense. The management test for the control

system is to ensure there are appropriate procedures to check code compliance without unnecessary or duplicated effort."

There's then a discussion of territorial authorities and their responsibilities and then the section –

ELIAS CJ:

So that doesn't – how does that help your argument because it's not being suggested that it goes further than the requirements of the Code.

MR GODDARD QC:

Well it will in terms of cost, for example, in relation to insurance. If local authorities are liable for losses suffered –

ELIAS CJ:

No I'm talking about the performance standards of weatherproofing.

MR GODDARD QC:

Yes and what I am - Your Honour is right. I mean there's no suggestion there should be different standards but obviously if there is liability for harm to different types of interests, again, thinking back to an example of you drive carefully to avoid collisions but how much it costs you to insure will depend on whether you're liable to third parties or whether you've tried to insure yourself as well and so the cost that a territorial authority or certifier will incur, and the cost that they are justified in passing on to everyone who builds a building, will depend on the types of loss for which they can be liable and it's consistent, in my submission, with harm to the interest they're seeking to protect to be insured and the costs of that recovered but it's inconsistent with the idea that owners make their own choices about protection of their own interests and bear those risks to suggest that in the event of negligence, failure to take reasonable steps to ensure code compliance, that harms those interests, the territorial authority will be liable which means that it needs to insure against that risk which means that it needs to recover that cost. It effectively means that, take the example of the commercial building owner. A prudent commercial building owner, who spends substantial amounts on experts to manage that risk, will also be required to pay in the fees that are charged for building consents and inspection certification, a contribution to the risk that someone else will take less care that a

territorial authority will fail to identify that and will have to compensate the owner. So there's a cost increase which is inconsistent with the policy drive of the legislation.

Turning to the liability issues. As I mentioned the Commission clearly did contemplate that there would be liability for careless performance of functions. There's a reference to that on page, if we begin at 2159, alternative procedures. It says, "To carry out its tasks of assuring compliance with the Code TA must have sufficient information." It looks at the ways that can be obtained. 4.74, "In adopting a performance based code assurance of compliance is vital." 4.75, "Need for physical inspection to be balanced against practicality and cost and availability of others qualified to do so." Discussion of qualifications of parties and this is where there's a discussion about producer statements and what's said in the first bullet point is that it's not a sufficient reliable assurance of compliance. Standing by itself so independent review is required. If a control authority on the other hand is required by statute to accept a certificate from the outside independent party, building certifiers, it cannot remain potentially liable for work covered by the certificate. Last bullet point, "There should be no statutory exemption from legal liability for subsequent damage or defect due to negligence." So that that would continue clearly contemplated by the Commission.

Over the page there's a heading, "Potential Liability Exposure." Applying these principles what are the alternative procedures for certification mean. Well statements by building producers that personal work, work carried out by them complies with the code are voluntary. Should the TA choose to accept such statements its potential legal liability remains intact. Certification by a qualified independent person, an improved certifier, must be accepted by the TA. The approved certifier assumes legal liability for any negligence that may occur in certifying compliance. Corresponding reduction of potential liability of the TA and so on. And there's a discussion of approved certifiers, their responsibilities and over at 4.85, elements of a building proposal covered by an approved certifier which proved to be faulty, but exposed that person to a claim in negligence or breach of contract by the employing owner. The essential part of the alternative procedure therefore the approved certifier has to be prepared to accept liability if a certificate is given in circumstances amounting to negligence leading to loss as a result. So yes, there is to be liability, or what's contemplated is that it will be triggered by giving a certificate, the legislation itself said. The same principle must apply if an approved certifier is not involved and a construction or occupancy consent is given by the TA in equivalent circumstances

and with the same result. However, faulty elements covered by a certificate would not lead to liability on the part of the TA because of its obligation to accept the certificate at face value.

Then 4.86 deals with the potential for liability of an approved certifier being capable to realisation, which will only work if there's insurance. And there's what proved to be an overly optimistic discussion of what insurance would be available and again just to save my friend having to go to it, perhaps over on page 2164 paragraph 4.92, when a building producer is at fault, be that the architect, engineer builder or any other member of the building team, the owner has a right of action for damages or for breach of contract. If the fault lies with the builder in common with the TA and/or the approved certifier, no reason why liability should not fall upon any one or more of them where it belongs in accordance with the general law. So no doubt that the general law was to operate in my submission, in a way that reflects and is consistent with, the policy of the legislation.

And just lastly in this lightning tour of this rather lengthy report. On page 2185, identification and allocation of control costs, reference in 6.12 to an objective of building control or form to reduce costs in the system, distribute the costs and benefits of control more equitably. This will come out in a number of ways by, there a list of various things, one of which of course is reducing the extent of regulatory controls to essential safeguards.

TIPPING J:

Would you mind just pausing Mr Goddard, I've just been pondering on this in accordance with the general law. You say that should be read in accordance, not with the law that exists at the moment, but in accordance with a shift in the law that's signalled opaquely one might observe, by this legislation.

MR GODDARD QC:

I say it means in accordance with the principles of the law of tort which are sensitive to the statutory environment in which a regulator operates. So in my submission it's a reference to the general law as in the law of tort, the law of negligence.

TIPPING J:

Why wouldn't they have said, "This is going to mean that some of the prior case law will no longer be valid?" It seems a rather extraordinary omission if they believe that the law was going to be changed in that way.

MR GODDARD QC:

I think that the expectations of designers of regulatory regimes, tend to focus on particular issues that are high on the radar screen, reports that are inevitably incomplete. There wouldn't be many reports of law reform bodies that have anticipated all the consequences that will follow from the more issues.

TIPPING J:

But if they were anticipating that there would be a narrowing of the ability to make claims in tort, surely they would have said so.

MR GODDARD QC:

I think it's fair to draw an inference from this report that they didn't consciously seek to achieve that. What I think the report shows is a conscious desire to limit the interests protected, but no reference at all to whether that had implications for the scope of civil liability in tort. That simply doesn't appear to have been considered.

McGRATH J:

Well they did to one extent didn't they, because they expressly said that where certifiers had liability, territorial authorities did not?

MR GODDARD QC:

Yes, and they dealt with –

McGRATH J:

And that may have been as far as they had in mind, going.

MR GODDARD QC:

Yes but again that leaves unresolved the question of what their expectations were in relation to the scope of civil liability, otherwise I think that if we had said to the drafters of this report, "Will the civil liability of regulators extend to the financial interest of owners in the property being built, with the result that local authorities should insure in respect of such liability and the costs of that insurance should be recovered from owners", the only answer consistent with the analytical framework

would have been "No", but they didn't tease out the implications of what they had done to that extent.

ELIAS CJ:

Look at the heading, "Protection from Financial Loss". On your argument, they weren't – none of this report is concerned with financial loss.

MR GODDARD QC:

No for other property Your Honour.

ELIAS CJ:

Oh for other property.

MR GODDARD QC:

It's financial loss, because they don't get to contract privately to manage that risk.

ANDERSON J:

I wonder whether 4.92 is really just contemplating the operation of the general law in relation to contribution in cases of joint liability.

MR GODDARD QC:

It's certainly a very general reference to the legal framework for civil liability. I think it's not more than that.

ANDERSON J:

I think that's what this is particularly concerned with. It's what's not said that I think creates the problem.

MR GODDARD QC:

Yes, exactly.

ANDERSON J:

It's something, as Justice Blanchard said, surely you would think that if this was intended to be a general limitation on a long stream of existing law, it would've said, and in consequence the Hamlin type case will no longer apply.

MR GODDARD QC:

I think the only fair reading of this is that the question of whether narrowing the scope of interests protected, had implications for the scope of civil liabilities, simply was not considered.

BLANCHARD J:

Well, they – at paragraph 4.94, are really addressing the kinds of issue that had arisen in the cases prior to, when was it, 1989, when this report came out. It's hard to read that as being a – that quotation as being a reference to anything other than the prior case law. But unless you can draw my attention to it, I don't think that they then go on to say, but it won't be as broad as that from now on.

MR GODDARD QC:

I think what 4.94 and 5 are addressed to, is the point that suing for damages after the event, is actually not a very sensible way of managing the risk of latent defects. And that prevention in advance is what a building regime should seek to achieve.

BLANCHARD J:

Well no doubt, and maybe that's a good idea, but where they don't go on to say that the result of what we're doing will be to narrow the ability to make claims, one anticipates, or one sees in this, that they don't think that's going to change. They may see there'll be less claims because there'll be better protective mechanisms in advance.

MR GODDARD QC:

Yes. The reason I say that that conclusion is intention, but what they say is that of course imposing civil liability is itself a form of regulatory intervention in this area and the fact that it can be done by Parliament or by the Courts shouldn't obscure that, it's a form of regulatory intervention which – and yet if we look back at sections 2 and 3, particularly for example 3.14, the limits on regulatory intervention were expressed in much narrower terms, it wasn't considered that it was property to intervene to protect the building owner's own property. So I think that this is one of those things where if someone had come along at the time and said, well what does this mean, it would've been consistent with whole analytical framework to say, oh no, of course it makes no sense to pay damages for harm to interests that are not protected here. Just as the building owner is responsible for managing those interests themselves, so too, any damage to that interest is a risk that they assume and they bear and it shouldn't be charged for and recovered through the regulatory process.

The other point that I would expect to have been made, because it appears in one of the appendices in the economic framework, is, and this is really dealt with on pages 2210 to 1, which is an appendix setting out the economic framework for this analysis. And the point that's made in paragraph 6 of that is, around the middle, is that increasing concerns by authorities about liability exposure has, over time, caused them to seek to impose more rigorous controls and put more resources into enforcement thereby further increasing costs to the consumer. And then down in paragraph 8, last few lines, imposing liability does not solve the basic problem that decision makers and investors not face all of the cost decisions simply creates the same type of problem elsewhere because the regulators do not bear all the costs of their decision either.

And this is the last point I wanted to make about this report which is that my learned friend suggests in his submissions that regulators will have stronger incentives to take an appropriate level of care in carrying out inspections if they face liability for negligence in carrying out those inspections but in fact that is an oversimplified and incorrect analysis of the incentives created by a liability regime on the part of a regulator. Of course where someone, for example, is building a building, take a developer, and they think they can save costs by taking shortcuts in what they spend on construction, the precaution they take, one can encourage an appropriate level of precaution, an appropriate balance to be struck by, as the economists say, internalising to them the costs of the harm they cause to others and then they balance out what they have to spend on precaution against the risk of paying compensation for it. Regulators, of course, don't bear the costs of additional precautions which they require others to take. They don't bear the costs because they can recover them from additional inspections so imposing liability on a regulator for harm to interests that are not sought to be protected, can be expected to encourage the regulator to overshoot in relation to the number of inspections. Overshoot in relation to the precaution required. Recreate the very excessive cost problems that this report is, in large measure, directed against.

TIPPING J:

I would have thought this litigation suggests that we should be aiming to overshoot rather than undershoot Mr Goddard?

MR GODDARD QC:

That wasn't the view of the reformers in 1989.

TIPPING J:

Yes but it is maybe the view of the common law.

MR GODDARD QC:

And it's, in my submission, the question of whether one should take higher levels of precaution overall is precisely a question for Parliament and exactly the sort of issues that the Building Act 2004 and subsequent amendments have sought to address. For example, by providing for licensing of building practitioners and various other forms of safeguard which were absent in 1991. But the response to that needs necessarily to be much more sophisticated, much more nuanced, than a crude imposition of civil liability on territorial authorities after the event.

TIPPING J:

Well we're told nowadays we have to be nuanced but I quite like calling a spade a spade at times Mr Goddard.

MR GODDARD QC:

There's nothing lacking in nuance in calling a spade a spade but there is something lacking in nuance in performing surgery with one Sir and that's really what I think Your Honour is –

TIPPING J:

That's quite a clever submission.

MR GODDARD QC:

I've finally said something that commanded, at least in terms of form if not substance, some measure of acquiescence and really that is – that's a complicated problem, how to regulate building in order to achieve appropriate outcomes that involve spending appropriate amounts at appropriate points in the process to produce an acceptable level of risk, recognizing we're never going to eliminate it completely. Parliament can do that and, for example, in the 2004 Act Parliament set out to do that by legislating for transmissible warranties of quality. I haven't got time to go to that but it's section 396 and following of the 2004 Act. Those are imposed on people carrying out building works. That includes builders, architects, designers. Any owner

can sue and those can't be excluded in relation to household units, so for dwellings occupied by a single –

TIPPING J:

So if we don't – if we're not with you on the high level point about *Hamlin* your next step is to say, well confine *Hamlin*?

MR GODDARD QC:

Or rather don't expand it –

TIPPING J:

Don't expand it.

MR GODDARD QC:

– would be my submission.

TIPPING J:

All right, don't expand it, and your control then is the reasonable expectation of professional supervision?

MR GODDARD QC:

Yes it's twofold. It's – I think the focus in *Hamlin*, and the reasoning in *Hamlin*, was very much on a particular class of vulnerable owners. They were vulnerable for two reasons. The first was that they were themselves of modest means and couldn't be expected to pay for their own protections and the second closely associated point, was that the building was of a kind where those protections could not easily be expected to be present.

TIPPING J:

But we have all sorts of concepts here. Modest means, type of building, we've got to have something a bit more administrable than those concepts haven't we?

MR GODDARD QC:

I think the idea, the allure of a bright-line has been something that in the law of tort has been pursued many times but never yet really latched onto. The law of tort by its very nature is concerned with matters of degree, matters of judgement, and every

time that we ask, for example, whether reasonable care has been taken in a particular situation, a content specific inquiry is required –

TIPPING J:

That's a performance issue not a scope of duty issue.

MR GODDARD QC:

Then consider, for example, questions of vulnerability and reasonable reliance which are regularly identified as factors that are relevant to proximity and therefore to the existence of a duty. Vulnerability, reasonable reliance, these are conceptual guides not precise determinants and the law has developed in a way which requires those guides to be deployed. There is no bright-line Holy Grail in the law of tort.

TIPPING J:

So your test would be the duty is a, this is, I'm hypothesising that there is a duty –

MR GODDARD QC:

To owners of some kind.

TIPPING J:

To owners of some kind.

MR GODDARD QC:

Yes I was about to move onto it.

TIPPING J:

I'm sorry. Hypothesising it, a duty is owed to owners if they place reasonable reliance on the Council.

MR GODDARD QC:

A duty is owed, yes, to vulnerable owners who can reasonably rely on the Council to protect their financial interest in the building.

TIPPING J:

They're entitled to rely on the Council.

MR GODDARD QC:

Yes and –

TIPPING J:

I just want the articulation of it clear as to, you know, precisely what the test would be in your submission.

MR GODDARD QC:

Yes. That is the submission is that it is, assuming that my primary –

TIPPING J:

Oh yes.

MR GODDARD QC:

– argument, chronologically at any rate –

TIPPING J:

Yes.

MR GODDARD QC:

– is rejected and there is a duty to owners then which owners. The answer is those owners who can be described as vulnerable and reasonably reliant on the Council to protect their financial interest in the home they occupy.

ANDERSON J:

Vulnerable in what way?

MR GODDARD QC:

Vulnerable –

ANDERSON J:

Financially or in any way?

MR GODDARD QC:

Well vulnerable in the sense identified by Justice Richardson in *Hamlin*, that is that they can't reasonably be expected to take responsibility themselves for ensuring that the building complies and can't reasonably be expected to retain experts to ensure that.

ANDERSON J:

This would apply very often in the case of apartments wouldn't it?

MR GODDARD QC:

That's where the question of the relationship between the original owner and the subsequent owners becomes very important but I think it's helpful to take it step by step so a good starting point is to say if that's the test, how will it apply, for example, to very large commercial buildings and the answer, in my submission, is easy –

ANDERSON J:

Commercial residential buildings or just commercial buildings?

MR GODDARD QC:

Just pure commercial.

ANDERSON J:

Well *Hamlin* never intended to go that far.

MR GODDARD QC:

No, no, that's my submission as well Your Honour.

ANDERSON J:

The line might be residences.

MR GODDARD QC:

And then we get to the question that was posed in *Riddell v Porteous*, what about less modest homes. What about Auckland silks glamorous cliff top home –

ANDERSON J:

They're so distracted they're very vulnerable.

MR GODDARD QC:

A wise distracted silk knows what things they're distracted from and makes provision for other more focused people to manage those aspects of their lives I think.

ANDERSON J:

Well you're a Wellington silk and from what you said earlier this morning you'd be particularly vulnerable.

MR GODDARD QC:

I'm actually in the process of building a new home at the moment and I don't see how it could be suggested that I'm reasonably reliant on the Wellington Council to ensure that my building is safely and property built for me and my family.

BLANCHARD J:

I think you better be careful there's people – unless you have an exception.

MR GODDARD QC:

I accept that here in a form that can be recorded in a transcript, and seen on the Internet forever.

BLANCHARD J:

It's too much for me.

MR GODDARD QC:

It could not be suggested, and the long list of different types of experts, some of which I didn't even know existed, that now appear on my list of people I pay and my Internet banking confirms that –

TIPPING J:

I think the violin could sort of be toned down a bit.

MR GODDARD QC:

Who would have known that there were that may sorts of engineer. But anyway, that's what someone building in my home is not quite as little as Mr Hamlins, ah it's a large family. It seems to me that to suggest that I fall within the concept of vulnerable person who can't reasonably be expected to retain and pay appropriate experts would be fanciful and for that reason it would be very odd indeed –

ANDERSON J:

Well mightn't that be a question of contributory negligence?

MR GODDARD QC:

No Sir. And the reason that I say that is that it's actually not in my interest for the Council to think that it might be exposed to liability in relation to a construction of that kind and as a result, to recover a contribution towards any insurance that it might be able to obtain. I don't want to both pay my experts to manage that risk and pay the Council to manage that risk. So it's positively contrary to my interests as someone building a home, and able to meet those costs myself, to be charged for them twice. I don't want to pay the Council to have a geotechnical engineer look at something that my geotechnical engineer has already looked at and I don't want to contribute to the Council's, whether it's insurance or sinking fund or whatever, contingency fund, in relation to responsibility, if my house, which currently has an address in one street in Northland, should gradually move down the hill until it ends up in Orangi Kaupapa Road instead. That's a risk which I can reasonably be expected to manage, and I don't want to pay for twice.

ELIAS CJ:

If you have statutory responsibilities which are owed to everybody, it may be that vulnerability of some is simply an aspect which gets taken into account in deciding whether there is a duty of care to all. In other words, that you don't go seeking out the particularly vulnerable for special facts, duties of care.

MR GODDARD QC:

Conceptually that's a possible approach. What one has to then ask is whether the class that's being identified as the beneficiary of the duty of care, can sensibly be described as a single vulnerable class that should be protected in that way. Or whether adopting the sort of everyone's in, or dwellings are in approach, which for example the Court of Appeal adopted here, results in firstly, the inclusion of certain people, an identifiable group of people to whom one couldn't sensibly say, you know, looked at in isolation, a duty was owed and second, in my submission it's important to be wary of fastening on something which might superficially appear to be a dividing line for a class that is better defined than the one identified by reference to the core criteria of vulnerability, but which actually is itself –

ELIAS CJ:

But it's your core, your core criteria, vulnerability. I'm suggesting to you the vulnerability may be, if this was a novel application, one might posit that particular class, but equally we may have moved beyond that, and the fact that there are a lot of people who are vulnerable, may support the duty being owed to everyone.

MR GODDARD QC:

I certainly –

ELIAS CJ:

Because it's the same duty. I mean it's the same statutory background.

MR GODDARD QC:

Well except that one has to ask what triggers it, and at the point where the rationale for imposing a duty is no longer applicable to a particular situation, it's rather odd to impose the duty.

ELIAS CJ:

Well I'm querying – you're querying what is the appropriate –

MR GODDARD QC:

Yes, and I'm suggesting that the conceptual determinant, the one which was invoked by the court in *Hamlin* was very much a concept of vulnerability because of inability to self protect.

ELIAS CJ:

Well it was New Zealand conditions wasn't it?

MR GODDARD QC:

It was more than just that. It was New Zealand conditions and a particular type of home. I wonder if it's worth going to *Hamilin* in the time that we have left.

ELIAS CJ:

Yes. Well sorry, have you finished with this report?

MR GODDARD QC:

Yes I had. I'd gone to the key passages in that I think.

TIPPING J:

The real thing about *Hamlin* is to invite your comment at the start, is that the – while vulnerability and so on was part of the rationale, it wasn't a limiting factor on the duty was it? If the head note writer has picked up the ratio correctly, and of course that's always a question, it –

MR GODDARD QC:

Indeed.

TIPPING J:

It is – Councils are liable to house owners and subsequent owners for defects caused and contributed to by building inspectors' negligence. The class is house owners and subsequent owners of houses, it's not vulnerable house owners.

MR GODDARD QC:

I do think one should be a little bit careful about fastening on head notes rather than –

TIPPING J:

I agree with you on that, I guarded myself against that. But can you demonstrate that the ratio is according to this vulnerability and reliance.

MR GODDARD QC:

That's what I'm about to set out to seek to do.

TIPPING J:

Oh.

ELIAS CJ:

What volume?

MR GODDARD QC:

Volume 5, the very last tab, tab 34. If one went just by head notes of course there would have to be a house not an apartment, and the result would follow, so one needs to be a little bit careful.

ELIAS CJ:

Some of the cheapest accommodation on the market –

MR GODDARD QC:

Is apartments.

ELIAS CJ:

On the market, are the – yes, apartments.

MR GODDARD QC:

Yes, the point which the Court of Appeal made.

TIPPING J:

And some of the most vulnerable owners.

ELIAS CJ:

Yes.

MR GODDARD QC:

And I am not suggesting that the purchasers of very modest apartments can be expected to carry out inspections or retain experts to a greater extent than Mr Hamlin say, but what seems to me critical here, is that the original owner building a multi-million dollar block of apartments, can be expected to take that precaution and that when the subsequent owner comes along, if they were to ask themselves, on whom am I reasonably relying to ensure that this apartment on the 30th floor of a high-rise in Auckland, stays on the 30th floor and doesn't gradually move closer to the ground over time, or quickly, that would be even worse still I suppose, the answer is going to be, well I'm sure that the developer will have had appropriate experts, I'm placing my confidence in the developer and the building company and the experts they retained. So at the time, and one of the reason for that of course –

ELIAS CJ:

Well all of them, as indeed the report you took us to suggests.

MR GODDARD QC:

Yes. And so then we get to the question, if there was no expertise vacuum at the time the building work was originally done, if there was no reason for the Council to think, it accords with the spirit of the times for us to step in and provide an expertise that's otherwise missing, then that situation which obtained at the time of construction, remains relevant for the rest of the life of the building, that vacuum wasn't present, the trigger for the Council to take responsibility in the absence of appropriate expertise wasn't present and the Council is not liable.

ANDERSON J:

So you would envisage a possible situation where the developer couldn't claim against the Council but the vulnerable people who bought from the developer could?

MR GODDARD QC:

No Your Honour, my primary submission is vulnerable people – vulnerability goes hand in hand with reasonable reliance. So vulnerable and therefore reasonably reliant on someone else, but who? And in my submission the answer to the, "Who?" in that situation, is the developer and the experts and builder that they retained to manage the risk at the time.

ANDERSON J:

Well experience has shown that you're more likely to get conscientious inspection by the Council than by the developers.

MR GODDARD QC:

What –

ANDERSON J:

That's what these cases show.

MR GODDARD QC:

The – there were certainly incentives for developers to cut corners, that's quite clear from the way things have worked out, and that is why one of the issues that arises is could you expect the developer to have appropriate experts who are ensuring that compliance and whose reputation stands behind the project in question so that, for example, in relation to a high-rise built by Mainzeal and designed by a well known firm of architects, those are factors that are relevant to the purchase of an apartment

in the building and they convey to someone considering the purchase of that apartment, in fact just looking at the building conveys that there's no reason to think that this was the sort of project devoid of external expertise, that required the Council to step in and provide it.

So that's one dimension of the absence of vulnerability. The other dimension which I don't want to lose sight of because, in my submission, it's the one which follows most naturally and directly from the decisions of the Court of Appeal in *Charterhall* and *Te Mata Properties* and follows most directly from the flag that was put up even by the President in *Hamlin* that commercial is out is, well what about investment properties. Properties that are not purchased as the home of the purchaser but as part of an investment portfolio. I've suggested that the original owner-developer of a multi-unit development can't be heard to say that they were reasonably reliant on the Council to ensure code compliance and if one considers the possibility, for example, of the Byron development having been purchased as a whole by a hotel management company and operated as an apartment hotel, it seems to me that that purchaser, the purchaser of all the apartments, would stand in the same position as the unsuccessful plaintiffs in *Te Mata Properties* who purchased a motel as a commercial property. Why then, and this is a question –

ELIAS CJ:

But we're not dealing with that case and –

MR GODDARD QC:

Well –

ELIAS CJ:

– this Court hasn't been called upon to rule upon that so you may well persuade us that that is the correct approach but you have to persuade us of that.

MR GODDARD QC:

Yes absolutely. That's what I'm saying, that I don't want to lose sight of this distinction, because it's an important one which is closest to the cases that have been decided by the Court of Appeal and it is relevant here because, for example, of the block of Blue Sky apartments that were purchased as a group of 12 by Porchester and then onsold to individual investors and my submission is going to be that just as it doesn't follow from *Hamlin* that the original owner-developer of a multi-

unit development can say, oh I was reasonably reliant on the Council to protect my financial interests in this venture, so too it follows that a subsequent purchaser of the thing as a whole, can't say that they're taking a commercial risk. They can either pay for reports or take warranties or use all the other risk management techniques that are available to a commercial purchaser and the same, in my submission, must be true, and I'll develop this in more detail, where what you have is a sophisticated commercial investor buying a few apartments in each of a range of developments, a diversified property investment portfolio. It makes no sense to say that you get a different result if you buy the whole of one development with 15 units in it, than if you buy three units in each of five developments and yet that appears to be where the Court of Appeal's test would take us.

TIPPING J:

Wasn't – in Johnson's case there were six flats, weren't there, or six units and the principle was held to apply in that case?

MR GODDARD QC:

and in fact, and my friend points out in his submissions, that was one of a number of blocks of flats built by Sydney Construction in a cul de sac which they developed as a whole so –

TIPPING J:

Well if six is all right where do you – 12 –

MR GODDARD QC:

That – what happened in *Hamlin* was that the Court, the New Zealand Courts paused and took stock of a development that had been happening in a somewhat piecemeal fashion over time with different explanations given for the nature of the loss being recovered, different approaches to limitation as a result and as I say, pause, step back and re-conceptualised the liability of local authorities in New Zealand pre-1991. And in my submission the focus has to be on the rationale that was adopted in that case and on the inter-linked way in which duty, loss and limitation were all addressed in that decision. That's really the point of departure for subsequent analysis. I think His Honour Justice Blanchard was putting exactly that to me earlier. That really if you ask what community expectations might have existed from the mid-1990s onwards, the defining point in relation to those is *Hamlin* and the explanation given there for what a local authority would, could be liable for.

So turning to *Hamlin* the first judgment is given by the President and at line 14 His Honour said, "As tried by the Judge the case raised issues of fact, having determined which he was able to dispose of the case quite simply by applying established New Zealand law." And the question of whether New Zealand law should change in the light of *Murphy* had been reserved and was being argued before the Court of Appeal.

The way in which the facts are recounted emphasises the facts many times that it was a house, a dwelling home as we see, for example, at line 28, "The plaintiff purchased the section in July 1972 from the building company which also contracted to build for him a comparatively modest one-storey suburban house. It was built quickly (a little over two months) –"

ELIAS CJ:
This is the recitation of the facts. You could –

MR GODDARD QC:
Yes I'm going to jump –

ELIAS CJ:
– really take us to the…

MR GODDARD QC:
Then, I just wanted to identify that that was, there was reference to the modest nature of the house and it seems relevant.

ELIAS CJ:
Yes but does it feature in the disposition?

MR GODDARD QC:
Especially in Justice Richardson's – yes.

ELIAS CJ:
No but in the President's to begin with?

MR GODDARD QC:

The President really deals with that by cross-referring to Justice Richardson, let me take Your Honour to it.

ELIAS CJ:

No he says that Justice Richardson sets out the New Zealand conditions and the difference – isn't that right?

MR GODDARD QC:

What –

ELIAS CJ:

Page 519.

MR GODDARD QC:

At page 519, line 80 following, the argument was that the context was the same in New Zealand therefore New Zealand law should follow *Murphy* and what His Honour said was, "I doubt whether the view that the contexts are materially the same can survive the analysis made by Justice Richardson, which I have had the advantage to see in draft, comprehensive to the point of disinterring His Honour's report and I gratefully adopt it. A main point is that, whatever may be the position in the United Kingdom, home-owners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws. Justice Casey illuminates this aspect in his judgment. The linked concepts of reliance and control have underlain New Zealand case law in this field from *Bowen* onwards."

ELIAS CJ:

Is that all because that doesn't refer to –

MR GODDARD QC:

From the President.

ELIAS CJ:

Yes. All right. Well that doesn't refer to the modesty bit of –

MR GODDARD QC:

No it refers to the discussion of the context and the context brings that into play.

ELIAS CJ:

All right.

MR GODDARD QC:

There's a, at line 36 and following, the reference to the need, "To deal with duty and limitation questions together, rather than in separate compartments, as they are inseverably linked," and that is important.

There's a discussion of *Junior Books* over the page on 520 and at line 39 His Honour interpolates, "That in this Court we have not had to consider a similar case. Following the general New Zealand approach to duty of care questions, restated in *South Pacific*… it would be open to us to hold that in such a case of industrial construction the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded." As you see in the words of Lord Goff, "There's no assumption of responsibility by the subcontractor… to the building owner, the parties having so structured their relationship that it is inconsistent with any assumption of responsibility." His Honour continues on, describes the English law. Explains that at 522 that the upheavals and high levels precedent in the UK have had no counterpart in New Zealand. The case law has been reasonably constant. Since *Bowen* in 1976 accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities.

BLANCHARD J:

He's not confining it there, they're modest houses.

MR GODDARD QC:

There's no express statement that he's talking about houses, modern houses, no Sir.

TIPPING J:

Or vulnerable owner?

MR GODDARD QC:

No, he's talking – he's using house as the limiting criteria.

TIPPING J:

Well the trouble is here we've got house, we've got residents, we've got tort homeowners, we've got all sorts of –

ELIAS CJ:

And you've got reference to *South Pacific* as the approach to be adopted?

MR GODDARD QC:

Yes. Which I identifies among other things the relevance of vulnerability and reasonable reliance.

TIPPING J:

Well I just think vulnerability complicates it. If there's reasonable reliance, surely that ought to be enough and that will generally be more likely to be so if the person is vulnerable.

MR GODDARD QC:

Yes. But of course in an area where one is talking not about actual reliance, but deemed reliance, general reliance, community reliance. Really again all you're saying is "What are the interests that the public could if asked, reasonably expect the local authority to protect and who could reasonably expect that those interests would be protected?"

The only other passage I want to note in the President's judgment is on page 522 at line 42 and following. "As Ms French argued, in a house-building case," again my reference to house, "where the basic defect is in the foundations, classifying the damage as economic, assists the conclusion that time runs from the date when a significant defect in the foundations is or ought to have been discovered." And ought to have been, which I'll have to come back to tomorrow. "Until then the defect is latent and the market value of the property has not been diminished by it. Some of the decisions already cited point to a wider scope for the test of date of discovery or reasonable discoverability," not addressed here and this Court has since dealt with that in *Murray and Morel.* And then there's a discussion really of the legitimacy of New Zealand striking out on its own in this area and the conclusion on the limitation issue.

We then have just time to deal with I think the judgment of Justice Richardson, and the context passage which the President adopted Your Honour. "A major question raised by this appeal is whether… this Court should depart from what has been the settled law in this country for nearly 20 years in relation to the liability of local authorities for latent defects caused or contributed to by the careless acts and omissions of building inspectors," and it should be "in carrying out inspection of houses under construction". "The argument is that our case law is out of line with English and Privy Council (from Hong Kong) authority. Legislation must be seen in its social setting and the common law of New Zealand should reflect the kind of society we are and meet the needs of our society." It's obviously so, and perhaps the point can be made, it should meet the needs of the society and their reasonable expectations as those evolve. "Important to consider the social and governmental context in which during the 1970s and 1980s the Courts of New Zealand consistently upheld duties of care on the part of local authorities towards house owners in relation to building inspections. There were six distinctive and longstanding features of the New Zealand housing scene at the time." So these are being identified, Your Honour, as the key aspects of context which justify New Zealand having a different set of rules form the United Kingdom. High proportion of owner-occupied housing.

"The second was that much housing construction, including low cost housing, was undertaken by small-scale cottage builders for individual purchasers… New Zealand house not a factory produced article, but was custom built to suit the site and the owner." Emphasises how small most firms in the building industry are. Third, "Nature and extent of governmental support for private home building and home ownership. Fourth, the surge in house building, construction and the buoyant economy of the '50s and '60s, and fifth, wider central and local government support for private home building. Justice Heath at first instance in *Sunset* identified these really as historical factors.

It is, though, I think helpful, at the top of 525 to note a discussion about the review of planning and building controls published in 1983. Noted in para 10.10, "That building inspectors filled a significant advisory and educative role spending 10 percent to 60 percent (depending on location) of their time in that way." And that's one of the things that the review, of course, in '91 sought to stop. The review noted, this is paragraph 6.12 or 13 I think that expressly dealt with that and said that shouldn't

continue, review also noted that while health and safety seemed to be the prime considerations, it was clear that health had included comfort or convenience and safety had moved into the area of good standards of workmanship or durability or sound construction. High social interest and standards and amenities reflected in terms of reference to the commission.

The sixth, and this is really where Justice Richardson sums up the implications of the preceding paragraphs. "It's never been a common practice for new house buyers, including those contracting with builders for construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building. In the low cost housing field, the ordinarily inexperienced owner was contracting with a cottage builder on fairly standard plans amended to suit the owner's wishes and pocket. That contracting was within the framework of encouragement and often financial support from the State and of the protection provided by local body controls and adherence to the standard bylaws. It accorded with the spirit of the times for local authorities to provide a degree of expert oversight rather than expect every small owner to take full responsibility and engage an expert adviser." So what –

ELIAS CJ:

That's the historic position as Justice Heath says, that's how the climate developed in New Zealand of reliance.

MR GODDARD QC:

And why it was reasonable to look to the local authority to provide a degree of expert oversight?

ELIAS CJ:

Yes.

MR GODDARD QC:

And therefore in an environment where that's not reasonable, one has to ask what consequences follow.

ELIAS CJ:

Well I'm not sure about that. You'll have to go on and show me where it said that those – that that is more than background.

MR GODDARD QC:

If we come then to, so His Honour sums up at 28 and following, "Bylaws and the question of whether it was just and equitable for the local authority to be under a duty of care to the owner (and successors in title) in discharging responsibilities in relation to the inspection of houses under construction, have to be considered against that background which was special to New Zealand of the times."

ELIAS CJ:

The times?

MR GODDARD QC:

Yes. And the common law of course has to adapt in a way which is consistent with the times. So one can't simply lock-in a rule for all time if circumstances change.

ELIAS CJ:

But Justice Richardson went on to say, "With that background it was for Parliament to make the change, because those were the expectations that had developed in New Zealand and which the Courts had responded to and if there was to be change in law it should come from Parliament."

MR GODDARD QC:

And broadly that's what His Honour said, but let me just go to those paragraphs and – so line 40, as noted in the 1983 review, building inspectors accepted that as significant advisory and educative role. Scope of local body involvement extended beyond pure health and safety concerns to consideration of comfort and convenience and standards of workmanship and sound construction, not surprising in the social climate which encouraged State support for home building and home ownership.

In *Stieller* Justice McMullin considered the counterparts of those provisions in the Local Government Act were wide enough to cover the construction of soundly built houses and result in safeguarding the persons who might occupy those houses against the risk of acquiring a sub-standard residence, he observed that the construction of houses with good materials and in a workmanlike manner, was a matter within the Council's control. Both the Council and residents in its district

benefitted from such regulations, which made for the economic and social wellbeing of the community and the creation of a pleasant environment. To the same effect President, Justice Cooke and Justice Brown, considered the local authorities, whether their functions were multiple or special, were concerned generally with matters going well beyond the range of personal health and safety, the preservation of community body and living standards, property values and amenities was part of their proper sphere.

So that's an explanation of the point that obtained, historically and at the time that this house was built, because, of course Your Honour, we're talking about a house that was built in 1972 so what the Court is doing is actually looking back some 20 years to ask what the position was and the environment in which this house was built.

Then the Court comes to the Building Act 1991 which introduced a new perspective on building and planning controls. It talks about, at line 18, the legislation being performance oriented and intended to promote greater efficiencies. Owners can choose between territorial authorities and private certifiers with competitive charging. Importantly, and this is the point, "Nothing in the legislation to preclude private damages claims in accordance with the existing New Zealand law for losses arising out of the negligent exercise of building control functions. On the contrary that may properly be regarded as part of the accountability at which the legislation is directed." Reference to section 91. Reference to paragraphs from the Building Industry Commission legislation and at the foot of page 527, "The point of all this is that over a period of 10 years building controls were the subject of detailed consideration, quite dramatic changes in approach were taken reflecting a particular economic and philosophical perspective, but without questioning the duty of care which the New Zealand Courts have required of local authorities in this field. While it may be going too far to characterize the Building Act 1991 as a ringing legislative endorsement of the approach of the New Zealand Courts over the last 20 years, there is nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in this field.

Decisions of the House of Lords although afforded great respect are not binding on this Court. Ultimately we have to follow the course which in our judgment best meets the needs of this society. Those distinctive social circumstances must be taken to have influenced the New Zealand Courts to require of local authorities a duty of care

to homeowners in issuing building permits and inspecting houses under construction for compliance with the bylaws. In none of the more than 20 such decided cases has any New Zealand Judge expressed any reservations concerning the imposition of a duty of care on local authorities. After a detailed series of studies…the Building Industry Commission recommended major changes…didn't question the responsibility of territorial authorities to homeowners for the –"

ELIAS CJ:

But you're jumping over some of these statements. Really isn't Justice Richardson saying that it's a social value judgment that the Courts have arrived at in New Zealand on the basis of our history and that that social judgment has been not departed from, despite the legislative incursions, or changes, and that it's really a matter for Parliament because there are other policy reasons why it shouldn't be disturbed by the Courts?

MR GODDARD QC:

Sorry Your Honour I wasn't intending to jump over anything, I was just coming to that passage which comes immediately below there at line 11 and following. "Against this background I consider that any change in the law should come from Parliament not from the Courts." And then – but Your Honour –

ELIAS CJ:

Yes but it's the social value judgment that is explained, how it was arrived at, but it still applies and it doesn't seem, in this reasoning, to attach simply to humble dwellings. It's a wider expectation.

MR GODDARD QC:

I think Your Honour that that was an issue which His Honour didn't need to address in the context of a case about a modest home and wasn't seeking to. Rather, in my submission, His Honour was identifying that the very factors which had led to the imposition of a duty of care, were directly applicable to Mr Hamlin building a modest house in 1972.

BLANCHARD J:

Look at what goes on in that judgment between lines 25 and 34 where he's clearly not just talking about low cost homes. He's talking about all house builders. "Relationships and fee structures developed under the building control regime

provided for under the Building Act 1991 would have to change if it were decided there should be no remedy in tort by house owners against local authorities. Insurance practices would have to change. No doubt owners having a house built and purchasers of existing homes could at a price obtain engineering surveys and insurance protection against the risk of subsidence and other design of construction defects. Or they could bargain fro an indemnity from the builder/vendor. But, this would call for a major attitudinal change which Parliament would need to weigh."

MR GODDARD QC:

And – yes Your Honour that's a very important passage and I say two things about that. The first is that in fact a major attitudinal shift was precisely what the 1991 legislation did contemplate in its greater emphasis on owners taking responsibility for the quality and value of the homes, sorry the buildings –

BLANCHARD J:

Well Justice Richardson had clearly read the whole of the Building Act, that's apparent from page 526 and I know he was the sort of Judge who would have read that from cover to cover anyway and he didn't see it.

ELIAS CJ:

Because it's not there. The change – the change of gears isn't there.

MR GODDARD QC:

In my submission the change of gears is there, and there are passages which make that reasonably clear but I've not obviously persuaded Your Honour at least of that.

ELIAS CJ:

Well you're right there's a change of emphasis and a change of approach to the statutory obligations but the liability in negligence is not –

MR GODDARD QC:

And if we look for example at cases like *Stieller* where liability was imposed for defective weatherboards with no health and safety consequence, very hard to see how that could be something which a local authority could be liable for post 1991.

BLANCHARD J:

Well Richardson J refers to *Stieller* on page 525, without any indication that it's not good law.

MR GODDARD QC:

Well His Honour of course concerned with a case that –

ELIAS CJ:

Wonky foundations.

MR GODDARD QC:

Was – yeah wonky foundations, so there were those - and a case that arose under a regime that had that broader compass, His Honour had just noted that earlier, but I said there were two points about that. The first was to say that I think a major attitudinal shift was called for, but the other one, which I would emphasise, is that again what's clear is that what Justice Richardson has in mind here, is the sort of house where the person having it built could not be expected to obtain engineering surveys because that would call for a major attitudinal shift and when we come for example, to substantial multi-unit developments, then we're clearly outside the sort of case that His Honour was talking about, because one could reasonable expect engineering surveys and other appropriate expert input to be procured. No attitudinal shift would be required for the builder, for example, of a 20 storey apartment block, to get engineering surveys.

