IN THE SUPREME COURT OF NEW ZEALAND

SC 33/2010

[2011] NZSC Trans 1

BETWEEN **MARLBOROUGH DISTRICT COUNCIL**

Appellant

AND **ALTIMARLOCH JOINT VENTURE LTD**

First Respondent

AND **D S & J W MOORHOUSE**

Second Respondent

AND **VINING REALTY GROUP LTD**

Third Respondent

AND **GASCOIGNE WICKS**

Fourth Respondent

40/2010

BETWEEN **VINING REALTY GROUP LTD**

Appellant

AND **ALTIMARLOCH JOINT VENTURE LTD**

First Respondent

AND **GASCOIGNE WICKS**

Second Respondent

AND **D S & J W MOORHOUSE**

Third Respondent

AND **MARLBOROUGH DISTRICT COUNCIL**
Fourth Respondent
SC 41/2010

BETWEEN **GASCOIGNE WICKS**
Appellant

AND **ALTIMARLOCH JOINT VENTURE LTD**
First Respondent

AND **D S & J W MOORHOUSE**
Second Respondent

AND **MARLBOROUGH DISTRICT COUNCIL**
Third Respondent

AND **VINING REALTY GROUP LTD**
Fourth Respondent

Appearances: D J Goddard QC M A Cavanaugh J H Morrison for Marlborough District Council
M E Casey QC and R N Dunningham for Altimarloch Joint Venture Ltd
M R Ring and A B Darroch for Vining Realty Group Ltd
F B Barton and M B Couling for Gascoigne Wicks

CIVIL APPEAL

MR GODDARD QC:

I appear with my learned friends Mr Cavanaugh and Mr Morrison for the appellant counsel.

ELIAS CJ:

Thank you Mr Goddard, Mr Cavanaugh, Mr Morrison.

MR RING:

Your Honours I appear with Mr Darroch for Vining Real Estate which is the appellant in the second submissions.

ELIAS CJ:

Yes thank you Mr Ring and Mr Darroch.

MR CASEY QC:

If it pleases the Court, I appear with Ms Dunningham for the respondent in both appeals Altimarloch Joint Venture Limited.

ELIAS CJ:

Thank you Mr Casey, Ms Dunningham.

MR BARTON:

If it pleases Your Honour, my name is Barton and I'm here with Mr Couling and we appear for Gascoigne Wicks.

ELIAS CJ:

Thank you Mr Barton, Mr Couling. Yes have counsel conferred about, we had assumed that you would kick off Mr Goddard, is that right?

MR GODDARD QC:

Yes that's right Your Honour counsel have conferred in relation to the order of addresses and if it's convenient to the Court what we propose is this. That I'll begin for the Council. That my learned friend Mr Ring for Vining will follow next, he'll respond to me and advance Vining's appeal. Mr Barton next for Gascoigne Wicks, again responding to me and advancing Gascoigne Wicks' appeal and then my learned friend Mr Casey for the respondent in all the appeals Altimarloch and then Mr Ring in reply and then finally me in reply.

ELIAS CJ:

It sounds confusing but I'm sure it won't be.

MR GODDARD QC:
It's seemed better than us popping up and down like jack in the boxes on the different appeals Your Honour.

ELIAS CJ:
Yes, all right.

MR GODDARD QC:
The Court has granted leave to the Council to appeal on two issues. First the question of whether a territorial authority providing a Land Information Memorandum, a LIM, to a requestor owes a duty of care in tort in respect of the accuracy of the information in that LIM, a duty to take reasonable care to prevent loss suffered as a result of the lien on information in that LIM.

The second issue on which leave to appeal was granted is the question of the inter-relationship between the liability of the Council in tort, tort and negligent mis-statement, and the liability of the lenders of the property, the Moorhouses, under section 6 of the Contractual Remedies Act described in the Courts below as a statutory deemed warranty in respect of the water rights held by the vendors and more generally that raises the question of the inter-relationship between liability in tort and liability on the contract which it's said the tortfeasor's negligence induced entry into.

TIPPING J:
It's a contribution point or indemnity point essentially is it?

MR GODDARD QC:
It's a question of loss Sir.

TIPPING J:
Well there are two steps I would have thought, one –

MR GODDARD QC:
There are two steps –

TIPPING J:

Yes.

MR GODDARD QC:

– Your Honour is exactly right. The first is, is there any loss suffered and the Council's primary argument is that the complaint against it is as a result of your negligence we entered into this contract and we're worse off. And we say, well hang on, you can only answer the question of whether or not you're worse off once you consider all the benefits and burdens associated with the contract. The contract requires you to pay money, in this case some $2.675 million but you also obtain under the contract a bundle of rights. You obtain the property and you obtain certain water rights and you retain certain contractual entitlements and you've got to work out what the value of those is and in this case there is no uncertainty about the value of the statutory deemed warranty under section 6 because the Court has heard the case, it's decided to award damages a little in excess of a million dollars, even the appeals which would reduce that to 400,000, will still mean that obtained under the contract and section 6 are rights worth well in excess of the purchase price paid. So this is a case, we say, that is indistinguishable from the situation where property and plant and equipment and ancillary rights transferred under a contract are worth more than the purchase price.

TIPPING J:

So that's step one, a loss.

MR GODDARD QC:

That's step one. If that's not accepted then the question becomes how are the concurrent liabilities in contract, statutory deemed warranty in section 6 and tort to be adjusted to avoid the obviously inappropriate result of over-recovery. No one suggests that it should be possible to recover full section 6 damages and full tort damages resulting in over-compensation on any measure. How is that to be managed and the Council there says, well – well the primary argument of the Council is that contribution is not appropriate. That rather the contract damages go in reduction of the tort damages but if that's not accepted then the same principle effectively operates in the equitable contribution field and the vendors, who have effectively been unjustly enriched to the extent that the price they were paid for certain assets and rights exceeds the value of what they did, in fact, transfer, were

able to transfer, should first account for that enrichment, leaving nothing then owing in tort. So it can be tackled in either of those two ways.

In fact there's a third way it could be thought about, which isn't addressed in my submissions but which occurred to me in the course of preparing, which is that it could be thought of as a mitigation measure as well. One could say, well the purchasers have acquired this property, certain water rights, and certain contractual rights against the vendors. If they don't enforce those contractual rights then whether it was unreasonable to fail to do so could be considered applying normal mitigation tests. But if they do, in fact, enforce them, as they have here, and mitigation in fact is achieved through the enforcement of those rights, then there is no loss.

So there are a range of ways of thinking about this problem all of which, in my submission, lead to the same conclusion. And that's because the basic complaint against the Council is that it induced entry into the contract and that that made the purchaser worse off but the Council says that's just not right because in fact they're not worse off.

Dealing with the – well I've summarised really the submissions on that second issue, let me do the same very quickly for the first one, the duty of care issue, and this is dealt with at paragraph 1.12 of my written submissions. It's a negligent mis-statement claim. The law in this area reasonably well trodden, a path well trodden I should say, confusing my metaphors, and cases such as *Boyd Knight v Purdue & Matthews* [1999] 2 NZLR 278 (CA) in this jurisdiction, *Caparo Industries PLC v Dickman* [1990] 2 AC 605 (HL) in England, identify the circumstances in which there will be liability for negligent errors in a statement. What's critical, of course, is the over-arching question of whether it's fair and reasonable to treat the Council as liable, to impose a duty to pay compensation where information is incorrect and the Council's has been negligent and in the context of negligent mis-statements, the Courts have held that is it fair and reasonable to impose liability only where the provider of the information can be treated as assuming responsibility for the correctness of that information and that is likely to be the case where the information is provided to a particular person or class of person with knowledge that they will rely on it for a particular transaction and it's reasonable for them to rely on the correctness of the information for that purpose.

ELIAS CJ:

Are you going to take us to the LIM?

MR GODDARD QC:
Yes.

ELIAS CJ:
Yes.

MR GODDARD QC:
I'm going to go to just a few key documents, the agreement, the LIM, and the request for the LIM, which I think are quite informative.

ELIAS CJ:
Yes, and you'll tell us why this, why the LIM dealt with the water rights, since it seems to be common ground that water rights don't attach to land.

MR GODDARD QC:
I don't know that that is quite common ground –

ELIAS CJ:
Right.

MR GODDARD QC:
– Your Honour and the language of attaching to land is not the language that's used in section 44A of the Local Government Official Information –

ELIAS CJ:
Affecting.