So to say a Council is not liable for substantial buildings that incorporate residential dwellings, is perfectly consistent with this line of analysis and is not precluded in any way by His Honour's comments about what sort of shift would be involved for people building homes where you couldn't expect engineering surveys, and people don't get them. Again, the less modest home, what His Honour's saying is, perhaps people could do that, but that would call for a major attitudinal shift, when in my submission not in relation to less modest homes. There's no evidence to that effect before the *Hamlin* Court, no evidence in these proceedings to that effect and no reason to assume it. It's not something that Judges can safely make assumptions about in the absence of evidence, and nor was His Honour doing so. I've gone over time, I'm conscious Your Honour today.

ELIAS CJ:

Did you want to – was there anything you wanted to particularly draw our attention to in the rest of the judgments in *Hamlin*?

MR GODDARD QC:

There are passages which I think which emphasise that the circumstances that the Court had in mind and which were affecting its decision were more modest homes where experts weren't retained for example, in the decision of Justice Casey as well as the many references to dwelling houses, there is in page 530 at line 14 the reference to the circumstances of home buyers, "Support a conclusion of reliance of the local body's inspectors doing their job properly." And 25 and following, deciding claims for negligence, New Zealand Judges be well aware of obtaining surveyor's or engineer's reports by house purchasers is virtually unknown in this country and that certainly –

BLANCHARD J:

That's still true isn't it?

MR GODDARD QC:

The evidence on that, which I haven't got time to go now, is a much more complex picture today.

BLANCHARD J:

For purchasers –

MR GODDARD QC:

A number of pre-purchase inspections were obtained by plaintiffs in this case, for example, so to the extent that it's a reliable random sample, there were pre-purchase inspections here.

McGRATH J:

Are you saying the evidence is to what the position was in relation to these purchasers, or in relation to the community generally?

MR GODDARD QC:

There is some of both, Your Honour. But otherwise, just to respond to Your Honour the Chief Justice's question, no there's nothing else in here in the Court of Appeal decision, which specifically picks up the modest home concept.

TIPPING J:

I think the head note's not too bad Mr Goddard.

MR GODDARD QC:

Well I think the head note as is often the case, involves a measure of over simplification Your Honour, but I will say that to the extent that the head note's not bad, and one of the reasons it's not bad, is that it's using house at rather than for example, building, to convey the idea of a standalone building of a particular level of complexity and is in doing so, drawing on an assumption that that house is also the purchaser's home.

TIPPING J:

Yes, but no one would suggest that the Court of Appeal in *Hamlin* had in mind a 50-storey block of apartments, the question is whether that is a necessary extension if you like, from the underlying reasoning.

MR GODDARD QC:

And – that's precisely right Your Honour and my submission is the reasoning is tied to two things. It's tied to reasonable expectations of expert input at the time of construction and it's tied to the extent to which the purchaser can reasonably rely on the Council rather than taking full responsibility, which doesn't always mean being able to identify the existence of a problem, but basically mean be expected to take the risk of a problem, and that's very important when we come to investor owners. I've trespassed on the Court's time substantially already.

ELIAS CJ:

No, thank you, that's very helpful.

COURT ADJOURNS:4.13 PM

COURT RESUMES ON TUESDAY 9 NOVEMBER 2010 AT 10.00 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour, I'm going to begin this morning by looking at whether the *Hamlin* duty extends to investor owners of residential buildings, that's a particularly important boundary issue raised by these appeals. What I hope then to do is to quickly address issues 9, 10 and 11 on my road map. I think either directly or as a result of questions from the Court, the others have been address. And then I'll finish by responding briefly to the Court's questions about evidence on insurance and on reliance.

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

So, investor owners. *Hamlin* does not in my submission, decide that there is a duty in those circumstances and really picking up Your Honour, on Justice Tipping's comment about the head note yesterday, in my submission there is one respect in which it could have been improved and that is that rather than saying, it was settled law that Councils were liable to house owners, what it should have said was, homeowners, and that is a difference of some considerable importance. There's no, if we look at the history of the litigation in this area, which played an important part in the Court's decision in *Hamlin*, there's no reported case for anyone other than a homeowner recovered pre-*Hamlin*. I'm aware of one unreported decision of Justice Fraser in 1992, *Otago Cheese Company* where a cheese company recovered against a Council. There the duty of care was assumed it wasn't the subject of any analysis. There's certainly no case where a sophisticated investor in residential property has succeeded against a Council.

There's no history of such claims and if we turn back to *Hamlin* and I must have been tired at the end of yesterday when Your Honour asked me if there was anything else I wanted to take the Court to, because there are just a couple of things I should highlight. That was in volume 5 of the authorities under tab 34. Critical passages in Their Honours' decision refer to homeowners rather than house owners and in my submission that's not an accident against the historical backdrop and against the context described by the Court. If we turn first to the judgment of the President at page 519, line 14, just after His Honour adopts Justice Richardson's description of

the context which gave rise to liability in New Zealand, His Honour says, "A main point is that whatever may be the position in the United Kingdom, homeowners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws."

The same theme comes up on Justice Richardson's judgment, in particular from the foot of page 527 onwards, after looking at the historical context, a context which is squarely focussed on government support for increased homeownership, a social policy setting in which a broader class of New Zealanders became owners of their own homes, than is the case in other jurisdictions. So at the foot of 527, we have –

TIPPING J:

But it's not as pure as that, because in Justice Richardson's third paragraph, he talks about house owners.

MR GODDARD QC:

Yes it's not a uniform usage, I'm not suggesting that Your Honour, the terms both appear, but that's why I said, "In some key passages the focus is sharply on homeowners," and the history is very much one consumer homeowners, and just pausing there, that's not entirely surprising because homeowners obviously present a paradigm of people who are making a relatively large investment compared with their other resources, people who have less expertise at their disposal, than to take at the other end of the spectrum, say, Housing New Zealand, which I think currently for example owns some 69,000 homes, and I don't know that one would say that if they are adding to that by buying a multi-unit building, Housing New Zealand, Crown Entity reasonably relies on the local authority, to ensure that it complies with the Building Code rather than relying on their own expertise and resources The Crown's ability to manage those risks was a central feature of the very careful judgment of Justice Asher in the *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC Akl, CIV-2007-404-4090, 25 June 2009 decision. Similarly some flippant comments were being made yesterday about the ponding outside this very beautiful Court and your beautiful lakes and it's –

ELIAS CJ:

I don't remember that, I must have been reading something.

MR GODDARD QC:

No I'm sorry, it was after Court there was a bit of a discussion.

ELIAS CJ:

It's a safety feature apparently. People don't like to get their feet wet, that's what we were told by the designer.

MR GODDARD QC:

It's very beautiful, but of course it then raises the question of ensuring that it stays on the outside rather than becoming a health and safety risk to Your Honours in the long hours that you spend in your chambers, and I think one can assume that the Crown retained appropriate experts to ensure that, one would certainly hope so, and wasn't reliant on the Wellington City Council.

BLANCHARD J:

It'd have to run a fair way up hill too.

MR GODDARD QC:

It's called "wicking" Your Honour and I think it can happen. So again, coming back to Justice Richardson's summary of what the New Zealand Courts had required, at the very foot of 527, last three lines, ultimate – "Decisions of the House of Lords although afforded great respect are not binding," of course. "Ultimately we have to follow the course, which in our judgment best meets the needs of this society. Those distinctive social circumstances must be taken to have influenced the New Zealand Courts to require of local authorities a duty of care to homeowners in issuing building permits and inspecting houses under construction for compliance with the bylaws." Reference to the –

McGRATH J:

The only point you're making in the home, house distinction, is personal occupation is it?

MR GODDARD QC:

Yes. I'm suggesting, what I'm really coming to here is that a large part of the Court of Appeal's decision was directed to where to draw the line between the cases where *Hamlin* applies and commercial buildings where that Court had held in two recent decisions that it didn't apply, and that line was drawn by the Court of Appeal

on the basis of the intended use of the building as disclosed in the plans and specifications provided to the Council. If it's disclosed as residential, a duty attaches regardless of who purchases, regardless of who owns it. As I read that judgment –

McGRATH J:

But I think all I'm wanting to establish is you're not trying to say an apartment which an owner occupies, is not a home?

MR GODDARD QC:

Oh no Your Honour, absolutely not.

McGRATH J:

No, well that's fine, that's all I want to clarify.

MR GODDARD QC:

So this is a separate argument from the one about expertise in the initial construction of the building, I'm now looking at whether the characteristics of the plaintiff are relevant to the duty of care as well as the characteristics of the building. And my submission is that both are relevant, that the nature of the investment, that if *Hamlin* is good law then it needs to be understood in the context of the line of cases which it was endorsing, and in the light of the social context which influenced those cases and the reasoning of the Court and that was in turn strongly influenced by the special factors that apply to homeowners in New Zealand. But as Your Honour the Chief Justice pointed out to me, some of the most modest homes available in New Zealand are apartments and it would be odd if a test that was informed by considerations of vulnerability, significance of investment didn't apply to apartments that are homes as well as stand alone houses that are homes.

So His Honour Justice Richardson, went onto talk about the decided cases, then said after a detailed series of studies over a decade, "The Building Industry Commission recommended major changes in building trials, but did not question the responsibility of territorial authorities to homeowners for the carelessness of their building inspectors." There are a couple more scattered references to homes through the middle of the page, but again when we ask why Justice Richardson after His Honour's review of the 1991 legislation and reports felt that it was doing, considered it was doing, that's apparent at 38 and following. "While the Building Act 1991 adopts more of a free market approach than the preceding legislation did, it

continues to reflect the premise that local authorities owe duties of care to homeowners in issuing permits and inspecting buildings." And also perhaps in terms of the community reliance point, just back up the page at line 30, "No doubt owners having a house built and purchasers of existing homes could at a price obtain engineering surveys and insurance protection against the risk of subsidence and other design or construction defects. Or they could bargain for an indemnity from the builder-vendor, but this would call for a major attitudinal shift which Parliament would need to weigh," and again that's very much in the context of homes and that same theme recurs on page 530 in the judgment of Justice Casey at line 13, "With respect," His Honour says, "The circumstances of home buyers in New Zealand include factors going well beyond those described in *Murphy v Brentwood District Council* and support a conclusion of reliance on the local bodies' inspectors doing their job properly."

Now of course the Court didn't have squarely on its radar screen the question of investor-owners because Mr Hamlin was not one. It hadn't arisen in any of the earlier cases, there was no line of authorities addressing it and either finding or excluding liability in those circumstances and that, I think, explains the use of home and house interchangeably in places, but in my submission there's no doubt about that. The circumstances which gave birth to this duty of care in New Zealand were very focused on homeowners, owners in particular of modest homes as homeownership expanded in New Zealand and the particular circumstances that they faced. There's no doubt but that was the paradigm that Their Honours had in mind in discussing the history and in confirming that it remained fair, just and reasonable to impose a duty of care to homeowners. That was the social value judgment that was referred to by Justice Richardson on page 528 at line 10, where His Honour said, "The Building Act 1991 contains no limitations on what has now been for over 18 years, the law of New Zealand in this field, embodying what is essentially a social value Judgment." And that was of course the paragraph that referred to the authorities finding a duty of care to homeowners.

So there is nothing in the reasoning in *Hamlin* to suggest that the *Hamlin* Courts, the Court of Appeal or the Privy Council, considered that it would be fair, just and reasonable for a Council to owe a duty of care to a investor-owner of a residential building and the rationale for development of liability of Councils in New Zealand was against a much narrower background, a much narrower paradigm which informed the reasoning of these Courts. And picking up Your Honour's question, that the history is

one thing but what then is the practice? Going forward, founded on that, the practice that is referred to, changing which would require a major attitudinal shift is the practice of homeowners, homebuyers in not obtaining pre-purchase reports. It's implicit that the Court considered that was a reasonable choice for them to make and that it was fair, just and reasonable to shift the resulting financial risk to the Council and its ratepayers. But there's nothing to suggest that it's fair, just and reasonable to shift an investment risk from people who elect to invest in residential property rather than shares or other investment products to a Council and its ratepayers. The considerations are very different.

ELIAS CJ:

Well, yes the consideration is different because the Council has no role in respect of purchase of shares.

MR GODDARD QC:

Of course there – at one level Your Honour that's right.

ELIAS CJ:

And the statute, the statute after all is concerned with residential use or it's concerned with use. So is it such a step forward to say that "uses the" is the line?

MR GODDARD QC:

Yes I – it is. I need to develop that in a few steps I think starting with the purely commercial case and then addressing Your Honour's question which was, why do I say that no duty of care is owed there, and then in the light of those factors addressing the question of where the dividing line lies, but I think it's helpful to establish the two points on the spectrum that, on this argument, exist in order to then turns one's attention to how one would draw a principled and workable line between them. So on this approach I'd start by saying, on the basis of *Hamlin* what is clearly in, is homeowners. Now I'm going to look at the position of commercial buildings and then I'm going to look at the line and ask what it is that makes a difference.

First, and not least, there's a very different picture in terms of the case law on commercial buildings, apart from the one unreported *Cheese Company* case, there is no long history of successful recovery by commercial building owners against local authorities in New Zealand.

Second, *Hamlin*, who on any view certainly focused on residential dwellings and the president expressly identifies the possibility of different results in relation to commercial buildings, a point that was also made in His Honour's impossible distinction article.

Third, a large part of the reasoning in *Hamlin* is addressed to explaining why the common law of New Zealand should appropriately develop in a different direction from the common law of England and one might add, Australia in this field, but in particular England what was focused on. And although some differences on the housing scene are identified, there are no factors suggesting a different result in relation to commercial buildings in New Zealand as compared with the United Kingdom or Australia, there's no reason to think that New Zealand commercial entities, building an office block or a large warehouse are any less well placed to make decisions about the risks they will accept, the steps they'll take to manage those risks, how much they're willing to invest in doing so. And that really leads, I think, to the obvious point that an owner-developer looking to build an office block has a range of options open to them which they can reasonably be expected to take to manage the risk of building defects. They can retain experts with appropriate qualifications and insurance backing or substantial companies, they can retain an experienced and substantial building company which both has the ability to build to an appropriate quality and the substance to stand behind any claims that may be made against them. One would expect to pay more to a company of that kind than to a single project, fly by night may be a little unkind, but single project thinly capitalised $1 company and that is a choice that an owner can make, if they choose to run with the experienced company – the experts, the other arrangements that they can make to manage those risks, then it's on those experts, much more sophisticated, much better paid than any staff a Council can be expected to employ, that the owner reasonably relies. And the prudent owner building a commercial office block doesn't want to pay twice for that expertise. They wouldn't, in my submission, thank the Courts for saying well the Council owes a duty of care and it should also satisfy itself, for example in relation to the geotechnical issues, with the results – similar to what I was saying about my house yesterday I think, but in a much more sophisticated level, with the result that first you pay your own engineer to advise on those and then the Council says well – so that we can demonstrate that we've taken appropriate care, we will retain an external expert and you will have to meet the reasonable costs of that.

What if an original owner of a commercial building elects not to spend money on managing those risks, decides to cut back? Well in my submission that's a commercial choice they make, it involves, like any commercial choice, risks and the fact that they've made that choice doesn't mean that it's fair, just and reasonable to shift the risk of loss and value of that commercial building caused by any defects that might materialise to the Council and its ratepayers.

ELIAS CJ:

Mr Goddard, I wonder whether you really need to develop this in any great detail because it's not the case we have.

MR GODDARD QC:

I don't –

ELIAS CJ:

I know that the Court of Appeal did refer to that distinction because it was purporting to follow its earlier decisions but I'm not sure that – that is not the case that we have before us and surely the most we could say is that there aren't any cases binding on us in which a duty of care has been recognised.

MR GODDARD QC:

Well I'm inviting Your Honour –

ELIAS CJ:

I know you are, but I'm just asking you why we should, when the case is not before us?

MR GODDARD QC:

Because what Your Honour does have before you, what the Court does have before it, is the question of whether a duty of care is owed to investor-owners –

ELIAS CJ:

Yes.

MR GODDARD QC:

And an integral part of that argument is that substantial investor-owners are not in any relevant respect distinguishable from commercial owners, that – to take an

example that I put to the Court of Appeal in argument, if an investor looking to invest in property is trying to decide whether to buy a building on Thorndon Quay with a few shops in the bottom and a few offices above or a block of a few apartments on Hobson Street running, backing onto it, the decision is the same. There is no reason for the Council to owe a different duty to that investor, making a decision about which type of property to buy, depending purely on its use. For that investor the nature of the decision is exactly the same. For that investor the nature of the loss, if there's a defect, is exactly the same and in my submission there is no distinction relevant to the imposition of a duty of care between those two purchasers. If that's right then the bright-line test doesn't work.

TIPPING J:

But your argument presupposes that there's no duty in commercial context doesn't it which I think is what the Chief Justice is saying, well can we work from that premise securely?

MR GODDARD QC:

And that's why I'm addressing the argument is because I'm trying, I'm seeking to satisfy the Court, first of all that that's a reasonable premise and then that you can work from it.

TIPPING J:

But you might have a very tiny little commercial venture and you might have a very big residential venture. I mean there are problems all over the place Mr Goddard, I mean –

MR GODDARD QC:

If Your Honour were to find that the overall test is one of vulnerability and reasonable reliance which had to be applied in a contextual way, then that also would, in my submission, be a more principled and appropriate line than that which has been drawn by the Court of Appeal and that would then fall to the applied, to the various plaintiffs in this case, it would exclude in my submission –

TIPPING J:

Well I wasn't foreshadowing necessarily an attraction to that because it's so amorphous.

MR GODDARD QC:

But the only point I'm seeking to make in response really is that yes that is of course a conclusion open to the Court and that would need to be applied but again that involves addressing this question of where a line lies between some cases which are out and some which are in, so all I am suggesting now is that there is a strong argument that there are some cases which are out, where the Council doesn't owe a duty of care, where it would not be fair, just and reasonable to say, yes this building owner-developer is vulnerable –

TIPPING J:

Well do you mean to say any more than that, that there must be cases which are out and therefore we need a line?

MR GODDARD QC:

A line. I mean, I probably don't. As long as that's a secure premise and I don't need to justify to the Court.

ELIAS CJ:

But the line maybe the use –

MR GODDARD QC:

Yes and that's –

ELIAS CJ:

– and you're going to come onto –

MR GODDARD QC:

And so there are then two types of characteristic that one might look to it seems to me in drawing the line.

ELIAS CJ:

It's just that if you – as Justice Tipping was putting to you, if you have a very expensive house, the position of that occupier-owner may effectively not be very different from an investor?

MR GODDARD QC:

Absolutely –

ELIAS CJ:

Yes.

MR GODDARD QC:

– in fact I – one of the examples I was going to put to the Court later on involved a wealthy American film producer moving to Wellington, which is now the movie capital of the world and buying a block of land and building three buildings on it, a lavish home, some apartments for visiting studio executives and actors and a post production facility, each of which costs say $5 million to build or $10 million to build and retain the same architect, same engineer, same builder and the question is, what principled basis is there for reaching a different conclusion in relation to the duty of the care of the Council in relation to each of those three buildings. There's also my warehouse on Thorndon Quay, block of flats on Hobson Street backing onto it example, and in my submission one needs to try to tease out what it is that prompts, has prompted for many Judges now, an intuitive response that the commercial buildings are out. The Court of Appeal in *Charterhall* is not alone in that of course, there were the other Judges in *Te Mata Properties* and many High Court decisions now, *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504, *Kerikeri Village Trust v Nicholas* HC Akl CIV-2006-404-5110, 27 November 2008, Andrews J, *Mt Albert Grammar,* "Blue Pacific Motel", I think I have forgotten one but it will come back to me. All of those Judges after reviewing the legislation and reading the cases have had the same sense that the buildings they were considering –

ELIAS CJ:

They may well be right, but my question is why –

MR GODDARD QC:

Yes.

ELIAS CJ:

– you would decide that in a case where the issue is not before us.

MR GODDARD QC:

Well the Court is going to need to adopt some sort of test to apply to the range of plaintiffs before it in this case, or and this is what I was going to come to later on,

perhaps approve a test and then, to the extent that it differs from the Court of Appeal's test, return the case to the High Court Judge to apply that test because, for example, on the approach that Justice Heath took, His Honour didn't need to take a view on whether particular purchasers were on one side or another of a purchaser related test –

ELIAS CJ:

Yes.

MR GODDARD QC:

– it was purely dwelling related, and that I think is probably a better way of dealing with the application of the test approved by this Court than what is now I think the impractical course of my trying to take the Court through evidence –

ELIAS CJ:

We do have to however accept your – your premise really is that it's a purchaser based test?

MR GODDARD QC:

That it's twofold, that there are – at the end of the day the focus is on those people who can reasonably look to the Council to shoulder this risk rather than accept responsibility and either manage it themselves, meeting the cost of that, or if they fail to do so, bear the consequences themselves. And there are two features of a purchase decision, which in my submission, are relevant both to the history of the cases in New Zealand and to the substance of that test, focused, as it is, on what's just, what's fair and what's reasonable, and informed by considerations of reasonable reliance and vulnerability.

Firstly, in my submission, the type of building. That's been integral to the decisions of the Courts in New Zealand, stretching back now over 30 years, in fact, now heading for 40, I think, with *Hope v Manukau City* (SC Auckland, A1553/73, 2 August 1976). The cases have very much been concerned with dwellings, and it's striking – and this is a point that's been made in almost all the decisions in this area recently – that when Parliament has turned its attention to the need for incremental protection for the owners of certain buildings, the focus has been on household units and dwellings, and the decisions below refer to the Building Act 2004, which has introduced a transmissible and non-excludable warranty of quality in relation to

household units. That was the area that Parliament saw as requiring additional protection.

And then there are the procedural simplifications for pursuing claims in the weathertight homes resolution services legislation of 2002 and 2006. Now, one can't go as far as my learned friend seeks to do in reliance on those Acts, and say that they demonstrate an intention that Councils should be liable, because, of course, that's a mechanism available for the owner of a dwelling house to make a claim against any person responsible for defects in it, be it a builder or a designer or anyone. So one can't say that it's a necessary background assumption underpinning that, that Councils are reliable, rather than other people. But clearly, that was part of the landscape against which that legislation was enacted. To whom has it applied? It applies to owners of dwelling houses, and just so that I'm very clear about one hurdle identified by my learned friend that I need to overcome here, there's no distinction made based on who the owner is.

ELIAS CJ:

Well, exactly.

MR GODDARD QC:

So much depends on what one takes from this sort of legislative intervention. It's very tempting – and my notes say in relation to the 2004 Act that if one were to apply to that the same analysis that the Courts adopted in *Hamlin* in relation to the 1991 Act, one would say, well, against a backdrop of a line of cases finding that homeowners could bring claims against Councils, what did Parliament do? Parliament provided for greater rights for all owners of dwelling houses, be they homes or not, against builders and architects and designers. It did not seek to modify or prescribe what the duty of Councils should be. It left the common law as it stood to operate, and it's very tempting to say that – and I think it's sound insofar as one can ever reason from legislative silence – to say that Parliament in the Building Act 2004 turned its mind to the areas in which the New Zealand liability regime, as apparent from the cases, was deficient. It extended it in a nuanced and sophisticated way, subject to appropriate safeguards in one area. It elected not to do so in others, and that it would be just an inappropriate for the Courts to expand liability more broadly, where Parliament has not. This is an area where Parliament should speak, not the Courts, as it would be to narrow it. So if one starts from the presumption that there's a particular established line of cases and there have been some surgical

interventions by Parliament, where protections for certain groups are insufficient, then it's a reasonable inference that it would be inappropriate to bring the rather blunter instrument of the law of tort to bear in a way which significantly expanded liability regimes related to building.

TIPPING J:

I have a note that you said there were two criteria. One was the type of building, but I've failed to identify the second.

MR GODDARD QC:

I haven't reached it yet. I was just about to.

ELIAS CJ:

And the type of building may be a standalone criterion for distinguishing the cases.

MR GODDARD QC:

That's what the Court of Appeal said.

ELIAS CJ:

Yes. So your second one is really much more to the point?

MR GODDARD QC:

And my second one is that the – well, it's the purchaser-related criteria.

ELIAS CJ:

Yes.

MR GODDARD QC:

And it goes to the sophistication and resources of the original owner/developer or purchaser, and their ability to accept responsibility and manage the risk for themselves. Let me say at the start, because I think it's easy to overlook this, that Justice Heath and the Court of Appeal – Justice Heath explicitly and the Court of Appeal implicitly – accepted this, at least in relation to original owner/developers. Justice Heath, for example, found in *Sunset* that Cauldry, the original owner/developer was not owed a duty of care and could not sue the Council. That was the reason why the Body Corporate was not permitted to recover Cauldry's share of common property costs. So this – and I think it's quite clear that if Cauldry

had not sold any of the units, had unit title of the property but then retained all of the units and let them itself, then His Honour would have said that no duty of care was owed to Cauldry, even though it owned units, which were intended for residential use.

McGRATH J:

His only claim was for the one unit he retained.

MR GODDARD QC:

He wasn't – they weren't a plaintiff, either, so it was the Body Corporate claiming on behalf issues that arose.

McGRATH J:

So it was only for the common property portion that related to Cauldry?

MR GODDARD QC:

Yes, and that raised the question, of course, the extent to which the Body Corporate can recover on behalf of unit owners who are not themselves plaintiffs, which is one of the things I'm going to try and touch on briefly before I finish.

ELIAS CJ:

Did the Court of Appeal actually deal with that? I can't remember. I remember it in Justice Heath's judgment.

MR GODDARD QC:

It wasn't disputed by the Body Corporate –

ELIAS CJ:

So it wasn't the subject of appeal?

MR GODDARD QC:

No. It was - the starting point of argument was that no duty would be owed to the original owner/developer of a development like this applying a commercial test. Sorry, Byron.

TIPPING J:

That was despite the fact that the intended use was residential?

MR GODDARD QC:

Yes. I'm sorry about that – it was, of course, Byron. It was developed by Cauldry that they retained one of, and the reason that's important is that there was a common property claim in Byron against the Council, but not actually in Sunset. So, yes, exactly. The use was disclosed as residential in the application for building consent, and in the building consent – and Cauldry just owned one unit, indistinguishable in all physical respects from the others, but Justice Heath held – and it wasn't challenged on appeal – that there could be no recovery by the Body Corporate for investor/owners who couldn't recover, that the Body Corporate stood in the shoes of unit owners, and that Cauldry, as the original owner/developer, couldn't recover. In my submission –

TIPPING J:

But the inability – the premise was, as I understood it, that if the individual unit holders had sued individually, they could have recovered.

MR GODDARD QC:

No. The premise was exactly the opposite, Your Honour. The premise –

TIPPING J:

So it didn't really matter whether it was the Body Corporate or the individual?

MR GODDARD QC:

In respect of common property.

TIPPING J:

In respect of common property, yes. But in respect of their individual units –

MR GODDARD QC:

They have to sue themselves.

TIPPING J:

They have to sue – yes. The premise was that in respect of individual units, the unit holders, if suing themselves, could have recovered.

MR GODDARD QC:

With the exception of Cauldry. The premise was that Cauldry couldn't.

ELIAS CJ:

Well, it didn't sue.

MR GODDARD QC:

Yes, but in deciding whether the Body Corporate could recover Cauldry's share of harm to common property, the Judge had to take a view –

ELIAS CJ:

Yes, I understand that.

MR GODDARD QC:

– on whether Cauldry was owed a duty of care and could recover, and the view His Honour took was that it couldn't.

ELIAS CJ:

Yes.

TIPPING J:

One of the services this Court might be able to provide is simplification, Mr Goddard, I suggest. This is all getting exceptionally intricate, isn't it, for people to administer.

MR GODDARD QC:

It is a complicated area. I don't know that it's possible to avoid a measure of exercise of judgement, at least in this area, because it is a line-drawing exercise, to echo the precedent –

TIPPING J:

And you say the line is drawn at people who can reasonably look to the Council to protect them from the risk? That should be the test? With no further elaboration?

MR GODDARD QC:

That's one test that I suggest as one that this Court could adopt. I'm conscious, though, that that test is open to the objection that it provides less guidance to the other Courts –

TIPPING J:

Well, what are the other ones that you are advising us to consider? Because I just want to have an idea of what your submission – your ultimate submissions actually are. Never mind how you get there.

MR GODDARD QC:

That one test, which I am offering to the Court for its consideration – the other one which I am offering to the Court for its consideration, which, in my submission, would be effectively a contemporary reiteration of Hamlin, is that a duty is owed to a person purchasing a home to live in.

TIPPING J:

To a person building or purchasing a home?

MR GODDARD QC:

Building or purchasing, Your Honour is exactly right. Building or purchasing a home to live in. And in terms of –

BLANCHARD J:

To live in immediately, or to live in at some future time?

MR GODDARD QC:

To live in. And that's why, on reflection, having considered my learned friend's submissions, it seemed to me that it was plain that, for example, Ms Kim couldn't sensibly be described as an investor/owner in circumstances where she purchased, but left the existing tenant, and intending to move in, but left the existing tenant in the unit while she sold her existing house. That must be the test. It's a workable test, and a test that Parliament itself has used to inform the boundary around consumer protection. The example that I point to in the note I handed up yesterday. I was going to take the Court to it this morning. It actually arises often in the context of

home buying, because it applies to every mortgage that's taken out to buy a house, and that is the boundary of what is a consumer credit contract, and the Consumer Credit Contracts and Consumer Finance Act. That's in the supplementary bundle that was provided to the Court last week, and it's under tab 1 of that bundle, extracts from it. It's included largely to respond to my learned friend's submission that a requirement to ask, well, is this for personal or household purposes or is this for investment purposes is too difficult to apply, and the point that I think this legislation makes very effectively is that Parliament has absolute confidence in the ability of the Courts to apply just such a boundary line, and sees it as relevant to the question of vulnerability, of the need for special protection. So part two of this Act is concerned with consumer credit contracts. Those attract additional disclosure obligations and additional substantive protections in relation to restrictions on charges that can be made.

ANDERSON J:

Can I take you back to the Cauldry issue for a moment. My understanding – and correct me if I'm wrong – is that Cauldry was held unable to sue, not by reason of status, but because of the principal, Mr Smythe, had actually designed the defective work, and therefore Cauldry was charged with the knowledge of the defects.

MR GODDARD QC:

As I understood His Honour's judgment, it was rather the acceptance of responsibility for the work by Cauldry and its principal, Mr Smythe, that informed that exclusion.

ANDERSON J:

It's at paragraph 369 of the decision. Cauldry was a developer of 45 Byron Avenue. Mr Smythe was the principal, and he reported to the architect of the work. As the developer has responsibility for and full knowledge of the defects, the defendant had a complete defence for the Body Corporate's plan for remedial work in relation to common property. So it wasn't a status exclusion. It was a knowledge-based exclusion.

MR GODDARD QC:

I think that His Honour – certainly you're right, Sir, His Honour refers to – but His Honour also refers to the concept of responsibility for the defects as developer.

ANDERSON J:

Smythe was the architect.

MR GODDARD QC:

But what His Honour said was, as the developer had responsibility for the defects, and in my submission, that ties very much into the line of cases in the New Zealand Courts, finding that developers are responsible for the quality of the development, and owe a non-delegable duty of care to subsequent owners. And what was being said here is yes, as the developer with full responsibility, and also in this case knowledge – but I think the knowledge of the defects, if one looks at that judgment, was not, in all cases, contemporary with their occurrence. He certainly drew it to the attention of the Council later, but he didn't know at the time that can't be what makes him liable for him.

ELIAS CJ:

But isn't the point that the recovery by the Body Corporate of the Cauldry proportion in respect to the common area was not attributable to the fact that Cauldry was an investor, but the developer.

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

But that's a plaintiff characteristic, so we're already in the territory of saying that there are some characteristics of a plaintiff rather than the physical property that are relevant to that. That's where I was starting.

ELIAS CJ:

Oh, I see. You're starting at the beginning?

MR GODDARD QC:

It's a very good place to start, as the song goes. But I won't sing it.

TIPPING J:

Well, your second approach is definitely more specific.

MR GODDARD QC:

It's more specific, and it's consistent with the identification of vulnerable people who need special protection when, for example, they take out a mortgage to buy a residential property in the consumer credit contracts part of the legislation, because a consumer credit contract – that's section 11 – is one where the debtor is a natural person and b) the debtor enters into the contract primarily for personal, domestic, or household purposes, and, of course, that's a test that occurs in other legislation, and in a number of international instruments. Justice Baragwaneth lists those in his judgment. Section 12 is the important one. Investment purposes. Investments by the debtor is not a personal, domestic, or household purpose. So if I buy a house and I buy it for my family to live in, and I borrow in order to buy it, then that's a consumer credit contract, and that's a test which Parliament considers. But, on the other hand, if I buy it as an investment property, then it's not a consumer credit contract. That's a distinction which Parliament considers can be drawn by those working in the field, and by the Courts which they come to apply it. In those circumstances, in my submission, the idea that that is not a workable test is simply not open, nor can it be suggested that it's not a relevant test, because the whole purpose of regulating consumer credit contracts is to protect vulnerable people who are not well-placed to protect their own interests, and that's exactly what the Hamlin duty is also seeking to achieve.

ELIAS CJ:

Well, that's the question. That's the critical question, whether that background was not the scene-setting and led to imposition of duty in wider circumstances in *Hamlin*.

MR GODDARD QC:

Yes, I think the central question for the Court is really whether there's a more extensive practice, and also, let me add, whether that practice is such a reasonable one that it's fair, just and reasonable for the Council to bear the risk.

ELIAS CJ:

Well, that might be so if this was the first case to come before the Court, so the –

MR GODDARD QC:

And on investor/owners it is. It's the first one to come to appellant Court.

ELIAS CJ:

Yes.

MR GODDARD QC:

So Your Honour is dealing with that as a fresh issue. There can't be any settled expectations –

ELIAS CJ:

If it's a point of distinction in terms of the rationale for Hamlin. If it's an available distinction.

MR GODDARD QC:

Yes, and in my submission, someone who read beyond the first paragraph of the headnote in *Hamlin* and actually noticed the many references to homeowners would, at the least, realise that there was a live question about whether it was only applicable to homeowners or whether it extended to a wider class of purchaser, and a reader who – even a reader who was not especially careful, but who did make it beyond the head note might, I think, if asked, well, does this apply to Housing New Zealand, they might say, no, that's silly. Of course, they've got an army of experts to manage their housing stock, and they can be expected to take full responsibility. Their position is very, very different. And that was the next point I was going to move to, after looking at owner/developers developing a residential block of apartments for their own commercial purposes, which, in my submission, suggests that there's more going on than just reading the application for building consent, and looking at what the units will eventually be used for.

The next point to move on to is well, what if the whole block is then purchased by a sophisticated commercial entity? I have two examples in mind which I think it's helpful to use as litmus tests for what is fair, just, and reasonable. The first is the situation where a hotel company identifies that there's a market for an apartment hotel complex on the North Shore, and buys the whole block in order to operate it as an apartment hotel. It seems to me that that purchaser is not in any sensible way distinguishable from the subsequent owners of the motels considered in *Te Mata Properties*. And it's very odd to suggest that merely because of what was originally

written on the application for building consent, the same company buying the motel, to operate it as a motel, or buying the Byron Avenue block to operate it as a motel or an apartment hotel, would be in a different position vis-a-vis the relevant Council.

ELIAS CJ:

Well, that's if we accept *Te Mata*. That's the premise that you're putting to us.

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes, all right. I think I understand the argument, yes.

McGRATH J:

Mr Goddard, just help me by giving me a little more definition around the term "apartment hotel". It's used in the submissions.

MR GODDARD QC:

It's a very popular term these days by people trying to charge you more for hotels. It usually means that you have basic cooking facilities, and a dishwasher, and things like that. So it's something which could be a very small apartment, or it could function as a hotel room. The Hyatt residences in Auckland, for example, would be described as an apartment hotel. It's very like a motel unit in many ways, but it tends to be high-rise and a bit more upmarket. That's the sense in which I'm using it, is the sense in which they've been marketed at me from time to time, and I've made use of them. So it's something which could be used either as an apartment for permanent accommodation, or for transient accommodation. It's the sort of thing that, if you're in a long trial in Auckland, it's quite nice to stay in, so that occasionally you can microwave something rather than having to go out and forage.

McGRATH J:

When you use the term, are you making any difference as to ownership, as to whether it's owned by one company or person, or owned by a number of individuals, you have a unit title or something?

MR GODDARD QC:

No. And, of course, that's an issue which the High Court dealt with and it's before the Court of Appeal next week in relation to that, because that's the 21 storeys of hotel in that building on the North Shore have been unit titled, and the units sold to separate investors, who lease the units back to a management company. Blue Pacific is like that.

McGRATH J:

Your argument is not concerned with ownership?

MR GODDARD QC:

No, not at all.

ELIAS CJ:

I'm sorry – does that mean that there is a case in the pipeline that raises the issue that you want us to determine in passing in this case?

MR GODDARD QC:

Well, there are many cases in the pipeline that raise the question of where the boundary lies between the core Hamlin cases and the commercial cases that the Court of Appeal has cited, and many in the High Court, some in the Court of Appeal. Inevitably, what the Court decides here, and the test that it enunciates, will have a significant impact on other cases.

ELIAS CJ:

Yes. Mr Goddard, you may be coming to this, but of course, you are pitching all this on duty of care. You're cutting the matter off at the pass. The question of liability is a more factual enquiry following that, and may it not be more sensible to leave questions such as sophistication for adjustment in terms of contributory negligence, and so on?

MR GODDARD QC:

That was the approach preferred by the High Court and Court of Appeal in relation to all dwellings.

ELIAS CJ:

Yes.

MR GODDARD QC:

So what the Court did was say, we're going to apply the use-base test as the criterion for duty of care.

ELIAS CJ:

Yes.

MR GODDARD QC:

And then we'll take issues relating to sophistication, steps taken to protect, steps omitted, into account in considering liability and, in particular, contributory negligence. And yes, it would be silly for me to argue that there's not a range of views open to a Court on these matters. That was a major premise of Hamlin itself, that this is not an area that calls out for a single logically demanded unitary solution. There's a value judgement to be brought to bear. But the Courts below have all felt – rightly, in my submission – that it would be productive of a great deal of cost and uncertainty not to put any parameters at all around the duty, and they've sought to identify the features that are relevant to duty, and they've done so by reference to the nature of –

ELIAS CJ:

The use.

MR GODDARD QC:

The structure of the intended use. Not the actual use.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

That's been rejected by the Courts, and, I think, understandably so, because then while you have one owner, duties could come and go.

TIPPING J:

Well, you have to have costs that's applicable at the time of the inspection.

MR GODDARD QC:

Absolutely.

TIPPING J:

It can't shift according to what might happen some time in the future.

MR GODDARD QC:

So that, for example, the Council knows what liability risk it faces, and can charge in a way that reflects any exposure it may have, yes. That must be the case. And so –

TIPPING J:

You're apt to do greater justice, I would have thought, just building on what the Chief Justice has put to you, because that's been going through my mind too. But by having – not an unduly expansive circle for the duty, and then adjust within that circle. Then at least you have clarity over the duty, and the uncertainty, which is inevitable, will be about the Court's apportionment of the ultimate responsibility.

MR GODDARD QC:

On that approach, one would look at the sophistication of the owner from time to time as a factor relevant to what they could reasonably be expected to do to protect their interests.

TIPPING J:

Well, it would be at the relevant time.

MR GODDARD QC:

Yes, the time of contributory –

TIPPING J:

The time when the –

MR GODDARD QC:

So at the time they purchase, you would look at what the state of knowledge was, what their sophistication was, what they could be reasonably be expected to do to get themselves –

TIPPING J:

At the time they bought into –

MR GODDARD QC:

Yes.

TIPPING J:

- the problem?

MR GODDARD QC:

And that is essentially the approach that was approved by the Courts below, but with one exception, which is that they felt – in my submission, rightly – compelled to say but at the point where you have full control over the way in which a building is constructed, and you make choices about what experts to retain and what precautions to take, then you can't say that you were reasonably reliant on the Council to safeguard you against defects. So original owner/developers are out of the duty circle. And in my submission, that must be right. There's no principled basis for imposing a duty of care to the original owner/developer of a substantial, valuable building, who can be expected to take full responsibility and protect their own interests.

I do also think that there's something in – there may be an important distinction reflected, and I looked back at Justice Heath's judgment last night and there's a number of references to purchases of single dwellings, and it may be that there's an important distinction to be drawn between someone buying a single dwelling and someone buying a whole block, and that may be the answer to the test that I posed, "How do we deal with someone buying the whole block to operate it as a motel or an apartment/hotel?" whatever you want to put. How do you deal with the Housing Corporation saying, "Ah something's just been built in this area, and actually we have a need for more accommodation in this area, we'll buy the whole thing."

TIPPING J:

But you say the duty might be confined to people buying or purchasing stand-alone single dwellings?

MR GODDARD QC:

Not stand-alone but single dwellings, as opposed to buying a whole development.

TIPPING J:

What do you mean by single if it's not stand-alone?

MR GODDARD QC:

Just one. If it's the difference between someone buying an apartment in a building and someone buying the whole building.

ELIAS CJ:

Well your Credit Contract and Consumer Finance Act is not so restrictive, because it looks at domestic use and household use as well as –

MR GODDARD QC:

Yes, well it's personal household and domestic –

ELIAS CJ:

And –

MR GODDARD QC:

You couldn't buy a whole apartment development.

ELIAS CJ:

No, but you might buy three apartments and park your teenage children in one –

MR GODDARD QC:

That's actually a very good idea, I hadn't thought of doing that.

ELIAS CJ:

And that seems to be what is envisaged.

MR GODDARD QC:

Yes.

TIPPING J:

Well that's one of the problems with your ode to a person building or purchasing a home to live in. What if I buy the house for my grandchild to live in, hypothetically? I mean that person would – I wouldn't be owed a duty, even if I was a poor pathetic vulnerable –

ELIAS CJ:

Judge.

TIPPING J:

Judge.

MR GODDARD QC:

I think I was, yes, the one who was accused of playing violins yesterday.

TIPPING J:

There's rough edges all over the place.

MR GODDARD QC:

There's rough edges all over – that really it seems to me, illustrates that whatever test one comes up with, there are going to be boundary issues and that the idea that there's a really bright line, is, with respect to the Court below, illusory.

TIPPING J:

I don't think it can be so bright that's it's going to solve all problems –

MR GODDARD QC:

No.

TIPPING J:

But at least it's got to have some illumination in it.

MR GODDARD QC:

One would hope so. And in my submission the Court, this Court - really in a way this case is about how much illumination can this Court provide in circumstances where there are a very large volume of claims, not only before the Courts, but of course also before the Tribunal and many people who want to resolve these issues, by discussion and settlement, but who need principled guidance about where the lines lie and in my submission the difficulty with the Court of Appeal's suggested approach, is twofold. One is that it's actually not as bright and sharp as that Court suggested and Justice Williams came up with an interesting raft of examples about boundary issues when His Honour preferred a vulnerability based test at first instance in *Te*

Mata Properties. The High Court of Australia had also waxed lyrical on the subject in Woolcock Street the difficulties of distinguishing between residential and commercial. So one is that actually with respect, the brightness and sharpness is a bit of an illusion, but secondly and more importantly, it fails to reflect features which are so central to whether or not a duty of care is fair, just and reasonable, that it risks leading people in the wrong direction and the striking examples of that are that on these facts there would be a duty of care ode apply in that approach to the subsequent purchaser of the whole of one of these developments. There would be, if you applied this test without refinement, a duty owed to the original owner developer, but I think you'd have to – no, no, but of course not them, but then why, and it seems to me that the Court can and in my submission should, draw a line around –

ELIAS CJ:

Well you might say that there's a duty of care but exclude liability, even in relation to the developer, if you took the view that the controlling issue in terms of – feature in terms of duty of care is whether it's residential.

MR GODDARD QC:

Yes, but I think if one looks right back at the rationale for having a duty at all Your Honour emphasised quite correctly and stated the idea of control, that vis a vis the developer, it's very odd to say that it's the Council that has control, it's the developer who controls the whole project, decides whether it will happen or not, whether to even take the set of risks or not, who will build it, what experts will be retained, what steps will be taken, whether to retain a Council or a certifier to perform, all those things are controlled by the original owner developer. So the foundational justification for liability here, which is control, is absent in that situation.

ELIAS CJ:

I'm just thinking of the traditional, probably long since superseded idea of the New Zealand handyman who puts up, who builds his own house, that person may well have been able to rely on the Council to stop him doing something that wasn't in accordance with the Building Act or regulations then in force.

MR GODDARD QC:

That issue arose in some ways in *Riddell v Porteous* and also I think possibly in *Chase* there was some mention, but at best a builder was retained to do some things and the owner did some work themselves, I just can't quite remember the facts

on who did that work. But certainly that issue has arisen and the New Zealand Courts have said, yes there can be a duty of care to the home-handy person working away on their own home.

ELIAS CJ:

Mmm, and then it's just really a question of degree and the circumstances, which one would have thought are better addressed in the context of liability than at duty of care stage,

MR GODDARD QC:

The difficulty there –

ELIAS CJ:

With the label of developer.

MR GODDARD QC:

The difficulty there of course, is that one increases potentially very substantially the number of cases that have to be subject to that much more elaborate analysis and consideration and there's a trade-off which is embodied in any judgment about how duty of care is defined by the Courts, between the cost of doing infinitely refined justice which would involve ultimately setting no boundaries at all really, but saying, we'll inquire into the fact of every case and come up with a tailored conclusion. And providing a measure of guidance to a society where many people are trying to organise their affairs, resolve matters, decide cases.

ELIAS CJ:

Duty of care is such a crude approach, and indeed there's quite a literature suggesting that in fact would be better to throw it out altogether. But I understand the argument you're making is that it's useful, because it prevents factual litigation.

MR GODDARD QC:

Yes, it is very useful. It's, well first of all it enables people to organise their affairs in advance by identifying areas where they may have a liability and making arrangements to manage those risks.

TIPPING J:

You'd have to insure against the whole –

MR GODDARD QC:

Yes, everything.

TIPPING J:

Gamoot.

MR GODDARD QC:

So for example, when this Court modified the law in relation to duty of care owed by barristers in connection with Court proceedings, that obviously has implications for the scope of insurance, the barristers and people then organise their affairs in advance in the light of that. So there really are important issues in terms of planning of commerce and people's lives that arise from an identification of in at least, you know, has general terms, the scope of a duty of care. And then where disputes arise, the sort of guidance that can be provided by description even in somewhat general or qualitative terms of where the duty of care lies, is an enormously important contributor to the public interest, for example in settlement of proceedings, I mean that's a public interest which has been recognised many times by the Court. It's an interest which is advanced by providing as much guidance –

ELIAS CJ:

Yes all right, I accept, I give up.

MR GODDARD QC:

Right. So my submission is the duty of care should live for another day.

ELIAS CJ:

No, but it does have a bearing on the scope and the weight, the baggage you put into duty of care.

MR GODDARD QC:

Yes, it's a matter of judgment and – but I do think that one of the things that New Zealand decision makers in lower Courts and Tribunals, could hope for from the establishment of our own Supreme Court, is that New Zealand, specific New Zealand contextual guidance, that is as specific as possible where you will be provided to them in the discharge of their duties, and that's what I'm inviting the Court to provide.

And to the extent, I think in the time available I should seek to touch at least briefly, on issues 9, 10 and 11 on my road map. The first of these is a Byron Avenue only issue, it's the question of a duty of care owed to the Body Corporate, and the ability of the Body Corporate to sue on behalf of unit owners who are not plaintiffs. I'm not going to – it's discussed in section 12 of the Byron Avenue submissions, I'm not going to spend a lot of time on this, the argument is set out in writing, but central to it is the point that of course a Body Corporate under the Unit Titles Act doesn't own the common property. The common property is owned by the unit owners as tenants in common. So, the Body Corporate doesn't own it and if value is reduced, it's not the Body Corporate that suffers that loss in value, it's individual unit owners and their positions may be very different. If for example, a defect in common property is identified in a unit title typically similar two apartment block, and one of those unit owners sells the unit in the knowledge that the Body Corporate will have to do work on this defect, and that there will in the future be a levy. I suppose even that it's known with some precision what it will cost, $100,000 to do the work in each unit, owner expects to be levied $50,000. If one unit owner has sold at a $50,000 discount, then the members of the Body Corporate are now someone who was there before the defect was discovered and has a claim and someone who purchased in full knowledge of the defect, obtained a discount for it and can't reasonably be permitted to sue. Yet the – and what that really illustrates I think is, and they shouldn't be – they can't sue –

ELIAS CJ:

Isn't that a damages problem? A causation of loss problem?

MR GODDARD QC:

However it's described, the point is that it's a loss that's suffered by each unit owner, the loss of value, not a loss suffered by the Body Corporate and it ties back into the point that this really is economic loss.

ELIAS CJ:

But isn't that a discount then that gets applied in the assessment of damages?

MR GODDARD QC:

But in my submission it needs to be the individual owner who sues for that loss and in the case for that one importantly of course, it's actually the former owner who can

sue for their $50,000 and they're not a member of the Body Corporate, so no one suggests the Body Corporate could sue for them.

TIPPING J:

Why isn't the Body Corporate suing on account of whoever suffered the actual loss, if any?

MR GODDARD QC:

Because they don't; have the ability to do that under section 13 of the Unit Titles Act.

TIPPING J:

Why don't they? Why?

MR GODDARD QC:

They're not –

TIPPING J:

They are the vehicle whereby the owners make their claims in respect of common property. This argument seems to me one that would do credit to a tax lawyer. But it –

MR GODDARD QC:

That's – that's very harsh.

TIPPING J:

It is, it is.

MR GODDARD QC:

Because I spend a lot of my time aspiring not to be a tax lawyer and am constantly bemused when occasionally I find myself grappling with those issues that I've –

TIPPING J:

I just don't see that this has got any merit at all. The whole scheme of the Unit Titles Act is that the Body Corporate will act on behalf of the owners. It's almost like a trustee.

MR GODDARD QC:

It's – except that it's not a trustee.

TIPPING J:

I'm not saying it is, but it's very like a trustee, and for present purposes, I think could be considered to have that kind of role. The owners themselves can't bring a claim in respect of the common property, it has to be done –

MR GODDARD QC:

They can bring a claim in respect of their loss which represents they're either a loss of value on sale, like an example I gave, or a loss representing their liability to be levied by the Body Corporate for the work. But that's where the distinction becomes really important, because in the example that I gave of the two units, the correct plaintiffs in my submission are the unit owner who remains in the complex and is exposed to a loss in the form of a $50,000 levy from the Body Corporate and the former owner, who has sold their unit and who has taken a $50,000 hit, but neither of those losses can sensibly be described as a loss suffered by the Body Corporate. There're also practical litigation management issues that arise and they would arise, especially acutely, if the individual characteristics of the owner are relevant to the assessment of liability, because if, this is important only where the unit owner's not a plaintiff, and in those circumstances of course, they're not providing discovery, they are not available to answer interrogatories. The Body Corporate does not have that information, is not in a position to give discovery of it, so what the Court was effectively doing is authorising the Body Corporate to pursue someone else's claim in circumstances where it's not in possession and control of information that's highly relevant to its determination.

ELIAS CJ:

But isn't the question whether the Body Corporate has suffered a loss?

MR GODDARD QC:

Yes.

ELIAS CJ:

And in some cases it will have, and in those cases, why should it not be able to bring the claim directly?

MR GODDARD QC:

The only claims that the Body Corporate – well no the Body Corporate hasn't suffered a loss, because the Body Corporate doesn't own the common property, so it's the unit owners.

TIPPING J:

But the Body Corporate may be responsible for restoring the Body Corporate. Restoring the common property?

MR GODDARD QC:

The common property, and entitled to levy then the onus for the time being to fund that.

TIPPING J:

Yes.

MR GODDARD QC:

And if that onus for the time being, which introduces a disconnect between the people who have a claim and the people who can be levied and that creates practical difficulties in this area, but Your Honour's comment about the tax lawyer was so cutting that I really don't want to spend much more time on this issue, except to leave.

TIPPING J:

Yes, it's a form over substance argument.

ELIAS CJ:

Yes.

TIPPING J:

Which I don't think would be appropriate for the Court to accept in this kind of context.

MR GODDARD QC:

It has Sir –

TIPPING J:

There may be difficulties over damages, as the Chief Justice says, but it seems to me that the whole scheme of the Unit Titles Act would be frustrated if the – the very vehicle that is intended to bring claims, is told that it can't.

MR GODDARD QC:

What about the situation in my two unit example, where both unit owners have sold, the defect remains in the common property, but the appropriate plaintiffs plainly are the former owners who are no longer members of it. Seems to –

TIPPING J:

Well then we'd have to look into the individual circumstances of what had gone on behind the scenes there. It's not a question one could answer in a vacuum.

MR GODDARD QC:

The last is just to say what I think that illustrates is that it is artificial to describe this as the sort of claim that falls within section 13 as a claim for and in respect of –

TIPPING J:

Body Corporates are artificial.

MR GODDARD QC:

– damage to common property.

TIPPING J:

The whole idea of having them there suing when they don't actually own anything is very artificial. One simply has to adjust around that.

MR GODDARD QC:

And the question then becomes what is the most sensible and practical way of adjusting and I tried to deal in my submissions, both with the principle reasons for saying that the Court should insist on the individual unit owners joining, and also the practical litigation reasons, which are, that as soon as one accepts that the claim of the Body Corporate cannot be better than the claim of the individual unit owners, then their circumstances, what terms they acquired on, what knowledge they had,

what terms they may have sold on, someone who is no longer even a member at all, as no relationship with the body corporate, all become centrally relevant to the claim and there are some very significant unfairnesses and procedural complexities that result from this approach but it's something that has had as much air time as I can spare it this morning, so I'll leave that there.

ANDERSON J:

Was that point pleaded, in any event Mr Goddard? Was there any pleading denying the entitlement of the Body Corporate to sue?

MR GODDARD QC:

I'd have to check further the specific issue was – my learned friend Mr Heaney, tells me that it was and he will know.

ANDERSON J:

Thank you.

MR GODDARD QC:

Item 10, the Blue Sky claims. This is discussed in the Sunset Terraces submissions in section 12. This is a striking example of residential property for investment purposes, as part of an investment scheme. The first step in it is explained in 12.2 of my submissions is that Porchester Ltd, a relative of company of Blue Sky, itself purchased 12 units and it's helpful to pause I think and ask well, can the Council sensibly be described as having owed a duty of care to Porchester Ltd which was in the business of residential property investment and repackaging it as investments for individuals, or was it rather taking a deliberate business risk.

That, I think, is a question which gains even more force when one looks at the marketing of the units as investments by Blue Sky, sold subject to leases to Blue Sky, investors, the plaintiff, who assigned claims to Blue Sky, agreed to purchase the units subject to the least to Blue Sky and also entered into a property management agreement with Blue Sky, under which Blue Sky agreed to manage the property for the duration of the lease.

Important terms of these leases which just show how much this was an investment product, are that the terms of the leases were 182 weeks, they could be extended for

another year. Blue Sky was obliged to meet outgoings on the property and to maintain it, so it, although it was a short-term lessee, unusually and atypically agreed to assume responsibility for maintenance in order to induce investment and the people who bought in were buying with that passage of rights and Blue Sky had an option to purchase the unit at the end of the lease at a set price, so there could have been no expectation of a right to retain these as a home for occupation.

TIPPING J:

So its option, its option could suffer commercial damage?

MR GODDARD QC:

Yes and if it didn't exercise the option then the investor/owner would suffer commercial damage but it would be the investment they purchased which was worth less than they had hoped.

So this – and all of these transactions, as the Judge noted at paragraph 341, were entered into at a time when damage had manifested itself but I'll come back to that. The critical point here is that there are two sets of claims the Court needs to consider but it's important to keep them separate because what the law has always set itself against is the idea that someone who has a good claim but has suffered little or no loss can assign their claim to someone who has no right of action but has suffered a loss as a result of the relevant events, enabling the assignee to then recover the loss they're suffered.

You can't glue together a right of action and no loss with a loss and no right of action and say ho ho, now there's someone who has a claim. Yet that, it seems to me, is the effect of saying well, in the aggregate, the whole ownership interest is now vested in Blue Sky as lessee or assignee and therefore it can sue. If we dissect each of those two claims, then in my submission the High Court Judge, this is 12.5, was right to find first, that as a lessee of 12 units for a relatively short-term, Blue Sky was not an owner to whom a duty of care was owned by the Council. This is a million miles from the *Hamlin* paradigm. Blue Sky was not an owner at all, it was a lessee.

The only reason that Blue Sky suffered loss was because it had voluntarily assumed contractual obligations to meet outgoings which would otherwise not normally fall to it as a lessee. So it chose, as part of a commercial arrangement it was entering into, to assume responsibility for something. It didn't fall on it in the ordinary course as

owner. It's not the sort of person to whom a duty of care is owned, on *Hamlin* or on any sensible principle underpinning *Hamlin*.

What then of the unit owners? Well, on the – this all depends on the test that the Court adopts but in my submission, this again provides a helpful litmus test because what the Judge found was that the owners either hadn't suffered loss because Blue Sky was contractually responsible to meet these costs, or and this was I think a more important part of His Honour's reasoning, had relied on the Blue Sky investment scheme to protect their interests. So, couldn't say that they were looking to, reasonably reliant on the Council in circumstances where what they had bought was a package of rights and obligations which excluded responsibility, shifted responsibilities for these matters to Blue Sky.

BLANCHARD J:

But only for 182 weeks?

MR GODDARD QC:

With the possibility of extension for a year as an option.

BLANCHARD J:

If problems developed outside 182 weeks and Blue Sky hadn't exercised the option, then the individual owners would inherit those problems?

MR GODDARD QC:

Yes, Your Honour's right but again, if we ask whether the investors were looking to the Council to manage their risk, or whether they were looking to the vendor of a reasonably sophisticated investment product to sell them for a particular price, a package of risk and reward, in my submission the latter is the position and if and to the extent that the loss doesn't fall on them, obviously they can't – and this is a case where the issues did emerge within the 182 weeks.

Your Honour's hypothetical question is quite right but that's not this case and in circumstances where the loss –

TIPPING J:

But they would ultimately carry the can, wouldn't they, if the contractual rights –

MR GODDARD QC:

Proved not to be valuable.

TIPPING J:

Yes.

MR GODDARD QC:

Yes and that goes to the question –

TIPPING J:

That's a question of whether they've actually suffered damage, isn't it?

MR GODDARD QC:

No, my submission is more fundamental than that and it goes to who they're reasonably relying on when entering into this essentially commercial investment transaction.

TIPPING J:

Well, this is really just saying in essence this was a commercial transaction. The fact that it was residential is incidental?

MR GODDARD QC:

Yes, that's my submission.

TIPPING J:

That's the nub of the point?

MR GODDARD QC:

That's the nub of it, so it's a particularly acute –

TIPPING J:

Yes, it's just an example –

MR GODDARD QC:

– example of what I've spent a wee –

TIPPING J:

Yes.

MR GODDARD QC:

– while going through and that was really what I want to draw out, was for them it's a very sharp example of a commercial investment in residential property. So if the Court finds that the appropriate test excludes investor owners of this kind, then that problem can't be fixed by assigning claims, obviously to Blue Sky.

TIPPING J:

Well, no one would think it could, it's not argued against you, is it, that you could, as it were, as you said so elegantly, glue one to the other and make something out of nothing.

MR GODDARD QC:

There is something of a flavour of that in my learned friend's submissions –

TIPPING J:

Well, we'll find out.

MR GODDARD QC:

– yes, suggesting that as long as the whole package of rights is in one place, then it doesn't really matter how the different bits came to be put together –

BLANCHARD J:

Well, you can't get someone else's loss assigned to you –

MR GODDARD QC:

No –

TIPPING J:

– if you've suffered no loss.

MR GODDARD QC:

– that's my point and perhaps worth exploring with my learned friend whether he's arguing otherwise. It is half past 11, I was left just with item 11 on my road map, claims by owners who purchase after a cause of action accrues.

ELIAS CJ:

Would you prefer to take the adjournment and come back to it?

MR GODDARD QC:

If that's convenient for the Court and the Court doesn't mind my trespassing for 10 minutes into the time after the adjournment.

ELIAS CJ:

All right, we'll take the adjournment now, thank you.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.47 AM

MR GODDARD QC:

Your Honour, I'm dealing with the position of owners of units in the Sunset Terraces development, who purchased after defects were not only discoverable but in fact discovered. The starting point for that, in terms of a factual foundation, is perhaps to look at volume 6 of the Sunset Terraces case on appeal, under tab 118 and probably this will be one of the volumes Your Honour has banished to be behind you I think.

ELIAS CJ:

No, I think I retrieved them. Oh, 18 –

MR GODDARD QC:

The case on appeal, not the authorities, for Sunset. Under tab 118, there's a –

BLANCHARD J:

Volume 6.

MR GODDARD QC:

Sunset, volume 6, the case on appeal Sir. We have three contenders for the title of volume 6 of course and the two cases on appeal and the bundle of authorities.

ELIAS CJ:

So, under which tab?

MR GODDARD QC:

Tab 118 Your Honour.

ELIAS CJ:

Oh, it's the other one then.

McGRATH J:

Mr Prendos, is it, Prendos?

MR GODDARD QC:

Yes, that's it Your Honour. We should actually have done for the Court what I did with mine which is to put little letters and numbers on all of them, so S6 and things, something useful to bear in mind for the future where there are multiple appeals being –

McGRATH J:

Actually, different colours for the two separate cases.

MR GODDARD QC:

I've done that as well but –

ELIAS CJ:

Actually, a bundle of any documents to be referred to would be awfully helpful but –

MR GODDARD QC:

That's another helpful thing to bear in mind Your Honour, thank you.

TIPPING J:

Is it essential because I can't find it?

MR GODDARD QC:

No, no, Sir. It's a letter dated –

ELIAS CJ:

What is it, 100 and what?

MR GODDARD QC:

118.

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

It's a letter dated 3 March 2000, I'll read out the only bits that really matter. Addressed to body corporate administration which was the Body Corporate secretary, in relation to the Sunset Body Corporate. It concerns an inspection of the property carried out by S M O'Sullivan, a registered building surveyor. Some concerns having been identified in relation to entry of moisture. A number of concerns were noted included severe efflorescence, inappropriately positioned joints, incorrectly fitted flashings.

After discussing those in a little bit more detail including for example, identifying at the foot of page 2 the need to identify the issue because it will be allowing considerable moisture into the roof structure which again will result in fungal decay if left unrepaired. On page 3, the surveyor concludes, "These matters are more than cosmetic and if left unrepaired will effect the structural integrity of the units."

So on 3 March 2000, the body corporate which as Your Honour Justice Blanchard pointed out to me, is really just a – well, it is the owners acting together, it's a fiction for them, knew that there were sufficient defects that were structural and that needed to be addressed and it seems clear that at that point proceedings could have been brought.

So, if there's a duty of care, then there is an identification of loss and the whole question of reasonable discoverability is in a way a little bit academic, as it was in the case of *Pullar v R* [2007] NZCA 389, before the Court of Appeal because there the Ministry of Education had actually commissioned a report which had identified the defects in question more than six years before it sued. That was a limitation case. Here, the issue is a different one. We don't need to ask when the defects were reasonably discoverable. They were actually discovered. The fact they were significant was known in March 2000. My submission, at that point, a cause of action accrued to each unit owner. What happens then when a unit is subsequently sold

and someone else purchases a unit? Well, the simple point is that that subsequent owner has no cause of action against the Council. It's the previous owner who had a cause of action against the Council and while the subsequent owner could of course taken assignment of any claim, none of the plaintiffs did so in this case.

ELIAS CJ:

What's the authority that you rely on for this?

MR GODDARD QC:

The authority that you can only sue in respect of a cause of action that accrues while you're the owner, I refer to 3 in paragraph 13.10. So I deal with it in a matter of principle and these are all quite brief comments by the Courts in question, they're not extended discussions of the topic and that's why I've emphasised principle, rather than citation of authority, although the principled argument is supported by such authority as exists.

ELIAS CJ:

So what's the principle?

MR GODDARD QC:

The principle is that a cause of action accrues once and once it has accrued it's the person who owns at the time of accrual who has that cause of action –

BLANCHARD J:

Is this cause of action some sort of right in rem, rather than right in personam?

MR GODDARD QC:

No –

BLANCHARD J:

Surely causes of action accrue to people, to plaintiffs?

ELIAS CJ:

That's your point?

MR GODDARD QC:

Yes, that's why it accrues to the owner at that time, so if there's a sale –

BLANCHARD J:

Yes but you could have, in respect of the same act, causes of action to different people.

ELIAS CJ:

Yes.

MR GODDARD QC:

If there is new damage.

BLANCHARD J:

Well, not necessarily. If the cause of action relates to say a hole in the road that people drive into, you could have several people drive in at different times.

MR GODDARD QC:

Suffering different damage and suing in respect of that damage, so one of the people who drives into it later isn't suing in respect of harm to the previous person and critically, the time for them to bring their claim starts running when they drive into it in respect of the loss they suffered. The person who drove into it first can't say oh, this hole in the road has kept causing people harm and the limitation period is therefore extended.

It's really the limitation consequences of permitting subsequent owners to bring such claims that are most striking and they're inconsistent with the Privy Council's observation that the start of the limitation period can't be postponed.

TIPPING J:

Isn't the 10 year long stop to deal with that problem?

MR GODDARD QC:

It is part of the solution but of course there are two limitation periods in relation to a building defects claim. There's the six years and then a long stop of 10. The way that the Courts have approached this issue in these cases, the six years can be refreshed and start running again against the Council each time there is a change of ownership.

TIPPING J:

Yes but never beyond the 10 years?

MR GODDARD QC:

Yes, exactly Your Honour.

TIPPING J:

But isn't that the balance that the legislature has struck for this purpose?

MR GODDARD QC:

Seems to me that the Court needs to identify a rule in relation to accrual of causes of action of this kind that is more general than just building defects and therefore the 10 year rule won't always be –

TIPPING J:

Well, after you've sold, you've –

MR GODDARD QC:

– and answer –

TIPPING J:

– suffered no loss unless you've had to discount the price. So this is a convenient way to say that no one has suffered any loss, or the Council is liable to nobody in these circumstances.

MR GODDARD QC:

Unless there's been an assignment.

TIPPING J:

Yes, well what about the concept of an implied assignment?

MR GODDARD QC:

That hasn't been pleaded or argued.

ELIAS CJ:

Well, doesn't it –

TIPPING J:

Well, it's a point of law, it doesn't have to be pleaded.

ELIAS CJ:

Yes and doesn't it follow from the recognition in *Hamlin* of duties owed to subsequent purchasers. Aren't you running together the limitation point and the liability point?

MR GODDARD QC:

I'm certainly running those together but very deliberately because both the Court of Appeal and Privy Council said that you have to deal with them in tandem. They're inextricably interlinked was what the President said and a proposition about one is apt to have implications for the other and rightly so in my submission.

ELIAS CJ:

But you're saying that a subsequent owner can't succeed to the cause of action in –

MR GODDARD QC:

Merely by buying the property. So in that sense, I'm saying the very opposite of what Your Honour – it's not in rem right that, as it were, passes with the land, rather it is, as Your Honour suggested, a personal right of action which arises against the Council. In fairness to the Council, or whoever the, you know, the defendant maybe, once, at the time of reasonable discoverability –

BLANCHARD J:

How can that be? It arises against the owner at the time but when a new purchaser comes along, that purchaser has a cause of action which arises when they buy. That's when they suffer their loss.

MR GODDARD QC:

Not – this is where the timing of discovery becomes very important. If they buy and the defect hasn't been discovered and it's subsequently discovered, of course there's no issue on the basis of *Hamlin* and the reasoning in *Murray v Morel*, a cause of action accrues at that time. Again, if the defect has been discovered before they buy and they're informed of it –

BLANCHARD J:

They wouldn't be able –

MR GODDARD QC:

– they wouldn't be able to succeed –

BLANCHARD J:

Yes.

MR GODDARD QC:

So what the Court's really grappling with here is the situation where it's been discovered but it hasn't been disclosed –

BLANCHARD J:

Or maybe –

MR GODDARD QC:

– by the vendor –

BLANCHARD J:

– it should have been discovered but it hasn't and –

MR GODDARD QC:

In this case –

BLANCHARD J:

– it could be a situation in which someone who was living in the property should have discovered it but you wouldn't say that vis-à-vis a purchaser.

MR GODDARD QC:

That's possible. That's not the facts of course of Sunset because it was –

BLANCHARD J:

Well maybe not but I'm looking at in –

MR GODDARD QC:

– so it's a strongest –

BLANCHARD J:

– general principle.

MR GODDARD QC:

– so this is the strongest case I think –

McGRATH J:

Your basic principle really is the plaintiffs have to prove damage during their ownership?

MR GODDARD QC:

Yes and that the damage, the Privy Council said in *Hamlin*, accrues –

ELIAS CJ:

Well, where does that come from? Sorry, where does that come from?

MR GODDARD QC:

That is the proposition in *Sparham-Souter & Ors v Town & Country Development (Essex) Ltd* [1976] QB 858 (CA), Lord Denning and the Court of Appeal in *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA). So the Court of Appeal in *Mt Albert Borough Council* said you must prove damage during your ownership and intuitively that –

TIPPING J:

You mean the occurrence of damage, not inheriting damage?

MR GODDARD QC:

Yes, yes.

ELIAS CJ:

Can we see that, sorry I'd like to have a look at that, where do you find –

MR GODDARD QC:

Mt Albert Borough Council is volume 6, tab 41, the green one, and it's in the joint Judgment of Justice Cooke and Justice Somers, it's at 238 and again at 232 and beginning at the bottom of 238, point of – oh in fact it begins back at 36. "As there was here no assignment of any right of action, Ms Johnson can only succeed on a cause of action arising during her ownership. That ownership began in 1970, her writ was issued in 1973, so if she has a course of action no question of limitation can arise. Whether she has a course of action turns on the effect of the intermediate events in 1967. If those events do not exclude it, she'll have a cause of action against each defendant based on negligence and consequent damage in 1970 or later. When then does damage accrue and with it a cause of action," so the entire premise of this analysis is the proposition that I've been putting to the Court. There must be damage during your ownership in order to have a cause of action.

ELIAS CJ:

But it's all directed at the Limitation Act point.

MR GODDARD QC:

But they're inextricably interlinked. One can't have a proposition about one without affecting the other.

TIPPING J:

It depends on what you mean by damage arising during ownership?

ELIAS CJ:

Yes.

MR GODDARD QC:

And –

TIPPING J:

It arises in the sense that you suffer it during your ownership, but it doesn't arise in the sense of originating, if you like, but this is getting pretty –

ELIAS CJ:

This is a very significant submission. I would have thought that there was some, perhaps not authority directly on point, but some principle that you invoke for this?

MR GODDARD QC:

Well, sitting behind this there is the whole line of cases –

ELIAS CJ:

On assignment.

MR GODDARD QC:

Well, and that the, it's the owner of property who can sue in respect of damage to that property during the period of ownership and then what one gets into, and this I think is –

ELIAS CJ:

But that's why I say, surely that has to be modified in relation to the *Hamlin* liability because it does recognise a duty owed to subsequent purchasers.

MR GODDARD QC:

But a duty owed to subsequent purchasers where damage occurs –

ELIAS CJ:

Only in respect you would say, of discoverable damage after –

MR GODDARD QC:

– yes, during their ownership and the difficulty that one runs into is that the long line of cases on, for example, damage to cargos on ships and things like that, is all concerned with physical damage to the goods in question, whereas what has happened as this line of cases has developed in New Zealand, this is one of the reasons why it, sort of with respect, is a whole bit difficult to suggest that it's actually a stable body of law that has had the same conceptual underpinning throughout, is that there was something of a focus on physical damage in the early cases and I think that's mostly what the Court means by damage in *Johnson* and that's why they refer for example to gradual erosion of banks and things like that and all the cases on whether lots of different causes of action accrue as a bank gradually slides away and support is withdrawn from a neighbouring property. But – sorry Sir –

McGRATH J:

I was going to say I see that page 1374 of the casebook, Justice Richardson takes the point up too.

MR GODDARD QC:

Yes at 242 of the report.

ELIAS CJ:

Sorry which, 137 –

MR GODDARD QC:

Page 2 – 1374 of the stamp numbers 242 of the report, Justice Richardson says beginning at line 16, "Premise on which the aspect of the case is to be considered is that each appellant breached the duty of care but it is well settled that a breach of the duty of care does not in itself entitle the person to whom the duty is owed to sue. Damage is an essential ingredient, and except where an existing right of action is assigned to a purchaser, he can sue only in respect of damage which occurs during the period of his ownership or occupation." So that limitation which Lord Wilberforce pointed to in *Anns v Merton London Borough Council* [1978] AC 728 (HL) as disposing of the possible objection that this was a floodgates situation. So those are the two passages in *Mt Albert Borough Council* that are authority for this proposition –

TIPPING J:

But you can't have floodgates because there can only be one person suffering loss. Professor Todd makes that point in his book on torts.

MR GODDARD QC:

As long it's just the owner.

TIPPING J:

As long as, yes.

MR GODDARD QC:

And then the issue becomes one of potential temporally infinite extension and the same person suing for the same defect again and again and again and how you

manage that issue and of course this was being written at a time when the 10 year long stop was not in place, so the prospect of perpetual recommencement of the six years –

TIPPING J:

Yes, well that's why I started with the 10 year long stop which I think frankly, is a very significant dimension in the picture and you may remember that it was going to be 15 years and the insurance industry persuaded Parliament to cut it back to 10 for this very reason, as I recall, for this very reason of the long extendable risk.

MR GODDARD QC:

And because it was suggested that insurance for 10 years on a liability arising basis was obtainable whereas 15 was not –

TIPPING J:

But it was all against on the basis –

MR GODDARD QC:

– which was not in fact the case.

TIPPING J:

– it was all legislated as I recall on the basis that the problem would otherwise be this long chain. It wasn't suggested that you couldn't sue if the –

MR GODDARD QC:

I don't think the suggestion was that there was a long chain of people who could sue in respect of the same harm; the point was rather that the defect might not be discovered until well down the track and then a cause of action would accrue for the first time.

TIPPING J:

I don't – well we have to look this up Mr Goddard, but my recollection is was both. That there were multiple concerns here and that's why Parliament brought it back from 15 to 10.

MR GODDARD QC:

I don't recollect any suggestion in the material I've seen that successive owners might be able to sue in respect of the same defect and certainly in *Hamlin* –

TIPPING J:

Does that mean then that if you sell without disclosing, you get the full value without any diminution for the known defect, the purchaser can't sue so no one can sue?

MR GODDARD QC:

If it was in fact discovered but not disclosed –

TIPPING J:

Yes.

MR GODDARD QC:

– yes because that's a matter for contract between the vendor and purchaser and if it's, for example, an original vendor then just the standard ADLS warranties will cover it otherwise –

TIPPING J:

Well if an express assignment is sufficient, there can't be any philosophical reason against a transfer of a right, so what's wrong with holding that it follows the land?

MR GODDARD QC:

That's a pretty sweeping development of the law which hasn't been contended for by the plaintiffs in this case or considered by either of the Courts below or addressed properly in argument by either party. In my submission that would be something that if the Court were minded to consider, it would necessary to actually come back and argue properly – I haven't done the work I would need to.

TIPPING J:

Well this submission appears to have developed a greater significance than perhaps, at least, I realised on perusing the written material. It means effectively that you can't sue for inherited known – or even if you don't know of it –

MR GODDARD QC:

Yes. That – what was argued in the Court of Appeal and that's why Justice Young said, he called it the "liability rule" and said it should be thrown out the window.

TIPPING J:

Speaking for myself, I'm not sure that I've felt the force of the – or the consequences.

MR GODDARD QC:

That's why His Honour said, Justice Young said, that he's reached the same conclusion of the Judge below but with much greater difficulty. He, His Honour saw this as having real force and raising really difficult issues and, in my submission, His Honour was right, only they're actually even more difficult than His Honour suggested with the result that they produce this outcome. But it is consistent with basic principles of property law and tort law; it's consistent with the observations of the Privy Council in *Hamlin* about the inability to postpone the start of the limitation period by closing one's eyes to the obvious. And in my submission what is obvious includes what is known through investigation to all the existing unit owners, that is obvious to them. And I think it –

ANDERSON J:

Is it possible for a Council receiving notice of a claim by a present owner to note a LIM of defects?

MR GODDARD QC:

Yes, but of course the whole point, the whole situation in which this arises is where that claim isn't made and the Council –

ANDERSON J:

But we have to assume that a claim will be made by someone otherwise there's nothing to worry about and as soon as a claim's made, the Council's response can be noted on a LIM.

MR GODDARD QC:

The critical question here is what happens where a claim hasn't been made at that time but the defect has been discovered.

ANDERSON J:

But for practical purposes the Council can protect itself against a succession of claimants.

MR GODDARD QC:

Well let – that's – if it's notified of a claim.

ANDERSON J:

Mmm.

MR GODDARD QC:

If it's not notified of a claim then it's exposed to the extension of the limitation period –

ANDERSON J:

But then it hasn't been, then it won't have been found liable on that claim.

MR GODDARD QC:

No.

ANDERSON J:

So it can protect itself in being claimed against more than once by noting a LIM.

MR GODDARD QC:

The ability to manipulate this, for example, with transfers within family arrangements to extend the limitation period is one that I think needs to be borne in mind but also primarily the unfairness to a defendant, the loss of the protection – which Parliament has said it's fair to have, this extended limitation period, by a recommencement of the running of that period on a sale and the – it's too simplistic to say well if the purchaser is not told of the defect, then they suffer the whole of the loss and the vendor suffers none because of course one thing which may well happen is that a vendor knowing of a defect is willing to accept a lower price than they otherwise would be, even though they don't disclose it. So it's not possible to say that whether or not the vendor suffers a loss and whether or not the whole of the loss is suffered by the purchaser depends simply on the fact of disclosure. As soon as there actual discovery of a defect, then in fact it influences the price at which transactions will occur.

ELIAS CJ:

Why then not separate for the purpose of limitation accrual from the right to bring a claim, why should not there be an implicit transfer of the right to claim –

MR GODDARD QC:

Because what that is really doing –

ELIAS CJ:

– even if the limitation period has started to run?

MR GODDARD QC:

So the suggestion is that the subsequent purchaser could sue but might not have a whole six years –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to do it in, and I suppose that would follow from Your Honour's suggestion of a deemed assignment because what would be assigned was the cause of action that had accrued here, say, on 3 March 2000.

TIPPING J:

Yes, subject to further loss accruing for the new owner.

MR GODDARD QC:

Which might give rise to new causes of action, but of course there can't be any –

TIPPING J:

Well –

MR GODDARD QC:

– question about that.

TIPPING J:

– about that. But to the extent of the past loss, if one can call it that, I'm – the Chief Justice's proposition is the very one I was raising, what's – what is jurisprudentially wrong with that? I understand your point about it hasn't been argued and so on.

MR GODDARD QC:

Yes that – my main concern is that it hasn't been argued and I haven't given it the thought I would normally hope to give to something before I made submissions to this Court, but it seems to me that first it's different from what the Court of Appeal said here because it – the subsequent purchaser would be exercising the former owner's right to sue and the limitation date would be different from what follows from their rule, enunciated by the Court of Appeal, so that is a significant – it would be in itself a significant decision, quite apart from its implications for broader principles and potentially for other areas which haven't been considered. But secondly, I really wonder whether, with respect, this isn't the sort of fiction designed to modify the way the Limitation Act works, that this Court said, for example in *Murray v Morel* really can't be judicially legislated.

ELIAS CJ:

It wouldn't alter the limitation period but I think your more powerful argument is that it would introduce distortions which the present law of vendor and purchaser might not be able to address –

MR GODDARD QC:

Yes.

ELIAS CJ:

– which is really what the respondents say in saying that we'd have to look at caveat emptor in those circumstances because if it were the case that the vendor had captured the non-disclosed value, then the Council might wish to join the vendor I suppose, as a third party in some circumstances. But it won't be able to because of the, because of caveat emptor.

MR GODDARD QC:

And certainly to the –

BLANCHARD J:

And then the vendor would probably want to claim against the Council –

MR GODDARD QC:

And certainly to the extent that the purchaser was exercising not their own right of action but that of the vendor, all the factors relevant to that person's purchase and the circumstances in which they went into it –

ELIAS CJ:

Mmm.

MR GODDARD QC:

– enquiries they made, the extent of contributing, all those things –

ELIAS CJ:

Yes.

MR GODDARD QC:

– would apply so you'd be expanding the range of necessary information and necessary parties –

ELIAS CJ:

Yes.

MR GODDARD QC:

– in a way which has potentially quite significant, I think, implications both for the substance of the law and for the way in which claims could be tried.

TIPPING J:

You get those problems on an express assignment too.

MR GODDARD QC:

But where there's an express assignment there will be expressed or implied rights to information necessary to pursue the assigned claim which I think –

TIPPING J:

I understand that it's not entirely straightforward but it does –

MR GODDARD QC:

It's not, I'm not saying that these are absolute and obvious barriers, what I'm saying is that they deserve much more careful attention than certainly I've given them and I accept full responsibility –

BLANCHARD J:

That's a bit worrying because I tend to agree with you Mr Goddard, that this has come up really as a kind of tail piece, we've had an awful lot of time consumed on other issues whereas this one which looks to be very arguable hasn't received the attention that perhaps it should have.

MR GODDARD QC:

I have had to make some very difficult choices about what to cover in the available time and it seemed to me that as we're going through the legislation there's a backdrop to so many of the issues, that it was necessary to take a bit of time doing that so –

BLANCHARD J:

I didn't intend that as a criticism.

MR GODDARD QC:

No, I absolutely accept that this is a case which just because of the number of plaintiffs, the number of issues, is actually rich in potentially important questions.

ELIAS CJ:

Well we'll hear from the respondent on this and it may be that we will need to hear further argument or require further submissions to be put in on it.

TIPPING J:

Because this is a known defect, the next question is what if it should have been known?

MR GODDARD QC:

Yes and the Privy Council equated the two in *Hamlin* and said that you couldn't close your eyes to the obvious and the obvious is not just, in my submission, the obvious from physical inspection but also the obvious because someone has come and looked and told you. And the obvious, I would say, vis-à-vis a purchaser includes the

things that could be ascertained by the very elementary mechanism of asking the Body Corporate whether there are any existing issues.

BLANCHARD J:

Because the Body Corporate mightn't know if it's something that ought to have been discovered but hasn't been.

MR GODDARD QC:

Absolutely. But here of course, it has. One would also get the question of the extent and this raises the thorny issue of attribution, the Body Corporate is the owners for the time being of the units, so if an owner is aware of an issue, then I think, there's a strong for saying the Body Corporate knows the issue, but of course what all the cases and attribution tell us is that the purpose for which you're attributing is key, and one would have to look at what the consequences of that attribution were and in particular circumstances.

McGRATH J:

Mr Goddard, can I just mention, I see the issue was actually touched on as long ago as *Bowen v Paramount Builders* [1977] 1 NZLR 394 CA by Justice Richmond, who didn't seem so convinced the mere discovery of a latent defect itself amounted to damages, he may have been hinting at the way he saw around this problem.

MR GODDARD QC:

That I think was very much at a time when the focus was on physical damage and that took the Courts down the path that led to the *Pirelli* dead end in relation to limitation and that's why what the Courts did was effectively back up the truck to use the metaphor and say, "No, no, this is not about physical damage occurring, it's about economic loss." And then the Privy Council began the process of working through the implications of that for the two interlinked issues of liability and limitation in *Hamlin*.