MR GODDARD QC:
Affect and what the Courts held below, was that water rights do affect land, even though they don't attach to it. I sought leave to appeal on that issue –

ELIAS CJ:
Yes.

MR GODDARD QC:

– and that was declined.

ANDERSON J:

But the Resource Management Act in section 87 and sections 134 and 136 say it does attach to land, it specifically says it in the Act.

MR GODDARD QC:

It doesn't pass with land, automatically transfer with land –

ANDERSON J:

No, but it –

MR GODDARD QC:

– in the same way as a land use consent, and it can be transferred away from the land, so in that –

ANDERSON J:

There it attaches to the new land to which it's transferred. There it says it attaches.

MR GODDARD QC:

I'd have to look at those provisions Your Honour, but the later provisions of the Act –

ANDERSON J:

Well it's section 134.

MR GODDARD QC:

Perhaps if we –

ANDERSON J:

A water right is a consent in terms of section 87 of the Act, and section 134 says it consents attached to the land.

MR GODDARD QC:

Ah no, I think Your Honour is thinking of land use consents. It's perhaps helpful to look at that, because it doesn't apply to –

ANDERSON J:

No, no, then section 136 refers to water permits.

MR GODDARD QC:

But these are water permits that we're talking about Your Honour.

ANDERSON J:

What's the difference?

MR GODDARD QC:

The rights that were the subject of the representations in this case were water permits, resource consent granted to abstract water from the Altimarloch Stream and the Act distinguishes between certain types of resource consent which attached to land in certain – perhaps I could take Your Honour to that up. In volume 1 of the bundle of authorities, under tab 6, there are some extracts from the Resource Management Act, not fortunately the whole thing. I hope we're not going to be embarrassed by not having any provisions we need, but if we go to, it's page 176 of the stamped numbers in the top right-hand corner. Does Your Honour have that?

ANDERSON J:

Yes.

MR GODDARD QC:

So section 134 provides that land use consents and subdivision consents attach to the land. That doesn't include water permits and dif we look at 136 we see distinctions being drawn between the two types of water permit, subsection (1) deals with permits to dam or divert water, that's not what we're concerned with here, that can be transferred to owners and occupiers of the same site, but not elsewhere, but what we're concerned with are water permits of the kind addressed in subsection (2) and those are permits to extract water and what subsection (2) provides is that they may be transferred either to owners or occupiers of the site in respect of which permits granted, or to another person on another site, or to another site, if both sites are in the same catchment and either the regional plan permits that or it's been approved by the consent authority. So there's a deliberate distinction drawn between types of consent which attach to land and types which don't, and it's common ground that we're concerned here with a type, and this is perhaps what Your Honour the Chief Justice is pointing, it's common ground that we're concerned here with a type

of resource consent that does not attach to land in the sense provided for in section 134.

ANDERSON J:
I'm just trying to find section 87.

MR GODDARD QC:
And section 87 is not included in this extract but I'll –

ELIAS CJ:
The reason I raised it is simply because of the argument you develop as to the inconvenience end result of liability. I'm really wondering whether this consent is required to be included in the LIM under section 44A because if it's not, it undercuts that part of your argument as to the inconvenience and as to the anomaly between local authorities which are consent authorities and where regional authorities grant consents.

MR GODDARD QC:
Yes it would mean I think perhaps revisiting the question of leave to argue that point under rule 29 of the Court's Rules, I would then want to pursue that.

ELIAS CJ:
Well I'm not sure that it would. It would mean though that the argument that you're seeking to make as to the inconvenience of liability, doesn't really have legs.

MR GODDARD QC:
No, I think it would still fly.

TIPPING J:
Well if the Chief Justice is referring I think to your paragraph (a) of 1.12, where you say you've got no – you cannot decline to provide it.

ELIAS CJ:
Yes, yes.

TIPPING J:

Which is your first point.

ELIAS CJ:

Yes.

TIPPING J:

You may be entitled to it, subject to the resolution of this point.

MR GODDARD QC:

That would then raise for determination by the Court, the question of whether a difference result should follow in liability, if under subsection (3) of section 44A the Council elects to provide the information, I'll develop this later, but if that were the position Your Honour, then the Council is required to provide certain information under subsection (2) of section 44A and then it may provide other information which would assist the requestor under subsection (3). What if –

ELIAS CJ:

And it has. And I'm not – I can't see that it makes any difference in this particular case because the liability that's been sheeted home to the Council was Hedley Byrne liability.

MR GODDARD QC:

Well then the question, the anomaly that Your Honour would need to, in my submission, address, is why a different result should follow if the information is provided in the LIM as compared with information that could be provided under subsection (3) in a LIM, been provided in a separate document headed, "Part 2 Official Information Act". In my submission it would be most odd –

ELIAS CJ:

Because of the status of the LIM.

MR GODDARD QC:

It would be a strong deterrent.

ELIAS CJ:

Because of the authority of the LIM.

MR GODDARD QC:

The LIM is a convenient format for aggregating certain information, and there is no ability to withhold that information and the timeframe for providing it is shorter than other official information, but it's still a collection of official information, and it's possible to make a very formal request to a council for specific information which is not in the form of a LIM, but which would not attract liability as I explained. If –

ELIAS CJ:

Well, you'll get on to develop that analogy with the Official Information Act regime which I'm not sure that I find entirely persuasive, but you'll come to it.

MR GODDARD QC:

I'll do my best to –

ELIAS CJ:

Yes.

MR GODDARD QC:

– develop that one. And to really explore the implications of the deliberate choice that was made to situate this information provision section in the Local Government and Official Information and Meetings Act rather than elsewhere and to confine it to territorial authorities, and in my submission once one teases through those two aspects of the statutory scheme, then really in order to avoid some quite peculiar anomalies, it's necessary either to conclude that the scheme of the whole legislation is inconsistent with the existence of a duty of care. This is an Act which provides for information to be made available for the benefit of certain persons, but which does not contemplate the payment of compensation in the event that that information is incorrect and that error results from carelessness. And – yes, well that's really the key point I think, that's where that statutory scheme takes you.

ANDERSON J:

On that other matter Mr Goddard you were right, and I am wrong. The water permit's a resource consent but it's not a land use consent.

MR GODDARD QC:

That's right Your Honour. Thank you for that. I was worried, that I missed something really important there. Coming back to my summary of the duty of care argument in 1.12, Your Honour's question whether paragraph (a) is well founded. The Courts below reached that conclusion which – but I'll come back to that. The short timeframe contemplated by the LIM is also relevant. Importantly, a LIM can be requested by any person there's no restriction on the classes of person to whom they're available and of course once one person has requested it, it can then be passed on to a range of people so a real estate agent acting for a vendor could give it to every purchaser, for example, of land. A solicitor could make it available to a range of people. Council doesn't know who it's going to end up in the hands of and they don't know what sort of decisions they're going to make on the basis of that. If someone had been buying Altimarloch to continue to operate it as a sheep and cattle farm, then this wouldn't have been an issue of a special importance. There was plenty of water for that purpose. It was the application for viticulture that made quantities of water especially important and that's not something that is necessarily known to a Council providing information, a particular special interest in a particular feature of the LIM. So we're a long way from the knowledge of a particular transaction or particular purpose for which information is required.

Because the Council doesn't know who's going to end up, who's going to be the end user of the LIM or why they require it, it's not possible to charge a risk related fee. You can only charge the same fee to any requestor and if you – and there's no ability to refuse a request on the basis that the ultimate user hasn't been identified or disclosed.

TIPPING J:

All you can do is charge a fee that carries something for the general –

MR GODDARD QC:

That's right Your Honour. Everyone ends up paying for the few people –

TIPPING J:

It's a spread.

MR GODDARD QC:

– who need it for special purposes.

TIPPING J:

It's a spread.

MR GODDARD QC:

Yes, which increases the cost to everyone of accessing this information which, in my submission, is inconsistent with the basic philosophy of this legislation, like the Official Information Act. It's not – one of the reasons, in my submission, that liability is expressly excluded under section 41 is to reduce risk and therefore reduce the cost of providing information and consistent with the principle of accessibility which is one of the fundamental principles of Official Information legislation as it applies to both central and local government and it's inconsistent with the scheme of it to increase the cost to the Council of providing the information and thus increase the cost to every requestor of obtaining information which is to be publicly available.