McGRATH J:

That may have been the focus –

MR GODDARD QC:

Yeah.

McGRATH J:

– but the later focus fairly clearly was on limitation. This is a lot of – a lot of the comments made by, seem, in particular the ones you've mentioned from *Mt Albert*, really seem to be passing comments in that context very much obiter.

MR GODDARD QC:

Those were, and certainly Lord Denning and *Sparham–Souter* was also obiter, saying "Don't worry about unfair consequences because this is how it works out, only the person in whose time the damage occurs can sue." But the same cannot be said of the Privy Council's consideration of the two issues because Their Lordships were acutely aware of the intimate relationship between the nature of duty, the nature of the loss and the time at which a course of accrues, they had both the duty issue and the limitation issue before them and they were concerned to provide a coherent answer to those two issues and did so drawing on Ms French as she then was, analysis, that this really was economic loss, loss to the pocket of the owner and therefore occurred only when the value was affected. The point I was trying to make earlier was that values affected not just by a purchaser being able to physically see a defect, but also by a vendor knowing of a defect. So certainly actual knowledge, even just on the part of the vendor has an immediate impact on market value and transactions.

Unless there are any specific –

ELIAS CJ:

There may well be some analogies that really should be looked at in this context. Not just negligence cases. Anyway –

MR GODDARD QC:

Yes. The analogies tend to focus on physical damage to property, for example trespassed goods, or liability of bylaws –

ELIAS CJ:

Nuisance.

MR GODDARD QC:

Nuisance. Nuisance cases also. Those are all very focussed on physical damage and all are consistent with the idea that it's only the person who owns at the time who can sue, and if in fact you are able to dispose of a cargo for example, without any discount for damage which is –

TIPPING J:

At the time the damage occurs or continues in the nuisance context anyway.

MR GODDARD QC:

Depends on whether its damage of a one–off nature or of a continuing harm.

TIPPING J:

Mmm, of a continuing.

MR GODDARD QC:

Yes.

ELIAS CJ:

This is really much more closer to the continuing harm.

TIPPING J:

The continuing. It's a vexed point

MR GODDARD QC:

It is a difficult point.

ELIAS CJ:

That's why I think that some wider thinking around it may be necessary, but we'll hear what the respondent has to say on that. Is that really where –

MR GODDARD QC:

I was just going to provide some references without going to them to respond to questions in particular from the Court.

ELIAS CJ:

Yes.

MR GODDARD QC:

The first was on insurance, if I could just perhaps note that the, Mr Flay one of the Council officers called in Byron, was cross–examined on this issue, the relevant passages in *Byron,* case on appeal volume 6, tab 73, at page 491, what Mr Flay confirmed was that the *Byron* case was covered by the risk pool arrangements between the Councils, which is not insurance as such but is a pooling of exposures by Councils with a levying arrangement, and the same I can confirm is the position in relation to *Sunset* that is of course a system which works like insurance on claims made basis, not liability arising and the consequence of no one having anticipated the scale of claims now seen and the vanishing of all commercial insurance from the market, and indeed risk pool arrangements, is that Councils and rate payers mostly now bear the losses associated with weather–tightness claims themselves. But there are some of the older cases like this one, that are the subject of the risk pool arrangements.

Reliance is the other question I was asked about. Justice McGrath asked me whether there was evidence about this. There's brief summary in Justice Venning's judgment in *Byron Avenue* at paragraph 30 referring to pre-purchase inspections now being more common place, but it certainly couldn't be suggested that they're universal, or even predominant in the New Zealand market of that time. And there is evidence that two of the *Byron* plaintiffs had pre–purchase inspections carried out, which did not identify the issues. Mr Wilson, who obtained a pre–purchase report, the cross-examination of Mr Wilson on that is in volume 3, tab 44, at page 676 and Mr Coulthard confirmed that he obtained an oral building report in his notice, answering – his answer to interrogatories volume 3, tab 29, page 488. In addition there's more general evidence about the availability of pre–purchase reports and steps that purchasers can take and were in the early to mid–1990s providing in the cross–examination of Mr Sean O'Sullivan, volume 4, tab 53, and in particular around page 889 and of Mr Cartwright at volume 5, tab 59, page 1020, the evidence for the Council also looked at the steps that can be taken in terms of obtaining pre–purchase reports and requesting LIMs and that's addressed in the evidence of Mr Powell, volume 5, tab 66, and in particular at 1123 to 4 of Mr Oden, Council inspector volume 6, tab 68 and in the evidence of Mr Robert Eades about what a solicitor advising a prospective purchaser would advise them to do and the steps that would normally be taken, that's in volume 6, tab 74. Really the whole of that evidence is very focussed

on that issue. So that provides a richer picture of the landscape in terms of what purchasers were able to do and were doing at the time of these transactions.

Unless there are any other questions at this stage.

ELIAS CJ:

Thank you Mr Goddard. Yes Mr Farmer.

MR FARMER QC:

I've prepared some notes if the Court pleases, which are intended really to kind of focus more on the issues as they've risen during my learned friend's argument and under the main issue, which is the general duty of care, I would propose going through that very quickly, because the matter's been so fully debated by Your Honours with my learned friend and as is usually the case, Your Honours have taken some of my best lines, so I won't try and repeat them. They are however, four preliminary points I'd quite like to deal with first if I could. The first is to actually show Your Honours what these two properties, Byron Avenue and Sunset Terrace look like, because we've heard a lot about expensive 20-storey apartment blocks with sophisticated engineers of various kinds, geophysical engineers and others being engaged, and therefore subsequent owners relying on them, but I'd like to suggest to you that we're not dealing with anything of that kind.

So if we could just look first of all at Bryon Avenue and you'll find that in the Bryon Avenue case of appeal in volume 7 at tab 82, at page 1407, what you'll see here is a series of photographs over the following pages but just looking at 1407 you will see that perhaps things haven't in this respect, this kind of property, moved on so far from the typical sausage type brick and tile unit that's still to be found in, at least in our suburbs in Auckland, Epsom and round Mt Roskill and so forth. So there you'll see what is effectively a two-storey building with a garage below, relatively simple construction and design and just to compare that with the Sunset Terrace building which is in the Sunset Terrace case on appeal, volume 3 at tab 54 and in particular at page 691, there you see an even simpler type of building, two stories no doubt, including a garage under and a very, very simple design indeed, albeit with a tennis court next door, whether it belongs to the development or the people next door, I don't know. And on top there's a swimming pool.

So that's the type of building that we're concerned with and I would certainly be submitting to Your Honours that in terms of value of such buildings, in terms of the type of building, it's really quite hard to draw lines between that and the what, so called modest type of single dwelling that my learned friend seeks to restrict the *Hamlin* duty to.

Now another preliminary point, if I may, is the question raised by Your Honour Justice Tipping on the question of inspections and what was pleaded and how the case was run. You will recall that my learned friend has really put his emphasis on two points. One, when the Council issues the building consent and the other when it issues the certificate of compliance and the inspection process sort of was in the middle of that and the issue that was debated or discussed rather, was whether and to what extent, the duty to inspect arises, as it were during the course of the process and what happens if on an inspection the inspector ought to have found or discovered a, perhaps, a fairly obvious defect but doesn't or hasn't and hasn't issued an immediate notice to rectify or taken some other step, along those lines.

Now I'd show you how the matter has been pleaded and then I'll show you a little bit of the evidence to demonstrate that the duty to inspect was squarely raised as being a continuing duty through the process of construction. So if you look, just taking the Byron case on appeal, volume 1 at tab 3 and turning to page, beginning first of all looking at page 27 is where the breach by the Council is alleged in various respects and going over to the third of those breaches which is on page 29, paragraph C, "It failed to put in place a regime of inspections designed to ensure compliance with the Building Code and/or it failed to carry out its inspections with sufficient thoroughness," and then there are particulars given of that which I needn't take you through and then if you go to page 31, paragraph D, "Failed to take reasonable steps to ensure that the defects were rectified so that the building work undertaken in respect of the Byron Apartments 1, complied with the requirements of the building consent, and 2, the provisions of the Building Code.

And then further down on the page, paragraph 41, "As a result of the Council's negligence, the Byron Apartments were built with the defects which have caused or contributed to the damage and the plaintiffs will have to take full remedial works." And then looking finally just at some of the evidence, perhaps the more important evidence in volume 5, also in the Byron case on appeal at tab 82, I'm sorry not tab 82, that's incorrect – at tab 57 looking at page 9 – this is the evidence, this is the brief

of evidence of Roger William Cartright who was an expert who previously worked with the City Council as a building inspector and was instructed to review, by the plaintiffs, to review the work and if you go to page 976, having examined the evidence he said at paragraph 25 under the heading, "notices to rectify," "The Council ought to have stopped the construction work and issued notices to rectify as it identified defects during the course of inspection rather than allowing work to continue and make the ultimate repair more difficult," and then he in fact examined the particular defects and in effect elaborated on that point beginning on page 978 and on 979, just to take two examples two of the major problems, two of major defects at the top of the page, "At the head of the windows the plaster had an ineffective light groove as a drip edge, the sill flashings were inadequate," and in paragraph 42 he said, "During inspections a prudent Council officer would have identified that the doors and windows were installed with no head and jamb side flashings and that the sill flashings were level or fell back towards the building. This should have been identified by the Council at the pre-solid plaster mid to late 1998 and final inspections," both points. "After identifying these defects the Council should have taken appropriate action to rectify the problem such as a notice to recertify."

And then in respect of the next key defect that's referred which were, both of these found by the Court to have existed, "The deck wing wall junctions lacked weather-tight and cladding clearance," and over the page at paragraph 45, "At the pre-plaster and final inspections the Council officers should have noticed there was no means of water being diverted away from this vulnerable junction and that the plaster on the wall was hard down against the flat top capping on the wing wall. The Council should have taken action to rectify the problems such as a notice to rectify." So that's both during the process of construction and at the final inspection stage.

Now as a third point, my learned friend began this morning by taking you back to *Hamlin* and seeking to draw a distinction between home and house and Your Honour I think, Justice Tipping pointed out to my learned friend that there was certainly – these terms were used interchangeably in fact, through the judgments and our submission would be first that no clear distinction can be drawn between the two terms but what is clear enough is that the key question is what was the intended use. If the intended use was that of a residence somebody is living in it, it's somebody's home, then the duty arises at that point. And indeed – you've seen it, I don't think I need to take you there, but in fact in the *Hamlin* Court of Appeal judgments Justice Richardson at 52 – I think I will need to find it, so it's volume 5 at tab 34 and at page

528 at line 40, what was said – that the phrase that His Honour there uses is a duty of care to homeowners that, with respect, is a phrase that can be applied both to an owner of a home living in it and the owner of a home who's rented it to someone who's made it their home and that's the problem really with that kind of phrase and one can also look at Justice Casey at page 533, sorry Justice Gault at 533 line 42, where His Honour referred to, "Builders and local authority building inspectors may be liable to owners and subsequent purchasers for defects caused et cetera," so there the onus is on the – the emphasis is on the owner and on the purchaser. The point being though that what is critical is the question of what is the use or the intended use to which the property is to be put. And indeed, this morning, my learned friend seemed to have acknowledged that, perhaps in an unguarded moment, when Your Honour Justice Tipping put to him, "You have to have a test that is applicable at the time of inspection," and my learned friend said and this is my note, "Yes so that the Council knows the risk it faces and what to charge." And with respect that really puts an end to the whole investor argument that we've heard, at least insofar as the investor argument applies to properties that are intended to be used as residences. And building – that particular interchange followed suggestion –

ELIAS CJ:

Sorry I don't, I think I'm missing something there, why does that put paid to it?

MR FARMER QC:

Because if the duty – if the – in the building permit application the intended use to which the property is to be put has to be stated, if the state of use is that of residence, residential property, then the Council knows that at the time – as my learned friend put it, it needs to know that so that it knows the risk it faces, it knows it's in a *Hamlin* situation and it knows therefore that it may charge or may need to charge more if its inspection process is going to be more thorough and if because it knows that because it's not a commercial building, it's more likely than not than in the case of a commercial building, that there may well not be the army of experts assisting the developer that would otherwise be the case in respect of a commercial building. And so that's the point of time where the duty has to be considered and assessed and where it arises. And that's consistent –

TIPPING J:

The point being is that the Council won't necessarily know at that stage anything other than residential?

MR FARMER QC:

That's right. It won't know who is going to buy this particular property, it won't know if it's going to be bought by someone who's going to make it his or her own home or if it's going to be bought by someone who's going to make it a home for somebody else, either by putting their grandchildren in it or their teenage children, or just simply renting it to a family as tenants, an arm's length basis, it won't know.

ELIAS CJ:

So the plaintiff differentiation won't actually help the Council in addressing its responsibilities?

MR FARMER QC:

That's so. And Your Honour the Chief Justice in a similar exchange this morning put it to my learned friend this way and it's my note again, "The statute is concerned with use, is it such a step forward to say that use is the line?" And Your Honour then said, "The line may be the use, your premise is," and this is the contrast of my learned friend's case, "Your premise is that it is a purchaser based test," and that is the clear issue in this case. Intended use versus who is the purchaser. Now just to go back in time a little bit to see how any earlier cases the matter may have been considered. If I can take you to *Williams v Mt Eden Borough Council* judgment of Justice Casey which is volume 8 at tab 60 at page 102,551. This is a case in 1986 so it's pre-*Hamlin*, but it's after the landmark cases of *Anns* and in Australia, *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564, (1985) 60 ALR 1 which is referred to on the opposite page, but if you look at 102,551 the first column, last paragraph, after referring to powers, statutory powers originally contained the in Municipal Corporations Act in New Zealand and then later Local Government Act, powers that gave Councils, enabled Councils to pass building bylaws, in that final paragraph His Honour said, "Having had these powers in relation to the construction of buildings conferred on it, the reasonable local authority would have no doubt have accepted that they were intended to be exercised for the protection of those members of the public concerned with those buildings, those buildings, whether as owners, occupiers or users," so the emphasis is on the nature of the building, the type of the building, the use of the building and the status of the person owner, occupier – owner or occupier is beside the point.

So, if I could perhaps then move to the notes that I've prepared and I've just on the first two pages and I won't take you through these, I've set –

BLANCHARD J:

Have we got those?

MR FARMER QC:

Oh sorry, yes. So on the first two pages which I won't read, first page and a half, I've just extracted from my learned friend's written submissions the issues that he has posed. First of all, under a general heading of "Duty of Care" and I've given references in footnotes to where I've taken them from, his submissions, that's actually I think the Sunset Terrace submission. Then "Special cases" at the top of the next page, assuming a duty of care, the investor point, subsequent purchaser point and what's not – what I haven't set out there but it's sort of the very special cases, such as the Blue Sky issue, the Byron situation with the no code of compliance, et cetera. I'll deal with those briefly later but they're dealt with in the written submissions.

So, under "Duty of Care" the first submission that we make is a fairly obvious point but it's an important one and that is that we are here examining a common law duty, we're not looking at a case of breach of statutory duty. Justice Baragwanath makes that point in the judgment, I've given the reference and I won't take you to it, in this case. He makes it in the context of considering a submission that was made to the Court, that the portion of the Building Code that explicitly refers to external moisture which is E2, does not, unlike other parts of the Code, refer to amenity but only to illness or injury.

So that's a core part of my learned friend's submissions, that the Building Act has narrowed the objectives, or the scope of protection to illness or injury, health, as opposed to protection of amenity. Although, of course the term "amenity" is to be found throughout the Building Act, in different places, my learned friend says well, when you look at the external moisture provision in the Building Code which was made as part of the regulations, that were promulgated under the Act, you don't find the term amenity there.

Interestingly, just on that point, if I may deal with it quickly. My learned friend did hand up to us and to you a later version, oh sorry, an earlier version of the building

regulations and said that the form of the building regulations that's contained in the volume is in effect a later version of it and I don't take issue at all with that but just for the sake – but it is of interest to take my learned friend's point about clause E2, although I will be, I am submitting there's a bigger point about it but just to take the particular specific point. If you look at page 454 of the bundle which is bundle 2, his point is that in E2.1 external moisture, E2.1 objective, "The objective of this provision is to safeguard people from illness or injury that could result from external moisture entering the building."

On the version that you have now in front of you, in the right-hand column, "Limits on application", that reads now but didn't read in the version at the time, it does read now, "Requirement E2.2 does not apply to buildings (for example, certain bus shelters and certain buildings used for horticulture or for equipment for washing motor vehicles automatically) if moisture from the outside penetrating them, or accumulating within them, or both, is unlikely to impair significantly all or any of their amenity, durability and stability." So you do find amenity has found its way now into clause E2. Excluding automatic car washing equipment would seem to be an obvious case for ensuring that E2 didn't apply.

So there is that point but the bigger point is Justice Baragwanath's point in this case, that what we're concerned with here is a common law duty, not breach of a statutory duty. I've given the reference to that. That's the same point made earlier by Sir Robin Cooke of course in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, where he talked of the common law duty arising alongside the statutory duty and there is no doubt that the statutory scheme is of course highly relevant to the scope and existence of the common law duty because the statutory scheme imposes the responsibility on the regulator.

There is no need for, as Your Honour the Chief Justice put it, I've noted it from yesterday, "The common law duty doesn't have to be co-extensive with the statutory duty. Certainly the common law duty mustn't be inconsistent with it but it doesn't have to be totally consistent with it either." I've just noted that.

The point was put very well also, if I may say so, by Justice McHugh in the case that my learned friend handed up to you, in the case of *Pyrenees Shire Council v Day*, he handed up, you'll recall, at the beginning of yesterday. I won't take you through the facts of it but the point is dealt with at page 371. This is a case really where the

whole issue of general reliance was debated at some length, beginning in Justice McHugh's judgment at 369 but if you go over to 371, first of all at 370, paragraph 105, at the end of that paragraph he notes *Hamlin* and says that the doctrine of general reliance was accepted by Lord Hoffmann in *Stovin v Wise*.

Then if you go across to page, the 371, paragraph 109, I'd like to read this. "Third," he says, "the fact that the authority owes a common law duty of care because it had been invested with functional power does not mean that the total or partial failure to exercise that functional power constitutes a breach of that duty. Whether it does will depend upon all the circumstances of the case, including the terms of the functional power and the competing demands on the authority's resources. Accordingly, I do not think that it is correct to say that the doctrine of general reliance is a fiction or that it gives rise to common law duties that are inconsistent with the conferment of discretionary powers and functions. There is nothing novel in the proposition that dispute the conferment of a discretionary power, particular circumstances may require the power to be exercised. To hold that the existence of the power can give rise to a common law duty to take reasonable care to exercise it is therefore not inconsistent with the existence of the discretion."

ELIAS CJ:

This of course wasn't a discretionary power.

MR FARMER QC:

No.

ELIAS CJ:

So this is closer to *Couch v Attorney-General*, where there was a statutory duty?

MR FARMER QC:

Yes, yes, that's so.

ELIAS CJ:

Yes.

MR FARMER QC:

Just as a final reference, in *Dicks v Hobson Swan Construction Ltd* (*in liquidation*) [2006] 7 NZCPR 881 (HC) which is volume 5, I won't take you to it, volume 5 of the

bundle of authorities, I've given the reference here. Justice Baragwanath also, the way he put it there was that the existence of a public duty does not exclude a private duty.

TIPPING J:

This is all implicit in *Attorney-General v Carter*, where we had to look at both aspects, both the common law situation and the statutory duty situation.

MR FARMER QC:

That's right, that's right. So we're not dealing with a case and I think Sir Robin Cooke postulated this as one type of case in *South Pacific Manufacturing*, we're not dealing with a case where the statute covers the field and has excluded the common law, the two co-exist. I've just noted also, Your Honour Justice Tipping's comments to my learned friend yesterday suggesting that there's nothing inimical about a common law duty lying alongside the statute and my learned friend sought to respond to that by saying well, the common law is not concerned with property values, Your Honour said well, why wouldn't that be a common law concern?

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.12 PM

MR FARMER QC:

So, I was just then going through some general propositions around the duty of care and on at the top of page 3 of the notes and I can go very quickly through these. The common law duty of care was established for policy reasons based on New Zealand's social conditions which of course derive from the statutory responsibility of Councils and that was so recognised by the Privy Council in *Hamlin*.

The common law duty is long settled and has been applied both before and after the Building Act many times and by appellate Courts and community reliance is thus entrenched and there's a dictum from the Privy Council. "In a succession of cases in New Zealand over the last 20 years, it has been decided that community standards and expectations demand the imposition of a duty of care and local authorities and builders and that duty of care extends" – I've written in the words there, to subsequent purchasers, are alike to ensure compliance with local bylaws.

So, in those circumstances, we would submit that the onus is on the Council to displace that duty, or to have it modified in some substantial way. My learned friend was prone to use the term "expanding the duty". We would say rather, that the duty, he is seeking to restrict the duty by carving out exceptions to it but in any event, we do say the onus on the Council to displace the duty is a very heavy one, particularly when one has regard to a number of factors. I've then listed them. The first being that the legislative changes upon which it relies have already been considered by the Court of Appeal a number a times and by the Privy Council of course and found not to affect the duty and indeed, to be consistent with it.

I then set out an exchange from yesterday, where my learned friend sought to downplay the consideration given by the Court of Appeal and by the Privy Council in *Hamlin* to the Building Act of 1991 and it's quite plain we would submit that in fact they gave a very full consideration to it, in both judgments, particularly of Justice Richardson and in the Privy Council. Specific provisions were referred to in the Building Act and what in particular Justice Richardson concluded from that analysis was that there was a statutory responsibility on Councils under that Act in respect of the construction of buildings, so that the radical change in the statutory scheme, although it has certainly changed in form, changed in incentives, economic incentives and so on, in essence, the scheme had not been changed to the extent that one could say that with it, with the change went the common law duty. I'll come back to that because that point was picked up by the learned president in the present case.

Second point we would make, on top of page 4, is there is an absence of any evidence that establishes a fundamental change in social conditions and in community reliance and expectations. I mean, this is not a case where there's been some kind of Brandeis brief, some sort of sociology survey, expert evidence led about change in social conditions, changes in community attitudes, changes in reliance on Councils. There's an absence of that evidence, instead the Court is simply being asked to assume that somehow things are radically different today from how they were found and described in *Hamlin*.

One thing is clear though, this is our point C, that to remove the Council duty of care, as it has been understood and applied in New Zealand, would have significant community implications among homeowners, the building industry, local bodies and insurers and that point was made by Justice Richardson in the reference I've given and Justice McKay agreed with what he said about that. That interrelationship

between all of those different players in this large social scene is picked up also by Justice Woodhouse as he was in *Bowen v Paramount Builders*.

Perhaps I would take you to that, it's in volume 4, although the passage is actually set out in our written submissions as well and the reference is given but in volume 4, tab 24 at page 419, His Honour described how there is this interdependence and interlinking and reactions by different, as I call them, players in the building industry which is a direct consequence of the law as it has been stated to be. I think Justice Richardson in *Hamlin* talked about the law having a symbiotic relationship with social behaviour.

So at 149, His Honour said at line 16, addressing the floodgates argument that had been put to him. He says, "I'm not impressed by the floodgates argument. It's an argument that's been heard before but the recognition of a duty of care in the face of it has not seemed to require any great readjustment. In my opinion, is unlikely to do so in the present type of case. There is the further consideration that the practical effect of accepting that there is a duty of care owed by one class to another is usually not limited to shifting individual losses from each innocent plaintiff to the negligent defendant. By the conventional use of insurance it becomes possible for the losses to be widely spread and thereby a double social purpose is served. On the one hand, the serious strains that can arise if the random losses were left to lie where they fall, are removed for the unfortunate and innocent victims. On the other, the opportunity for their wide distribution through insurance encourages savings in the form of premium reserves which can be used for the important purpose of supporting the economy generally and in this regard, third party insurance by the building industry would seemed to be entirely feasible, while any general system of first party insurance by purchasers would not."

So he's saying it's impractical for individual purchasers to insure against this kind of risk. That kind of insurance just doesn't exist. On the other hand, participants in the building industry and the local authorities, can insure against this kind of risk and that spreads the cost of the problem through the industry as a whole and through the community as a whole, via the local authorities who, not only have insurance cover to call upon but also, if need be, ratepayers' funds. The point being though, that the loss is spread through the community and that's recognised for example too in the government's current proposed scheme for an alternative means of recovery

whereby half the losses will be able to be obtained from a statutory scheme to which the government contributes half and local bodies contribute half.

Now that, one wonders about the future of that scheme. If this Court were to find that there was no liability in the first place, on local bodies, one would imagine that the local bodies would very quickly pull out of the scheme and so the result, the outcome that Justice Woodhouse is talking about, would be detrimentally affected to that extent. You wouldn't have that spread of what is really a community problem, through the failure of the building industry, you wouldn't have that spread of the losses throughout the community in the way that Justice Woodhouse clearly thought was both practical and fair and equitable.

Now, I've got a note, another reference to *Hamlin*. You've obviously heard enough about *Hamlin*. I just make the point too though that what Justice Richardson had to say, in *Hamlin* in particular, his analysis of the social factors that led to the concept of general reliance was referred to with approval by Lord Hoffmann in *Stovin v Wise* and the reference for that, it's in our written submissions but I think we may have given an All England reference rather than appeal cases, so the reference to Lord Hoffmann is 1996 appeal cases and the dictum is at page 954.

So that moves onto the next point of principle which is the key policy consideration that founded the duty was the fact of community reliance on Councils to carry out their statutory responsibilities. The responsibility that comes from statutory control and that leads to community reliance and that's what Sir Robin Cooke referred to in *Hamlin* as the linked concepts of reliance and control which he said have underlain New Zealand case law from *Bowen* onwards and I've given the reference for that particular statement. It was picked up by the Privy Council and I've given the reference to that as well.

Local authority liability for negligence of its building inspector is based, as I say, on those policy considerations and in particular where there is sufficient, the test, or the principle, is whether sufficient proximity exists which is a question that will be influenced by the Court's assessment of community standards and demands. That's a quote from Mason CJ in *Bryan v Maloney* [1995] 182 CLR 609 which the Privy Council again also picked up in *Hamlin*.

Now, the policy reasons for continuing the duty and that's really the point that it's really now a matter for Parliament because the duty is so well entrenched and has had such an impact in terms of the arrangement and the understandings and the expectations that everyone has had, that really it is now a matter for Parliament. The way that Justice Baragwanath put it in the present case, in Sunset, given the reference at the top of page 5, was that we've all had 15 years to adapt to *Hamlin* and of course, the Privy Council said in *Hamlin* that the law had been settled for whatever it was, 20 years earlier, so we've had a long period now of this duty and Justice Baragwanath's statement was it is better to maintain a steady course.

He also said in the passage I've noted, that there was an onus, we would say a very heavy onus, for the reasons I've given, to show why the settled law should be departed from, particularly because it has been accepted by the New Zealand community as a feature of our law.

Now, I've then got a number of references which I won't go through as to the changes of the Building Act, where they have been considered. Justice Richardson, as I say, considered them. Justice Baragwanath, in *Sunset*, in fact read through both the Act and the commission report that proceeded it, at considerable length. What I would take you to, I think, is what the learned President in Sunset had to say because, to some extent, he agreed with my learned friend's submissions on it. So if you could perhaps find, pick up volume 4, tab 19 which is Sunset and go to paragraph 139. This is following a heading, just above that, "The continuing applicability of *Hamlin* under the Building Act 1991, general considerations" and in 138, he noted that my learned friend had reserved the right to challenge *Hamlin* in this Court.

In 139, the learned President recorded that at the heart of my friend's arguments is what he maintained, "was a sharp dichotomy". I'm told there was reference in a hearing to a sea change. All I can say is, I don't think my learned friend has probably ever experienced a real sea change, otherwise if he had he wouldn't regard the Building Act as one, let me tell you, from personal experience.

So, in 139, he says, "At the heart of his arguments is what he maintained was a sharp dichotomy between (a), the regulatory regime of the 1970s and '80s which informed the pre-*Hamlin* common law developments and (b), the regime which resulted from the enactment of the Building Act, including the related legislation. The

former regime was in part aimed at protecting the economic investments made by homeowners, a proposition which is illustrated by *Stieller*. Mr Goddard's argument is that no such purpose can be discerned in the Building Act and the Code and the precursor, the commission's report."

That point is elaborated in 141, His Honour notes that Justice Baragwanath had surveyed the Act at some length and then His Honour, in that paragraph said, "It is sufficient for me to say that I accept the force of much of what Mr Goddard said in argument. In particular, I agree with him that the thinking which underpinned the new regime was at least partly captured in the following passage from the 1990 report, 3.7, protection of the economic interests of people in getting value for money is not a justification for building controls, since value and quality can be supplied through forces of the market." His Honour continued, "I consider that this is reflected in the health and safety focus of the Building Code and the absence of any direct statutory indication that a new regime was designed to protect the economic interests of house and apartment buyers. In this respect, the legislative scheme is materially different from the previous regime. I thus accept that there is a dichotomy between the regime which was introduced in 1991 and the earlier regime."

So at that point, my learned friend was well ahead but then His Honour said, "However, I do not see this dichotomy as quite as sharp as Mr Goddard contended. The logical corollary of a forces of the market approach would have been the abolition of the *Hamlin* duty. Interestingly and importantly however, the legislature did not do so explicitly. Indeed, as Justice Baragwanath ahs demonstrated, the 1991 Act contemplates claims in tort against, among others, negligent local authorities associated with badly constructed dealings."

Then he set out some responses from my learned friend and I won't go through those because they are to the same effect of what we've heard here but, at the end of it, that was rejected. At 145, His Honour said, "So I propose to approach the case on the basis that the *Hamlin* duty survived the 1991 Act. Further, I am not prepared to read down the extent of the *Hamlin* duty in a way which proceeds, directly or indirectly, on the premise that *Hamlin* is confined to its own facts.

I won't take you through the rest of His Honour's judgment of course but it's quite plain that His Honour takes a very expansive view in relation to the specific issues that arise in this case including the position of so called investors and is not prepared

to read down or limit the duty in any way. And just as an example of that on the expert, the existence of an expert or the assumed assistance of an expert point that my learned friend placed so much emphasis on at 153 begins, "It would be capricious results if the Courts concluded that the *Hamlin* duty is displaced wherever an architect or engineer was involved, irrespective of the relevance of that involvement to the loss," and so on.

Now I do want to say just a little bit about the changes in the Building Act because as I say that is the learned President's judgment in terms of his analysis or his statement of the content and effect of the Building Act is in my learned friend's favour but it's shown His Honour wasn't prepared to draw, take the next step and to touch the duty. But in fact, with respect, we would submit that there's more to the Building Act or perhaps less to the Building Act than has been argued and our submission would certainly be that the Council's responsibilities in the role that it plays under the Building Act of 1991 is in fact extensive and its functions are such that its responsibilities and control are not impacted to anywhere near the extent that has been suggested, notwithstanding the existence or the what someone's referred to I think, as the unhappy experiment of certifiers, that existed for some years before they were removed in 2004. Now Your Honours were taken through the Act and so I just want to highlight the particular sections that we say do support the fact that the Council retains. As Justice Richardson said of *Hamlin*, "It does retain responsibility, an overall responsibility in respect of the construction of buildings," and if – I know you've seen these but if you just perhaps very quickly look at them again, the particular provisions I wanted to refer to, it's in volume 1 tab 2 and the sections that I just wanted to remind you of as having particular importance is section 6 of course, which is purposes and principles and reference to loss of amenity in 6(2) and there's section 24E and 24E is an important one which initially my learned friend overlooked I think, when he was taking you through this section and one of Your Honours brought him back to it. Functions and duties of territorial authorities, E is to enforce the provisions of the Building Code and regulations.

There's section 26 which I don't think you were taken to, "It is a duty on territorial authorities to gather such information and undertake all commissions, such research as is necessary to carry out effectively its functions under the Act," so that's an indicator we would say of this overall supervision, supervisory role that it has. 28(2) you were taken to, the power of territorial authorities – it's 28(1) and (2) to fix charges

in respect of building consents, so they do have the ability to bring forward such resources as they need to carry out these functions and on a user pays basis.

Then we have, we go through I think to 42 which is the rectification, notices to rectify. There is the power on the Council to intervene and require work, defective work to be rectified and indeed under 42(2), to require work to be suspended until the matters have been attended to. 43(6) is also relevant to that because that's the power of the territorial authority to – if it's not prepared to issue a code compliance certificate, then it not only may – it shall issue a notice to rectify in accordance with section 42 of the Act. And we have submitted and I took you to the pleading that's relevant to this, this morning, that when the Council took the view that it wasn't prepared to issue a code of compliance – a code compliance certificate, then it really had no option at that point but to issue a notice of rectification – it failed to do that.

My learned friend sought to argue there was some kind of intermediate position where somehow it could say, well we're not satisfied yet that a certificate should be issued but nor do we have to issue a notice to rectify, and we would submit that that intermediate position can't be found in that section. It either issues a certificate or it doesn't. And the problem that exists if it doesn't do anything is that of course what happens under contracts where people buy off the plan or they buy when a property's nearing completion, is that they sign contracts where settlement takes place when the certificate of practical completion has been issued by the builder or by the architect or whoever issues it, but the point is that when that certificate of practical completion is issued, then they have to settle under the normal contractual provisions and so all of that can and, obviously in this case, did occur before there was either a code compliance certificate issued or a notice to rectify issue and so that's how one gets to very quickly, gets to the point where there is a relationship between what the Council does or doesn't do, on the one hand, and what the purchasers of, in this case home units or apartments, what happens to them, namely that they then purchase a property that is defective which hasn't been signed off by the Council, but where the Council equally hasn't done anything about fixing the situation. So 42(6) we say is important. 43(6) I'm sorry.

Forty seven, that was that's the proportionality section as so referred to by Justice Baragwanath, matters for consideration by territorial authorities in relation to the exercise of powers. And you'll see there in G, the intended use of the building. There's again – is that emphasis on the intended use of the building as being what

the Council must direct its exercise of its powers to, not the intended ownership or it's the intended use of the building.

And then we, there was some time spent on 57 which is the building certifiers section and really the position taken by my learned friends is very one much of saying, well the way that they put it, this portrays my learned friend Mr Goddard's expertise in competition law the way it's put is that the regulatory function has become contestable and it's a wonderful phrase. But it's, in fact, when you look at it that suggests that somehow that excludes the local body altogether out of the picture. If a certifier's engaged then the certifier has total responsibility and the local body has none and we would dispute that proposition, and you actually see it in fact in section 57. In particular in 57(3) because there the engagement of the building certifier is subject to certain conditions and the first one in A, 57(3)A is that, "The building certifier shall report to the territorial authority in the prescribed manner," and in B, "The building certifier shall notify the territorial authority if the building certifier becomes or expects to become unable to inspect all or any of the specified items for any reason, or believes that there's a contravention of the provisions of the Building Code in respect of those items and has directed that the person carrying out the work to rectify the contravention, but that person has not done so within a reasonable time." And when you, you then go down to 4, "On receiving notification, the territorial authority shall amend the building consent accordingly and shall make such inspections and issue such notices to rectify as it considers necessary." So again you have that overriding control, responsibility, duty, whatever one may call it, all of those things no doubt in the local body.

Then we have 64(4) which is another provision which my learned friend initially overlooked but Your Honour Justice Blanchard I think it was, took him back to it, "A building shall be deemed to be insanitary if B, its provision against moisture penetration – if its provisions against moisture penetration are so insufficient or in such a defective condition as to cause dampness in the building or in any adjoining building." So that's the deemed insanitary nature of the building from moisture penetration and dampness and that's we would submit, a – and that leads into the statutory powers that the Council has in respect of buildings which are deemed to be, as the heading to section 64 put it, deemed to dangerous or insanitary, and you have those powers set out in section 65 – powers to give notice and so forth.

And then finally, the final provision I want to refer to is section 76, which is the inspection section, the definition of what an inspection is. And 76(1) is, "The taking of all reasonable steps to ensure that any building work is being done in accordance with the building consent," and so on. And in particular in C, "That buildings remain safe, sanitary and have means of escape," so there's the link back to section 64(4), the deemed insanitary building, powers of inspection that arise in D, not only powers of inspection but we would submit duties of inspection if a building is insanitary, surely there is a duty of inspection that would arise at that point. And in fact if you look at D, "Buildings which in the opinion of the territorial authority are likely to be deemed to be dangerous or insanitary under section 64 come to the attention of the local authority." And then finally 76(3), "It shall be a condition of every building consent that the territorial authorities authorised offices shall be entitled at all times to inspect." So that's the condition of the building consent, irrespective of whether there's a certifier involved in the picture in this limited period when certifiers existed that there is a power reserved to the territorial authority to inspect, and we would therefore say that it's an integral part of two of the inspection function and a purpose of the inspection function in that if there are defects found then there will be a notice to rectify issue if that's the appropriate measure, which it normally would be.

And we also, I think you had – Your Honours' attention was drawn to regulation 8 which His Honour Justice Richardson specifically referred to in *Hamlin*, in the building regulations that my learned friend handed up. Regulation 8 deals with certifiers but it requires a building certifier to make inspection reports to the territorial authority under section 57(3)A of the Act at least once every calendar month and so there again there is a further degree of control and of supervision which the Council has over building certifiers.

Now at the top of page 6 of the submissions we've made a submission that the cases relied on by the Council are not applicable to the common law duty in relation to residential housing. *Carter's* case, a shipping survey case, *Te Mata Properties* and Queenstown Lakes District Council v Charterhall, commercial buildings and to the extent that my learned friend relies on overseas authority, then of course there's the obvious point that there may be and in the United Kingdom is, or are, different social and policy consideration that have led the Courts to other outcomes. For example there have been *Murphy* in the United Kingdom and a decision which itself is not free of controversy and we've, in our written submissions –

ELIAS CJ:

Sorry which decision?

MR FARMER QC:

– at paragraphs 99 to 114, we've made much more detailed submissions really about all those cases, *Murphy v Brentwood, Woolcock Street,* which is in Australia which was a commercial building case, the Canadian cases which if anything are more in line with our own approach, *Carter*, *Te Mata* and *Charterhall* and so forth, so that's all been traversed in our written submissions and I don't propose, unless Your Honours would want me to, to go into the detail of that.

So that leads then to the final point to do with the general duty which is this question of economic loss and our submission here is that the New Zealand Courts at least have taken a broader and less theoretical view of limitations on recovery for economic loss. I may be wrong but I, my impression is that that's a position that's taken more strongly in my learned friend's written submissions than he's taken in this Court but whether that's so or not, we do give these references that in *Hamlin*, Sir Robin Cooke following his earlier judgment in *Mt Albert Borough v Johnson* made the point that economic loss in this kind of case is associated with physical damage and that point was picked up by the Privy Council in *Hamlin*, it's also the same point made by Justice Casey and Justice McKay in the Court of Appeal in *Hamlin* as well. And one can also refer in that respect to what Justice Baragwanath had to say in the present case and contrasted with *Te Mata* and I might just take you to that perhaps. Volume 4.

Sunset is at tab 19, and a particular passage where Justice Baragwanath deals with this. It's page 508, and really beginning at line 27. I won't read all this to you, because it runs all the way to 510. But at paragraph 52, he says, "It's arguable that Murphy misapprehended the authorities it sought to apply. The main thrust of Murphy is the classification of the cause of action as pure economic loss", and the consequential application of a number of cases, which he described as being the lineal forebears of *Carter*, *Te Mata* and *Queenstown Lakes District Council v Charterhall Trustees Ltd* in New Zealand. And then he goes on to other jurisdictions and then in paragraph –

BLANCHARD J:

Just while you're there, in relation to the last matter which we heard from Mr Goddard on, he mentioned some shipping cases without citing them, and I think one of them is that *Aliakmon* –

TIPPING J:
Yes, it is.

MR FARMER QC:
Oh, yes.

BLANCHARD J:
I have a feeling there may have been a much more recent one.

MR FARMER QC:
I can't remember.

BLANCHARD J:
It's off this point. I'm just drawing it to your attention.

MR FARMER QC:
Yes, thank you. Sorry, I can't help you on that. At paragraph 53, he says, "The Judges who decided *Hamlin* were well aware of the common law authorities, their reluctance to shoehorn into the *Murphy* constraints habitation claims involving actual damage to property" – actual damage to property – "poses a question as to the true classification of the cause of action. *Murphy* and the others turn on the hierarchy at 24 above, which confers the lowest level of protection to merely economic interests". You get that hierarchy starting with physical injury down to property injury or damage, down to what's called mere economic damage. "That classification" – His Honour says – "is described by the Law Commission of England and Wales as quite problematic. What is different about habitation claims based on loss flowing from damage to property is that the physical damage impacts to a greater or lesser extent on the right to shelter". And His Honour then goes on to look at the Universal Declaration of Human Rights and other charters which guarantee the right to shelter. I'm very pleased, Your Honour the Chief Justice, to be able to refer to human rights documents at last in a case. I so seldom get the opportunity.

ELIAS CJ:

It's section 27 you need to pay closer attention to.

MR FARMER QC:

Yes, I have read section 27. Now. And then he goes on and gives further references, and really, it ends up, I think, on page 510 at about line 25. "While the economist may choose to describe damage to an apartment as economic, and that term is used in *Hamlin*, a Court's task is to make the characterisation that best fits all relevant values, or which the loss of investment or price of repair is only one. Whatever may be the proper assessment in England, in New Zealand it is a misnomer to call it pure economic loss, and an error to go on from that to apply the pure economic loss cases". Now, we would submit that, with respect, is a very fine analysis that is correct.

Now, one can contrast that with *Te Mata* which is in volume 8 at tab 58, which Justice Baragwanath also, of course, sat on. This is a commercial building, motels, which were leaky buildings. Here, of course, just looking at the headnote, and I'm always only too happy to look at headnotes. I have respect for headnote writers, because I know it's a difficult task. The headnote says, "The duty of care of a local authority in inspecting buildings was an exception to the general rule that claims for pure economic loss were not recoverable in negligence". If we go from there to paragraph 62, in Justice Baragwanath's judgment, in paragraph 60, he refers to the fact that – it was following a discussion of *Murphy* – he refers to the fact that in New Zealand the Building Act, he says, actually contemplated suits against local authorities, and you've had that point before you already. And both legislative and judicial limbs of the New Zealand government, having endorsed the course of action, it was not appropriate for the Privy Council to disagree".

And then in 61, "In the absence of any plea based on public health, the line must, in my view, be drawn at the habitation point as *Three Meade Street* and *Woolcock Street* have done. This does not extend to cover a motel owner, whose interest is to be characterised as outside what we will impute to *Hamlin* as a double requirement that the premises be the plaintiff's place of habitation, and contain potential risk to health. I've referred to, with care, the contrary opinion in respect of the authorities, Professor Todd. He argues a dissenting view of Justice Kirby, and *Woolcock Street* should be endorsed on the basis that there is no principal distinction between domestic dwellings and commercial premises. We accept his logic but not his conclusion. I am satisfied – the public health issue aside – *Hamlin* claims can be

justified only as an exceptional response to the claims of residence and domestic accommodation. They provide no basis for extrapolation to non-residential property. Outside such a context, a claim for purely economic loss encounters the obstacle that damages for such loss are generally unrecoverable in negligence".

ELIAS CJ:

Just pausing there. That seems to – I haven't read this with attention – but that seems to be suggesting that where there are – there is a deficiency which poses a public health issue, that there may be a duty of care in which the statutory obligations march with common law duty of care. It occurs to me that in the case of a building which is deemed to be unsanitary, you might have, indeed, a duty of care which is not on all foars with *Hamlin*, but might well be recognised.

MR FARMER QC:

Yes, indeed. And I'm not sure that section 64(4) – which I think Your Honour Justice Blanchard can rightly lay claim to have discovered – I'm not sure that that section has ever been given consideration previously. It's certainly never been referred to that I've seen in any of the cases that we've been looking at. And so that is the link between public health and the leaky building and duty of care claim. That is the link.

ELIAS CJ:

Yes. That is my concern, about our going beyond the particular case we have to decide, because it may be that in a properly-argued case, where this was a factor, a duty of care might be recognised.

MR FARMER QC:

Yes, that's so. My only point here – and this judgment that I've just been referring to, *Te Mata*, is valuable in the sense that His Honour recognises that public health may be a different category.

ELIAS CJ:

Yes.

MR FARMER QC:

Although he doesn't give consideration to section 64. But my point in taking you to this is to show that in the residential building case, His Honour wasn't prepared to regard that as a case of pure economic loss, because of the fact that there was

physical damage, which there is, of course, in a commercial building as well, but linked with that was the sort of questions of habitation, and that led into the sort of higher echelons of looking at international treaties and the like, which you can do to support that. So, really, His Honour was saying, well, if it's a commercial building, I'm going to regard that as just sort of grubby economics of the matter, but if it's somewhere where someone actually lives, which is someone's home, then I'm going to not say the only interests that are economic interests, pure economic interests. I'm going to take a rather broader view of the matter, and whatever view one ultimately takes about the commercial use and whatever view one takes about the specific situation that Your Honour has just raised with me, it's our submission that what he says about residential use and the interests that are being protected must be, with respect, correct.

TIPPING J:

I think, Mr Farmer, there's something of a fetish – and I agree with your argument – there's something of a fetish in some quarters about the concept of economic loss as somehow or other being – and if you go right back to *South Pacific*, Justice Cooke, the then President, made the very point that it would be a crude system of law that distinguished between economic loss parasitic on physical damage, and economic loss standing alone, because tangible and intangible interests are in play. But I seem to remember he said a "crude system of law" or something like that.

MR FARMER QC:

He does. I think that's the reference that I've given. It's on –

TIPPING J:

I remember it, because he made a slightly polite observation about a judgment I did. That's the only reason I remember it.

ELIAS CJ:

I remember it because it was sane.

MR FARMER QC:

The economic loss – it's not that kind of economic loss of a, say, an opportunity cost. Physical damage occurs to something that costs money to repair.

TIPPING J:

It can only be compensated in damages.

ELIAS CJ:

Damages are always economic loss.

MR FARMER QC:

Exactly. It's really no different from –

TIPPING J:

And the English, with great respect, have got hung up on that concept, and they didn't even distinguish between economic loss and the so-called pure economic loss. That's why *Murphy* got out of sync with our approach, or we got out of sync with theirs, I suppose you could say.

ELIAS CJ:

We did it first, though.

TIPPING J:

We were there first.

MR FARMER QC:

And another very common example – we tend not to think about these because we have an accident compensation scheme, but in personal injuries, common law personal injury claims, economic loss was – I acted for a chap in Sydney who did hit a hole in the road, and came off and lost his leg, off his motorbike, and his economic loss was loss of wages for the next five years, or whatever it was going to take. Now, that was something that was attendant, and the result of, a physical injury. But it was still referred to as economic loss in the damages claim, but not regarded as somehow not being recoverable, because of this doctrine.

TIPPING J:

It's this line-drawing I think that's the most difficult part of this case, the line-drawing, the circle-drawing.

MR FARMER QC:

Yes, and I actually noted what Your Honour said yesterday to my learned friend at the bottom of page 6, that Your Honour referred to all sort of criteria and modest means, modest buildings, we got to have something to administer.

TIPPING J:

Yes, you can't just have it up in the air in some theoretical, otherwise no-one will know where they stand. You are adopting, aren't you, the Court of Appeal's intended use?

MR FARMER QC:

Yes.

TIPPING J:

Never mind who owns, or for what purpose, or whatever.

MR FARMER QC:

That's right.

TIPPING J:

That's your clients' stance?

MR FARMER QC:

That nails the Council to know when its duty arises, and what its duty is, and so on. There's all those sorts of reasons for supporting that. Now, I move on to the bottom of page 6 to a number of specific things we've had to look at here. The multi-unit development apartments versus the small, single-unit dwelling, and that issue is much traversed by Your Honours with my learned friend. My learned friend put a lot of emphasis on vulnerability, modest people with modest homes, and so forth, and had to deal with the issue, of course, in terms of single-unit dwellings versus apartment blocks, the fact that the typical apartment is not the 20-storey luxury building on some grand site in Auckland. Rather – actually he should come to Auckland and have a look around. There are lots and lots and lots of pretty scruffy apartments that are very cheap and have been built very cheaply by developers whose only motive is to get the thing up as quickly as possible, get out of it as quickly as possible, and that is at the heart of the problem, because those developers don't have an army of engineers and architects.

And, indeed, in this case – I've shown you the photographs – but in this case, we had the situation where the developer was also the so-called architect, and I think in respect of the other development, there was an architect who did outline drawings only. Because, of course, an architect can perform a total, comprehensive service of doing very detailed drawings and doing project management, or they can just be little more than an architectural draftsman, who just draws the outline plans that are good enough to get a building permit. And so that's one issue.

In one of these two developments, there was an engineer, but what was the relevance to that engineer? There was no question of the engineer performing a function that was relevant at all to the leaky window sashes and the flashings and those sorts of things. Engineers typically are concerned to make sure the foundations are done correctly, and that there's enough steel in the concrete, and that sort of thing, and nobody sued the engineer in this case. So the engineer is just a red herring. So we make the submission that if vulnerability is the test, then unit holders are among the most vulnerable.

But, of course, again, as a matter of line-drawing, if we say, well, we're going to restrict the duty to those who are vulnerable, and my learned friend would say, yes, we have to look at it to see who did the homeowner, the purchaser, rely on. And if he relied, or could be taken to have relied, on the developer, and could be taken to have assumed that the developer had an architect, well, then, the Council's off the hook, and, with respect, there are a whole host of problems with that approach. Now, one of them is – we've noted this in the submissions that we would, with respect, adopt what Your Honour the Chief Justice put to my learned friend yesterday, when, that I have noted here, the vulnerability of some is an aspect to be taken into account when deciding whether there is a duty at all, but you don't go out and seek special facts of vulnerability. The fact that there are a lot of people who are vulnerable may support a duty owed to everyone, because it's the same responsibility, and once you've got the responsibility, that leads very quickly to reliance, and Your Honour Justice Tipping put it by saying vulnerability is a part of the rationale, but it's not a limiting factor in the duty. My learned friend is trying to use it as a limiting factor of the duty. He's trying to say, well, unless you can prove in a particular case on the facts that you are vulnerable, because you're a person of modest means or whatever, then there is no duty owed to you.

ELIAS CJ:

It might be said that that, in fact, pulls against a policy of the statute, to the extent that that is part of the background in which this duty of care is recognised, because it is a statute concerned with safety, and with sanitary buildings, and what would be the policy in limiting a concern for those features? It's almost emphasising, or it's almost taking the view that all of this is only about economic loss, whereas the background is actually one of safety and sanitary buildings for users.

MR FARMER QC:

And for all users too.

ELIAS CJ:

And for all users.

MR FARMER QC:

Yes, so I'm just as entitled to be protected against getting bronchitis from my –

ELIAS CJ:

Legionnaire's disease –

MR FARMER QC:

Yes, or whatever it is, as anyone else.

ELIAS CJ:

I notice Justice Baragwanath referring to the Markesinis, et cetera, book which I was looking at the other day and it does refer to the European concepts of a term that's perhaps a little controversial, "gross delict" not to use gross negligence, but it occurs to me that in fact, but it occurs to me that in fact failing in your statutory obligation may be a pretty gross delict on the part of a territorial authority, if taken to the extent of permitting unsafe or unsanitary buildings to continue.

MR FARMER QC:

Yes, that's 5.1.1 isn't it, these are the dons from Oxford or Cambridge?

ELIAS CJ:

Yes.

MR FARMER QC:

That Justice Baragwanath has just felt a need to point out, and professors at Paris and Munich.

TIPPING J:

A prophet in his own country Mr Farmer.

MR FARMER QC:

Yes, yes.

ELIAS CJ:

I'm sorry, I didn't mean to take time –

MR FARMER QC:

Yes, no but there is a point that emerges out of that which is the – in *Murphy* one of the criticisms made about *Murphy* was that it leads to lower standards of care by building inspectors, whereas the suggestion is that it's actually led to higher standards of care and that –

ELIAS CJ:

Mmm.

MR FARMER QC:

– and that my learned friend would no doubt add to that and higher costs, but the Building Act says well you can recover those costs, it's user pays. So it's undoubtedly one of the policy considerations in any event that needs to be thought about.

TIPPING J:

Mr Farmer I've wondered whether there is a fundamental premise on which this presence of architects and other experts is based, namely that if there's some other people who might be liable, well don't hold us liable. Whereas the –

MR FARMER QC:

Yes.

TIPPING J:

– reality I would have thought was that there are a whole raft of people who may be negligent and I don't quite see why you should cut out –

MR FARMER QC:

No.

TIPPING J:

– one of them simply because there are others.

MR FARMER QC:

Yes its concurrent liability and the –

TIPPING J:

Yes.

MR FARMER QC:

– problem is though that it gets back to this cottage industry point, that so many of our builders are small builders, small companies, two or three people only –

TIPPING J:

But if that, if you've ...

AUDIO STOPS: 3.13.30 PM

COURT ADJOURNS: 3.21 PM

COURT RESUMES: 3.31 PM

MR FARMER QC:

The final point I wanted to make before going on to look at the particular issues, is on the middle of page 7 of the notes which is the issue of experts and I've set out in the middle of the page there what my learned friend said. He said, "I'm not suggesting that purchasers of modest apartments should engage experts but the original owner should. So, a subsequent owner will come along and say well, who should I rely on and he would say, I'm placing my reliance on the experts engaged by the developer." Now, there's immediately a point there that Your Honour Justice Tipping raised just before the break, as to that suggests that you exclude any reliance on anyone else and in particular on the local body.

My learned friend went onto say, "If there is no reason for the Council to think that there is an expert vacuum, then that remains relevant for the rest of the life of the building and the Council is not liable." I've just raised some questions then. Well, how would the purchaser know, first of all, whether the developer did engage experts and experts who were relevant and who had a full brief, so to speak and he allied to that, if so, how would he know the quality of the expertise, given particularly the fact that the developer's incentive is to cut costs and sell the development as quickly as possible in these typical, sort of, multi unit buildings.

Now, on the question of investor owners, if I could ask the Court to turn to our written submissions which, on this topic, begins on page 32, at the bottom of page 32, paragraph 181 and then up to the top of page 33, paragraph 182. We referred in 182 to a point that's already been raised in this hearing, the fact that certainly under the Weathertight Homes Resolution Services Act, the term, the definitions of household units, well the definition of household units in the Building Acts and dwelling house in those later Acts are based on the intended use of the dwelling, not on whether the owner lives in the dwelling or not. The use of the dwelling by the owner is simply irrelevant to the duty and I referred you also to section 47(g) of the Building Act 1991 which refers to intended use of the building.

That leads us into the habitation interests which I've already touched on. I took you to what Justice Baragwanath had to say about that. I'll just give you another reference there, in paragraph 25 of His Honour's judgment he said that habitation is the dividing line and that of course is very clear from his two judgments, in this case and in *Te Mata Properties Ltd*. "We would submit in 184, the most logical person for the Council to owe its duty to is the owner. It's the owner who suffers the loss, who pays for the repair and ultimately provides the shelter which is at the heart of the habitation interest."

Community reliance. There is a passage in His Honour Justice – the learned President's judgment in Sunset which we've given a reference to. It's in volume 4, tab 19, at paragraph 169. There His Honour said, under the heading, "Is the duty limited to those who buy for personal residential purposes?" So that's the issue that we're looking at here. In 169, he said, "On the other hand, the reality as to the facts of the present case show is that such a restriction would produce very arbitrary results. When a local authority carries out its statutory responsibilities under the

building regime it will not know whether any particular dwelling or unit will be acquired by an owner/occupier or by someone who is buying to lease. The way in which purchasers behave in terms of the sorts of checks which might be carried out, are unlikely to depend on whether the purchaser is an individual owner-occupier, a family trust, or company which will make the dwelling available, whether for rent or otherwise, to someone connected with the trust or company, or a landlord. Further, the way in which dwellings are used may vary over time. A dwelling which is initially rented out, perhaps while the purchaser sells an existing home, may shortly afterwards be occupied by the owner." I'll come back to that point because that point is also made by Justice Venning in the High Court and is indeed illustrated by the facts in this case.

In 186, we say investor/owners are in no better position to protect themselves from the risk of purchasing a leaky home than anyone else. In Byron the evidence was that even pre-purchase inspections failed to identify the leaky building problems and if we look at – I won't take you to the evidence but the matters dealt with by Justice Venning, also in volume 4, tab 20, at paragraph 330 first, where His Honour dealt with one case which was a particular purchaser, Mr and Mrs Coulthard, who nominated a company of theirs to be the actual purchaser on settlement. In the 330, "Before signing the agreement, they had a builder friend look at the unit. He said it was fine. They were aware that the unit did not have a code compliance certificate. They did discover that there was some money owing in respect of building levies which were for repair works."

His understanding was that some related to general maintenance work and there was a clause put in the contract about deducting it and so forth. So there was an enquiry made, using a builder, a builder friend, who went around and this is the problem, how do you – short of undertaking an intrusive examination, in other words, one where you drill a hole in walls and so on which presumably the vendor is not going to be too happy about. Short of doing that, how can you, in many instances, discover the defects because they've been plastered over and of course, in case of subsequent purchasers and this gets onto the accrual problem that we'll look at later but in the case of subsequent purchasers, it's not unknown for an existing owner who does discover the problem to in fact conceal it by painting over the dampness or whatever. That raises these issues about the intermediate inspection test by the subsequent purchaser and the reasonableness, or the ability, the reasonableness of

the opportunity that that purchaser have to discover what are hidden and latent defects.

Also and still in Justice Venning's judgment, paragraph 340, he considered another purchaser, or purchasers, Mr Wilson and Ms Stewart. They signed an agreement for sale and purchase. The real estate agent gave them a certificate that the Council had issued confirming that two outstanding items for the whole development had been signed off by the Council. They then instructed their solicitor to obtain a LIM report which said nothing about this. They also had somebody else carry out an inspection of the unit which didn't disclose any leaky building issues. There had been some question of the vendor altering the inspection certificate. The point is though, that the certificate had actually been – it was a certificate, it wasn't a code compliance certificate but it was a certificate which said subject to these things being attended to, we will sign off. They took, what on the fact of it which seemed to be reasonable steps, made reasonable enquiries but nothing was revealed and so, as Justice Venning went onto say in the next paragraph, "On the information they had, there was nothing to put them on notice or inquiry about the state of the unit. They asked a builder to inspect. They had their solicitor obtain a LIM report and nothing emerged."

Then 353, just to give one other example. This is Ms Kim, to whom reference has been made before. She, admittedly after the purchase, obtained a building report which advised there were no problems. I'll come back to Ms Kim shortly.

Now, I've got a section, 187 of our submissions, to *Bowen v Paramount Builders*. The point there being that *Bowen* was indeed a case – first of all, it was a multi unit case, two flats. Secondly, there was no apparent intention by the Bowens to live in either of the units. Mr Bowen's mother-in-law moved into the rear flat, paying a nominal rent and the other flat was tenanted. The Court of Appeal held, nonetheless, that the builder owed a duty of care to the plaintiffs as subsequent purchasers.

BLANCHARD J:

Did that case involve the Council?

MR FARMER QC:

No because that was – the significance of that case was an action in tort allowed against the builder in favour of a subsequent purchaser and it was regarded

therefore, for that reason, as being something of a landmark case in terms of the line of cases that developed in relation to Councils. You'll find, just to give you the reference, I don't suggest you go to it but page 403 at line 47, "The Bowens took possession on the 3rd of June 1969 and Mr Bowen's mother-in-law moved into the rear flat straight away, paying only a nominal rent. The other flat was tenanted." So it's an investor case in that sense, to that extent and it's a multi-unit case also, to that extent and it's not a case where the Council recedes. But –

TIPPING J:

But just taking that point up. I don't think it's ever been suggested, has it, that an astute distinction should be drawn for duty of care purposes to subsequent purchasers between the builder and the Council. In other words, they've tended to seen as going together?

MR FARMER QC:

Yes, indeed –

ELIAS CJ:

There wouldn't be any –

MR FARMER QC:

– because they're suing in tort –

ELIAS CJ:

– principled –

MR FARMER QC:

– and it's a duty of care, that's the whole point, they're suing in tort –

TIPPING J:

Yes, so the fact that the Council wasn't in this one didn't inhibit –

MR FARMER QC:

No –

TIPPING J:

– the development of cases where the Council was involved?

MR FARMER QC:

And here the plaintiffs had a substantial builder who they could –

TIPPING J:

Well Paramount Homes, yes –

MR FARMER QC:

– sue and unfortunately, in so many cases, the builder has gone through and the developer had gone through, or has had a single purpose development company that has been wound up which doesn't affect at all, as Your Honour says, the whole question of concurrent liability.

Now, we've got a section on practicality and just in relation to this question of change of use and why the intended use at the time of the issue of the building permit should be decisive rather than who ends up owning the property over time, occupier/owner, investor, landlord. That matter was considered by both Judges at first instance in the present litigation. So, looking first of all perhaps at, if you've still got volume 4 there, at tab 20, Justice Venning's judgment, paragraphs 23 to 24. He considered a submission from the Council. Under the heading, "Can the Council owe a duty of care on *Hamlin* principles to owners who may be investors?" At 23, he said, "At a practical level, the approach Ms Thodey advocated would be unworkable. In the case of successive owners of one unit the Council could owe a duty to some but not all, depending entirely upon the purposes the particular owner bought the unit for, personal reasons or investment. It is also quite possible that during the course of ownership the purpose might change in relation to an individual owner. If for instance, the owner initially bought the unit to live in themselves but later purchased another home and decided to rent the unit out."

Then 24, "To the extent, there is a distinction to be made between commercial property and individual's homes, as discussed in *Three Meade Street*. The appropriate focus is on the intended end use of the building in question. The end use in *Three Meade Street* was the business of a motel. The intended use was commercial. The intended use of a block of apartments is residential, that is the case with 45 Bryon Avenue. The Council was aware the intended use was residential. The application for a building consent required the applicant to specify the intended use of the building. Couldrey confirmed," Couldrey was the developer, "the intended

use was residential. I agree with the reasoning of Justice Heath in Sunset Terraces on this issue, the start point must be that prima facie the Council owed a duty to the owners and subsequent owners of the units at 45 Bryon Avenue in accordance with *Hamlin.*"

And of course, in this case, as our submissions indicate, going back to page 34 of our submissions, we've gone through – we've got a list of the Byron owners which indicate the very difficulties on the facts of these cases. You've read them, so I won't go through them all but just to take the first one. Mr Jupp, he bought unit 4 as he thought, "It would be a good place for me to live when I return to New Zealand for my retirement." That was his evidence. He tenanted the apartment and upon his return to New Zealand decided to live in Huntly. Despite the fact that he intended to retire in the unit and still could, the Council submits he should not be owed a duty of care. All these other cases are very good illustrations of that and we heard reference to Ms Kim, just on the next page, that she didn't, she waited until her house was sold and kept the existing tenant. Did that make her a tenant, or make her an investor for whom no duty was owed.

Just to complete the references. Justice Heath in Sunset also considered this issue and as I've just read, Justice Venning agreed with him. That's in volume 3, at tab 18 and you'll find – His Honour deals with that beginning at 205 and this is quite a good discussion, with respect, 205, he says, it's paragraph 25, "The nature and scope of the duty of care imposed on a territorial authority must be principled, capable of being expressed simply and predictable in its future application and result in a just and reasonable allocation of risk between parties who are not in any contractual relationship. Ms Grant suggested that if a duty were imposed on the Council, its touchstone ought to be the vulnerability of the claimant to an extent but not completely.

That submission accords with Professor Todd's views, however I see vulnerability, while a factor to be taken into account in determining whether a duty exists or ought to be created," which is the point Your Honour the Chief Justice made earlier, "As being too uncertain a concept to be the ultimate test. With respect, Ms Grant does not give sufficient weight to the need for predictability. I use the word predictability in preference to certainty deliberately because however the test is articulated there will remain grey areas which will need to be determined on a case by case basis – certainty is too much to expect. Predictability provides a level of assurance that is

needed by the Council to determine the extent of its potential liability and to take steps to guard against risks. As any Judge knows, even with legal principles that are well settled, the difficulty lies in applying them to the facts to particular cases. It is equally important that both advisors for those who are buying a home and the Council officers understand clearly the category of persons to whom the duty is owed. A relatively simple articulation of the extent of the duty and a predictable manner should discourage claims by those who fall outside its ambit, particularly where it is possible for an advisor to make enquiries, yet provide an incentive for the Council to ensure its functions are performed to an acceptable standard."

And he then referred to *Dicks* and other cases and then if I take you to 210 on the next page, "The Sunset Terraces Development was intended to create a number of residential and dwellings to be acquired by individuals. If the focus were on the intended use of the individual units, the purchasers could not be seen as at any different position to the homeowners to whom the *Hamlin* duty is owed, nor could their position be distinguished from the occupier of a flat at Begbie Place discussed in *Mt Albert Borough Council v Johnson*, whether a dwelling is a single building or a unit in a high rise or linear development, the potential vulnerability if the prospective owner will be the same, that is reflected in the way in which the Weathertight Homes Resolution Services Acts 2002 and 2006 have defined the term, "dwelling house". Such an approach is consistent with the underlying philosophy of *Hamlin* and the earlier cases. The intention is to protect those who rely on systemic safeguards when acquiring, what for most New Zealanders is, their most valuable asset." And with respect that's a very careful and principled discussion.

Now so going back then, I haven't taken you through all of those individual owners but they're there to see and the – their particular factual situations and the certainty point is dealt with in our paragraphs 205 and 206 and 207 where we go back to Justice Heath's passages that I've just read to you. So that deals with that topic. I, what I'd like to do next I think is perhaps go to the accrual issue, perhaps with some degree of trepidation in light of a discussion that took place earlier but I'd at least like to take you through the way in which the Court of Appeal dealt with this issue because, with respect, it may be that it sheds a considerable amount of light on the issue and what was seen as perhaps apparent problems, may be less problems once we've been through and looked at the way in which a particular learned President and Justice Baragwanath dealt with the matter. So this part of submissions is on page 37, part 12 of the submissions and it raises the question of what's often referred

to as the intermediate inspection test and just on the facts of that in the present case if you just quickly look over at page 41, what we've dealt with there in the section under Byron Avenue is to look at the failure by the Council to identify defects during the course, sorry now I've gone too far. I'll come back to that.

So let me take you straight to the cases and I'll start with *Bowen* in fact and you'll find that in volume 4, tab 24. This is perhaps where the point arises first as to – that gives rise to the claimed difficulty, so if you go into the Judgment of the learned President, Sir Clifford Richmond, at page 413, he has a section which begins halfway down the page, "To whom is a builder's duty of care owed?" And there's a reference to the Limitation Act as providing some kind of cut off point for claims and there's a reference also to *Sparham-Souter* which is the judgment of Lord Denning that's been referred to and he considers at about line 35 the question, well the issue being discussed here is whether it's possible to limit, as it were, the number of or to limit the claimants by application of a proximity principle bearing in mind that there may be a series of subsequent purchasers, such obviously to a limitation period expiring eventually. So His Honour says at line 35 after the reference to *Sparham-Souter,* "It also seemed to me impossible to limit the class of purchasers to the first purchaser or any particular subsequent purchaser. At present I think the ambit of the duty can be effectively controlled only by a strict insistence on the proximity principle to which I've earlier made reference. In other words I take the view that the duty of the builder is not owed to anyone who purchases a building with actual knowledge of the defect. Or in circumstances where he ought to have used his opportunity of inspection in a way which would have given him warning of that defect. Subject to that qualification and to the provisions of the Limitation Act, I see no reason why the loss caused by damage to a building resultant from a latent defect should fall on an innocent purchaser rather than on the builder who negligently created it. So there he's saying that if it's a defect, the builder caused it, a subsequent purchaser who's within the limitation period should be able to claim, but he accepts from that the purchaser who has actual knowledge of the defect or ought to have used his inspection opportunity in a way which would have given him warning of that defect. So that's the so called intermediate inspection test. And I'll come back to that test if I may.

So then his second question is, does the builder's duty extend beyond negligence causing a source of physical damage, and he considers that and I don't need to say any more about that because on the next page, the third question is, when does the

cause of action arise, and this is I think getting more to the heart of what we're, what the Court was discussing with my learned friend.

This question he says has of course been discussed in length in *Sparham-Souter* in the context of the Limitation Act of the UK. It may also have importance if a question arises as between successive purchasers, in whom the cause of action against the builder is vested particularly if the cause of action is of a nature which vests once and for all, when damage occurs, to a degree which is more than minimal. And then there's this statement. "The general principle of English law is that he only can sue for negligent damage to property, who had a propriety interest in that property at the time when the damage occurred." And he cites *Margarine Union G.m.b.H v Cambay Prince Steamship Company, Ltd.* "For myself, and with respect, I accept the view expressed in *Sparham-Souter* that in a situation like the present, the damage does not occur at the time when the builder negligently erects a house on inadequate foundations and sub-foundations, it occurs when the negligence of the builder results in actual structural damage to the building which is more than minimal. There may be difficulty in accepting the mere discovery of a latent defect as itself amounting to damage. If however a purchaser by some means discovered the defect after he'd purchased the building, then it would seem reasonable that he should at least be able to sue for the cost of repairs actually incurred to prevent threat and damage," and there's a reference then to *Dutton v Bognor Regis Urban District Council*, 393.

A similar view was expressed in Canada and he talks about that for a little bit and then goes onto say at line 32, "In the present case the evidence shows that substantial damage occurred after the Bowens had purchased the building. It does not however establish that more than minimal damage had occurred before they purchased. In those circumstances no question can arise as to the cause of action against Paramount having arisen prior to their purchase, even if it be assumed that Paramount owed a duty and tort as distinct from contract to Mr McKay. I should add that in *Sparham-Souter* Lord Denning expressed the view that the only owner who has a cause of action is the owner in whose time the damage appears. He alone can sue for it unless of course he sells the house with its defects and assigns the cause of action to his purchaser."

Now there's the issue that was discussed. If the defect occurred, so the previous owner discovers the defect and my learned friend says, yes here we have a case where the defect was in fact discovered, previous owner presumably knows about it

and the cause of action accrues at that point of time because of course in tort the fact of injury or loss is what consummates or creates the tort. Now the question though we would respectfully submit is whether – is to ask well in whom, whose cause of action is it because in this same case what we have is a situation where it's been recognised that the builder, in our case the Council, owed a duty of care to each of a number of successive purchasers within the limitation period and so in this case, in *Bowen*, of course there was only one purchaser that was relevant, that was the subsequent purchaser and the issue was whether there was no, the issue was whether the defects came, arose and came to their knowledge at the time that they owned the property.

Now in the, and this is where the relevance of the intermediate test comes in, the intermediate inspection test comes in, because if we have a situation where the previous owner, existing owner we'll say, discovers the defect, then he would have a cause of action. But if in fact instead of pursuing that course of action he then covers it up in some way, conceals it and then sells the property at full value, that is to say the value that takes no account of the fact that there's this latent defect, to a subsequent purchaser, that subsequent purchaser is someone to whom the same duty of care is owed by the Council as the first owner. And our submission therefore would be –

ELIAS CJ:

Well that is the solution that the President seems to be adopting, because that paragraph is really – goes on, it's not a quote when he says, "I do not know whether Lord Denning was there," but that seems to be what he's saying, isn't it?

MR FARMER QC:

Yes, yes it is. And I'm sorry I should have kept reading but I wanted to seize on what Lord Denning had said, when he said, "He alone can sue for it unless he sells the house and assigns the cause of action," and what my learned friend drew Your Honours into was a discussion about assignment of cause of action so that's the sort of trigger for that but as Your Honour says, in our submission that's not – that would be – the assignment of a cause of action would be the, perhaps the only way out so to speak if the existing owner, knowing of the defect sells the property at full value but assigns the cause of action with it. But if he, because the subsequent purchaser then would know about the defect and he would have no – because that

knowledge of the, because the defect has arisen at a time when he was not the owner and he knew about before he became the owner, then his only way forward would be either to get a reduction, well the way it would probably happen is you would get a reduction in the price and take an assignment of the cause of action to try and reimburse himself out of it.

The other possibility might be if the vendor sold at full price, sorry – yes that's in fact how it would happen but in the case that we have here, the purchaser, the subsequent purchaser didn't know about the defect and the only issue is well on a reasonable inspection ought he have been able to discover the defect and if the answer to that is no, our submission would be that his cause of action arises at the point when he is an owner, when he discovers the defect himself.

ELIAS CJ:

So it's only the long stop limitation that –

MR FARMER QC:

And the long stop – that's right.

ELIAS CJ:

– protects the Council.

TIPPING J:

Is the theory behind that Mr Farmer, that there are in effect concurrent potential causes of action and –

MR FARMER QC:

Yes.

TIPPING J:

– the cause of action is consummated, to use your word, when the loss accrues?

MR FARMER QC:

Because there is concurrent duties or coexisting duties owed to a series of successive purchasers.

ELIAS CJ:

They're contingent though because –

MR FARMER QC:

Oh yes.

ELIAS CJ:

Yes.

MR FARMER QC:

Contingent on first of all someone actually being a successive purchaser, a successive purchaser coming along within the long stop period and contingent on that purchaser passing the intermediate inspection test.

ELIAS CJ:

And contingent on the original owner, not himself obtain relief?

MR FARMER QC:

Yes.

ELIAS CJ:

It's very complicated and it isn't really what Justice, what the President is assuming in *Bowen* because he's talking about successive subsidences.

MR FARMER QC:

Yes that's right and so the *Bowen* case is not, I mean it's – first of all it's – yes that's right it is a different feature because the issue there was, that's ultimately how on the facts that case ended up being decided, it was able to be decided on the facts, on those facts.

TIPPING J:

If you have a duty of care over to you Mr Farmer, and I'm just teasing this out with you, in order to be able to sue, well first of all you've got to show breach –

MR FARMER QC:

Yes.

TIPPING J:

– and then you've got to show damage, now the fact that someone else may earlier have had a cause of action –

MR FARMER QC:

Yes.

TIPPING J:

– for the same damage – I know I'm speaking quite adventurously here, it wouldn't seem as a matter of logic to deny the subsequent person the right to sue if the damage vests in them?

MR FARMER QC:

Yes.

TIPPING J:

I've never liked the *Leigh and Sullivan v Aliakmon Shipping Co Ltd* frankly, I've never thought it was a very – that's the case which made an astute distinction on –

MR FARMER QC:

Which case Sir?

TIPPING J:

The *Aliakmon*, the shipping case.

MR FARMER QC:

The shipping case yes.

TIPPING J:

But because it seemed to me to put a real premium on sort of precise, the precise status in the title which the person owns and the goods in the hold of the ship –

MR FARMER QC:

Yes.

TIPPING J:

– now if you build on that, why should it matter one might ask rhetorically, whether someone else may have had a cause of action at an earlier stage, but for whatever reason it's not been exhausted –

MR FARMER QC:
Right.

TIPPING J:
– and you say, well I'm owned the duty, there was a breach of the duty and I've suffered loss.

MR FARMER QC:
Yes.

TIPPING J:
Now I know that sounds all very neat and tidy and simple but I've struggled with why that shouldn't be the position.

MR FARMER QC:
And it works pragmatically Your Honour because if the first owner has its cause of action, if he pursues it then the property, the defect will then be repaired. He will have done the repairs and sued the Council for the cost of those repairs, the house will have been restored to its full market value at that point.

TIPPING J:
That's subject to the problem about the person not spending the money, but we'll leave that.

MR FARMER QC:
That's where the intermediate inspection test might somehow come into it. But assuming that happens, then that's the end of it, unless there's some fresh defect that arises.

TIPPING J:
Well, there's no problem with fresh defects.

MR FARMER QC:

No, no. If, on the other hand, the first owner discovers the defect and does nothing about it, conceals it, paints over it, and then sells it on at full value, that defect is still there. It would be unjust in a sense, in a broad social sense at any rate, if the Council then had no liability to anybody, because of the way in which the law was then being applied to that situation.

BLANCHARD J:

Although the Council is not responsible for the painting-over.

MR FARMER QC:

No, it's not.

BLANCHARD J:

And but for that, the second purchaser, or the purchaser, would have discovered.

MR FARMER QC:

Yes, then he would have discovered it, and then what had happened, if he'd discovered it, it almost certainly would have happened if it was going to be an immediate sale, is that he would have purchased the property at the reduced value, and taken an assignment of the course of action of the first action, and sued the Council.

ELIAS CJ:

But if he'd had a reduced price, then he wouldn't have suffered a loss.

MR FARMER QC:

You're quite right. I've got that wrong. So either that would have happened, or there would have been some other contractual arrangement entered into to deal with the problem. If, on the other hand – yes. So that's really how it would have ended up.

TIPPING J:

I think Mr Goddard has to argue that there is no duty of care if a course of action has already vested in an earlier owner.

MR FARMER QC:

He does have to argue that.

TIPPING J:

Because if there is a duty of care, it's very hard to see how the existence of a course of action in a previous owner can take away that duty of care and the loss – and the breach and the loss. And the question, I think, is more, is a duty of care owed to a subsequent purchaser if the course of action has vested in an earlier purchaser? That may just be putting the same problem into different language, but I think that analysis might sharpen it. Because why shouldn't a duty of care be owed, then, you have to ask.

MR FARMER QC:

It's why shouldn't it be – particularly the real pertinent question, we would submit is, who suffers the loss, and if the first purchaser doesn't suffer the loss because he sells it on at full value, it's the second purchaser who then suffers the loss at the time that he discovers the defects. That's when the loss accrues, or occurs, to him.

McGRATH J:

So it's not a question of whether the damage has occurred, on your argument –

MR FARMER QC:

No.

McGRATH J:

It's a question of whether the loss has been suffered.

MR FARMER QC:

Yes.

McGRATH J:

And that's how you get out of this marginal union issue?

MR FARMER QC:

Yes, and it's also - reasonable discoverability comes into this, too. I'm not trying to say it doesn't.

ELIAS CJ:

But we really need to look at all these supporting cases, such as –

MR FARMER QC:

Can I take you to our own Court of Appeal judgments, because I think they deal with some of these cases, and I think, with respect, they deal with them very convincingly. So perhaps, again –

McGRATH J:

Are you going to look at *Mt Albert Borough Council v Johnson*? That was the intermediate case, wasn't it, and Justice Richardson dealt with. Are you going to help us with that?

MR FARMER QC:

Yes. Well, I can look at that. Perhaps I'll defer that until I've gone through these other judgments.

ELIAS CJ:

Well, it may be that when we've gone through the Court of Appeal judgments, you're not really able to help us by a partial review of the authorities. We really need some more thorough digging-down. But perhaps we can see how we go on that, on the reasoning.

MR FARMER QC:

Well, then – so volume 4 tab 19. I'll go first to the judgement of Justice Baragwanath, which deals with the point more shortly than the precedents, and that begins at paragraph 80 on page 517, under the heading "May owners other than initial owners sue". Mr Goddard submits that, "Because the Privy Council in *Hamlin* determined that the course of action accrues when the latent defect is discovered, or is reasonably discoverable, once that occurs, the accrual is complete, and it cannot recur. The market value is then affected, so once the course of action has accrued while the property is in the ownership of one owner, it cannot accrue again in favour of a later owner". That, Your Honour Justice Tipping, that is putting it very precisely, as you saw the issue.

TIPPING J:

Yes.

MR FARMER QC:

He cites the statement by Lord Denning in *Sparham-Souter*. I'll read it. "One word more. The only owner who has a cause of action is the owner in whose time the damage appears. He alone can sue for it unless, of course, he sells the house with its defects, and assigns the cause of action to its purchaser". So that's the same passage that Sir Clifford Richmond referred to in *Bowen v Paramount Builders*. Mr Goddard also cited *Johnson*, so here we have *Johnson* coming into it. Cited by Justice Gregg in *Lester v White* [1992] 2 NZLR 483 (HC) for the proposition that "The Council's duty of care is not owed to everyone, or, indeed, to each subsequent owner. The plaintiff's right of action depends upon proof of damage during their ownership, which is referable to breach of the duty of care. Neither New Zealand," – this is Justice Baragwanath – "decision supports Lord Denning's statement made without reasons or citation of authority."

I respectfully decline to follow Lord Denning. Mr Goddard's argument and Lord Denning's assertion do not meet the point that the earlier owner, who may be the entrepreneur, who had the leaky building erected, may fail to disclose the fact of its character to the market, and may even cover it up.

As noted in *Commerce Commission v Carter Holt Harvey*, New Zealand law has declined to follow the decision of the House of Lords in *Cartledge* that a cause of action may accrue, and a case become statute-barred, although the plaintiff had no reason to know of it. See the series of decisions of this Court from *McKenzie* to *Searle*. Privy Council in *Hamlin* cited *Cartledge* but did not apply it. It stated, "The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations and not before".

So if I can just pause there, that's *Hamlin*, Privy Council, and that's in fact what we're talking about here. The market value has not depreciated at the point where it's sold on to a subsequently purchaser who doesn't know, and who passes the intermediate inspection test, doesn't know of the defects.

The Privy Council continue, "If he re-sells the house at full value before the defect is discovered, he has suffered no loss". Just pausing there, that must be true also if he covers up the defect and sells it on at full value. Again, he suffers no loss. That's the vendor. "Thus", the Privy Council says, "In the common case, the occurrence of the loss and the discovery of the loss will coincide. But the plaintiff cannot postpone the

start of the limitation period by shutting his eyes to the obvious". And then there's a reference to –

ELIAS CJ:

Sorry, I just wonder whether that can be accepted, that he suffers no loss if he's covered it up and flicks it on. It may not come home to him, and he may be sort of running a risk with the Fair Trading Act, or something like that, but –

BLANCHARD J:

Well, he's running a risk under the ordinary law of vendor –

ELIAS CJ:

Fraud.

MR FARMER QC:

Well, there's another possibility, too.

ELIAS CJ:

But is it right to say that he hasn't suffered loss?

MR FARMER QC:

Well, I think what you're suggesting to me is that he may have suffered a potential liability for fraud, or whatever. But there is another possibility –

ELIAS CJ:

No, no. I'm putting to you that he has actually suffered loss. He knows he's suffered loss. He chooses not to pursue his remedies, but to quit while he can.

TIPPING J:

What does one mean by loss?

MR FARMER QC:

It's a loss that can't be quantified. Well, the loss is nil.

ELIAS CJ:

Well, it doesn't require him to actually take proceedings in order to say that he has suffered a loss. He actually has a loss, for which he has a cause of action, and he chooses not to exercise it.

TIPPING J:

But once he's sold on, his loss is gone.

ELIAS CJ:

Oh, he doesn't have a loss.

ANDERSON J:

He could have a loss that he doesn't know about, then he sells it, still not knowing about it, and he's got nothing to claim for.

ELIAS CJ:

No, we're talking about the one who knows.

TIPPING J:

Yes, well, even if he knows and sells on without diminution, he's got no loss.

MR FARMER QC:

Well, that's, with respect, how I would have seen it. I mean, that's consistent with the –

TIPPING J:

He may have a contingent liability.