So when we come to look at the scheme of the legislation and it's fundamental emphasis on access to information, openness of information, what I'll be saying is that an integral aspect of that is that it be available at the least feasible cost and that imposing liability and increasing those costs is directly at odds with it, and that ties in very importantly to the analysis of Parliament's intention and what can have been contemplated by Parliament in *Stovin v Wise* [1996] AC 923 (HL) in the speeches both of the minority, Lord Nicholls, and the majority, Lord Hoffmann.

McGRATH J:

Mr Goddard, it might not be possible to include in the fee an element for particular circumstances or requests but it would be possible to include in the fee a general sum that might be, say, take account of the premium that was payable for insurance.

MR GODDARD QC:

And that's what His Honour Justice Tipping suggested to me a moment ago, an area of spreading that insures cost across everyone and my response is, so everyone ends up paying more for their official information and in my submission that's inconsistent with the scheme of the legislation which is to make official information widely available at the lowest possible cost.

ELIAS CJ:

But it's not as broad as official information, it's only the information under section 44A, affecting the land.

MR GODDARD QC:
If it's requested in the form of a LIM and not separately.

ELIAS CJ:
Yes.

MR GODDARD QC:
That still means that every LIM requestor, whatever the risk associated with their particular LIM, which may be very plain vanilla, is going to end up bearing a share of that cost.

ELIAS CJ:
Yes.

MR GODDARD QC:
And it would mean that someone buying Altimarloch for purposes that had nothing, were not water sensitive, had to pay a contribution towards the cost of insuring in case the request was one that was water sensitive or some other option or issue sensitive.

BLANCHARD J:
But they'd be getting other benefits because the LIM covers other matters.

MR GODDARD QC:
It would mean that there's an additional cost which is spread across every requestor and inevitably, with a system like this, different people are making requests for different purposes and some would derive more benefit than others. The question has to be, is it consistent with the statutory scheme to increase the average cost to everyone by imposing liability in this context.

McGRATH J:
It's important here though, isn't it, that as the Chief Justice said earlier, that the LIM does have a status under the Act, and I'm thinking really of subsection (5), section 44.

MR GODDARD QC:

That's the provision that deems information in it to be correct in the absence of proof to the contrary. That means that it can be produced as evidence of information without going back into the files unless someone seeks to displace it. It's not conclusive, it's nothing more than a provision of convenience so –

McGRATH J:

It's certainly removing it, though, from ordinary Official Information Act policy considerations, isn't it?

MR GODDARD QC:

It's a feature of a LIM which isn't present, Your Honour's right, in relation to other Official Information Act requests but on the other hand this is not a certificate that has any sort of conclusive effect so we're not, for example, in *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223 territory where a certificate was issued by a registrar omitting the charge of the Ministry and as a result, because that was determinative, the charge was lost. In other words it's not as if anyone's rights –

McGRATH J:

Well you're going to the extreme but it does have a status and that seems to me to be significant.

MR GODDARD QC:

It does have a presumptive status. It's actually not easy to see in what circumstances this would have any significant effect and given that it is just in the absence of proof to the contrary so if the issue was actually disputed by someone in a property transaction or if there was a prosecution for failure to comply with a restriction applying to the land and someone said, look I've got a LIM that says there's no such restriction, it will always still be open to prove the contrary.

TIPPING J:

What about the stark contrast between official information being exempted from liability and there being no exemption for LIM? I mean that's a pretty solid sort of point Mr Goddard.

MR GODDARD QC:

That assumes that in the absence of section 41 the Court would find that a duty of care was owed in respect of official information and that section 41 brings about a result that wouldn't follow, in any event, from the scheme of the legislation but the submission that I'll be developing this morning is that actually consistent with the scheme of the legislation one – and it's purposes, one would not impose liability in any event.

TIPPING J:

So it was put in as an abundance of caution you're saying?

MR GODDARD QC:

So far as negligence liability is concerned it's abundance of caution. It does other things which are over and above negligence liability. It also protects, for example, against copyright infringement claims and this is – I'm very reluctant to stray into territory in respect of which I haven't been granted leave, but one of the difficulties that is raised by the approach of the Court of Appeal now of course is that if an Official Information Act is request, which requires the release of plans of information in a report about land, which is the subject of copyright, if there's a specific request that's not a LIM and that's provided, the territorial authority is protected from any liability for breach of copyright. But if it's provided in respect, as is often requested for a LIM, that same express protection doesn't apply –

ELIAS CJ:

But that's because it's such a formal step. It's a certificate, effectively.

MR GODDARD QC:

But if one attaches to it, under subsection (3), copies of a report in relation to the land which is subject to copyright, or plans which are the subject of copyright protection, under subsection (3), so it's not something that one is under a legal obligation to do, then a result of the findings of the Court of Appeal in relation to the scope of application of section 41, is that there's a copyright breach by the Council to which no protection extends. Again, if we go to section 41, just look at the different things it does, so that Act is under tab 5 of volume 1 of the authorities. I was going to work systematically and slowly through the Act but I'll dive in here for now.

ELIAS CJ:

Well perhaps you should work through it because the structure of the Act –

MR GODDARD QC:
Is very important.

ELIAS CJ:
– is extremely important to your argument.

MR GODDARD QC:
It is. In fact why don't I do that? Why don't I leave the summary and –

ELIAS CJ:
I think you should. I think you should get straight to the Act.

MR GODDARD QC:
Because there's a risk that in the course of dealing with the summary –

ELIAS CJ:
We've read your argument after all.

MR GODDARD QC:
Yes, and responding to Your Honour's questions I'll anticipate random pieces of my substantive argument but not others. Let me take a step backwards then and move to section 2 of my submissions, the facts, and let me just take the Court, I'm conscious that the Court's read the arguments but there are just a couple of documents that I think it will be helpful to see. The first of those is the agreement for sale and purchase. That's in volume 4 of the case on appeal. I think volume 4 is pretty much the only interesting volume so far as the Council's appeal is concerned and the rest is paper weights.

TIPPING J:
You might, no I won't say, you might remove the reservation.

MR GODDARD QC:

So the agreement for sale and purchase is under tab 63, entered into on 20 February 2004, so that's before the date of the LIM, and the two things I just want to note –

ELIAS CJ:

Sorry I missed the, is it 60?

MR GODDARD QC:

It's 63 Your Honour, sorry.

ELIAS CJ:

So 63 thanks, yes I have it now, thank you.

MR GODDARD QC:

So 20 February 2004, purchase price of 2.675 million, and then if we go to the very last page of the agreement, it's page 598 of the case, we see the handwritten clause 20, "All water rights related to the property are transferred on settlement". And in my submission, I'll get to this in the second half of my argument, the effect of the representations that were made on behalf of the vendors and s 6, is that the matter falls to be considered effectively as if this had gone on to say, "All water rights related to the property are transferred on settlement, namely A B C". So that's the agreement for sale and purchase. If we turn then to tab 66, we have the LIM request. So this is a one page form prepared by the council, the requestor, identified as a firm of Wain and Naysmith, client name inserted there, McNabb, no mention of Altimarloch Joint Venture Limited, property details are then provided and a certificate of title, the details are not filled in but ones that were attached, and then the Court will see under the historical search box, "Legal description from the attached certificate of title which is blank, and then any specific additional requests about property. Now that's clearly intended to provide an opportunity for requestors to identify specific information that they would like, that seems a sensible and helpful thing for a local authority to do, consistent with the spirit of the legislation, but I just ask the court to bear in mind the implications of putting a request in her, in terms of a duty of care and the irony that if a specific request about some matter falling outside subsection (2) is made here and if that's responded to in a document, separate from the LIM, it's very clear there'd be no liability, even though this is specifically being asked for, not just as part of the umbrella of the LIM. Whereas on the Court of Appeal's approach there is liability if the information happens to be included in the LIM.

ELIAS CJ:

Well, you'll go on and explain what's so wrong about that in terms of the scheme.

MR GODDARD QC:

I will, I will.

ELIAS CJ:

Yes.

MR GODDARD QC:

To the connotation of specific requests about property.

ELIAS CJ:

So there's no specific request about water rights?

MR GODDARD QC:

No.

ELIAS CJ:

No.

MR GODDARD QC:

Not in this. There was the earlier search of certain files by the real estate agent. The real estate agent searched the grey property file for the property and photocopied the copies of the consents that had been put on it in accordance with the council's pre-2000 practice of putting water consents on the property file as well as having a separate resource consent file, but there was no specific request for information about water rights in the LIM request from the solicitors. And again, I'll come back to this, but in my submission it's striking that if the solicitors had written a letter to the council saying, "We are acting for Altimarloch Joint Venture Limited a company which is contemplating the purchase of the property Altimarloch for development into a vineyard, obviously water rights are of crucial importance to our client for that purpose accordingly, could you please provide up to date information about all water rights associated with that property." And the council had looked at the file, made exactly the mistake it made and written back saying, "1500 cubic metres per day of A class water and whatever the quantity is of C class water, then there'd be no liability."

ELIAS CJ:

But leaving aside liability, think of the chaos if a LIM could be carelessly issued and then it sought to rely on it under subsection (3). I mean the scheme –

MR GODDARD QC:

Subsection?

ELIAS CJ:

Of section 44A.

MR GODDARD QC:

Five Your Honour, or?

ELIAS CJ:

As evidence.

MR GODDARD QC:

Five?

ELIAS CJ:

Five, yes, yes, sorry, five. Again this is – you're going to move onto the scheme of the Act.

MR GODDARD QC:

And I will.

ELIAS CJ:

It's entirely understandable surely that if the Council chooses to give a certificate in the form of a LIM, it's nailing its colours to the mast?

MR GODDARD QC:

Only unless the contrary is established, it's not a conclusive certificate.

ELIAS CJ:

Yes.

MR GODDARD QC:

So the possibility that the information is wrong and that the contrary will be established, is expressly contemplated by section 44A.

TIPPING J:

But the presumptive, if I may use that word correctness of it, surely supports the proposition that care must be taken and that there will be tortious responsibility?

MR GODDARD QC:

It's that second step that in Mr Timmins submission is not consistent with the statutory scheme. There's an important distinction between legislating for the provision of information for the benefit of certain persons, and imposing liability, imposing an obligation to pay compensation if that information is not correct. And the fact that one doesn't follow from the other, is, I think, illustrated very nicely by the Official Information Act and as it applies to central government, any official information one obtains from central government, no matter how specific the request, no matter how important that information, will not, it's incorrect, sound a claim in negligence. And then we have a parallel scheme under this legislation. That's the general rule and it applies to water rights in most parts of New Zealand. If Mr McNabb had been tossing up between buying a vineyard in Marlborough and a vineyard in Martinborough, and had been exploring the characteristics of both parcels of land, in Martinborough if he asked the South Wairarapa District Council for a LIM, that's a territorial authority, so it has to provide a LIM, it's not a regional council, so it wouldn't contain any information about water rights, his solicitors, presumably knowing that water rights are important, would also write to the Wellington Regional Council, perhaps the sort of letter that I indicated a moment ago, and they could emphasise the importance of this and the financial stake of their client, till they were blue in the face in their letter, and if what they get back as they would, as a letter from the Wellington Regional Council saying, you know, "In accordance with the Official Information Act we provide the following information, copies attached" and it made exactly the same mistake, then this legislative scheme does not contemplate liability. So –

ELIAS CJ:

But everyone's on notice of that. Everyone knows that if you apply for official information, you're within the section 41 regime. But I'm sorry, you will go on to look at the structure of the legislation, and that, you may have answers in that?

MR GODDARD QC:
Yes.

ELIAS CJ:
But I was wondering whether you have investigated any other statutory regime in which certificates are provided, that people are entitled to rely on and I understand your argument that the reliance is circumscribed in subsection (5), but it is still notice to all comers which they are entitled to rely on, at least to that extent. I just wondered about parallels.

MR GODDARD QC:
I'm not aware of any regimes of that kind which have been the subject of judicial consideration in the context of negligence liability, and that I have explored.

ELIAS CJ:
Yes.

MR GODDARD QC:
Carefully, in New Zealand.

ELIAS CJ:
No I was just –

MR GODDARD QC:
In Australia there's the *Mid Density Developments Pty Ltd v Rockdale Municipal Council* [1993] FCA 408, (1993) 44 FCR 290 case –

ELIAS CJ:
Yes.

MR GODDARD QC:
And there are some parallels with the provision considered in that case.

ELIAS CJ:

But there, for example under, I may be totally out of touch, out of date with this now, but under the former Evidence Acts, there were presumptions of validity which are quite similar in terms of formal –

MR GODDARD QC:

Rather than producing various registers and –

ELIAS CJ:

Yes.

MR GODDARD QC:

Instead of producing various registers, various forms of certificate can be given as to entries in the register –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and there's no provision in the Evidence Act for payment of compensation in the event of an error in those certificates but the context was very different and –

ELIAS CJ:

Yes.

MR GODDARD QC:

– I wonder whether one can really draw parallels between a certificate for use in judicial proceedings –

ELIAS CJ:

Yes I was wondering whether they were mirrored in proceedings outside that particular context, which is the one I'm most –

MR GODDARD QC:

That's not something I've specifically looked at.

ELIAS CJ:

Yes, thank you.

TIPPING J:

It may be that it's arguable that this provision about presumptive evidence is confined solely to the evidentiary connotations as opposed to reliance connotations.

MR GODDARD QC:

That's very much my – that's what I was going to suggest as I went through the scheme –

ELIAS CJ:

Well it's hard to see why that should be so because the whole purpose, one would have to look at the purpose of the LIM and that's not really for litigation purposes.

MR GODDARD QC:

Interestingly, I think when one looks, I will take the Court to *Mid Density*, and when one looks at that particular New South Wales provision in relation to specific issue, information provided under the Environmental Planning Act, certainly has caused me to wander about whether it was, to some extent, looked to as a model for section 44A and that provision in relation to evidence is specifically focused on proceedings and I wondered if the New Zealand drafter hadn't, in what they saw as a blow for efficiency and brevity, dropped out most of the words that would explain just what the provision was meant to do.

TIPPING J:

Modern drafting in other words?

MR GODDARD QC:

Exactly Your Honour. To remove two-thirds of the useful indications in the provision but it's the Court's job to re-engineer those back in Your Honour and that's certainly what I'll be asking the Court to do.

TIPPING J:

Well that's quite a big ask.

MR GODDARD QC:
It's – the drafter was confident the context would explain it and I'm sure that the Court will see that that is indeed the case. Anyway, so that's the LIM request and –

TIPPING J:
Is there anything specific about this LIM request that you say helps your argument? So far I'm interested in it but can't really see much in it that helps your argument.

MR GODDARD QC:
It's really just setting up some of the arguments I'm going to be making about the tension between the cross of a box to ask for a LIM and a specific request outside the LIM and the peculiar results that one might get, depending on –

TIPPING J:
Yes I fully understand –

MR GODDARD QC:
And that's all.

TIPPING J:
That's all?

MR GODDARD QC:
That's all. Now Your Honour the Chief Justice wanted to go to the LIM and that's under tab 70, it's the last tab in this volume, and this is the last of the documents that I need to go to. So there's, if we turn over the cover pages, section 44A is set out on the first page and then there's the requestor detail on 611 of the case. Again no reference to Altimarloch Joint Venture Limited, no reference to the purpose of the enquiry, because there was none in the request for the LIM. And then what one has is a number of sections that map basically to the paragraphs of subsection (2), so special features or characteristics, no information located, private and public storm water and so on. And here we see a good example of information, not all of which necessarily needed to be provided, being provided more to be helpful. Some maps and plans prepared by the drain layer.

The next couple of pages. Rates information and then on 615D, consent certificates, notices, orders or requisitions affecting the land so that tracks the language of paragraph D of subsection (2). And what it says is, "Please view the following building consent summary." Only what we actually have is a resource and planning consent list at the bottom including not just building consents but other consents. A comment about the solid fuel heater. A comment about activities on other properties.

ELIAS CJ:

Sorry, where's that? Solid fuel heater?

MR GODDARD QC:

It's not important Your Honour. I'm just tracking through the paragraphs.

ELIAS CJ:

I must be at the wrong page.

MR GODDARD QC:

Page 615 of the top right-hand corner numbers. Not the handwritten ones, the stamped ones.

ELIAS CJ:

I see. Yes, sorry, solid fuel heater, yes.

MR GODDARD QC:

These documents comply with the rule that every document has to have, you know, at least three sets of numbers on it. So there's a list of resource and planning consents appended and those rather uninformative in themselves numbers are fleshed out by attaching those consents. Perhaps just note that the second one referred to, U010884, is the C class and the very last one, U970068 is the A class consent for 1500 cubic metres a day. So then what we have is a number of consents that have been attached. Dwelling additions on 616. Building work on 617 and 8 and then on 619 we have the class C consent. A water permit to take surface water. And then subdivision consent on 621 and 2 and 3. A pond consent on 624.