MR FARMER QC:

He may, but again, he may not, because while we know the Body Corporate received this report, but the report – what happened to it after that is, I don't think, the subject of any real evidence. There's no suggestion the subsequent purchasers knew about it, and my learned friend said yes, well, you can always ask to see Body Corporate minutes. Actually, a purchaser doesn't have the right – a potential purchaser doesn't have the right of access to Body Corporate minutes. They are – there's no legal right to see them at all. But, anyway, that may be a bit of a red herring. I was just really

looking at the way the Privy Council started out. The plaintiff was – I mean, the market value is depreciated.

ELIAS CJ:

All right. I'm not sure that you've really answered the point. If somebody – if someone suffers physical damage to their property, they've suffered the loss –

AUDIO STOPS: 4.21.08 PM

COURT RESUMES ON WEDNESDAY 10 NOVEMBER 2010 AT 10.00 AM

MR FARMER QC:

If the Court pleases, on this accrual question, I overnight went back and had another look at *Bowen*, which I'd taken you to yesterday, and I think I'd like to go back to it, if I could, because I think it is actually – it's not, with respect, the easiest case to read, but it does, if one puts together the various pieces from it, I think a picture emerges, the correct picture emerges just as to how the issue that we're looking at should be dealt with. What I've done is just prepared some notes, which might make it easier for you to follow, if you have those.

In particular, I'm going to – what I'd like to start with before I get to *Bowen* is just very briefly to look at *Sparham-Souter* which, of course, is the judgment of Lord Denning, that's received some comment in that, and Justice Baragwanath, in the present case, said he would not follow – chose not to follow Lord Denning, or at least the dictum of Lord Denning's in that case. But I want to refer to it just for one proposition, which is to the effect that the duty of care by local authorities is one that is owed to subsequent purchasers, and I say purchasers in the plural. It's a duty that is for the benefit of future owners and occupiers. Obviously, at some point in time, there would be a cut-off point which would probably be a limitation coming up, or it might be a causation, a break in the chain of causation, and that's really the issue that I want to go back to, looking at *Bowen*, and looking in particular at the intermediate inspection test.

But if you just look very briefly at *Sparham-Souter*, which is in volume 8 tab 53, and I want to take you just briefly to the judgment of Lord Justice Roskill, which is at page 1760 of the bundle, or 870 of the report. I just want to show you how he described the effect of *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 which, of

course, was the landmark case on local authority liability – sorry, on liability for builders in tort to subsequent purchasers. So at page 870 of the report, at the very beginning of His Lordship's judgment, he refers to *Dutton*'s case. He says it considerably extended the doctrine first laid down by the House of Lords in *Donoghue v Stevenson* [1932] AC 562. He said, "This Court then held for the first time that a builder developing a housing estate on land which he owned, on which he built a house with inadequate foundations so that serious defects subsequently developed owed a duty of care to a subsequent purchaser of that house. He suffered loss by having to remedy those defects, and further, in fact, that a local authority exercising its powers to control buildings within its area under the Public Health Act, and any bylaws made under that Act, were exercising those powers for the benefit of future owners and occupiers of such houses, and were thus obliged at common law to take reasonable care to see that those bylaws were complied with, and was therefore liable to a subsequent purchaser if the local authority by its servants had negligently approved the foundations."

So it had hidden defects when later revealed caused damage to that subsequent purchaser. And just on that point, there's the affirmation of the fact that the damage occurs to the subsequent purchaser at the time when the defect is revealed. And one might add to that, or it reasonably to have been revealed. So that what we have to focus on, with respect, is the particular plaintiff, the particular purchaser, and look to see at what point damage occurs to that purchaser, and the point is, as Lord Justice Roskill has said, it's at the point of time where the hidden defect is revealed to that purchaser. And so you can have – and do have – these concurrent and separate duties owed by the local authority to future owners, all purchasers in a chain, in a line, and you have to, in fact, as I say, examine when it is for any one of those that the damage or loss actually occurs, and it's at that time when the defect is revealed, or reasonably could have been revealed. And that takes us into the intermediate inspection point, which I'll come back to shortly.

So if we put that aside and go to *Bowen*'s case, which is volume 4 tab 24. We looked at this before. Just looking at my notes, if I could just follow through there, we looked on page 414 – the interesting thing about the learned President's judgment in that case is that you almost have to read it in reverse to understand it. And so I take you, in fact, to page 414 of the passage that we did look at, at line 40, where he referred to *Sparham-Souter* and to the dictum from Lord Denning that has aroused some controversy, where he said, "The only owner who has a cause of

action is the owner in whose time the damage appears. He alone can sue for it, unless, of course, he sells the house with its defects and assigns the cause of action to his purchaser." Now, the comment made by Sir Clifford Richmond on that is as follows. He said, "I do not know whether Lord Denning was there intending to exclude the possibility that successive purchasers could acquire separate causes of action in respect of successive subservices. The question is not likely to be of importance in practice of the view which I've expressed in relation to proximities accepted and adhered to."

So if I can just go back and look at that a little bit more closely. First of all, Lord Denning. "The only owner who has a cause of action is the owner in whose time the damage appears". Now, just thinking back to what Lord Justice Roskill has – if, in fact, and if my submission is correct – that there are, in fact, separate duties owed to separate owners in succession, and the damage that occurs to each of them is at the point of time when the defect, the hidden defect, is revealed. Well, then, really that –

ELIAS CJ:

Revealed to them.

MR FARMER QC:

Revealed to them, exactly.

ELIAS CJ:

So did you get that from Lord Roskill?

MR FARMER QC:

Well, I think I do.

BLANCHARD J:

I thought he was talking about a situation in which after the purchaser acquired the property, suddenly the damage occurs. I didn't think he was thinking of the subtlety that the damage had been reasonably discoverable beforehand, but no-one had discovered it until the purchaser discovered it after buying.

MR FARMER QC:

Well, the words he uses are the "hidden defects when later revealed caused damage to that subsequent purchaser", so I took that to mean that the defects are revealed to

that subsequent purchaser at the time that he's the owner, and if that's correct, well, then, of course, Lord Denning's requirement that the only owner who has a cause of action is the owner in whose time the damage appears, if it appears to him, if one reads that into it, and I would submit you should, because that's, after all, when the damage occurs to that purchaser, to whom that separate duty of care is owed.

ELIAS CJ:

Well, that was the discussion we were having yesterday, and I have difficulty with that, because it seems to me that the damage has occurred, even if the purchaser doesn't know of it.

MR FARMER QC:

The damage occurs, really, at the very time when the negligence occurs. And so it's there throughout, but it's not – it doesn't become relevant for the purposes of the law of tort until that damage is – comes home to the particular owner at the time by virtue of the hidden defect being revealed to that owner.

BLANCHARD J:

Damage occurs, in terms of Hamlin, when the market value is affected.

MR FARMER QC:

And that's when the market value is affected.

BLANCHARD J:

Well, I'm not sure that that follows. It's not necessarily affected the moment the negligent work – the negligence occurs, because it's not known.

MR FARMER QC:

Yes, that's right, sorry, it's not known, so the market doesn't know. But at some point in time – the market can only know at a point in time when it becomes revealed.

McGRATH J:

Physically apparent? Revealed in the sense of physically apparent, or revealed in the sense of a person having an opportunity to look at it?

MR FARMER QC:

The latter.

McGRATH J:

Yes. And that, I think, is a viewed concept, isn't it, over and above –

MR FARMER QC:

No, sorry, I withdraw that. It's not – there is the question of whether – the intermediate inspection test says that if you're reasonably to have known of it, then you're deemed to have known of it, as it were. Of course, the market wouldn't necessarily know of it at that time. The market – just when the market knows that this property is a leaky building is a bit difficult to define. It'll vary from case to case. But certainly, the loss – what the Privy – and there may be a difficulty in actually determining precisely when the loss occurs to the particular owner at the time. Does it occur when he discovers it? Or does it occur when he discovers it, and the market thereafter knows of it? But I don't think I have to resolve that dilemma, because the only point I'm making is that there is a separate duty of care to that person. There is a loss suffered by that person at the time, either that he discovers it, or when the value is lost because he can't get as good a price for it as he otherwise would have got.

So the point that I'm making, though, is that the answer to the general principle, the general statement, that the cause of action must be in the owner, that the loss must occur in the owner at the time when he owns, then our response to that is to say, well, that happens here because there are separate duties of care owed to each subsequent owner. And the loss that occurs to each of them may well be at a different time – and will be at a different time. For example, if, to take the facts of the Sunset case, if the Prendos' report were regarded as knowledge to the owner at that time, that's one situation. But if it's not known to the subsequent owner, and the finding, we would say, is that it wasn't known to the subsequent owner and could not reasonably have been known to him because of the fact that that report would not be accessible to a prospective purchaser, then the loss doesn't occur to that owner – the new owner – until he moves in and finds the problem.

I should say on that, by the way, that it's not in the report, the reported version of the Sunset High Court decision, but in the unreported version, and I have a copy of it. There is a finding by Justice Heath that the allegations that were made against the plaintiffs that they had failed to make reasonable enquiries, and that that, therefore, was at the very least a warranted findings of contributory negligence, that those

findings were dismissed by His Honour, who found that in the circumstances and on the facts, they could not be said to have failed to make reasonable enquiries. I can give you the – for the record, I'll tell you the paragraph numbers where you'll find that, and then I can separately hand up to you the actual full unreported judgment. I'm told it's in the case on appeal, so that's helpful. In any event, it's paragraph 568 which sets out the allegations in the pleading of contributory negligence, and the finding, the dismissal of those claims, is at 581, where His Honour said that, "In my view, neither negligence on the part of any individual proprietor entitled to claim", nor what he called "causal potency", assuming breach of some duty of care has been proved, and the claims for contributory negligence fail.

So if I could go back to *Bowen*, 414, so at about line 45, the learned President was considering, therefore, this question of whether, as he put it, Lord Denning was intending to exclude the possibility that successive purchasers could acquire separate causes of action in respect of successive subsidences. Incidentally, *Mt Albert Borough Council v Johnson* is really a case – I'm not going to take you back to it – it's really a case which was decided on particular facts, and the facts were that there wasn't a separate, succeeding subsidence that the plaintiff, who was a subsequent purchaser, suffered, as it were, and therefore the case was decided on that basis, that there was a separate loss that occurred that enabled her to sue on it. So I don't think that case really takes the matter very further. But what the learned President then went on to say, "That this question" – he said – "is not likely to be of importance in practice if the view which I have expressed in relation to proximity is accepted and adhered to."

And Your Honour Justice McGrath asked me to say something about that, and I think that is very helpful – hopefully it will be very helpful if I now do that. If you then – to find out how the President handled the question, or dealt with the question of proximity, I think you need to go back – as I say, I'm reading this judgment backwards, as it were – but if you go back to 413 at line 35, again, after referring to *Sparham-Souter,* His Honour says, "It would also seem to me impossible to limit the class of purchasers to the first purchaser, or any particular subsequent purchaser. At present, I think that the ambit of the duty can be effectively controlled only by a strict insistence on the proximity principle, to which I've earlier made reference in this judgment".

And if I just pause there and show you where he did make that reference, it's on the opposite page, 412, where, at line 20, he refers to the principle of the question of what he calls intermediate examination, which he says may be relevant, and he says, "The first relates to the question whether a plaintiff is in sufficient proximity to the negligent act of the defendant to bring him within the ambit of the defendant's duty of care". And if you then go – he goes on, I won't read it, but he goes on to say –

McGRATH J:

What line are you at?

MR FARMER QC:

I'm sorry – line 20. He then goes on to say, well, defendants can't – the burden on them, if they're trying to establish reasonable expectation of intermediate inspection as a defence, there's a heavy onus on them. But going back to 413, then, so having said –

ELIAS CJ:

Sorry, I still don't quite understand what he's saying about the test for proximity. Is it that he's simply talking about creation of the dangerous situation? Is this really analogous to product liability, manufacturer's product liability?

MR FARMER QC:

No, it's breaking the chain of causation. It's saying that if you are a plaintiff and you have an opportunity to make an inspection of – in this case, the land – and if you ought, on making that inspection, to have discovered the defect, and you go ahead and you purchase, well, then, that breaks it, where the chain of causation –

TIPPING J:

It's the use of proximity that hasn't taken root, because proximity is now seen in somewhat different terms. I agree, it's better to see it in terms of causation.

MR FARMER QC:

Yes, that's why I've slipped into that, because, with respect, that's exactly how I see it. It's rather like – if you think in the present case Mr Smyth, or the developer, who was actually also the man who was responsible for drawing up some fairly defective plans –

TIPPING J:

If you owe a duty to subsequent purchasers, there must be proximity, ex hypothesi.

MR FARMER QC:

Yes, yes.

TIPPING J:

But the duty is not owed where there is – or there is no – it's not breached if you have a chance of intermediate inspection, or you already know.

MR FARMER QC:

Or you already know, which was Mr Smythe –

ELIAS CJ:

So does that mean that proximity and duty of care is always owed to a subsequent purchaser, and then the question –

MR FARMER QC:

Yes.

ELIAS CJ:

Yes, I see.

MR FARMER QC:

Yes. And so if we go back to – because what Sir Clifford Richmond was trying to do was to try and put some limit on how far into the future these duties and breaches were going to go, and so if I can take you back to 413 at – I'll read it again from line 37. "It would also seem to me impossible to limit the class of purchasers to the first purchaser, or any particular subsequent purchaser". So he accepts that there's a chain of purchasers, all of whom are going to be owed a duty.

ELIAS CJ:

Yes, and earlier.

MR FARMER QC:

Then he solves the problem by saying, "At present, I think that the ambit of the duty can be effectively controlled only by a strict insistence on the proximity principle, to

which I have earlier made reference. In other words, I take the view that the duty of the builder is not owed to anyone who purchases a building with actual knowledge of the defect, or in circumstances where he ought to have used his opportunity of inspection in a way which would have given him warning of that defect." So that's the causation point. "Subject to that qualification, and to the provisions of the Limitation Act" – so that's the second stop on the chain – "I see no reason why the loss caused by the damage to a building resulting from a latent defect should fall on an innocent purchaser rather than on the builder who negligently created it". Now –

ELIAS CJ:

And is the control also in this approach that the product, as it were, is dangerous? I mean, is there a question of degree in there?

MR FARMER QC:

A question of degree?

ELIAS CJ:

In terms of defect.

MR FARMER QC:

Well –

ELIAS CJ:

Because he does talk about dangerous situations.

MR FARMER QC:

Well, that's – yes, he does, but I think that's by the way. I wouldn't – I think that's a little bit of a red herring as far as we're concerned with here.

ELIAS CJ:

Well, I'm thinking of the submission that's made by the appellants that cosmetic or quality deficiencies are not contemplated by the *Hamlin* duty of care.

MR FARMER QC:

Yes, that's right. My learned friend keeps referring to *Stieller* in that respect, of the knots in the weatherboards. But, in fact, those weatherboards were found to be

capable of moisture ingress through the knots. So it's not – that's not a cosmetic case, although I think my learned friend, with respect to him, has almost endeavoured to present it that way. Could I just –

TIPPING J:

There are real difficulties, with the greatest of respect, in this judgment, because the learned President at 413, the first main paragraph, tends to write out causation from the analysis. But I think we can't be too distracted by the various and slightly awkward ways in which these things have been expressed. I think we've got to decide what the law ought to be.

MR FARMER QC:

I hope there are no law students in the back of this Courtroom.

TIPPING J:

Well, they might be learning something.

MR FARMER QC:

I do acknowledge the standing of this Court.

TIPPING J:

There are, and always have been, difficulties with the learned President's exposition in *Bowen*, and you yourself hinted as much.

MR FARMER QC:

Yes, that's right. The other passage in this case that perhaps is helpful is in Justice Woodhouse's judgment at 418 line 10. Actually, it's interesting, so I'll start reading at line 5. He says – he's considering *Dutton* and he says, "In arriving at that conclusion, both Lord Denning and Lord Justice Sachs considered in rejected arguments that purchaser after purchaser down the line could not be regarded as in sufficient proximity to the District Council, in terms of the test in *Donoghue v Stevenson*. Their conclusions in that regard were, of course, equally applicable to the builder. For myself, I am in no doubt that a builder constructing a permanent or semi-permanent building ought reasonably to have in contemplation those who will make subsequent use of it, including, of course, persons who may purchase the place from time to time."

ANDERSON J:

I remember in a case called *Riddell* page 1 where the accrual is discussed by the Court of Appeal in terms of the policy which drives it. What we're struggling with here is to find a policy-driven solution that meets the circumstances of Hamlin-type cases. So the trick might be to find a way to limit the mischief which the accruable policy addresses, but synthesise the policy of the Hamlin cases. This is why yesterday I raised with Mr Goddard the ability of the Council to note on a LIM that a claim has been made, which would then be noticed by subsequent purchasers, and would break the risk of successive causes of action brought by different people. Now, in the case of the person who sells for full value, there's no loss. This is referred to by Lord Justice Lane in the *Sparham-Souter* case, for example. So the first person who makes a claim ought be the last one able to, because of the ability to –

MR FARMER QC:

Well, that's all dependent on whether the Council chooses to notify. It receives a claim, which is not necessarily a public claim. In the normal course, it wouldn't be.

ANDERSON J:

It runs the risk of it, doesn't it?

MR FARMER QC:

I agree that if the Council were to put on the LIM there is a claim against us for defective – hidden defective – for a leaky building, then yes. And if you take the view that possibly wouldn't have been a view at the time of this litigation but would almost certainly be the view today that a prudent prospective purchaser would obtain a LIM, notwithstanding the outrageous fees that Councils charge for them.

ANDERSON J:

Ten years ago it was common practice to – LIM conditions were –

MR FARMER QC:

I'm not so sure that's correct. I think there was some evidence from Mr Eades. Now, I haven't read that evidence, but I'm told, and correct me if I'm wrong, that he didn't go that far. Not so common in those times, but certainly more common today. I readily accept that.

BLANCHARD J:

It's standard practice today, isn't it?

MR FARMER QC:

Oh, yes. Probably within the category of prudent conduct by a prospective purchaser, and Councils are, no doubt, aware of that and reflect that in, as I say, the fees they charge for the LIMs. I'm talking about Auckland City, I guess. Personal experience there.

TIPPING J:

The real thrust of Lord Denning's approach seems to me to have been in the limitations context. He was adding a sort of tailpiece to an earlier discussion, and I think it's very important that it be viewed and construed and possibly not followed, because the problem has now been solved by the long stop in the Building Code.

MR FARMER QC:

Yes, exactly.

TIPPING J:

No doubt there is a contestable issue, but that is one way of looking at it.

MR FARMER QC:

Yes, indeed, and that, the longstop, does feature in the judgment in the Court of Appeal in this case, in particular in the judgment of the learned President. And we are dealing here with the *Hamlin* cases, which are being described as being sui generis, and so whether that may mean that separate remedies, separate body of law, that is integrated as a whole to deal with the entire situation which encompasses successive purchasers and duties owed to them needs to be developed. I did read overnight the – I read this morning, actually, the *Aliakmon* decision and, with respect, it seems to me that that case is a million miles away from what we're dealing with here.

BLANCHARD J:

It's actually discussed in *Riddell v Porteous*.

MR FARMER QC:

Yes, yes.

BLANCHARD J:

I had forgotten what I'd said in *Riddell v Porteous* until after we adjourned last night, and I thought that case might shed some light on the way in which this kind of issue could be resolved. It's almost the opposite case because there the owner didn't directly suffer any loss because the loss only emerged when the owner had sold the property to the purchaser, then the purchaser discovered the problem that the owner apparently hadn't known about and we allowed the owner, the vendor, to sue the Council because the owner, because the vendor had had to accept responsibility for the problem –

TIPPING J:

A warranty was it?

BLANCHARD J:

Yes, yes, so we allowed what the Canadians would call a "species of transferred loss" to be sued for.

MR FARMER QC:

Yes.

BLANCHARD J:

Now it seemed to me that one possible approach, and I certainly haven't any concluded view on this, in the situation that we are confronted is, is that if we came to the conclusion that the damage was suffered before the purchasers acquired the property, that in fact they could be treated as having inherited the loss –

MR FARMER QC:

So that's transferred loss?

BLANCHARD J:

Yes. Rather than implying some fictional assignment. Simply say if you buy a damaged property, you have inherited that damage and subject of course to questions of intermediate inspection and so on and your ability to claim, perhaps, against the vendor. That you can sue the person who's responsible for the loss. The

Aliakmon, the policies underlying the *Aliakmon* are also referred to in *Riddell v Porteous*.

MR FARMER QC:

Yes.

BLANCHARD J:

And I think the thing that influenced the Court the most in *Riddell v Porteous* was the idea that what the House of Lords were concerned about was a multiplicity of claims because there you had goods being carried on a ship and there could be all sorts of down stream interests and people indirectly affected by the damage to those goods. Now that's not a concern where you're dealing with the sale of a house.

MR FARMER QC:

No. And I mean the facts of *Aliakmon* were a bit unusual in the sense that there'd been a, as I read it, there'd been a failure by the buyer to make payment which meant that he never got title at the relevant time. The goods title was reserved in the seller, so the seller remained the owner and it was some considerable time later before the buyer obtained title.

TIPPING J:

The risk had passed to the buyer but not the title –

MR FARMER QC:

But the risk had passed, that's right. The risk had passed.

TIPPING J:

– that was the twist in that tale.

MR FARMER QC:

Yes that's right, so that was quite a difficult, complex situation. The risk having passed but title not have been passed, and then you have a rule that says unless you own the property you can't sue, you can see immediately there was a bit of a conundrum and at the end of the day that proved to be fatal.

TIPPING J:

You could have held that you had a proprietary interest because of the passing of the risk but Their Lordships didn't –

MR FARMER QC:

Well they explored that as I understood to see whether there was some sort of equitable title and rejected that.

TIPPING J:

Yes but they didn't go with that.

MR FARMER QC:

No, no that's right. And the only other comment I think I responsibly should make is that what Your Honour Justice Blanchard has just described to me, I don't think it gets as far as a sort of in rem type situation, it stops short of that but certainly the in rem solution was considered in – by Lord Justice Roskill and Lord Denning in the *Souter* case and was rejected. The argument that was put up was rejected, said well it's not an in rem situation. But this concept of transferred loss, as I understand it, would fall short of that, I don't think it's quite that.

TIPPING J:

It's a transfer in persona –

MR FARMER QC:

Yes.

TIPPING J:

– in personam.

MR FARMER QC:

Yes.

TIPPING J:

There is another case where the *Aliakmon* was distinguished, a case I was involved in where a man in a yacht, remember *Attorney-General v Williams* [1990] 1 NZLR 646; (1990) 3NZBLC 101,694 (CA) where the yacht was brought ashore by someone who paid for it and the customs forfeited it because it was carrying drugs –

MR FARMER QC:

Yes.

TIPPING J:

– and they didn't look after it property, the true owner got waiver of forfeiture but didn't own it at the time when the loss occurred because it was owned by the Crown under the forfeiture and by three to two, the Court of Appeal held that that person had a sufficient interest in it to recover and the fact that he didn't own it and didn't have a technical possessory interest in, a la the *Aliakmon* –

MR FARMER QC:

Yes.

TIPPING J:

– should not be found to defeat his claim. I haven't put that very well but –

MR FARMER QC:

Yes I understand.

TIPPING J:

– it was a very restrictive approach to the *Aliakmon* and as my brother says, the Court there too focused very much on the contractual network in the *Aliakmon* which was nowhere near present in *Attorney-General v Williams* and the yacht.

MR FARMER QC:

Yes.

TIPPING J:

And we've got nowhere near that problem in this case either, so that there is authority for the view that you don't actually have to have ownership or possessory title in order to make a claim.

MR FARMER QC:

Yes, well I wasn't – I have to say I wasn't aware of that authority and as someone who's had professional crews deliver yachts to Australia I've always been worried about the possibility of them carrying drugs in the boat, so I'm – I will read that case with interest.

TIPPING J:

Well that's what happened. It was the famous case where the police constable at Karamea carried the suitcase ashore, helping the –

ELIAS CJ:

Is that a sort of an indication that you acknowledge that you're on inquiry?

MR FARMER QC:

Well I do take precautions, I require them to give undertakings and all sorts of things. I have the boat searched before they go, but one can't exclude the possibility and I require references from – I do all of those things, and that's on the record now.

ELIAS CJ:

I think this record, both you and Mr Goddard may wish to suppress at some stage.

BLANCHARD J:

It sounds more like a plea in mitigation.

MR FARMER QC:

Perhaps. Just if I could go back to my notes, so what I've said in paragraph 2, just to read – is that the submission be put, that the claim of a subsequent purchaser to whom the Council owes a duty may be defeated by a break in the chain of causation, which is I've said is the way I'd perhaps prefer to express it. In particular if the intermediate inspection test is not met or if a previous owner had recovered damages but had failed to repair the building and that is a separate kind of problem area that would have to be explored. So in paragraph 3 we say the focus is on the plaintiff, is he proximate, if so he's owed a duty of care separately from others who may also be owed the same duty. Recovery for breach of that duty is subject to normal causation principles, in particular the right of recovery may be defeated by a failure of a particular purchaser to meet the intermediate inspection standard be he either knew of the defect or recently to have discovered it.

In leaky building cases the opportunity for intermediate inspection that a purchaser has is very limited compared to the rights of inspection which a building inspector has during the course of construction. It will be a rare case indeed, and this quoting our learned President in the present case, "It will be a rare case indeed where the

significance of the opportunity for intermediate inspection breaks the chain of causation," so perhaps just to take you to that paragraph, because we would submit it is a helpful one. So you'll find that in volume 4 at tab 19 I think, yes tab 19, paragraph 166.

I hadn't – yesterday I'd been taking you through this Judgment on this issue and I hadn't got right through it and I don't propose to go back to it, beyond perhaps picking up at paragraph 164, there is this heading, "The significance of opportunities for intermediate inspection," and you'll see references to *Bowen* there in the Judgment of Justice Venning, which my learned President sets out in some length and then if you go through to 165. "On the basis of that survey of the authorities, an opportunity for intermediate inspection may be relevant to liability for a particular loss in two ways. First as to whether a duty was owed and secondly, as to causation. As well, the opportunity may form part of a contributory negligence argument. In leaky building cases the opportunity for intermediate inspection that a purchaser has is very limited compared to the rights of inspection which building inspectors have during the course of construction. So I see the former opportunity as irrelevant to whether the local authority owes a duty of care. To put this another way, the opportunity for a purchaser to inspect a completed residential unit does not warrant any lack of care by building inspectors in the course of their inspections, and I also think it will be a rare case indeed where the significance of the opportunity for intermediate inspection breaks the chain of causation."

So going back to my notes, paragraph 5, "If a subsequent purchaser passes the intermediate inspection test and pays full market value, the chain of causation we submit will not have been broken until such time as he later discovers the breach, or because of matters that have come to his attention he ought reasonably to discover it. In that case the loss has been suffered by the proprietor at the time of the loss, so that that principle is satisfied. This is consistent in our submission with the statement in *Hamlin* that the plaintiff's loss occurs when the market value of loss is depreciated by reason of the defective foundations and not before. The fact that a previous owner knew of the defect," and this quoting from Justice Baragwanath says, "Nothing about the position of later buyers who are to be judged on what they know or should know".

TIPPING J:

I just would like you to give me a little bit more help on your paragraph 5, I'm not sure that I quite follow it Mr Farmer. If a subsequent purchaser passes the intermediate test and pays full market value, the chain of causation will not have been broken until such time as he later discovers?

MR FARMER QC:

Yes.

TIPPING J:

Well his discovery doesn't break the chain of causation.

MR FARMER QC:

No, no, no it doesn't. I am sorry that's just inelegantly worded. I'm not suggesting it – well I'm not suggesting it breaks the –

TIPPING J:

But you then –

MR FARMER QC:

That's the point where he sues, that's where the loss –

TIPPING J:

In the last sentence you've jumped to a yet further purchaser haven't you?

MR FARMER QC:

Well I didn't –

TIPPING J:

I don't think you meant to.

MR FARMER QC:

No I didn't mean that, what I meant was that at that point of time he would have incurred the loss –

TIPPING J:

The loss crystallises at that time?

MR FARMER QC:

Yes, that's what I mean.

ANDERSON J:

In the *Sparham* case one or two of the Judgments distinguish between damage to the property and damage suffered by the claimant and this rather captures that idea doesn't it, that if the house is sold by the person –

MR FARMER QC:

Yes.

ANDERSON J:

– at the time damage to the house actually occurs –

MR FARMER QC:

Yes.

ANDERSON J:

– if a full market value, there's no loss suffered?

MR FARMER QC:

That's right., because the damage to property as I said earlier, it goes – it's there all along – it's always been there from the day that the –

TIPPING J:

The physical damage?

MR FARMER QC:

The physical damage has always been there and – but it's not – it's only when it's revealed to somebody –

TIPPING J:

It doesn't sound in a loss?

MR FARMER QC:

That a loss will arise, yes that's right.

McGRATH J:

Mr Farmer if you're finishing off this note, you really have passed very quickly by *Mt Albert Borough Council v Johnson* –

MR FARMER QC:

Yes.

McGRATH J:

– and while I've found what you have said about the President's judgment in *Bowen* extremely helpful and the links in the later cases, including the President's judgment in the case that we're now subject to appeal, I'd be interested in just how you place Justice Richardson's comments referring to that old common law English duty and what weight we should be giving to that in light of the submission you have developed in relation to causation.

MR FARMER QC:

I'll just find that. That's in volume 6, tab 41. The passages I have noted have been perhaps of interest begin really at 238, this is in a judgment of, a joint judgment of Justices Cooke and Somers, delivered by Justice Cooke as he then was. So on page 238 at line 35, this is under the heading of, "Limitation Act," His Honour says, "As there was here no assignment of any right of action Ms Johnson can only succeed on a cause of action arising during her ownership. That ownership began in 1970 and her writ was issued in 1973. So if she has a cause of action no question of limitation can arise. Whether she has a cause of action turns on the effect of the intermediate events in 1967." So '67 was when that initial subsidence occurred and then there was the later one in 1973.

And His Honour continues, "If those events do not exclude her, she will have a cause of action against each defendant arising from A, negligence in breach of the kind of duty of care considered in *Anns* and B*owen*, coupled with B, consequent damage in 1970 or later." Then on the question of the point of time at which the damage might be said to accrue, His Honour refers to *Anns* and to *Cartledge* and then at the top of the next page, the paragraph beginning, "But the speeches in *Anns* were influenced by the emphasis in the background legislation there on the health and safety of persons, and in *Bowen* all three members of this Court held that a purchaser in Ms Johnson's position can recover in tort for economic loss caused by negligence, at

least when the loss is associated with physical damage. That is the current law in New Zealand. Even apart from the effect of Bowen as a precedent, we're attracted to that view, such a cause of action must arise we think either, when the damage occurs or when the defect becomes apparent or manifest. The latter appears to be the more reasonable solution," and refers to English authority to support that. Then the next paragraph, "In all events in the present case, neither appellant has contended that apart from the events of 1967, the kind of damage suffered by Ms Johnson would not be actionable."

Now when you – just also of interest at the foot of that page, 239 – another reference to *Anns* and then a reference in particular to Lord Wilberforce who said, "We're not concerned at this stage with any issue relating to remedial action nor are we called upon to decide upon what the measure of damages should be, such questions, possibly very difficult in some cases, will be for the Court to decide. It is sufficient to say the cause of action arises at the point I have indicated." And His Honour then goes on at the top of the next page to say, "The reference to a cause of action is consistent with the possibility that others could arise later." So he's recognising that there could be a succession of series of causes of action which is consistent with I have submitted earlier.

Then if you go to Justice Richardson which begins at page 242, –

ELIAS CJ:

What's the stamped –

MR FARMER QC:

It's 1374, yes I had that difficulty too.

ELIAS CJ:

Oh yes.

MR FARMER QC:

He begins by saying he agrees with the conclusions by the – in the other joint Judgment and then at line 15, the paragraph beginning, "The premise on which this aspect of the case is to be considered is that each appellant breached the duty of care it owed to prospective purchasers of the property and so to the respondent, but it is well settled that a breach of the duty of care does not in itself entitle a person to

whom the duty is owed to sue, damage is an essential ingredient and except where an existing right of action is assigned to a purchaser, he can only – he can sue only in respect of damage which occurs during the period of his ownership or occupation." It is that limitation which Lord Wilberforce pointed to in *Anns.*

TIPPING J:

The word, "occurred there," can be construed as meaning, "is suffered"?

MR FARMER QC:

Yes. But also I think when he then goes onto look at the facts of the case, what's become apparent is that the – there were these separate acts of subsidence, there'd been the earlier one –

TIPPING J:

Yes.

MR FARMER QC:

– which had been fixed and then when she inspected the property everything was fine but later cracks started to emerge in the foundation as the property sank, as it were, further into the ground or whatever happened. And it's that which then led him to be able to say well, that was a separate act of damage as it were which then caused her to suffer loss at a time when she the owner which entitled her to sue.

TIPPING J:

In this case, Their Honours were not facing precisely the present issue.

MR FARMER QC:

No, no, that's why I did say this morning that I thought this case, although of interest, at the end of the day, it doesn't take us any further in the analysis because it is very facts specific and was solved on its own facts.

TIPPING J:

I mean, it's elementary that if separate damage occurs the greater – the problem is more with the suffering or occurrence of loss.

MR FARMER QC:

Yes, through the hidden defects –

TIPPING J:

Yes.

MR FARMER QC:

– which are there all along but which only emerge, are only found, revealed, to use the word –

McGRATH J:

Mr Farmer, we're right at the point now that's concerning me and I'd just appreciate you putting the proposition you have in relation to the facts of your clients which I understand is essentially that in their situation, despite the date of the Prendos report, the damage occurred during the period of their ownership, or occupation. Could you just en-capsulate why it is you're making that submission, if I've understood it correctly?

MR FARMER QC:

Damage was revealed and thereby the loss incurred, was the way that His Honour Justice Tipping has really just put it and that's what I, with respect, say as well but, as I say, with respect, I do find this case, at the end of the day, not terribly helpful because –

McGRATH J:

Yes, it's obiter – if you're saying it hasn't addressed the right issue, I think you're emphasising limitation questions and I understand all of that and that may well be the way through but I was just really wondering, in terms of that English principle in *Michael Eden* (?) how your case stood in relation to it and I think you're saying essentially the answer you've given to Justice Tipping encapsulates that and you do say the damage occurred during the plaintiff's occupation?

MR FARMER QC:

Yes and that's right at the foot of page –

ELIAS CJ:

I thought you were saying that the loss occurred?

MR FARMER QC:

Well really both because, you see, if you look at the very foot of page 243, at line 48. Well, just above that, there's a reference to *Bowen*, where Justice Cooke had said, "Presumably however, it is a question of fact and degree whether damage is sufficiently distinct to result in a separate cause of action" and Justice Richardson said, "I entirely agree. In the light of the earlier analysis of the facts, I consider that the present structural damage to the building cannot be regarded simply as a continuation of the damage that was manifested early in 1967." So it was actually known in 1967. "Indeed, the evidence does not show that any further subsidence had occurred before the respondent purchased the flat in February 1970. In these circumstances, the damage that first became apparent late in 1970 should, in my view, be treated as separate and distinct from the earlier subsidence." So that's the factual finding that enabled the Court, in this case, to decide it very easily in fact and didn't really have to draw a distinction between damage that had occurred at an earlier time that was hidden, not revealed but revealed at a time of ownership and then the loss suffered in terms of loss of value, et cetera.

ELIAS CJ:

This maybe a little simplistic but is it perhaps the case that as soon as the law is a matter of policy, decides that a duty of care is owed to subsequent purchasers, then the real question is when the cause of action arises for that purchaser and it is when it is discoverable by that purchaser?

MR FARMER QC:

Yes, yes. No it's not, with respect, simplistic at all.

ELIAS CJ:

So that many of these other cases really are not relevant because they don't drive off the subsequent purchaser –

MR FARMER QC:

That's right –

ELIAS CJ:

– determination and the matter is much more analogist to manufacturers liability for defective products?

MR FARMER QC:

Yes, yes. Now, the only other – my last note was the 10 year limitation period provides the cut off. That was Justice Baragwanath at paragraph 82 and I haven't given you a reference but the learned President in the present case also made some play of the importance of that cut off date as providing a statutory limitation on these claims running forever.

So that's, unless – on accrual, that was all I wanted to say and the only other topic I really was intending to deal with was Blue Sky, the position of Blue Sky. I say that because I don't think my learned friend specifically dealt with the *Byron* situation where there had been no code of compliance issued, he just relied on his written submissions and I'm happy to do the same. I did address you on the, when we looked at the statute on the notice to rectify and the continuing rights, duties, powers and duties of inspection on the way through the construction process.

That matter – I'll just give you these references, well perhaps I should take you to them briefly. Oh no, I'll just give you the references, unless you want me to go but Justice Venning – because this matter hadn't been dealt with in the Court of Appeal and I don't know quite how it got here but it's here.

UNKNOWN SPEAKER:

It was dealt with in the Court of Appeal.

MR FARMER QC:

Oh, I'm told it was but I couldn't see anything on it in the judgments but Justice Venning certainly dealt with it in volume 4, tab 20, in that judgment and the paragraph numbers that are relevant are 13, 124 to 125, 129, 137, 141, 155, 156, 164 and then 170, in which he follows through the whole history of the failure of the building inspector to pick up, at the intermediate inspection stages, some pretty obvious problems that were likely to emerge, with windows and window sills and flashing and all the rest of it and concludes at the end of it that first, that there was negligence by the building inspector and secondly, that he ought to have issued notices to rectify.

Then he also, in those passages, deals with the fact that the Council actually had signed off, for all practical purposes, had signed off on completion and were about to issue the code, the certificate of code compliance, when they received the letter from the developer who had got into a scrap with the builder and they then said okay, well – they when then notified there was a defect, they however did nothing other than simply take no steps to issue the formal certificate but did nothing about issuing a notice to rectify and so, in the meantime, the purchasers were being required to complete their purchases based on certificates of practical completion that had been issued by the builder and which, under their contracts, they were required to complete. So they were in sort of blissful ignorance of all of this and, as I say, the Council sat on its hands and did nothing.

So the other, the final issue then – the other matter, the Body Corporate entitled to sue, I rather apprehended that my learned friend was rather stung by the suggestion that he might be a tax lawyer and didn't proceed to push that one any further, so I won't. I'll just rely on our written submissions on that which I think are fairly clear, in any event.

Blue Sky units, we've dealt with that in our written submissions at page 36, section 11, beginning paragraph 209. Just to recap very briefly on the facts of Blue Sky. The units were sold, the development occurred, the units were sold and this particular block of units, it wasn't the whole, all the units in the development but a particular group of units, were sold to a company called Porchester. Porchester entered into the lease, the 182 week lease, with Blue Sky Holdings. Porchester then sold, onsold the units to various individual owners who bought subject to that lease and who had the traction of a contractual arrangement there for with the lessee, with Blue Sky, where Blue Sky took responsibility for finding tenants and for effecting maintenance and so forth.

Then the rights – subsequently, when the problems were discovered, the rights to sue were assigned by the individual owners back to Blue Sky. So the cause of action is the right, is the individual owner's cause of action but the right to sue has been assigned. Now, the matter was dealt with, we would submit very succinctly and firmly, in the judgment in the present case of the learned President and again, that's tab 19, volume 4, at paragraph 184.

He actually begins his discussion at paragraph 179, on page 537 and records the view of the Judge below, Justice Heath, who had rejected the claim, the Blue Sky claim and the reasons for that are set out in paragraph 180. The reasons for dismissing it were that, "Blue Sky's status in relation to the units was as a lessee," although in fact, as I say – I'm sorry, that was a separate claim. Blue Sky sued, as I understand it now, in two capacities. One as a lessee, that was dismissed and that is not pursued. So what we're looking at is the owner's claims but Blue Sky is plaintiff by virtue of the assignment.

So what Justice Heath said about that was that, "In the case of the assigned claims of the Blue Sky investors, there was no evidence of reliance, or as to enquiries undertaken by them before they purchased, or their knowledge of the state of the building, accordingly, causation had not been established." Now, that immediately raises, of course, the dichotomy between specific reliance and general reliance and we'll come back to that shortly.

Then he says in 181, "There was also an issue which the Judge touched on" and he's right in saying he touched on it, "as to whether Blue Sky as the assignee of the investors could only recover losses actually suffered by the investors. This is a potentially important point but not an easy one for us to resolve in what is a comparative vacuum as to factual findings of loss" and that's correct. I'll give you the references, in Justice Heath's judgment, paragraphs 25 and 26 and 374. The matter was rather left up in the air from a factual point as to exactly what had happened, who had suffered loss and at what point of time and so on. So that's how the Court of Appeal has proceeded from there.

Now, if you go over to 183, he again sets out what Justice Heath had to say, in paragraph 374 of His Honour's judgment, "Blue Sky's claim must fail on causation principles. Only the loss of the true owners can be claimed. There is no evidence any of the original owners relied on the Council's actions to acquire the units, rather they seem to have bought them as part and parcel of the ARPT system described by Mr Bryers. Nor is there any evidence that the enquiries undertaken by the assignors before they purchased, including their knowledge of the state of the building at the time of acquisition."

Now His Honour's, the learned President's response to that is in 184. "Collectively, Blue Sky and the investors held what could fairly be regarded as full ownership

interest in the 12 Blue Sky units and although their investment ambitions and strategies were different in degree from those of the investor/plaintiffs who succeeded, they were not necessarily really different in kind, at least if analysed at a sufficiently high level of generality. All investors were seeking to obtain economic advantages from residential property investment deriving from intermediate rental income and eventual anticipated capital appreciation."

So the investment, the intended – go back to the point, the intended use of the property at the time it was built was residential. These investors, in exactly the same way as other individual investors, were seeking to obtain rental income and hopefully a capital gain in the longer term and that's the point His Honour is making here.