ELIAS CJ:

I'm sorry. I just see that the consent at page 619 and 203, expires on 30 September 2011.

MR GODDARD QC:
And –

ELIAS CJ:
Does the A rights similarly expire on a set date?

MR GODDARD QC:
That was issued in 1997 and was due to expire in 2007. There was some evidence addressed to that –

ELIAS CJ:
I see.

MR GODDARD QC:
– first instance and Mr McNabb said that based on his experience he expected it to be extended beyond that. So –

ELIAS CJ:
Was there – I don't recall anything in the Court of Appeal judgment dealing with this in assessment of damages?

MR GODDARD QC:
No. It wasn't an issue that was pursued at first instance, in terms of quantum. That the only expectation that could be held was for another three or four years of access to water and then there was a discretion that supervened. The other provision that might have had some impact on that is if we look at page 620, the provision about the consent being valid for a period of two years from date of issue and lapses unless the permit holder has substantially exercised the permit. And I don't think that there'd been any exercise of the class C permit at all at the time of the purchase but –

ELIAS CJ:
The class C permit, though, is pretty key to the construction of the dam, isn't it, because –

MR GODDARD QC:

Yes.

ELIAS CJ:

– it's the class C water rights that will be –

MR GODDARD QC:

Relied on for that purpose.

ELIAS CJ:

– stored there, yes.

MR GODDARD QC:

Yes, that's exactly right. Now if we come over to 626, which is the other water permit attached to the LIM, that's the A permit. So the Court will see again it's a water permit to take surface water and then the abstraction rate, it's expressed in various forms but the one that's been used in these proceedings most consistently is the 1500 cubic metres per day. And over the page, conditions in relation to validity and certain other matters, a footnote about transfer of ownership, a reminder to the applicant in the event of relinquishing the water permit to a new owner, notification of the transfer must be lodged with the Council and all conditions of consent must have been complied with.

McGRATH J:

So this permit was originally sought to irrigate grapes and olives by the Moorhouses?

MR GODDARD QC:

Yes. Unlike the C permit which was to – no, that's to fill storage dams for irrigation of pasture and proposed vineyards so, yes. And then we come back on 628 to the LIM form, building certifier certificates, none, uses to which the land may be put, zoning, the proposed plan as attached. Then on 630 certain other categories of information in relation to which nothing was located. Over at 631, additional information, comments on building permits, comments on sites of archaeological interest, historic places, about half way down the page, just a little more after the address of the Historic Places Trust, "Any person contemplating taking an interest in the property is advised to address the issue of water supply". With the benefit of hindsight, that's excellent advice. And –

TIPPING J:

What relevance has it got?

MR GODDARD QC:

When I come to talk about what councils are and are not obliged to do under this, I'll come back to some of these flags. And the question of what councils can say by way of qualification of the information they provide. Two more things to note about this, after we move quickly past the plan on 623 and the discussion of rabbits on 624, they're definitely not relevant.

TIPPING J:

That's a relief.

MR GODDARD QC:

Some things I'm not going to explore Your Honour will be glad to hear. Six three five, some more general provisions about the information being provided pursuant to section 44A. Deals with the only matter that specifically addresses, not a general warranty of fitness, and that is addressed using information of Council's records. "This information may not be sufficient, or sufficiently recent in a particular case to adequately deal with any issue in relation to the property. Some informations supplied by third parties may not be accurate. No inspection of the property." And the next bullet point, "Persons intending to make decisions in relation to the property are encouraged to take appropriate professional advice, including legal and engineering advice." And my submission later on will be that is a perfectly fair warning consistent with the statutory scheme and the role of a LIM as a source of useful information, but not as any sort of financial guarantee to a requestor.

TIPPING J:

You're not suggesting that if you do have a duty of care it gets you out?

MR GODDARD QC:

No.

TIPPING J:

No.

MR GODDARD QC:

I'm suggesting that it's a flat which is entirely consistent with the statutory scheme in the absence of a duty of care. So that's the key factual background. Perhaps the one thing to add to that is at paragraph 2.9, just to get the numbers straight. The Court has seen that the purchase price was $2.675 million, the findings in the High Court on the basis of expert valuation evidence, were that the land with the full class A water rights would've been worth 2.95 million and that with half the class A water rights the land was worth 2.55 million. That is $125,000 less than the purchase price. Whereas if the full water rights had been included it would've been a good buy. I won't go through the judgments, the Court will be familiar with those, or the approved grounds of appeal. That brings me then to the statutory scheme, and it is important I think to work carefully through the Local Government Official Information and Meetings Act 1987, which is under tab 5 of volume 1 of the authorities, and also to just bear in mind the close parallels between this regime and the Central Government Official Information regime, which inspired it.

So, just looking at the contents, the parts that are critical to my analysis will be the purpose provision, section 4. Part 1, the generic local authority information part, and in particular then Part 2, "Requests for access to information." Part 5, "Review of decisions" and Part 6, "Miscellaneous provisions relating to access to official information." Just pausing there, it's suggested in the *Resource Planning & Management Ltd v Marlborough District Council* HC Blenheim CIV-2001-485-814, 10 October 2003 case, a decision of Alan France J at first instance, is the distinction between information and official information. In my submission there is no such distinction in the Act. All the information referred to in the LIM is information on Council files, which is plainly official information and that's the case is really I think, underscored, both by the heading to Part 6, which talks about these being provisions relating to access to official information, and the definition of official information.

The long title, Act to make official information held by local authorities more freely available. That's really the key LIM here, and to establish procedures for the achievement of those purposes at the end of that long title. The only provision that I need to pause on in the interpretation provision, is on page 78 of the stamped numbers, official information (a means any information held by a local authority. So there's no doubt but that all the information that we're concerned with here is official information.

Section 4, the purpose provision. Purposes of the Act are (a), (a) is the critical paragraph, "To provide for the availability to the public, of official information held by local authorities". So it's to make information available to the public as a whole and promote open and public transaction of business at meetings in order, firstly to enable more effective participation by the public in the actions and decisions of local authorities, and secondly, to promote accountability of local authority members and officials. And what's quite clear as we'll see later on, is that accountability is this sense, did not, was not understood when the legislation was enacted as including negligence and liability that was expressly excluded. So what we're talking about here is accountability for decisions through the provision of information about those decisions. Not accountability for the provision of the official information itself. Part 1 –

ELIAS CJ:
Part 2 was inserted in the Act after having been introduced in the Building Act wasn't it?

MR GODDARD QC:
No, Part 2's original Your Honour.

ELIAS CJ:
Wasn't it?

MR GODDARD QC:
It's just – what was inserted by the Building Bill 1991 –

ELIAS CJ:
Yes.

MR GODDARD QC:
– it was just section 44A in relation to LIMs.

ELIAS CJ:
Oh, right.

MR GODDARD QC:

So what one had was the Official Information Act.

ELIAS CJ:

Yes.

MR GODDARD QC:

And then a parallel regime for local government enacted just after that in the Local Government Official Information and Meetings Act. Very close parallel in terms of principals, availability, procedures, timeframes, recourse to the Ombudsmen, in the event of complaints. Exclusion of liability, here section 41 Dudley Road, in the OIA section 48 in identical terms. But then what happened was that in 1991, section 44A was parachuted into –

ELIAS CJ:

Yes.

MR GODDARD QC:

– this Act. And in my submission it was a deliberate choice to locate it in this Act. I'll take the Court to the Bill where what was originally a provision to go in the Building Act, was relocated into this Act, and redrafted along the way, so that it fitted with the scheme of this legislation rather better and in my submission, what the Court will see is that that reflects firstly, a legislative scheme which on enactment involved no negligence liability for any information provided under this Act, consistent with its scheme, section 41 Dudley Road's not an over-rider of a rule, a liability that otherwise exists, it's part of a coherent scheme for the provision of information which would be undermined by Court liability and then a deliberate decision was made to locate section 44A in an Act which works in that way.

So, the purposes of the Act provide for availability to the public in order to make available more effective participation and promote accountability. The purposes which obviously are advanced by the local authority being providing information rather than withholding it where there's any doubt, and providing it at the lowest possible cost because it's not much of a right of access to official information if you have a right to receive it, but the fees associated with the requests are a material barrier to making such requests. That, I think, is borne out by the importance of section 5, which again is a direct parallel with the Official Information Act. Principle of availability, "The question whether any official information is to be made available,

where that question arises under this Act," it's the whole of the Act including 44A, "shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act, and the principle that the information shall be made available unless there is good reason for withholding." So a strong bias towards provision of information.

Certain conclusive reasons, in section 6, and other reasons in 7, not important here. And then we come to Part 2, requests for access to information held by local authorities. So this is the original regime for making requests for official information that prior to 1991 would have applied to all the information that's provided in a LIM, and that still applies if I decide after another difficult day before an Appellate Court that it's time to take up the cultivation of vines rather than advocacy, that I would like to buy a little piece of sheep farm outside of Martinborough and convert it. If I write to the Wellington Regional Council asking for information about water permits in terms of my escape plan then this is the provision, this is the part I'd be asking under. And I could make that request, or a real estate agent might make the request or a friend who's investigating it for me, someone knowledgeable about these matters. I could ask Mr Carruthers QC if he could make a request and check out its suitability for a vineyard, all those possibilities, and they wouldn't necessarily need to say they were asking for it for me. They make the request and it's the duty of the local authority to give reasonable assistance to somebody who wants to make a request.

I should perhaps ask the Court to bear in mind as we read these provisions that in my submission they also apply to LIM requests so that, for example, if someone comes in wanting information the section 11 duty applies for local authorities require – it's official information. When you ask for information under 44A, you're asking for specific types of official information and, for example, section 11 applies, it's the duty of a local authority to give reasonable assistance if somebody wants to make a request, and importantly section 12 applies. Suppose that I address my enquiry about water rights to the South Wairarapa District Council. It would be the duty of that Council to say, no we don't have information about water rights, this should be transferred to the Wellington Regional Council. So – and similarly if you ask for a LIM and you send the LIM request to the Wellington Regional Council, the Wellington Regional Council, in my submission, has an obligation to say, no, we're not the right source. For a LIM, in relation to Martinborough, you'd have to get that from the South Wairarapa District Council which is the territorial authority and

transfer that there. Or if you've got the boundaries wrong, of course you've got the wrong –

McGRATH J:

Well the duty is actually for the authority, the reasonable authority to transfer the request itself?

MR GODDARD QC:

Yes. Exactly Your Honour. Or if you get your boundaries wrong and you think that you're within the area of one territorial authority and you make a request to them but actually you're in the next door one. Again the wrong one has a duty, in my submission, if they're asked for a LIM to transfer it. Decisions on requests, 13, subsection (1) is the timeframe provision which is over-ridden by 44A(1), I'll come back to that. (1A) provides that you can charge for the supply of official information. Can't exceed the prescribed amount and (3) where not such amount is prescribed any charge fixed shall be reasonable. Now these are the provisions that govern what can be charged for LIMS as well as other forms of official information. There's no corresponding provision to (2) and (3) in 44A because there's clearly been an assumption that they apply as well. What does apply is 14, extension of time limits. 15 applies, the form in which information is made available. You can provide information in a range of ways and should provide it in the form requested unless one of the exceptions in subsection (2) applies. 17, refusal of requests doesn't apply. There's express provision in 44A that you can't refuse and that's because otherwise this is a request for official information to which section 17 would apply. Don't need to look at Part 3 or Part 4 in relation to personal information but I do want to look briefly at Part 5, that begins on stamped page number 98.

Part 5 is a review of decisions. Decisions under Part 2 and section 8. Functions of the Ombudsmen, section 27, "A function of the Ombudsmen to investigate and review any decision by which a local authority refused to make official information available to any person in response to a request made by that person in accordance with section 10," or decides in what manner information will be applied. Or under section 13 for what charge a request is to be granted. So the power of the Ombudsmen to review refusals, and to review charges, is prescribed in section 27 and it's a power that applies only to requests under section 10, only to charges set under section 13, which also applies to 10, that makes perfect sense is a LIM request is a request to which both Part 2 and section 44A apply because then if information is

withheld you can complaint to the Ombudsmen, because it's a request under section 10 and shouldn't have been refused because 44A says you can't. If the charge is too high you should be able to go to the Ombudsmen. Plainly that's what's contemplated by the legislation but you can only complain if it's a charge set under section 13 which applies to Part 2 requests. So again if there's to be jurisdiction for the Ombudsmen to review charges for LIMs, which in my submission is part of the scheme of this legislation, that arises because it's also a request under Part 2. And the machinery for determination of those complaints is prescribed in the balance of Part 4. There's separate provision, if we look at section 38 and following, for review of decisions under Part 3 or Part 4 but there's no separate provision for review of decisions under 44A and that's because, in my submission, what Parliament plainly contemplated was that these review provisions would apply, because a 44A request is a request for official information.

ELIAS CJ:

The LIM form that you took us too, I didn't have this point in mind, does it purport to be under section – any other section than section 44A?

MR GODDARD QC:

It doesn't refer to a section at all.

ELIAS CJ:

It doesn't refer to a section at all.

MR GODDARD QC:

It just describes itself as a Land Information Memorandum request.

McGRATH J:

Has the Ombudsmen ever had occasion to give a reasoned decision on this question?

MR GODDARD QC:

On?

McGRATH J:

The question of whether power to review lies under section 44A via Part 2?

MR GODDARD QC:

I don't know. I'll investigate. That's actually a very, Your Honour a very interesting question and I'll explore that at the adjournment and come back to the Court on that. It should be fairly easy to find in the compendium, I think, that's online.

TIPPING J:

The nature of the requests for LIMs are likely not produce the controversy that other requests for official information sometimes produce, I would have thought.

MR GODDARD QC:

It's not the same set of boundary issues but for example –

TIPPING J:

Well it's all there clearly set out in the statute as to what's got to be supplied.

MR GODDARD QC:

If the Court is right to suggest, as the Court did in the course of questions to me earlier today, that inclusion of information in a LIM gives it a special status and creates certain rights of action that wouldn't otherwise exist, one could imagine a complaint being made in respect of a discretionary decision under subsection (3) not to provide certain information, so that boundary issue could arise. But mostly what I'd envisage being an issue is the charge issue and certainly that is an issue which bubbles up from time to time. But I wouldn't expect the same volume, if there had been any considered decisions –

TIPPING J:

Well at the moment I'm having difficulty understanding what the importance of the Ombudsmen is. Are we going to – is that going to be elaborated?

MR GODDARD QC:

It's just this, that in my submission access to the Ombudsmen to review refusals and to review charges is an integral part of the scheme of the legislation but if it's to be available under, in respect of LIM requests, that must be because they are requests made under both Part 2 and –

TIPPING J:

And what relevance does this have –

MR GODDARD QC:
– section 44A.

TIPPING J:
– to the existence, or otherwise, of a duty of care?
MR GODDARD QC:
And what that shows is that 44A is not a special, standalone right to a separate category of information but just a special example with tighter timeframes of the provision of generic official information.

TIPPING J:
One which for some extraordinary reason is not brought within the protection of being within Parts 2, 3 or 4 or 5?

MR GODDARD QC:
Well –

ELIAS CJ:
That's the argument.

MR GODDARD QC:
That's the argument and I'm under the handicap, as I stand here, of not being, not having leave to argue that because the request is made under both Part 2 and section 44A, section 41 does, in fact, apply. It seems to me that that is a natural reading of the legislation which is open on it and that that would avoid all the anomalies –

TIPPING J:
Well that's an argument –

MR GODDARD QC:
– that I'm identifying.

TIPPING J:

– available ex facie the statute as it stands. It doesn't require going into the interstices, as I recall, of the legislative history which is what you were denied the ability to ventilate.

MR GODDARD QC:
I was denied the ability to support that with a legislative history argument.

TIPPING J:
Yes.

MR GODDARD QC:
But just from the face of the statute in my submission, that is the most natural reading of the inter-relationship between sections 41 and 44A.

TIPPING J:
Well I don't agree. Prima facie –

MR GODDARD QC:
I think Your Honour made that clear in the leave decision.

TIPPING J:
I would have thought it was the farther stronger inference is that the express exclusion of a reference to Part 6 in the protecting provision, was designed to show that Part 6 requests were not within the –

MR GODDARD QC:
Well of course at the time that the protecting provision was enacted there was no section 44A.

TIPPING J:
I dare say.

MR GODDARD QC:
And 44A was added later and the question is, what was contemplated in terms of its addition and I'll come –

ELIAS CJ:

You will take us to the history of 44A in the Building Bill?

MR GODDARD QC:

Yes. I will.