Then he continues. "Given the importance I place on a bright line, I am not attracted to an approach to duty which depends on a nuanced and necessarily unpredictable assessment of the precise nature of the commercial ambitions of investor purchasers. Indeed, there is no logical reason why the Council's duty which encompassed inspections made before Blue Sky purchased, should be retrospectively negated because of what later happened in terms of sales of units to a purchaser with a complex business model." That point is really, should the Court be looking at an individual investor's plans in respect of the property, how they thought they were going to maximise the return on it, looking at business models and that kind of thing.

So His Honour then went on to say, in 185, "I'm also of the view there was no need for the Blue Sky investors to give evidence of personal reliance. This is because the *Hamlin* duty rests notions of general, rather than particular reliance." I think that is the same point that was made by Justice Baragwanath. Yes, in paragraph 109, His Honour said, "I'm satisfied, that for the reasons already developed, there is no difference in principle between the claims by Blue Sky and those of other plaintiffs. In terms of *Hamlin*, general reliance by the owners on the Council is to be assumed. From their standpoint, it does not follow that because they relied on Blue Sky they did not concurrently share the general public reliance on the Council. Certainly the Blue Sky cases take the *Hamlin* principle a significant distance, beyond the paradigm recounted by Mr Goddard." That's the modest single dwelling of the modest owner. "I agree with the President that in defining the legal categories we must employ bright lines. That means that some cases will fall outside which might plausibly be included and vice versa. The cross-appeal by Blue Sky should succeed."

So that's all I wanted to say about Blue Sky and that's really all I wanted to say generally, by way of presentation of our submissions and response.

ELIAS CJ:

Thank you Mr Farmer. Yes Mr Price.

MR FARMER QC:

I'm –

ELIAS CJ:

Yes.

MR FARMER QC:

My learned friend had said that the unreported Sunset judgment was in the bundle but I think the particular pages we rely on may not be but anyway, we'll sort that out later.

MR PRICE:

May it please the Court, the first thing I should say is thank my learned friend Mr Farmer, he's really dealt with most of the matters which I had intended to deal with which leaves me with a narrow focus this morning.

I'd like to start though by continuing on the question of the accrual issue that my learned friend dealt with. I like to make some additional comments and one that I believe was picked up by Justice Anderson which is this question of damage to the property versus damage to the purchaser. Your Honours have been taken to the decision of Lord Denning but if one reads the entirety of his judgment and indeed higher up the page, to the quote which is being referred to you, what can be seen is that the question of damage being referred to by Lord Denning, is not damage, physical damage to the property but rather damage to the purchaser, damage to the plaintiff and damage to the claimant. And perhaps with help if I were to start off by taking Your Honours to – it's at page 1758 of volume 8 of the authorities.

ELIAS CJ:

One, one?

MR PRICE:

Actually I'll start by going over the previous page, 1757. And if I could draw the Court's attention to the bottom third of what is page 869 of the reported Judgment where Lord Denning is referring to the decision in *Cartledge* and quotes from Lord Reid there saying at the bottom of that quote, "In those cases the danger created by the defendant only causes damage to the plaintiff at a much later date." Starting off with that we can see there the reference to damage is to the person not to the property. And that then continues over the page at page 868 of the reported Judgment, halfway down at the first part of that paragraph Lord Denning talks about, "This was the first time that any damage was sustained. None of the previous owners had sustained any damage. Each had bought and sold the house at a full price. The only person to sustain the damage was the person who owned it when the house sank and the cracks appeared." And that continues down the paragraph by reference E that may be asked what about *Cartledge.* But there the damage to the man was in fact when the dust was inhaled, that of course being a personal injury case. Here there was no damage to any purchaser of the house until it began to sink and cracks appeared.

Now in my submission the reference by Lord Denning, to what appears, to some extent with respect to him, be a throwaway line of the only owner who has a cause of action is the owner in whose time the damage appears. If one takes it as being damage to the purchaser, it in fact ties in entirely with the approach of our Courts in relation to the purchaser who purchases once the damage has become obvious. Because it's only once that damage has become obvious that the market value is impacted upon and the incumbent owner or the vendor in fact suffers a loss. And what we do know is that if the vendor sells it at a discount and therefore they suffer the loss, the purchaser cannot sue for that discounted amount. It's not the purchaser's loss. That's also consistent with a notion in *Bowen* of a multitude of duties or duties plural being owed by the Council to a multitude of potential parties, each of whom may have a cause of action, as and when they suffer the damage, in other words when the defects first become apparent to them.

The next point I'd like to make is that the accrual issue actually applies to a narrow situation. We are talking about a situation where the fact of a latent defect becomes apparent to an incumbent owner but is not yet apparent or obvious to a potential purchaser. Obviously once it becomes apparent to a potential purchaser, then the

market value is impacted upon. So we are dealing with a narrow situation and it's one which the Privy Council appears to not necessarily appreciated, because the Privy Council in *Hamlin*, I'm at – if I can turn Your Honours to page 1262 of volume 6 of the authorities and I'm referring here to line 35 where the Privy Council stated, "In other words the cause of action accrues when the cracks become so bad or the defects so obvious that any reasonable homeowner would call in an expert." And then the next part is, "Since the defects would then be obvious to a potential buyer or his expert such that it effects the market value." And what the Privy Council doesn't appear to have appreciated is that if you are living in this property you may well discover, in the terms of doing that, matters which would never be obvious to a potential purchaser. And yet it's not until it's obvious to a potential purchaser that the market value will take a hit and, therefore, that the incumbent owner at that time will suffer a loss. Once it does become so obvious to a purchaser, then the incumbent owner does take the hit, does suffer the loss, but the purchaser cannot sue for that loss because they haven't suffered it, the causation chain has been broken.

Now I wanted then to turn to the question of the mischief, or the question of mischief and policy dealing with that.

ELIAS CJ:

I wonder whether just further down the page is helpful too: the reference during the case of the latent defect, "The element of loss or damage necessary to support a claim doesn't exist so long as the market value of the house is unaffected."

MR PRICE:

Yes, I agree with that, Ma'am, and it's important to remember, when we're dealing with a patent defect, the idea of defect and loss or damage go hand in hand, they happen at the same time. If someone drives into your house, you have a point in time of damage and loss at the same time, or defect and loss at the same time. But a latent defect case, of course, is that unusual one, which is why we deal with the reasonable discoverability issue, that the existence of the defect and the loss – and I'll use that very carefully, because if I say, "Damage," it could mean to the property or to the purchaser – but the existence of the defect and the loss do not go hand in hand until the point in time when it becomes either apparent to the homeowner who's going to stay there and have to fix it up rather than sell it on, or at a point in time it becomes so obvious to a potential purchaser that the economic loss is suffered and the market value is reduced. So, yes, Ma'am, that fits all in there together.

In relation to the question of mischief – and it's appropriate to accept at first blush the idea of the Council owing a duty to a multitude of potential parties and potentially each one being able to sue the Council can give rise to a level of concern that policy should address. But, in my submission, as one looks in a bit more detail, that's actually an over-reaction, and it's an over-reaction for two reasons. There are two potential risks, as I see them, arising from that situation. The Council could be sued for the same loss a multitude of times, or this idea about a constantly repeating limitation period. I'll deal with the latter first, because it's a very simple point. Parliament has put in place a 10-year long stop, that concern is a very limited one. Even then, it can only be an issue where one person discovers or should have discovered the defect in the first four years. Because four years and one day on the Limitation Act in fact doesn't impact on the matter at all, it's dealt with entirely by the Building Act, being if you're at four years and one day your Limitation Act period will actually expire after the Building Act has already cut you off. Furthermore, even in that situation, from the Council's perspective they still know that they have a maximum time period within which they can be sued and, unless they are at risk of facing the same loss multiple time, which I'll come back to in a minute, then it's difficult to see how they can be particularly prejudiced. My learned friend, Mr Goddard, raised this question about the ability of people to distort the limitation period by transferring it to a family member or the like, and again I would raise the point that that's, whilst it may seem to be a potential concern at first blush, if that transfer to a family member is with knowledge, of course the purchaser does not end up having a claim. So then you get to the hypothetical, where a parent transfers it to their child at full value without telling them of the defects. Well, in theory that could happen, just as it could to an independent party as well. But, again, you only have one set of loss and, again, it's only going to happen where the defects are not so obvious as to put the potential purchaser on notice.

TIPPING J:

You're always only going to have one set of loss unless a person already compensated doesn't spend the money on the repairs.

MR PRICE:

Well, I was going to come to that right, so it's an appropriate time to do so. And I see there are two potential ways that a multitude of loss in theory could arise. The first one is exactly as Your Honour identifies it: a person goes to the Council and says, "I

have a defective house, I've discovered it, and I now require you to pay me money to fix it," and then they don't. They sell it at full value – again, assuming they can sell at full value, if the house has the defects not so serious as to put a potential purchaser on notice, but they sell it for full value. That is one potential area that the Council could be held doubly liable. But the Council has the ability to address that, either by recording it on the LIM or by issuing a Notice to Rectify, based on the fact it's now deemed an insanitary building. So, ultimately, it's actually within the Council's control to protect its own position in that case and, even then, it's a very narrow situation.

The other situation would be where a person subjectively finds that they have a problem and then they sell it – I think my learned friend, Mr Goddard, said, "Sells it cheap to be able to just get rid of it, even though a purchaser wouldn't know about the problem," and then the purchaser then suffers the loss when it becomes apparent to them. Again, a very narrow possibility, and the real answer there is that a market value of course is not determined by the vendor's subjective wishes on how much they would get for the property but, rather, following the *Hamlin* line of thinking, it's only affected once it becomes sufficiently obvious to a potential purchaser that they will pay less. A vendor may not get as much as they would like, but if a purchaser is willing to pay an amount that takes into account no defects, it's difficult to see how that can be anything than a market value.

TIPPING J:

Well, if it was so low, you'd be on notice that something was afoot.

MR PRICE:

Well, that would be right, or you'd get to the point where you'd seriously have to question is that a vendor who's actually acting in that quasi misrepresentational, fraudulent way, by covering up defects and passing it on. But again, yes, one can conceive of some very limited situations, if one turns one's cunning mind to it, where there could be some potential situation. And where you do end up then with some overall resulting risk that cannot be removed by the Council by putting a notice on the LIM or a Notice to Rectify, then the question is, at that stage, who should bear that remaining risk? Should it be the tortfeasor that created it, or should it be the innocent purchaser that has now found themselves in the situation where they are suffering it? And, in my submission, that's a very narrow remaining scope and, in that situation, that is properly borne by the Council for a variety of policy reasons, being, they

created it, they are in the best position to have avoided it, and they are in the best position to be able to afford it.

That's all I had to say on the accrual point. I had a very quick note to make in relation to the question of investor owners, and of course my clients, the Turners, fall into this situation. And my learned friend, Mr Goddard, referred on a number of occasions to this notion of a sophisticated property investor and used Housing Corp, I believe it was, as an example. In the present case, there can be no suggestion – or certainly that my clients, but I daresay any of the affected investor owners – fall within the idea of a sophisticated property investor along the lines of something such as Housing Corp New Zealand. For the reasons identified by this Court earlier in the week, it's dangerous therefore to try to resolve matters which fall outside the present situation, but to the extent that it is necessary to address it, in my submission, where you have a sophisticated property investor, that does not go to the question about the imposition of a duty, but it goes to the question of liability. And the reason for that is that a sophisticated property investor can reasonably be expected to look after their own interests to a higher level of degree than, say, my clients, the Turner sisters. Housing Corp would be expected to carry out a thorough due diligence if they are going to purchase an entire block of flats, and if they do not do so with appropriate care, then they will no doubt suffer the consequences on the contributory negligence or a liability finding. But, in my submission, it's not necessary for the Court to deal with it at this stage and, most importantly, from my submission's perspective, it's not actually a situation that relates to my clients.

TIPPING J:

So, you're really saying that the level of sophistication will go to contribution, rather than to deny the duty?

MR PRICE:

That's certainly my submission, Sir, because otherwise you get the problem of whereabouts in the spectrum do you draw the line?

TIPPING J:

I just wanted to make sure I understood you, yes.

ANDERSON J:

It's not really so much the level of sophistication, but what would be appropriate commercial practice, isn't it?

MR PRICE:

Well, that's probably correct, Sir. The focus is more along the lines of, what would be reasonably expected of that person to look after their own interest? And if they failed to follow appropriate commercial practice of a level expected of someone of their sophistication or characteristics, then they will suffer the consequences. And what would be expected of someone purchasing an entire block of flats would be very different to someone purchasing one apartment.

TIPPING J:

The contribution might be a hundred percent.

MR PRICE:

Well, it could be, or some other lesser figure, and that's something which I haven't prepared a lot on and I haven't, not really in a position to explore, but conceptually that's right. It doesn't apply in the present case but, in my submission, it certainly is not a duty case.

And that ties in actually to a point that my learned friend this morning dealt with and which Your Honour, Justice Tipping, identified, which is a question about the breaking of causation. If you have a multitude of duties owed, the duties exist when the Council was carrying out its acts back at the time of the construction. The breach occurs, if a breach occurs, at that time as well. And, in my submission, it's subsequent events, such as the knowledge of the, becoming aware of or knowledge of the defects, or purchasing with knowledge of the defects, does not retrospectively undo the duty nor retrospectively undo the breach, it goes to the heart of causation. There is no causation if you purchase something knowing it is defective, but it doesn't undo the Council's duty, nor does it undo the Council's breach. From the claimants' perspective in that situation, of course, it makes no difference, they have no claim.

The last matter which I wished to address, and which had been covered to some extent, but I wish to go a bit further into it, is in relation to the Building Act. And, as I see it, central to my learned friend Mr Goddard's submissions in this regard, was this idea of – and if I've captured his words correctly, "The deliberate and conscious, also referred to as, 'A nuanced and sophisticated intentional drafting,' of the person

drafting that statute," so as to remove the Council's liability in tort to what I'll call the "subject owner" as opposed to the owner of the other property. In my submission, what hasn't been addressed on that is the question, "By whom?", a deliberate and conscious drafting by whom. It's not Parliament, we know that it is silent in the parliamentary debates –

ELIAS CJ:

Well, I think really we should – the submission is based on the text and scheme of the statute, I don't think it was developed really further than that. Because, as you say, there's nothing in the parliamentary debates –

MR PRICE:

Yes.

ELIAS CJ:

– but we really have to just look at the text and let it speak to us.

MR PRICE:

Well, that's correct, Ma'am. I was going say, to the next point, which is – my friend sought to deal with the Building Industry Commission report as the context to the drafting of that statute and to interpret the statute in that context. And I would just wish to refer Your Honours to paragraph 4.9(2) and 4.9(3) of that report, which expressly envisages civil liability being owed to the owner. As one reads those sections, in my submission, it's clearly meaning, "The owner of the subject property."

But the last thing I wish to address in this part is, in the statute itself, if one turns to section 57 of the statute, which Your Honours were taken to, in dealing with building certifiers, the building certifier is prohibited from limiting any civil liability which may arise from their conduct or their involvement. In my submission, the only person with whom the building certifier contracts is the subject owner, the only person whose entitlements, if you like, or expectations, could be limited in contract, would be the subject owner. Certainly, the owner of a property engaging a certifier cannot purport to limit certifiers' liability to a subsequent purchaser or the next-door neighbour or the users. And that section, coupled with section 90, which requires a person suing the certifier to sue in tort, not contract, again envisages that a person who is suing would otherwise have been able to sue in contract, in other words, the subject owner. And there are two potential situations that you could take from section 90: either the

intention is to remove all entitlement to sue, because you can't sue in contract and, on my learned friend's interpretation, the subject owner can't sue in tort, or, it expressly recognises, when coupled with section 57, that there is a potential claim by the subject owner, as opposed to the user or the neighbouring property owner, but that must be brought in tort rather than contract. So, in my submission, you put those two together and that actually expressly envisages in the statute that there will be a tortious duty of care owed, not just to other property owners, not just to users, but, indeed, to the subject owner.

I said I'd be short, that's all I have to say, unless the Court has any questions for me?

ELIAS CJ:

No, thank you, Mr Price, and we'll take the morning adjournment now.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.54 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour, I have prepared a short note of the key points to make in reply to save time. I hope I could just hand that up, and while that's happening, perhaps also mention that my learned friend Mr Farmer queried whether the unreported Sunset Terraces decision was available to the Court. It is, of course, in volume 1 of the case on appeal for Sunset Terraces under tab 5, so there's no need to hand up further copies of that, and inflict, at least in that one small respect, further paper on the Court.

Turning then to my reply, I want to begin by tackling the question of investor owners, and the exchanges between my learned friend and the Court at the stage at which it's taken into account. And the heart of my submission is that plainly, the fact that a plaintiff is a property investor, and in particular, a sophisticated property investor, must be relevant to the overall determination of the claim by that person. And the real question for the Court is the stage of the enquiry at which that gets taken into account. This is, I think, one of the issues on which, as Your Honour Justice Tipping said this morning, the Court may need to make a bit of law, because the authorities

are all over the place. One can find support for the proposition that this is relevant to proximity and duty, relevant to causation, relevant to breach, and relevant to contributory negligence. And, really, this is an issue on which guidance is important. It's important also because there has been something of a tendency when it's raised in one context to say, no, no, it's relevant in this other context and push it away a bit. And the risk is that it ends up being lost sight of, falling through the cracks is perhaps the right phrase in the context of defective building litigation.

So critically, in my submission, what needs to be considered is, at what stage of the enquiry is it relevant that the plaintiff is a property investor, perhaps a sophisticated property investor. My learned friend Mr Price suggested that didn't arise on the facts of this case, but consider, for example, Mr Jupp, who couldn't remember in evidence just how many properties he owned. He thought it was 10 or 11. And then, of course, the Blue Sky investors, who were very much making a commercial investment in Sunset. So my first submission is that the better view is that the President was right in *Bowen*, for example, to treat the ability of the plaintiff to make enquiries and assume risk or manage risk as relevant to proximity, and that's a perfectly orthodox proposition, of course, in the context of the law of tort, because vulnerability, reasonable reliance, who is better placed to manage the risk or to assume it, are all questions that every list of factors relevant to proximity will pick up. The comparative ability of plaintiff and defendant to assume the risk, to manage the risk, will always, quite properly, feature in that list. So it lies at the heart of the law of tort that the position of the plaintiff, their knowledge, their ability to manage risk, must be taken into account.

The only argument, really, against that here is, well, the Courts have said that a duty of care is owed to subsequent owners, and at the time the Council performs its functions, you can't know who those will be. It seems a little bit odd to say, well, because we're extending the duty of care to other people, factors that would otherwise having a bearing on whether they were owed a duty of care will now be disregarded. One of the reasons that, in my submission, it's important to pay attention to plaintiff-specific factors is that the Council can't always be assumed to have more control than a particular owner, the initial owner-developer, being the critical example, and that claims by investors for loss of value of their investment fall outside the interests protected by the Act. That was a factor that was treated as relevant to duty in *Attorney-General v Carter*.

TIPPING J:

Mr Goddard, can I just take you back to this concept of vulnerability. I would see the main aspect of vulnerability in these cases as being that the work is covered up, and that is an across-the-board sort of vulnerability.

MR GODDARD QC:

It goes – and this is something I was going to come to in a moment – but this goes to what is, in my submission, an unduly narrow conception of what it means to inspect or investigate risk later, and what it means to assume or accept risk. If we jump to the example in 1.5 of my note, consider an investor owner buying a property in 2003, Your Honour, with an understanding of leaky homes issues, and with the knowledge that in the late 1990s, many Councils didn't have the skills and systems to identify weather-tightness risks. And that's certainly something that any sophisticated property investor, I think, would be conscious of now. The investor buys, putting no weight on the CCC, but doing two things, perhaps a third as well. Relying on a pre-purchase report, perhaps seeking a warranty from the vendor as well, but knowing that there remains a risk of latent defects. In that situation, where there's a conscious purchase knowing that the Council actually won't have had systems in place to manage this risk, because many Councils didn't, or, at least, there was a very substantial risk of it, putting no weight on it. Perhaps the pre-purchase report says there's a code compliance certificate, but, of course, one can have no confidence in that, because Councils in the late 1990s weren't alive to weather-tightness issues. That's what the Hunn report says.

ANDERSON J:

This is a monolithic constructive house with no eaves.

MR GODDARD QC:

Exactly. So we can get a pre-purchase report, but things have been covered up. So there are things we may not know. We haven't seen any damage so far. There's a residual risk. Now, in orthodox tort circumstances, there are two things one could say about that. One is there's no sufficient proximity, because the interest of the investor in the value of the investment is not something the Council was ever supposed to protect, or one could say – and this is what Justice Heath said in relation to the Blue Sky investors – that that goes to causation, and that you can't sensibly

describe a loss as having been caused by reliance on the Council where, in fact, there was none. That treats, really, general reliance as a rebuttable presumption rather than an absolute.

What the Court of Appeal did was say, no, no, we found there's a duty to investors, and because it's general reliance, causation doesn't matter. You don't have to show specific reliance. That's what I mean about the issue falling between the cracks, because the Court of Appeal would say that this investor can recover, and that matters because if the pre-purchase report was perfectly competent but didn't identify a risk that could be discovered without, you know, extreme invasive inspections of the sort that can't reasonably be required, and if the vendor warranty proves not to be worth anything because the vendor is insolvent, then on the Court of Appeal's approach, the Council is liable and could end up being required to pay. And it would be very difficult to argue contributory negligence, because, of course, this purchaser has done everything that they can do at that time to manage the risk. They've obtained a pre-purchase report, but it can't see the defects because they're covered up. They've taken a warranty, but it didn't pay. So it would be very hard to argue contributory negligence, but, in my submission, common sense, basic tort principles, suggest that there's just not the link between the Council not exercising care and the investor suffering the loss that justifies recovery. That can only – that result, which is the only just, fair and reasonable result – can only be reached by treating the ability of the investor to identify a risk, manage it in part, and accept it, otherwise, as going either to duty or to causation.

TIPPING J:

Wouldn't this argument equally apply to a person buying for their own occupation?

MR GODDARD QC:

If they turn their mind to the weather-tightness issue, yes. And that might be almost an argument for saying that it gets dealt with at the causation stage, and applies to – yes, Your Honour is right.

ELIAS CJ:

And this argument might have been quite attractive, if the law hadn't moved on, because it's really an argument against general reliance, and for specific fact duty of care.

MR GODDARD QC:

It's an argument, perhaps, for treating general reliance not as a rule that applies regardless of the facts, but as a presumption that can be rebutted on the facts, if you show that, in fact, no reliance was being placed on the Council by this particular purchaser. And in my submission –

ELIAS CJ:

Well, isn't that what the causation enquiry is directed at?

MR GODDARD QC:

Well, normally a plaintiff has to positively prove reliance. What general reliance does is really either presume that, but subject to it being rebutted on a causation argument, or say as a rule, we are always going to treat people as having relied, even when, in fact, they did not. And it seems to me that to take what Justice Kirby, in my submission, reasonably, accurately described as a fiction, general reliance in *Pyrenees Shire Council v Day*, and elevate it not just to analytical technique, which is what the High Court criticised there, but to an absolute rule, takes artificiality in this area well beyond what any of the case law requires, and well beyond what principle can tolerate.

I think I've picked up a lot of the earlier paragraphs of 1.3 here. What I do say in 1.3 is that it's not right to suggest that a plaintiff-based test is inconsistent with the Council knowing at the time it carries out its consent and regulatory functions, whether or not it's at risk. If one has both a plaintiff-based test and the Court of Appeal's test based on intended use, then the Council knows where it processes a consent for a residential dwelling that it may be liable for negligence to a future owner-occupier, if such persons own it at some time in the future, and it can charge in the light of that risk. I say "charge" deliberately, because there are two ways in which it's suggested that a Council might respond to the knowledge that it's on risk. One is by carrying out more intensive regulatory activity, inspecting more often, or looking for things it wouldn't otherwise look for. And the other is by charging to reflect the cost of insurance or contingencies.

In my submission, it can't be the first of those. No-one's ever suggested that the duty of a Council in tort goes beyond doing what it's required to do to perform its public law functions under the legislation, and, indeed, both majority and minority in *Stovin v Wise*, for example, emphasised that the common law's response to a regulator who

says, why pick on me, is, well, we're not asking you to do anything more than you're already required to do under the legislation. So it's not about changing behaviour. It's actually about charging. Very important, I think, to bear that in mind when considering some of the claims that are made for the benefits of imposing a duty of care in tort. And, indeed –

ELIAS CJ:

Sorry, about charging?

MR GODDARD QC:

No. That's it not about doing more. And that's particularly important when one bears in mind that this legislation positively prohibits doing more. Councils aren't allowed to do more than is necessary to achieve the statutory objectives.

ELIAS CJ:

To ensure sanitary houses.

MR GODDARD QC:

They're required to take – do such inspections as to enable them to be reasonably satisfied that certain performance objectives are adequately met. These are all open-textured standards. The Council must do whatever is required by those under the legislation, but not more. And if it did more, it would be imposing additional practical burdens, if it asked for higher standards to be reached, or cost burdens, if it just inspected more often and charged more than it otherwise would. So we can only be talking about enabling the Council to charge more, and it will be able to charge more if it knows that it's a dwelling, because it may be at risk, but at the same time, incorporating the plaintiff-based test in the duty of care ensures that the Council isn't exposed to claims that it's not fair, just and reasonable for it to face claims that Sir Clifford Richmond, for example, in *Bowen* considered it wouldn't be just for it to face in relation to certain subsequent purchasers. Otherwise, in 1.4 I say it must be open to the Council to argue as a matter of causation that the investor is not, in fact, relying on the Council to protect its investment interest, and I suggest there are two ways of doing that. One is to limit general reliance to homeowners and require an investor – unlike a homeowner – to show actual and reasonable reliance on the Council, or alternatively, one could treat general reliance as a presumption rebuttable by showing that this particular investor was able to either manage or assume the risk and did so.

And there's some analogy, I think, here with an issue that's come before the Court, for example in *Boyd-Knight v Purdue* [1999] 2 NZLR 278. Consider the position of an investor in establishing reliance on audit report that's been prepared for the purpose of being shown to potential purchasers. So they haven't got one person in mind. They're giving it to the company, knowing that the company might show it to a range of potential purchasers. Plainly, the person preparing – the auditor preparing that audit report owes a duty of care to all prospective purchasers who may be shown it, but the respective purchaser, in order to recover, still needs to show that they actually saw it and that they relied on it, and what it means to rely on an audit report was, of course, the subject of the Court of Appeal's decision in *Boyd-Knight v Purdue.*

I've given the example in 1.5 which I think is an important touchstone; an example that has to be tackled head-on in order to ensure that the law in this area is coherent and fair. And I then – and I suggest that the best answer, the better answer is that reliance goes either to duty, or at least to causation. In 1.6 I say that at the very least, the fact that a person is an investor must be relevant to their ability to either contract to shift risk, or to bear the risk themselves if they choose not to seek warranties and reports, and so forth. More can be expected of them in terms of risk management and risk acceptance than ordinary inexperienced homeowners.

But there are a couple of difficulties in shoehorning that issue into the contributory negligence box. One is that traditionally, at least, the Courts have taken a very narrow approach to what can be expected, even of an investor in this area, in terms of enquiries, and have really focused on physical inspection and the difficulty of looking inside walls once they've been closed in. But what about the fact that an investor making a commercial investment and with more sophistication that an ordinary inexperienced homeowner, to pick up Justice Richardson's phrase, could be expected to say to the vendor, are you aware of any defects. What about an investor-owner saying to the vendor, please provide Body Corporate minutes for the last year, two years. My learned friend is quite right to say that purchasers, of course, are not entitled to Body Corporate minutes, but the vendor, as a member of the Body Corporate, as in the purchaser, can say, I'm only going to buy if you provide them, or is this conditional on my receiving them, and them being satisfactory to me. More can be expected of such people in terms of risk management and risk acceptance than ordinarily expected of homeowners.

The second difficulty is the one I touched on a moment ago, that if they know they can't rely on what the Council has done, because Councils didn't have this monolithic face-fixed cladding and it's pretty widely known, certainly now but I think even some years ago, that systems for investigating that nationally were inadequate. So you say, well, you can't rely on a code compliance certificate or on what the Council did as providing assurance on this risk. I'll do what I can. There's some residual risk. I'll just have to wear that. If that's only looked at wearing contributory negligence spectacles, then the answer is, well, they did everything they could. So they haven't been contributory negligent, so there's no reduction. That produces the bizarre result that someone who was completely conscious of the risk and knew they couldn't rely on the Council to manage it recovers in full against the Council. And that just makes no sense.

So this issue, in my submission, has to be tackled in a way that works, and in a way that reflects the ability of investor-owners to bring to bear a whole range of techniques, including making perfectly common sense enquiries of vendors and Bodies Corporate as well as the Council. I'll come to the accrual issue later, but let me again just pick up a point raised by Your Honour Justice Anderson about, can the Council manage that risk by putting something on the LIM. Courts have never yet held that failure to ask for a LIM is 100 percent contributory negligence. And so the question arises, so if there's some sort of concern about a property, the Council puts that on the LIM, and someone doesn't seek a LIM and isn't aware of it, an investor-owner, for example, how is that dealt with in terms of this analysis?

ANDERSON J:

I would think these days everyone gets a LIM.

MR GODDARD QC:

But we're –

ANDERSON J:

Every person acting reasonably.

BLANCHARD J:

It'd be grossly negligent on the part of the solicitor not to ask for a LIM.

MR GODDARD QC:

And what of the situation, which is not uncommon, where an agreement for sale and purchase is signed first, and a solicitor consulted second, and it's not made conditional on a LIM. The evidence in this case is that that's still not an infrequent occurrence, that people go to a solicitor once they've signed the agreement for sale and purchase.

ANDERSON J:

I thought there was a standard term –

MR GODDARD QC:

I think you have to tick a box, but –

BLANCHARD J:

Do you? Is this something in the agreement form?

MR GODDARD QC:

In the standard ADLSRNZ form.

BLANCHARD J:

You have to tick a box if what?

MR GODDARD QC:

If you don't. Let me check that.

BLANCHARD J:

I've read that form, and I don't remember anything like that. Unless it's in the very new form.

MR GODDARD QC:

The rebuttal of the agreements that were relevant at this time here, so my learned junior will just rustle one of those up, and we'll look at it in a second.

ELIAS CJ:

Well, awareness, of course, will have moved on.

MR GODDARD QC:

Yes, so that's really – and dealing with these cases, and what the law was at that time, we've still got –

ELIAS CJ:

The Council under the legislation – correct me if I'm wrong, but the impression I had was the Council has a continuing obligation in respect of insanitary and unsafe housing.

MR GODDARD QC:

But not, of course – and I'll come to this later, too – but not to fix it at their own expense.

ELIAS CJ:

No, but to notify? To requisition?

MR GODDARD QC:

To carry out such inspections as can reasonably be expected to bring such issues to their attention, and if they come to their attention, then there's a power to take a range of actions which, of course, like any public law power, has to be exercised in a reasonable way. It won't always be necessary to serve a notice insisting that it be fixed within six months. Often the person occupying a property will say, well, it's not that immediate an issue. I can't afford to do it now. So you'll have a mix of appropriate public law responses. It might be correspondence, it might be a notice. There's no mandatory obligation.

ELIAS CJ:

I'm just wondering, really – well, of course, it's irrelevant to this case, but given the widespread failures that must have been emerging, what steps Councils really did take to say our inspections may not have been very good.

MR GODDARD QC:

There are a range of steps that Councils are taking, and I don't know that this is single, uniform practice throughout New Zealand –

ELIAS CJ:

It's probably irrelevant, in any event.

MR GODDARD QC:

I think it is here, because there's no claim about anything that happened after construction was completed, and I'll come back to that when I come back to section 64.

ELIAS CJ:

Although it is background, perhaps, if you're making the submission as to where loss appropriately lies, or who is in the best place to actually address something like this.

MR GODDARD QC:

And there, I think, what's relevant is the range of powers that are available, and how they could reasonably be expected to be exercised, bearing in mind that it isn't always in the interests of an owner or an occupier to have an extremely fierce and short-term imposition of statutory obligations to do remedial work where, for example, they're not in funds, and they're trying to recover from a builder or architect, and will be better placed to do the work once they've done so. Everything will turn, then, on the degree of health risk as to whether it's reasonable to insist on work being done in the short run, anyway. So it would be wrong, I think, to proceed on the basis that there's some sort of crude mandatory obligation to issue a notice to rectify within the shortest possible time as soon as the issue comes to the attention of the Council, and that's a very important, I think, backdrop to thinking about the role of the Council in this area.

I will come back to that, but one of the submissions I was going to make at the end of this reply was that these questions can't be answered in isolation. There needs to be a coherent and integrated response to, for example, what one says about reliance and what one says about accrual to what is said about the legal consequences of no code compliance certificate being issued, and what one says about both reliance and accrual and contributory negligence. And if failure to obtain a LIM only results, for example, in a 25 percent reduction for contributory negligence, even where it would have been unreasonable not to seek it, then it's not a complete answer to the concern that I'm raising about the position of a Council in terms of accrual or in terms of awareness of a claim.

BLANCHARD J:

Have there been cases on percentage reductions for failure to obtain a LIM?

MR GODDARD QC:

That was an issue which arose in relation to Ms Kim. For example, in this case, no LIM was obtained by her solicitor, and it was held that that was 25 percent contributory negligence, attributable to her. So that's before –

BLANCHARD J:

We don't have that issue before us, though.

MR GODDARD QC:

The quantum of contributory negligence isn't, but the fact that it was treated as 25 percent, unless the Court says no, that's actually wrong.

TIPPING J:

What did the LIM say that should have been –

MR GODDARD QC:

What the LIM indicated, because this was, of course, *Byron* was a no code compliance certificate had been issued, and what the Judge said was that that would have rung appropriate alarm bells, and would have triggered a line of enquiry which would have disclosed that.

BLANCHARD J:

But if the LIM had – if a LIM would have said more than that, then that 25 percent would, presumably, have shot upwards dramatically.

MR GODDARD QC:

Not as I understand His Honour's reasoning. His Honour's reasoning was that once you went down that line of enquiry, you would have known everything that could sensibly have been written in a LIM.

ANDERSON J:

That's about eight years ago, though, when she bought?

MR GODDARD QC:

Yes, Sir. But these issues can't be separated out, is my main submission. They all tie in together.

TIPPING J:

Well, one decision by one Judge as to what it's worth isn't really terribly relevant to whether, as a matter of principle, it's right to go down the contributory negligence road or not.

MR GODDARD QC:

No, and that's why my main –

BLANCHARD J:

It's difficult for you to raise this argument, because we don't have it before us. We can't go around contradicting a finding below which hasn't been appealed.

MR GODDARD QC:

But I'm not asking Your Honour to contradict it. I'm asking Your Honour to either note it and say that that's one reason, although not the main reason, for saying that the issue should be tackled at any earlier stage of the enquiry. There are difficulties with dealing with it in contributory negligence. This is just one, and I wouldn't want it to be thought that it was my main argument. My main argument is that as a matter of principle, it's relevant to causation, and that's how it's normally dealt with, or perhaps even relevant to duty and proximity, but certainly it shouldn't be postponed to that later stage.

My second submission about the later stage is that it produces perverse results, both because if it's found that they, knowing of the risk, took certain steps but those are inadequate, the Council end up liable. In my submission, that's exactly upside-down. And secondly because if they failed to take the steps, the reductions have been small. And it would be open to Court to say no, that should be taken into account, and the reductions could potentially be very large. But that doesn't require the Court to contradict the finding in this case.

TIPPING J:

The problem with causation is that it's generally in or out. You cannot adjust the contribution. You cannot say it's sort of half-cause, therefore you'll have half the –

MR GODDARD QC:

No, but if someone's not relying on someone as a source of assurance about a particular risk, the right answer is to say they're 100 percent out.

TIPPING J:

Well, if it can truly be said that there was absolutely no reliance, yes.

MR GODDARD QC:

Take my 1.5 example.

BLANCHARD J:

It's not a realistic example, with respect. A person in that situation is much more likely to say, well, the pre-purchase report seems clear, and I know that the CCC may not be reliable in the circumstances, so there is still a risk, but I am still relying on the Council.

MR GODDARD QC:

Well, with respect, Sir, first of all, that's a factual enquiry which should happen, and –

BLANCHARD J:

Well, it presumably will have done.

MR GODDARD QC:

Well, on the Court of Appeal's approach, it's not a question that can be asked, because you just assume general reliance and you don't even enquire into whether that was the thinking, or whether it was a higher level of risk assumption, but second, at the point where someone reaches the level of saying, this may or may not be reliable, they're not relying on it, and it, in my submission, is no longer fair, just or reasonable to allocate any responsibility to the Council.

BLANCHARD J:

The fact that you accept that the ultimate outcome may be that it is not reliable does not mean that you are not relying. We rely on things all the time, knowing that there's still a risk.

MR GODDARD QC:

But where we do that in a commercial context –

BLANCHARD J:

Well, we do it in commerce.

MR GODDARD QC:

Yes, then the question that has to be asked is, is there still reliance or not, and that's a factual enquiry, but it will often be the case, if someone's saying I can give no weight to that because I just know that people at the time weren't looking for the right things, that you aren't. You're consciously managing the risks so far as you can now, but otherwise accepting that it's your risk. And someone who had read the literature about a systemic problem of this kind could readily, I think, come to the conclusion that systemically – and, indeed, this is part of the complaint in this case – there wasn't a proper system of inspections is what Justice Baragwanath found at first instance in *Dicks v Hobson Swan*. Similar issues occurred here. As soon as you know that there just wasn't a proper system of inspection for what we now understand to be the weather-tightness risks associated with monolithic face-fixed cladding, the truth is that a rational person can't rely, because you know that they didn't do anything which would be calculated to uncover that sort of risk. And the Court has pending an appeal in which the issue of responsibility for some of that systemic failure to identify risk as between local government and central government will fall to be determined. That's the *Body Corporate 207624 v North Shore City Council and ors* HC Akl CIV 2007-404-04037 11 November 2009 appeal, which has been – leave has been granted, but it's been adjourned until this case is decided for a fixture to be allocated. But with the awareness of that sort of systemic failure to look for the right issues, a reasonable person cannot put weight, in my submission, on a CCC issued from the time, in respect of this risk.

The 1999 version of the standard agreement for sale and purchase, there's one that's filled in, in the *Byron* case on appeal, volume 7 tab 88. What that shows is a box which says LIM required and there's a Yes/No, and you have to circle which you want. So in conditions at the box about two-thirds down the page, there's LIM required, Yes/No, and then clause 8.2, it says if the purchaser has indicated on the front page of this agreement that a LIM is required, then certain things follow.

BLANCHARD J:

Is that still the formulation?

MR GODDARD QC:

I don't know, Sir. But at the time, you had to positively indicated you wanted a LIM in order to get one. And I'm pretty sure – although I am going from memory – that the evidence of Mr Eves was that it's not unusual for a solicitor to have an agreement brought in after it's been signed with nothing having been circled in that box.

BLANCHARD J:

But that's simply part of the condition clause. You wouldn't take it from that that a purchaser would necessarily not get a LIM. It's a condition clause to enable you to get out of you don't like the LIM. In other words, to make it less arguable that you have a right to withdraw.

MR GODDARD QC:

Your Honour is quite right. I mean, some purchasers obtain a LIM before they even put a proposal in on a property. Sometimes a vendor obtains a recent LIM and makes it available as part of the package of material of an open home, for example. I've seen that done. So there's a range of ways in which one can come to attention. But in terms of Your Honour's earlier comment that it would be negligent for a solicitor not to advise that one be sought, all I was flagging was that there's a factual observation it won't always be the case that a solicitor will have the opportunity that one be obtained as a condition of purchase, although one could be sought in any event, and Mr Eades says that that is something that he would normally advise. Of course, if it's unsatisfactory, the question then becomes, so what? Can you get out? And that will depend on the issue disclosed. It may be that one gets into the issues of abatement of purchase price, which this Court has dealt with in a complex but very helpful judgment recently. So whatever the right stage is to grapple with these issues of investors taking a range of steps including asking vendors to disclose Body Corporate minutes, asking vendors if they're aware of any defects or concerns, carrying out physical inspections, accepting residual risk, that hasn't been taken into account in any of these ways as a result of the Court of Appeal's approach in this case, and therefore in my submission, has to go back to the High Court to make such an assessment of applying the test applying by this Court. That's going to have to happen in any event for Blue Sky, because, of course, Justice Heath didn't deal with issues of contributory negligence in quantum because His Honour found that there was no causation and therefore no claim. So those issues have yet to be determined in the High Court in any event. But the issue also arises, for example, for Wilson and Stewart and *Byron*.

That brings me, then, to issues that have arisen in the course of submissions by my learned friends in relation to the Building Act provisions and scheme, and the Act, of course, is in volume 1 of the authorities under tab 2, and there are really just two provisions I want to look at. Maybe three. The first is that – I just want to take the Court back to the definition of amenity, and my learned friend Mr Farmer appeared to be suggesting that amenity was broad enough to include the economic wellbeing of the building's owner, but in my submission, it's quite clear that it's been defined in terms of health, physical independence, and wellbeing, and that's a phrase which is coloured by the whole of the thrust of the definition of users, not owners, but not associated with disease or a specific illness. If there's any doubt about that, then the paragraphs of the building industry commission report that are the genesis of this in policy terms, which I've noted in paragraph 2 of my note, paragraph 3.6 talking about amenity and the contrast with what's said to be out in 3.7 and 3.9, which is questions of value and quality for an owner put that beyond any doubt.