ELIAS CJ:

Yes.

MR GODDARD QC:

But not to the internal memorandum which officials submitted to the Minister and the Minister submitted to the select committee suggesting that the provision be relocated from the Building Bill to this Act specifically to ensure that the immunity applied.

BLANCHARD J:

Well that's not admissible evidence.

ELIAS CJ:

No.

TIPPING J:

And it's in here –

BLANCHARD J:

And I don't think you should be referring to it when you've been specifically told that you can't raise that.

MR GODDARD QC:

Your Honour is quite right that I can't advance a formal argument on it –

BLANCHARD J:

We can only look at the face of the statute and such background material as is admissible on ordinary principle.

MR GODDARD QC:

And what I can say is, and what I should say, is that when one looks at the relocation and the changes that were made to the provision in the course of that, in the Bill, then there are other inferences available apart from the inference that Your Honour Justice Tipping suggested, in other words deliberate exclusion. There are two, in my submission, two – in fact three inferences available. The one that Your Honour suggested, there's a deliberate distinction between the circumstances that give rise to liability and those that don't and that's what the Court of Appeal preferred.

The two other inferences are that Parliament proceeded on the basis that provision of official information does not found negligence liability and that therefore no express exclusion is needed. But consistent with the whole scheme of this legislation and the principle of availability at low cost there is to be no negligence liability for the provision of any official information or it would be consistent with an understanding that there might be a prima facie duty of care but its excluded by section 41 in relation to LIM information, like other information again, that's not an issue that's addressed in my written submissions. But what I'm inviting the Court to draw is the inference that in situating section 44A in this Act, the whole scheme of which does not contemplate negligence liability for incorrect information, the intention was, the contemplation was that provision of specific types of official information, in an even tighter timeframe, would not attract a negligence liability, the specific request for that very information would not attract.

So we come then to Part 6, section 41, protection against certain actions. Where any official information is made available in good faith pursuant to Part 2 or Part 3 or Part 4 of this Act by any local authority. First of all, no proceedings civil or criminal lie against the local authority or any other person in respect of the making available of that information or for any consequences that flow from it. So the protection for both the local authority and anyone else, for example, the author of a report which makes defamatory statements about an architect or an engineer involved in the construction of a property, which the local authority passes on. And –

TIPPING J:

Are you saying that somehow or other one should read the introductory words of subsection (1) as if they referred to Part 6 as well?

MR GODDARD QC:

My argument –

BLANCHARD J:

Have you got leave to raise this ground?

MR GODDARD QC:

No, I was just about to say, my argument in the Court of Appeal –

BLANCHARD J:

All you can argue is that there's an inconsistency if there is a duty of care under section 44A but you can't argue that section 41 directly applies.

MR GODDARD QC:

What I can argue I think Your Honour is that as the legislation was enacted there was no negligence liability in respect of any official information. That the basic scheme of this legislation was that official information would be made available to the public but that there would be no negligence liability in respect of the provision of that. And that section 41 doesn't alter the position that it would have obtained in the absence of such provision, it's simply declaratory of the result that the Courts would have reached, having regard to the purpose of this legislation, even in the absence of such a provision. That the scheme of this legislation would have led the Court to conclude that there was no duty of care and no negligence liability in respect of any official information because that would be inconsistent with the drive to encourage information to be provided and to minimise the cost of provision of that information.

So my submission is that there's no special magic in section 41 that produces a result different from what the Courts would otherwise have arrived at. That the, in order to have a coherent scheme of common law and statute consistent with Parliament's intention in enacting this legislation, no duty of care would have been imposed in any event. And that applies just as much to LIMs as it does to any other official information. And the breadth of protection provided by section 41, contemplated by section 41, or rather, to be precise, the absence of liability declared by section 41, is very broad and that is, in my submission, a necessary consequence of the underlying policy and scheme of this legislation.

BLANCHARD J:

That being the case, isn't it extraordinary that Parliament then puts in section 44A and it doesn't put it into Part 2, 3 or 4. It sets up a separate procedure albeit relating

to certain classes of official information, but it sets it up in what appears to be a way which separates it from the section 41 protection.

MR GODDARD QC:

And that really comes back to my submission that it's not a complete stand alone regime but simply a modification of how Part 2 operates in relation to certain types of information. That's the point of my submission about the Ombudsmen and if we look, for example Your Honour –

ELIAS CJ:

But if that's so then section 41 applies and you don't have leave to argue that.

ANDERSON J:

Isn't it really an argument that the Court should not impose liability for LIMs when it's simply providing compendiously information that would not attract liability if it was provided separately?

MR GODDARD QC:

Yes. That's exactly right. In response to a specific request it identifies the particular person who needs it and the purpose for which they want it. If we go back to the foundations of negligent mis-statement liability, the basic principles discussed in *Boyd Knight* and *Caparo* one would think that the more explicit one was about who required the information and the purpose for which it was required, the stronger the case would be for negligence liability. But here we have a situation where a very specific request, that lays out the reasons why the information is required, and why it's so important, if responded to under this Act would not attract liability. In my submission that's not nearly by virtue of section 41 but by virtue of the overall scheme of the Act, which is that information is to be made available but there are no rights to compensation because that would discourage the making available of official information and add to the costs of it, and consistent with that a request for, in abbreviated form, a LIM, give me these categories of information by not having to list them all, would not be expected at common law to produce a different result. It's simply a handy way of identifying certain categories of information.

TIPPING J:

Mr Goddard, does the evidentiary significance of a LIM mirror evidentiary significance of all official information, or is that subsection of 44A the one we were looking at half an hour go or so. Is that special to LIMs?

MR GODDARD QC:
Yes.

BLANCHARD J:
Mr Goddard can you remind me of how there is a tie up between the provision for LIMs and the introduction of the Building Act?

MR GODDARD QC:
Of course Your Honour. Let's go straight to tab 7 of this volume. The Court has seen 44A and the Local Government Official Information, I mean obviously that was on page –

BLANCHARD J:
So what I'm getting at is why were they dealing with the LIM subject matter at the same time as they were doing the Building Act?

MR GODDARD QC:
To make it simpler for owners of land contemplating doing building work to get information about subsidence and consents and things that already apply to the land and to make it easier for people, I accept this, there's no doubt about it, contemplating acquiring the land and doing work on it, to obtain information relevant to that work. So if we – that was very much the thrust of it. So if we look at tab 7 –

BLANCHARD J:
And why did they think that was necessary?

MR GODDARD QC:
Because the timeframe for provision of official information was much too long to be useful for commercial transactions, 20 working days and the ability to extend –

BLANCHARD J:

Yes, but why did they think it was necessary at the time they were introducing the Building Act?

MR GODDARD QC:

To provide for certain information to be provided on a tighter timeframe and with no ability to withhold it on the grounds of substantial compilation for example Your Honour. So the –

BLANCHARD J:

But there was no such thing as a LIM before this time was there?

MR GODDARD QC:

No, but there was the Local Government Official Information and Meetings Act, so all the information that's in a LIM you could ask for from your local authority under part 2. That was the position before the Building Bill was introduced.

TIPPING J:

Was this a more streamlined procedure?

MR GODDARD QC:

Exactly Sir. So the idea was, if we look at the Bill as it was introduced, which is under tab 7, the original provision dealing with this in the Bill, it's on page 184 of the stamped numbers, was clause 74 of the Bill, Land Information Memorandum, "Was an ability to apply to a territorial authority for the issue within four days".

ANDERSON J:

Not working days?

MR GODDARD QC:

No, four days. And there were howls as one might imagine, at that and what we ended up with eventually was the 10 working days that features in the section 44A. But the idea here was that information, which was already held by territorial authorities and which could be requested under Part 2, would have to be provided faster, it's a streamlined procedure, Your Honour's phrase is with respect, just

encapsulates it perfectly for a shorthand request for particular categories of official information to be provided in a shorter timeframe and with no ability to refuse.

ELIAS CJ:

But the purpose surely is, so that people can rely on that information in important decisions that they are making, isn't that part of the scheme of the building Bill, which was about consents and regulation as well?

MR GODDARD QC:

If Your Honour looks back at clause 73, which was also struck out of the Bill, Your Honour will see how that link works. What is critical is, "It's proceedings against authority or territorial authority in subsection (3), subject to section 74(5), no proceedings, civil or criminal shall lie against the territorial authority for anything it may do or fail –

ELIAS CJ:

Sorry, which one are you –

MR GODDARD QC:

Sorry, I'm on page 184 again.