Now, that brings me next to section 64(4), and this is the provision that my learned friend Mr Farmer referred to Your Honour Justice Blanchard as having discovered, I think, yesterday. Whatever bearing it might have on the responsibilities of the Council once a building has been completed, in my submission it's not relevant to these cases, and there are a number of interrelated reasons for that. The first is that the relevant provision while a building is under construction is actually section 42, which the Court was taken to earlier, notices to rectify. A notice to rectify provision, which is the power to issue to the owner or the person undertaking building work notice to rectify requiring building work not done in accordance with the Act or the Code to be rectified, applies by virtue of subsection (3), while the building consent is operative. So that's the provision that enables a Council to say you must do this work while the consent is operative in accordance with the code. Once the consent is not operative, because either a code compliance certificate has been granted, Sunset, or a decision made not to grant one, Byron, that comes to an end.

But as my learned friend quite rightly pointed out, and I took the Court to this as well, under 43(6), if a decision is made not to issue a code compliance certificate in circumstances where the territorial authority considers on reasonable grounds that the work does not comply with the code, then there's actually at that point an obligation to issue a notice to rectify. Before that, it's a discretion, and it applies in the course of building work. Section 64(4), if one looks at it, can't sensibly be applied before a building is completed. If one looks, for example, at supply of potable water,

that won't usually be on and full until it's actually completed. Adequate sanitary facilities, again, that's once it's completed and being used. And the –

BLANCHARD J:

It says not for its use, but for its intended use. So it's forward-looking.

MR GODDARD QC:

Yes.

BLANCHARD J:

It suggests that it does apply during construction. Obviously, (c) couldn't apply.

MR GODDARD QC:

Nor, in my submission, (b), if one tries to think about that. For example, during construction, you won't have a roof, often. And then once you've got a roof, you won't have closed in and various other things. It really – section 64(4) isn't thinking about something that's in the process of construction. It's focused very much on a building that is about to be used.

BLANCHARD J:

Well, it's focused on how it will be in its finished state, but it still applies during construction.

MR GODDARD QC:

It would be a slightly odd use of the power, in my submission, because 42 provides all the powers that would be needed to ensure that it will be built so that when it's completed, it complies with the code.

ELIAS CJ:

But these set the standards against which that is to be assessed, surely.

MR GODDARD QC:

Notice it's the building code that sets the standards, and 42 then requires that you build to that standard.

ELIAS CJ:

But section 64 deems matters to be – buildings to be dangerous or insanitary for the purposes of this Act. It must be controlling.

MR GODDARD QC:

No, Your Honour, I think it's, in terms of work to be done, all that you can require is that something comply with the Code, and there's a positive prohibition on more. It's implicit, I think, either that something that complies with the Code will not be dangerous or insanitary. If you comply with the Code in all respects, a section 64 issue will not arise. But it's very clear that the obligation, if you're carrying out building work, is to build to the Code. I took the Court to the relevant offence provision in relation to that earlier. It's very clear that a building consent can't require anything to be done beyond what's required by the Code. So it's the Code that's the standard. But it's, of course, implicit that if you meet the Code, it won't be dangerous or insanitary. The usual understanding is that dangerous or insanitary is a lower threshold than Code compliance, and that's why you can apply that to existing buildings as well, even though the Act expressly prohibits requiring existing buildings to be brought up to the standard of the Code. So, again, I think that's another way of looking at it. It's implicit in the statutory scheme that the Code is a higher standard than merely not dangerous or insanitary. You can require existing buildings to be rendered not dangerous or insanitary. You can't require them to meet the higher Code standard.

Section 42 is actually a much crunchier power, because you can require the building work in progress to come up to Code standard, and that's the relevant benchmark. The other point to make, coming back to my note 3.3, is that a leaky building won't generally raise section 64(4)(b) issues immediately on completion of the building. There may be no issue at all about dampness in the short run. Perhaps from a very practical point, there's no allegation of failure to exercise the section 65 power here, which ties into section 64. Just not this case. But most importantly of all, if we pause and ask what loss is sought to be recovered, it's the cost of doing remedial work. So let's ask, would the owner be saved the cost of remedial work if the section 64 power were properly exercised? No, again, with respect, that actually stands section 64 on its head. The whole point of section 64 and 65 is to make the owner incur the remedial costs in order to remove the health and safety risk. So a complaint that the section 65 power had not been properly exercised could never result in the recovery of remedial costs, because the counterfactual, the power is properly exercised, requires the owner to meet exactly those costs.

TIPPING J:

Are you saying it's not preventive?

MR GODDARD QC:

It's preventive, but not preventive of cost to the owner. So the owner can't sue to recover remedial costs because of failure to exercise the section 65 power. If it had been properly exercised, they would have incurred those costs.

ELIAS CJ:

I must say that I had taken the deeming provision in section 64 that the significance to be that it addressed your early argument that the Act is not concerned with economic loss, but it is concerned with buildings which are insanitary, so a statutory definition of what constitutes insanity –

MR GODDARD QC:

Insanitary, Your Honour.

ELIAS CJ:

Oh, yes, yes.

MR GODDARD QC:

This Code quickly drives one to – I am teetering on the brink as a result of doing too many of these cases. I think it's my learned friend's fault. My response to that is the one I've just made, if you say, well, is section 64 a power intended to protect –

ELIAS CJ:

No, I'm saying I don't see it as whether the powers are being exercised. I see it as part of the background in a determination that a duty of care marches in step with the purpose of the legislation, and preventing insanitary buildings.

MR GODDARD QC:

Yes, and I agree with that. I've always said that it's intended to prevent insanitary buildings, because of concerns about the health and safety of those who are in them.

The point I'm making here is that it's not a power that is designed to spare owners from incurring remedial costs. Quite the reverse. So one can't logically hang a claim in tort to recover remedial costs off a provision that is not intended to spare them remedial costs, but actually make them incur them for someone else's benefit.

TIPPING J:

I think you're taking my brother's discovery far beyond the purpose for which he discovered it.

MR GODDARD QC:

Well, I'm very happy to be told that, but I was concerned that this was -

TIPPING J:

Speaking purely for myself.

MR GODDARD QC:

I was concerned that my learned friend was latching onto it as something akin to Columbus' arrival in America, and with the greatest of respect to Justice Blanchard, I was trying timidly to suggest what Your Honour has just put rather more forthrightly.

TIPPING J:

Well, I'm not saying it's irrelevant. I'm just saying it's not the clincher.

MR GODDARD QC:

No, it's not a clincher, and it actually doesn't point to a concern about the interests of owners. It points to a concern about the health of occupants and it says we will necessarily make the owner spend their money to make the property safe for other people.

ELIAS CJ:

Which is why imposing liability which enables an owner to meet this responsibility is not contrary to the Act.

MR GODDARD QC:

No, Your Honour. That is exactly the opposite. The Act says the owner should pay to fix it, and the Council can tell them to. It doesn't say the Council should pay to fix it. So Your Honour, I think, is standing that –

ELIAS CJ:

I'm not relying on the Act. I'm simply saying that the common law liability is not inconsistent with the purposes of the Act.

MR GODDARD QC:

I'll come to that in a moment.

ELIAS CJ:

All right.

MR GODDARD QC:

I'll deal with that, then, because there's a two part response to that, I think. In the course of my learned friend's argument yesterday, there appeared to be some pushing-aside of *Carter* on the grounds that the Court was focused more on statutory duty, but, of course, that was a case where the plaintiff pursued both breach of statutory duty and negligence claims, and there's an extensive discussion and in my submission, consistent with principle of the statutory scheme in relation to the negligence claim. And the statutory scheme and the interests sought to be protected were treated as going both to proximity and to policy under the heading of negligence in this case, and that's a discussion which many of the Courts that have grappled with these issues below have seen as directly of assistance to considering the scope of the duty under the Building Act, and rightly so, in my submission, because what is pointed out in *Carter* is that it would be odd for a common law duty of care to extend to persons who were not to be protected by the statutory scheme, and to interests that were not intended to be protected by the statutory scheme. And that restriction is consistent with all the high level contemporary case law of which I am aware.

It's consistent with *Pyrenees Shire Council v Day*, where the Judges of the High Court put considerable emphasis on the fact that the harm that materialised, the spread of fire, was the very harm that these powers were intended to prevent, and *Stovin v Wise*, where both Lord Nicholls and Lord Hoffman emphasised – they emphasised a number of things – but one was, an integral part of Lord Nicholls' reasoning in favour of a duty in the minority was that the harm suffered was of a kind that the statutory powers were conferred to prevent, harm to road users. So another point that was central to His Lordship's reasoning was that the risk of such harm was actually known to the Council in that case. It's another reason why I don't know that

Stovin v Wise actually provides any support for *Hamlin*, for example, at all. Even the minority decisions. But what I did want to pick up was that there is, I think it would be fair to say, a consensus across the final appellate Courts of the common law world that in asking whether a duty of care is owed by a public body that's charged with providing certain benefits under a statutory regime, a centrally relevant question is, is the plaintiff one of the persons to whom those benefits are to be provided under the scheme, and is the complaint about loss of a kind which that person was intended to be protected against under that scheme.

Even if that's the case, that's not enough for a duty of care, and now I'm beginning to answer Your Honour the Chief Justice's question about what's inconsistent. It was an important part of the reasoning of both minority and majority in *Stovin v Wise*, and in my submission, rightly so, that you need something more than just the absence of inconsistency before you can impose a duty of care in tort, where a regulator charged with providing benefits fails to provide them. And it's worth, I think, just going to some of the relevant passages very quickly in *Stovin v Wise*. It's in volume 8 of the authorities under tab 56. Beginning in the speech of Lord Nicholls at page 936 of the report, the point about the common law obligation and the public law obligation marching hand-in-hand is made it letter B, and that leads to the conclusion, a few lines above letter E, that a "concurrent common law duty would not impose on the Council any greater obligation to act than the obligation already imposed by its public law duties. The common law duty would impose not a duty to act differently, but a liability to pay damages if the Council failed to act as it should."

That's the no additional precaution, just liability to pay point that I was making earlier. "This is the consequence which considerations of proximity must especially address in the present case. Was the relationship between the parties such that it is fair and reasonable for the Council to be liable in damages for failing to behave in a way which merely corresponds to its public law obligations. In this type of care, therefore, the reluctance of the common law to impose a duty to act is not in point. What is in point, in effect, they're not in a legal form, is an obligation to pay damages for breach of public law obligations. This leads naturally to a further feature of the typical statutory framework. This feature points away from public bodies being subject to concurrent common law obligations. When conferring the statutory functions, Parliament stopped short of imposing a duty in favour of the plaintiff. This is so when there's a statutory duty not giving rise to a cause of action for breach of the duty. This is even more marked when Parliament conferred a power. Without more, it

would not be reasonable for the common law to impose a duty sounding in damages, which Parliament refrained from imposing. For this reason, there must be some special circumstance beyond the merits of the power, rendering it fair and reasonable for the authority to be subject to a concurrent common law duty sounding in damages".

ELIAS CJ:

But you have a duty here.

MR GODDARD QC:

But to whom, that's the question this Court is being asked.

ELIAS CJ:

I understand that point. But the point that Lord Nicholls is making here is that if you simply have a power, it's a different situation from where the statute imposes a duty, and we have a duty here imposed on the Council.

MR GODDARD QC:

In relation to the issue of notices to rectify during construction, for example, it's a power, and I think that's why Your Honour said that to the extent –

ELIAS CJ:

Yes.

MR GODDARD QC:

– of the inspection-related part of this case, which is the whole of the complaint in relation to *Byron*, where there was no CCC, it's much more like *Stovin v Wise*. Your Honour put that to me on the first day, and I agreed that actually, Your Honour was right, and I'd gone too far earlier when I'd said it wasn't such a *Stovin*-ish case. So it's the presence of the additional special circumstance which imposes a common law duty, and continuing down to 937, you have to find what the special circumstance is, and halfway, "The special circumstance must be sufficiently compelling to overcome the force of the fact that when creating the statutory function, Parliament abstained from creating a course of action sounding in damages for its breach", and His Lordship goes through, looking at the various possible X-factors that might lead to liability, and then on 939 through 941, applies the test to that case, noting at 940, just

under letter E, that the purpose of the statutory powers is to protect road users by enabling highway authorities to remove sources of danger.

TIPPING J:

It's interesting to see that Lord Nicholls, in his reference to *Hamlin*, talked about relying on or dependent on.

MR GODDARD QC:

Yes.

TIPPING J:

That might give some pause for thought, in the sense that there can be dependency without express reliance.

MR GODDARD QC:

And that's the whole thrust of the concept of community reliance. That links it in, really, to the Canadian case about air traffic controllers. Before you get on the plane, you don't have to think, thank goodness for air traffic controllers. I'm relying on them to make sure my plane doesn't hit another.

TIPPING J:

It's quite a unique way, however, of encapsulating the idea of general reliance.

MR GODDARD QC:

What one then has to ask is whether that dependence applies to a particular person, so that still raises the investor-owner issue.

TIPPING J:

Oh, yes, it still leaves certain issues alive.

MR GODDARD QC:

Yes. Your Honour is quite right. I actually think that's a much better way of thinking about the issue than general reliance, which is, as a number of the Judges at the High Court said in *Pyrenees Shire Council v Day* a bit of a fiction that tends to distract from analysing how – what really is being said is that there is a measure of dependency.

TIPPING J:

Because in this case, why you're so dependent on the Council is that the work will be covered up, and the Council's inspection is the only time where you get an independent examination of the status of the work.

MR GODDARD QC:

That's why it's important to address two questions clearly and not shy away from them, as some of the Courts, in my submission, have done. The first is, who's the "you", because that doesn't apply to the original owner-developer, for example. They are, in fact, better placed to ensure things are done properly. As matters go on, they're in control of what's done before it's closed in, so they don't normally have that dependence. Certainly the exception to that might be the person who couldn't reasonably be expected to protect their own interest, the homeowner, the modest homeowner. But other people can't fairly be described as dependent on the Council to avoid the defects in that way. A commercial building developer certainly can't, for example. And it also requires immediately the question, dependent to protect what interests, and that's the question that Your Honour, again, tackled in *Carter*. Dependent to protect what interests. It's the people who sail in ships who are dependent on the maritime safety authority to protect their health and safety. It's not the owner who's dependent, or the cargo owner.

ELIAS CJ:

On your view, they're only protected by not embarking. Why does it not further the policy of the legislation to look out for the interests of the owner who can be expected to put right the defect?

MR GODDARD QC:

Because the obligation to put right the defect exists independent of recovery in tort. It can't possibly be the case that a risk to health and safety will be fixed by the owner, if and only if there's a claim in tort against someone solvent. If there's a dangerous defect, that has to be fixed, and the statutory scheme requires that. There's no connection at all between the award of damages in tort and the fixing of the defect. One sees that both because often the defect will have to be fixed regardless of recovery, but also because there's no obligation about how you use damages. So you may not spend it, in fact, on doing remedial work itself.

ELIAS CJ:

I understand that argument.

MR GODDARD QC:

So there's a disconnect, a disconnect as both a matter of logic and principle.

ELIAS CJ:

Of logic, maybe.

MR GODDARD QC:

And principle, I think. And this is my point 5. This is an issue that was addressed, very helpfully, in my submission, by the Court of Appeal in *Charterhall* and by Justice Asher in a very thoughtful judgment in *Mt Albert Grammar School Board of Trustees v Auckland City Council*, where His Honour asked, is there any connection between the ability of the Crown to recover damages from the Auckland City Council, and the Crown removing any safety risk to children in the school. You only have to ask a question, I think, to see that the obvious answer is no. If there's a risk, of course it must be fixed. And it will be fixed regardless of the outcome of a tort claim; regardless of the right to recover. I think I've gone to the passage of Lord Nicholls' speech. I won't go to Lord Hoffman's. I've provided the pages where His Lordship makes the same point that there needs to be that X-factor, something additional to the power to overcome the pointer against awarding damages that is implicit in the statutory provision for such an award.

The Court has, I think, indicated a fairly strong view that it's not appropriate to revisit *Hamlin*, because of the passage of time and the practices to which it's given rise on the part of homeowners. But the statutory scheme, in my submission, points strongly against an extension of Hamlin liability to new categories of claim by different building owners, for example, non-homeowners, when one undertakes the enquiry directed by Lord Nicholls, and answers those questions about dependence. I've dealt with, I think, five. I do have probably another 15 or 20 minutes, and I suspect the Court has heard enough from me for now.

ELIAS CJ:

Yes, we will take the luncheon adjournment now until 2.15.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.17 PM

MR GODDARD QC:

Your Honour the Chief Justice asked a question this morning about what Councils are doing now about concerns about claims, and I've had drawn to my attention by my learned junior a LIM which is quite helpful for seeing one option open to a Council. That's in the Byron Avenue case on appeal, volume 14, under tab 308. It's a LIM that was obtained from the Council's file from someone who is not an actor in the current proceedings, in relation to Unit 2, the one owned by Couldrey perhaps, a potential purchaser who didn't, it seems, go ahead, that was issued in December 2004, and there's the – on page 2797 of the case on appeal – there's reference to the consent issued on 13 January '98, 14 units, and note C, "C" being, "Code compliance not issued.? But, in addition, if we turn over to 2799, what we see is the Council doing essential what Your Honour Justice Anderson suggested they should do, so under, "General, any other relevant issues recorded," there's, "Yes," in big, bold letters, and then what it says is, "Non-compliance to NZ Building Code," "Non," I think that should be, "Non-issue of code compliance due to weather-tightness issues, quality of control joints cannot be confirmed and apparent defects referred from CCC resolution team, owners can approach BIA for determination, all above units are subject to remedial leak repairs to cladding, window jambs, wall penetrations or other moisture intrusion repairs under the supervision of independent building consultant, Pat O'Hagan." So, it's up in lights on that LIM that there's a weather-tightness issue, and that links into what I was saying earlier today about someone buying with the knowledge of the risk. If someone obtained this LIM and then proceeded to buy, how could they say that they were relying on the Council's earlier inspections or that they were relying, indeed, on anything the Council had done to ensure an absence of weather-tightness issues?

ANDERSON J:

Well, it's causation, that point, isn't it?

MR GODDARD QC:

Yes, well, that – I was suggesting that –

ANDERSON J:

They buy with knowledge of the defects.

MR GODDARD QC:

And so then the next question is, what if they didn't request the LIM, when this was available from the Council for – my learned friend Mr Farmer complained bitterly about the fee, but I think we're talking about $200, which shouldn't be beyond his means – and for $200 you can get this information. What happens if you don't ask for it, and –

BLANCHARD J:

Well, it might be a hundred percent contributory negligence.

MR GODDARD QC:

Well, in my submission, the better way of dealing with it is to say it actually indicates an absence of reliance on the Council, because you don't care what the Council thinks.

ANDERSON J:

Yes, but general reliance is not a factual, it's not factual conduct, it's a community expectation basically.

MR GODDARD QC:

And that's been accepted in relation to home owners, that links back into my question then about, well, is more expected of investors, can the Council defending a claim where this was available to people, an investor sues, elects not to seek a LIM, even though a prudent investor would, can you then say, "Well, a home owner may be able to invoke general reliance, but you're making a commercial investment, you failed to take elementary steps to protect your interests, there's no causation."

ANDERSON J:

It's an unlikely scenario, isn't it? I mean, if you're an investor, you're then more likely perhaps to get a LIM?

MR GODDARD QC:

And that's why, if they don't, then there's a good argument that they're not relying on the Council –

ANDERSON J:

I'd have thought it goes to contributory causation. Where it comes in, doesn't matter if the result's the same, does it?

MR GODDARD QC:

If the result's the same on that one, and if it's a hundred percent of contributory negligence, then Your Honour's right, that would be the same. If it's anything less than a hundred percent, of course the result's not the same. And that begs the question, again, of a situation where a clean LIM is obtained showing a code compliance certificate, but the relevant investor is well informed, has read the Hunn report and the media, and just knows that you can't rely on code compliance certificates issued in the late 1990s. But I covered that this morning, and I don't want to go round that again.

That brings me back to my reply note, and also item 6 at the very foot of page 3. And perhaps a good way to lead into this is to say that my learned friend Mr Price was quite right to say that it's important to distinguish between damage to the property and loss to a plaintiff. In fact, there are three concepts which it's important to keep distinct in this area. The first is the concept of a defect, the second is damage to the property and the third is loss to a plaintiff. And I say that because, of course, there are cases where there's been no damage to a property, but there's a loss in value caused by a defect and there would be a cost to remedy a defect that arises, for example, in cases like *Chase v de Groot*, where a different adverse event overtook the house before the inappropriately situated foundations had caused any problems. Or, perhaps more commonly, in the situation where before a defect gives rise to any consequential damage to a property, a careful building inspection reveals the defect and the need for remedial work. So, it's important when thinking about issues such as loss and accrual, to bear in mind the possibility that loss may result without any intervening physical damage to the property, and what I think that really underscores is that these are claims for the cost to the owner's pocket, and that they may be economic loss result from a building defect but not necessarily economic loss resulting from physical damage. Now, I don't think one needs to get bogged down in these labels, as I said at the beginning of my submissions, but my learned friend seemed to suggest at points that there will always be physical damage, and that's really what this is about, and that's also an oversimplification.

Over the page, the expertise vacuum argument. Your Honour Justice Tipping put to my learned friend, and he of course agreed with alacrity, that my argument about the

expertise vacuum was really saying, "Well, there might be other people who are liable, so we shouldn't be." If that was the argument, it would be a very silly one and very swiftly dispatched. But it's a little bit more sophisticated than that, I hope, and what it really focuses on is that something more, that x-factor that needs to be present to translate statutory responsibility for conferring a benefit on someone into civil liability for failure to confer that benefit. And when one asks, "What is the something more?" in the context of *Hamlin*, it is very much the fact that home owners are presumptively vulnerable, cannot reasonably be expected to protect their own interests by retaining appropriate experts and entering into appropriate contracts. So the submission is that if that characteristic is absent on the part of a plaintiff, then the rationale for a duty of care is absent, regardless of whether or not experts were in fact retained and regardless of what their retainer may have encompassed. I just clarify the argument so that it's clear. It goes to the duty point and it goes to whether there's something more that justifies imposition of civil liability as present in the relevant circumstances.

In the context of some submissions about the relevance of *Bowen v Paramount Builders*, my learned friend submitted that there nothing much to be gained from distinguishing between the builder and the Council in this area, and it's certainly true that the imposition of liability to subsequent owners is an issue that's being tackled more or less in tandem. But it is important to keep a distinction between the position of the builder and the position of a Council, because of the very different relationship between both the builder and the original owner, responsible for actually conferring the contracted benefits, and also the Council and subsequent owners and users of the building. The basic reason for that's actually 8.3, it's the builder who, in the language of Lord Cooke, "Puts out a defective thing." In terms of Your Honour's the Chief Justice's comparison with product liability –

ELIAS CJ:

Well, except this "thing" can't be put out without Council involvement.

MR GODDARD QC:

I don't think, though, that one would normally describe, for example, a food regulator as "putting out" the defective bottle of ginger beer with the snail in it. The Council is in the same position as someone who supervises the manufacture of food items and drinks: they're not doing the manufacturing and, yes, it's the manufacturer of the ginger beer who carelessly includes a snail in it, and they're liable to downstream

purchasers with no opportunity for intermediate inspection. Whether a food safety regulator has a liability –

ELIAS CJ:

Well, the food safety regulator doesn't have to look at each ginger beer bottle.

MR GODDARD QC:

They do inspections of factories, though, and if –

ELIAS CJ:

Yes, but –

MR GODDARD QC:

– there were snails crawling around –

ELIAS CJ:

No, but no building can be undertaken without consent.

MR GODDARD QC:

Almost none, Your Honour's right, none that matter for present purposes.

McGRATH J:

It's just that a different situation gives rise to proximity, doesn't it? I mean, I don't see how you can build the argument on this.

MR GODDARD QC:

All I'm flagging is that there are different responsibilities. I mean, Your Honour's of course right, the level of control the Council has is much greater than the level of control that a food safety regulator has, and I'm not suggesting anything different. But what that emphasises is the need to enquire in each case into what control is being exercised and for whose benefit. And one shouldn't be surprised to find that that scope of liability of a builder – this is my main point – is wider than that of the Council, because it's fair, just and reasonable for the builder to be liable for defects in the building itself and for damage to the building itself, whatever the type of building, whereas –

ELIAS CJ:

I don't think anyone is arguing against that.

MR GODDARD QC:

– for a Council, there will be a wide range of defects that the Council's not liable for, because they don't raise the sort of issues for which the Council is supposed to be regulating and they don't affect the interests which the Council's supposed to be protecting. It's a very small and, I hope, an uncontroversial point, but there seemed to be a submission being made that the two positions could be equated, and that's not the case.

Accrual issues – the note says, "To be addressed separately." That's because I wrote this overnight and my learned friend had a discussion last night where we anticipated providing further written submissions to the Court. But my learned friend has since addressed that at some length this morning, and what I really wanted to ask Your Honour was whether I should take 10 minutes to respond now or whether the Court would prefer some more considered written submissions at a later date?

ELIAS CJ:

Well, do you feel the need for further consideration, Mr Goddard?

MR GODDARD QC:

No, I think I can deal with the issues of principle, without exhaustive reference to authority now. If the Court wants –

ELIAS CJ:

Well, let's hear it all then.

TIPPING J:

We can always call later if we need to.

ELIAS CJ:

Yes, exactly.

MR GODDARD QC:

In that case, let's begin with the facts, and I want to go back to the report that was given on 3 March 2000 by Prendos, which is in the Sunset exhibits, volume 6, under tab 118. This was a reasonable careful but non-invasive inspection of the Sunset

units. Your Honour the Chief Justice said to me earlier today, "But the defects have been covered up," and Your Honour suggested that was an important part of the dependence of subsequent purchasers here. This was a non-invasive inspection confined solely to matters that were visible from walking around, and they are the defects in respect of which the claim has been pursued. So, on the very first page, page 1279, the following concerns were noted, "Severe efflorescence, showing as white marks on the cladding, cracks to the jointing of fibre cement sheets, inappropriate position of joints to those sheets, crumbling paint surface, bubbling and blistering of painted surfaces, incorrectly fitted head flashings to the garage doors and inadequate flashings to the roof," and there's then a more detailed discussion of all those issues, concluding of course on page 3 of the report, "These matters are more than cosmetic and, if left unrepaired, will affect the structural integrity of the units."

So, first, it's wrong to assume that these are defects of a kind that are completely covered up and are discoverable only by the Council at the time that it does its work. Second, what we have is an inspection of a kind that doesn't involve any invasive testing of the sort that a vendor could reasonably object to, which revealed the defects. So, it's pretty clear that, as of 3 March 2000, these defects and the likelihood of continuing damage and potential health risks were reasonably discoverable by a careful inspection and were, in fact, discovered, and were known to the Body Corporate, the members of which are the unit owners. At that point, a cause of action accrued to each and every unit owner. They could sue for the remedial costs of dealing with all those issues, and they could say that the market value had been reduced as between an informed vendor and an informed purchaser, and if the Council tried to say, "No, you can't sue for loss in market value because, with a lick of paint here and there, you can cover this up and sell for full market value," that wouldn't get the Council very far before a Court, I think.

The question of market value being reduced has to be addressed by reference to whether, once defects are discovered, a transaction on the basis of that information would affect market value. And what that means, importantly, is that on 3 March 2000 at the latest, the whole of the loss sued for – remedial costs, loss of market value – could be sued for, claims could be brought against the Council, by the existing unit owners. Well, what about the point that a unit owner could, and, according to the evidence, some did, sell without disclosure and obtain a market price that didn't reflect the existence of these defects. Well, that doesn't mean that

somehow magically and retrospectively the claim unaccrues, the cause of action still accrued on 3 March 2000. The claim could have been brought for the whole of the loss. That particular vendor, if they managed to sell at a price which means overall they'd suffered no loss, cannot, at that stage would have a problem in terms of quantum, unless and until of course they were pursued on some sort of warranty or potentially a misrepresentation by concealment claim by their purchaser. If they warranted the state of the unit or if they were liable for misrepresentation and they had to pay damages, they'd then be in exactly the same position as the Riddells – unless I've got the names wrong – the people who successfully recovered in *Riddell v Porteous.*

TIPPING J:

The Bagleys.

MR GODDARD QC:

The Bagleys, thank you, Sir. The Riddells were the purchasers.

BLANCHARD J:

The Riddells were the vendors. It's the other way round.

MR GODDARD QC:

Yes, and it was the vendors who recovered –

BLANCHARD J:

Yes.

MR GODDARD QC:

– from the Council. So they'd be in the same position as the Riddells if they were liable to their purchaser –

BLANCHARD J:

Yes.

MR GODDARD QC:

Just as the – yes, right.

TIPPING J:

If they sell at no loss, does not the loss then transfer to the purchaser?

MR GODDARD QC:

And the question then is, "How does one deal with that claim?" and there are a number of questions that arise in relation to it. There are the limitation issues, and those have been well traversed by the submissions. I'm not going to go through those again, but the critical issue is, whose claim it is obviously will decide when time starts running – was it on 3 March 2000 or is it at the time of the subsequent purchase? And, in my submission, that's a very important question in itself. But then there are a number of other questions that arise. What about the Council's ability to settle a claim with the current owner? If some current owner of a unit came to them in April of 2000 and said, "This issue has arisen, we think you were negligent, we'd like to settle it," is the Council able to settle once and for all with that unit owner? If it's that unit owner's cause of action which is inherited or transferred or implicitly assigned, then a settlement between the Council and that unit owner will prevent a claim by the subsequent purchaser, if it's a new cause of action it won't, and so that that's a very important distinction to draw.

TIPPING J:

Well, if the Council settles with the previous owner, it would seem to follow, unless there some shenanigans, that the purchaser won't suffer a lot.

MR GODDARD QC:

Not necessarily. One possibility is that there's a settlement but neither that nor the defects are disclosed and a sale takes place to someone who assumes it's defect free. Another possibility – I'll come to the potential to note this on the LIM and whether that's a fix or not in a moment.

ANDERSON J:

More than that, I was thinking that the Council would been foolish in such a case not to issue a notice to remedy, to ensure that the settlement monies are used. This is then applicable cases, insanitary.

MR GODDARD QC:

So, not a notice to rectify, but a section 65 –

ANDERSON J:

Yes.

MR GODDARD QC:

Yes, the appropriate notice at that time.

ANDERSON J:

That regime.

MR GODDARD QC:

Your Honour's – quite. That would be one possibility, of course, a purchaser who didn't obtain a LIM wouldn't necessarily be aware of that if, before the work was done, a sale took place, so it's not a complete safeguard. But more of an issue –

BLANCHARD J:

But if the purchaser didn't get the LIM in those circumstances, the purchaser's got a real problem with their claim.

MR GODDARD QC:

And, again, if it's a hundred percent problem, then I don't – then you're right, that would reach the same result by a different route. Let me identify two more issues that need to be grappled with, if there's going to be this sort of transfer. Staying with that possibility of a settlement, or a claim and a successful recovery, what of the situation where repairs are attempted – think of Mr O'Hagan's attempt: the money is actually spent on repairs and people think, for a year or two, that it's all fine, but it turns out that they weren't sufficient and the problems recur – critically, at that point, the question arises, can the owner at that time sue the Council, based on original carelessness in inspection and based on general reliance? In my submission, it would be profoundly unfair to –

TIPPING J:

Well, the causative negligence would be spent, wouldn't it? Because they'd been – you're not presupposing yet further failures of inspection?

MR GODDARD QC:

What I'm presupposing is what happened in relation to Byron, which is repairs which were thought to be adequate at the time, in respect of known defects, but which turned out not to fully resolve the issue, and that's by no means uncommon in this

area. So, one knows all the defects, people attempt a particular type of remedy, but in fact it doesn't solve the underlying issues.

McGRATH J:

Are you also contemplating a settlement by the Council, in conjunction with those circumstances?

MR GODDARD QC:

Yes. So, you've got a settlement, you've got work carried out, a sale – and this is not fanciful, this happened in some of the Sunset units, people bought, thinking that Mr O'Hagan's work had fixed it – sorry, Byron – and what then happens if, as was the case with Byron, the work was not adequate to deal with the known issues and further moisture penetrations are identified, can the Council be sued again?

McGRATH J:

Well, it's not really a double liability, though, is it, because –

TIPPING J:

Not by the original owner.

McGRATH J:

– there's a repair that doesn't fix the problem caused by the Council's failure to inspect –

MR GODDARD QC:

Well, it is, I –

McGRATH J:

– and you then have the continuing problem which the Council would have to face up to when the new purchaser came in.

MR GODDARD QC:

Well, not if the same person continued as owner, Sir. If they'd settled all claims arising out of the Council's original negligence, they couldn't come back for more just because the repairs that they had done didn't fix it

McGRATH J:

So, you're saying they'd – you're contemplating a settlement on the basis that repairs will be done –

MR GODDARD QC:

Yes.

McGRATH J:

– and the –

MR GODDARD QC:

Have been done or will be done.

McGRATH J:

– owner taking the risk that they won't be effective?

MR GODDARD QC:

Yes. Which is the normal arrangement, because it's the owner who does that.

McGRATH J:

Yes, I see.

MR GODDARD QC:

Or what if they win? What if the owners in this case, having obtained judgment, do some work, and it transpires that it was inadequate, it's not itself properly designed, it doesn't deal with the issues adequately? It surely can't be the case, this matter being res judicata as between the Council and the person who succeeds against it, that someone else has a new cause of action and can come back. So, the idea that there's a brand, shiny, new cause of action for the subsequent purchaser, unaffected in any way by that which has passed between the Council and the person who was owner at the time that the matters were discoverable and discovered, in my submission, is profoundly problematic in relation to settlements, res judicata, limitation, also, I could add, contributory negligence. When the Council faces a claim from the original owner, in whose time the March 2000 arose, what if that person had bought, suspecting some of the issues, or what if that person was Couldrey, who couldn't sue because they are the original owner developer? I mean, this one provides a very good example. Suppose that Couldrey, as they owned Unit 2 at the

time that the defects were discovered, someone then buys. When the Council comes to defend the case, can they say, "Well, you've inherited Couldrey's claim but they had control, so you can't sue," or can you effectively wipe the slate clean and dispense with contributory negligence defences available to the Council simply by transferring it to a naïve purchaser? Again that would be –

TIPPING J:

Would not putting it on the LIM – and I know you're coming to this – but why can't the Council guard itself in these sort of circumstances by putting it on the LIM that there's been a problem, it's been settled, and everyone else watch out?

MR GODDARD QC:

And again, if that provides – if putting it on the LIM provides a complete answer, whether a LIM is or is not requested, then Your Honour's right, there's no unfairness.

BLANCHARD J:

You seem to be very worried about this business of the failure to request a LIM not having a hundred percent effect.

MR GODDARD QC:

And that's because there has not yet been a single case I am aware of in which any lower Court has accepted that not requesting a LIM has a hundred percent contributory negligence impact. And my learned friend Mr Heaney, who knows far more about what's been happening in this area than I do –

TIPPING J:

And you cite this for 25 percent in whatever that case was?

MR GODDARD QC:

Yes. And there's a big difference in terms of outcome between paying 75 percent and paying zero. So the unfairness is very real, unless it were for example to be made clear that, if it's put on a LIM, that provides equivalent protection to a Council –

BLANCHARD J:

I would have thought it's almost reached the stage of being similar to failure to search the title.

MR GODDARD QC:

Is Your Honour saying that that was the position in the early 2000s?

BLANCHARD J:

No, I'm talking about now.

MR GODDARD QC:

What that would produce would be, would solve problems in relation to future transactions, but it wouldn't address the difficulties that I have identified in relation to the many claims that are currently proceeding through the Courts in relation to transactions in the late '90s and early 2000s. So the concerns that I have identified all remain very acute in relation to those –

ANDERSON J:

But that assumes that the LIMs disclose everything, from that era.

MR GODDARD QC:

It assumes that some do, or that there's enough on them to start a chain of inquiry. Coming to the LIM issue –

ELIAS CJ:

Well, before you do, are you moving off the accrual point?

MR GODDARD QC:

No, I was really staying with LIMs –

ELIAS CJ:

All right, thank you.

MR GODDARD QC:

– and their relevance to accrual.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

And what I was going to say is that the other issue that arises, of course, is the situation where the Council isn't aware of weather-tightness issues in relation to a building, an inspection like this is commissioned, and there's then a lengthy period while the Body Corporate agonises about what to do, during which there's no communication with the Council. So, the knowledge is there, but the Council's not in a position to take any action to put anything on the LIM to protect its position, and any approach to the accrual issue that's adopted needs to address the position where the Council isn't able to protect its position in that way, and what that means for example, if someone purchases during that period for when time started to run for contributory negligence, whose do you look at? But the Council couldn't put it on the LIM and then rely on the argument that getting a LIM would have disclosed it –

BLANCHARD J:

Well, in this scenario the Council doesn't know about the problem.

MR GODDARD QC:

Yes. And that's also by no means uncommon because, once a report like this is obtained, quite often what –

BLANCHARD J:

But the Council's at no greater risk then, than if the property hadn't changed hands.

MR GODDARD QC:

Well, it is if, for example, you're talking about a unit owned by someone like Couldrey, who couldn't sue. If they tried to sue they have no claim, but if it changes hands after that the new purchaser might, just to take one example of someone who – yes, I mean, that's probably the simplest example.

BLANCHARD J:

But that would only be in the case of somebody who essentially built for themselves.

MR GODDARD QC:

Or who was contributory negligent in some other respect – they had a look round and perhaps identified some issues.

BLANCHARD J:

Yes.

MR GODDARD QC:

But it would affect what defences are available to the Council if there was a sale at a time when the Council could do nothing about protecting its position because it didn't know of the discovery of the defects. These are all real, practical issues, in a world where there are many hundreds of claims working their way through the system. And the approach that the Court takes to this accrual issue has the real potential to produce arbitrary and unfair results, depending on the relative timing of various events that are outside the control of the Council, depending on things like whether subsequent repairs are fully effective or not.

ELIAS CJ:

What's the simple proposition, then, that you put to us? I'm starting to get a bit lost in the questions.

TIPPING J:

No accrual.

MR GODDARD QC:

My simple proposition is that the people who –

BLANCHARD J:

You solve the extreme problems by having no liability.

MR GODDARD QC:

By saying that the people who were owners on 3 March 2000 at the time that the problem was discovered can sue, and the Council can raise against them the defences that were available to the Council against them, that people who acquire later cannot sue because the cause of action accrued when someone else was the owner and, if one likes to think of that in causation terms, one could say – and that's

why I say these things are linked – that actually the loss of the purchaser is caused not by anything the Council did, but by the vendor's non-disclosure.

TIPPING J:

That would be getting very close to saying there was no duty owed or no liability to subsequent purchasers.

MR GODDARD QC:

The –

BLANCHARD J:

Yes.

MR GODDARD QC:

– initial cases – that wasn't the answer I was going to give, Your Honour.

BLANCHARD J:

It's what I thought I put to you a moment ago.

MR GODDARD QC:

It's been put in its bluntest form now. The cases that established the ability for subsequent purchasers to sue are the very cases that suggest that this is a relevant cut off, and those Judges didn't see it as an inconsistency. Rather, they saw it as an appropriate control mechanism on the extent to which subsequent purchasers can sue.

TIPPING J:

Well, ex hypothesi a subsequent purchaser, there will be a previous owner.

MR GODDARD QC:

But the previous owner won't necessarily have discovered –

TIPPING J:

No, I agree, but I doubt they –

MR GODDARD QC:

And so Sir Clifford Richmond, Justice Woodhouse, Justice Richardson, all of those Judges saw these two propositions as capable of co-existing and, indeed, saw it as desirable that they co-exist, saw one as an appropriate check on the difficult issues that would be otherwise raised by the other. In my submission, they were right. That's my simple proposition.

ELIAS CJ:

There's not serial liability?

MR GODDARD QC:

That's my submission, that there's not serial liability. There can be liability to whoever is the owner, original or subsequent, at the time that the defects are discovered or reasonably discoverable, that's what I understand the Privy Council to have said in *Hamlin*, that's what was said in *Mt Albert Borough Council v Johnson*, it's what was said in *Bowen*, in my submission, it's right.

I'm sure that if I now say to the Court, "Do you want to hear more from me in writing in that?" I can guess the answer, but perhaps I should check?

ELIAS CJ:

Well, not at the moment.

MR GODDARD QC:

Thank you, Your Honour.

ELIAS CJ:

But it may be that we'll have some follow-up queries, in which case we'll put out a memorandum.

MR GODDARD QC:

In that case, I have one little factual note, which is in paragraph 10 of my reply notes. My learned friend said something about a certificate from the Council to the owners of Byron Unit 7, Wilson and Stewart. I just wanted to clarify the facts, which are set out in the High Court judgment, are that no certificate was given to them. A certificate confined to internal inspection of the unit was given to the previous owner and the High Court Judge's finding was that that was altered by deleting the limitation internal from the certificate and that therefore there had been no reliance by them on

any certificate that the Council was actually the author of that was relevant to the defects complained of.

And one point, my learned friend suggested that the no code compliance certificate argument in Byron hadn't been addressed in the Court of Appeal. The reference is, where it's discussed in the Court of Appeal judgments, are paragraphs 55 to 63 of Justice Baragwanath's judgment and 133 to 135 of the President's. So that was live there, it was run and it was dismissed.

My learned friend Mr Farmer says that he wanted to – his submission was not meant to be that it wasn't discussed, but that it wasn't a ground of appeal to this Court – to the Court of Appeal. I think my submission on that is that it was dealt with under the rubric of reliance and the argument that there could be no reliance on the Council where no code compliance certificate had been issued, it was bundled up with that, but I don't know that there's much point in going round that loop more. I was trying to clarify things and I think I made them murkier, so that was unfortunate.

Unless there's anything else I can assist the Court with, those are my reply submissions.

ELIAS CJ:

No, thank you. Thank you, Mr Goddard.

We'll reserve our judgment in this matter and thank you all, including junior counsel, who I'm sure put in a lot of effort into the written submissions. Thank you all for your help.

COURT ADJOURNS: 2.55 PM