ELIAS CJ:

Yes.

MR GODDARD QC:

Clause 73(3).

ELIAS CJ:

Yes.

MR GODDARD QC:

Subject to section 74(5), "No proceedings, civil or criminal shall lie against any territorial authority for anything it may do or fail to do in the course of the exercise or intended exercise, unless it's shown the territorial authority acted without reasonable care or in bad faith." So that clearly contemplates negligence. Then when we get to 74(5), in the LIM provision, what we see is a territorial authority shall not incur any liability in respect of any information provided in good faith in addition to the

information provided under subsection (2), so what you had there was a mandatory information category in subsection (2) for which there was liability in negligence or deceit effectively, and an optional information category under sub-clause 3 which did not attract negligence liability and what then happened was that, if we turn over two pages we come to, "New Clause 78" of the Bill, this is as reported back from the select committee, which provides for section 44A to be inserted in the Local Government Official Information Act, and this the provision that was enacted. So that combination of provisions was deleted, a LIM provision in the Building Act and a liability provision which distinguished between compulsory provision, compulsory information and discretionary information, and instead 44A is inserted in the Local Government Official Information and Meetings Act with that same division between mandatory information under subsection (2) and discretionary information under subsection (3), but no provisions at all in relation to liability.

ELIAS CJ:

Well why is that not a legislative choice and why is it not the case that that legislative history demonstrates that if there is no liability in negligence, particularly in respect of the compulsory information that people are entitled to look to the local authorities for, there's a big hole in the system envisaged?

MR GODDARD QC:

Clearly by eliminating any specific provision in relation to the liability for LIMs, including discretionary information from this clause, some background assumptions were being made about the liability regime that would apply to both compulsory and discretionary information and it's no longer possible to say there are two different sets of rules. The Bill used to –

ELIAS CJ:

No, no I understand that.

MR GODDARD QC:

So the question then becomes, what inference do we draw form the fact that they be treated the same? Are they both to be treated the same with liability not incurred? Or are they both to be treated the same with liability with liability incurred. In my submission the better inference, consistent with the desire to encourage provision of discretionary information, is that all information in a LIM was being assimilated to the treatment that previously applied only to discretionary information, namely that there

is no negligence liability and that that is the reading which is most consistent with the broad scheme of the legislation into which 44A was inserted.

ELIAS CJ:

Well, you say the relocation is part of that?

MR GODDARD QC:

Yes.

ELIAS CJ:

But what does it do to the Building Act assumptions?

MR GODDARD QC:

It's entirely consistent –

ELIAS CJ:

Because the relocation could simply be, because it's more convenient to have all the information obligations of territorial authorities in one place. It doesn't mean to say that the purpose of section 44A, given that legislative history, is not properly seen in the context of the Building Act and the regulation and certainty built around that regime.

MR GODDARD QC:

The relocation reflects, in my submission, and Your Honour's right really, that a provision of this kind does have a more natural home in Local Government Official Information legislation, because the information provided goes well beyond the Building Act information, and what it's really dealing with is a more efficient and streamlined version of requests for particular types of information that could be requested under that Act in any event and it makes sense to link it into the machinery provisions of that other Act, complaining to the Ombudsmen about charges, delegation of powers, all those things, but that leaves unresolved the question of what was contemplated as a result of the removal of the old sub clause 5, because the old sub clause 5 made it very clear that there'd be no liability for negligent information included optionally as a matter of discretion in a LIM and the question is whether this Court reads the relocation as assimilating the compulsory information to that regime, consistent with all other official information, so that would make a coherent whole. There'd be no singled out information. Or whether the Court reads it

as intending to impose a greater level of liability than the previous version would have on discretionary information in a LIM despite the obvious implications that would have for the willingness of local authorities to provide such information.

ELIAS CJ:
In a LIM?

MR GODDARD QC:
In a LIM. And in my Subject: that would mean that subclause 3 would not operate in a manner that was consistent with the principle of availability and the scheme of the Official Information Legislation.

ELIAS CJ:
Well, except the information as you say would always be available, but not within the LIM regime. Anyway I'm sorry, I've detained you –

MR GODDARD QC:
Yes.

ELIAS CJ:
– we should – I'm sorry.

BLANCHARD J:
Can I just before the break ask –

ELIAS CJ:
Yes.

BLANCHARD J:
Was there any reason why, any drafting reason why section 44A couldn't have gone into Part 2?

MR GODDARD QC:
No, one can put anything anywhere in an Act with the necessary linking language.

BLANCHARD J:

But isn't it significant that they didn't put it in Part 2, they put it in Part 6, dealing with miscellaneous provisions relating to access to Official Information and they appear to have put it in, in a stand-alone subpart?

MR GODDARD QC:

Your Honour is asking me a question that necessarily takes me into territory in respect of which leave was declined, but in my submission the location of 44A makes perfect sense, if it operates in the same way as for example section 42 or 43, which is it's an adjectival provision dealing with how certain things are done under earlier parts. The whole of Part 6 is exactly that, it's miscellaneous provisions about the earlier parts work and in my submission the better view is that there's no such thing as a request under 44A, it's a request under Part 2 and 44A and all that 44A is doing is saying certain types of Part 2 request are to be dealt with in a certain way. If that's how one understands it and it's perfectly natural to put in this miscellaneous provision section at the end. So that's the – a line of reasoning a drafter could well have gone through.

ELIAS CJ:

Well it could equally though have been put in Parts 2 with different timeframes?

MR GODDARD QC:

Yes. And really the question is, how much weight is to be put on the physical location of the provision as opposed to the way in which substantively it interacts with Part 2 and in my submission the most important thing is that one cannot say sensibly, that a request for a LIM is not a request for Official Information under Part 2, to which section 13, 11, systems, all those transfer positions are placed. If it's a request under Part 2, a drafter could perfectly reasonably have thought that it linked into section 41.

COURT ADJOURNS: 11:35 AM

COURT RESUMES: 11:51 AM

ELIAS CJ:

Yes, thank you Mr Goddard.

MR GODDARD QC:

Your Honour. I'd just like to go back to the Local Government Official Information and Meetings Act under tab 5 and draw the Court's attention to a

couple more features of that Act and then come back to my submissions in relation to the duty of care issue. I was in Part6, which begins on stamped page 108, and I've looked at section 41, protection against certain actions, and I've gone, at various points, to parts of 44A but I just wanted to pause and look, for example, this is really continuing to respond to Your Honour Justice Blanchard's question of what the drafter had in mind in situating 44A in this part of the Act. If we look at section 42, delegation of powers by local authority. A local authority can delegate to any officer or employee or any other powers of the local authority under Parts 2 to 5. Now in my submission the powers under Parts 2 to 5 include, for example, powers in relation to fees, powers of various kinds, create and converted by Part 2 and if we come down to 43 we see the same provision for delegation by officers to other officers of powers under Parts 2 to 5 or section 46A. Now for those delegation powers to work in relation to the provision of LIMs, it must necessarily be the case that the powers that are being exercised are Part 2 powers. So clearly –

ANDERSON J:

Or that if you're providing a LIM you can't delegate the preparation of it.

MR GODDARD QC:

But the territorial authority has to be able to delegate some of the discretionary decisions, for example, under subsection (3) to particular officers. It can't be the case that the Council as a whole has to meet to decide what discretionary information to include under subsection (3). So if we look at 44A(3) which says, "In addition to the information provided for under subsection (2)… a territorial authority may provide in the memorandum such other information concerning the land as the authority considers, at its discretion, to be relevant." Plainly that's a power that's going to be exercised by officers and a power that must be subject to sections 42 and 43. That works only if, as I submit is the case, 44A is read as an adjectival provision governing the way in which certain types of Part 2 requests are made but not others. So it's wholly integrated into the scheme of the Act. It's not a distinct magic provision, a stand alone provision, that operates independently from that. We see that again in section 44, "Savings." Now subsection (1) seems a little unlikely to be relevant to a LIM, providing information that would constitute contempt of Court or of the House of Representatives. I suppose an order could be made in relation to confidentiality of certain information but it's really the general subsection (2) that I think is important. "Nothing in Parts 1 to 5 … derogates from," then there are certain

provisions referred to which authorise or require information to be made available. And –

ELIAS CJ:

In the Building Act is there any reference to LIMs?

MR GODDARD QC:

No I don't think so Your Honour. There is to project information memorandum which are provided under that but not, I think, LIMs. I'll check that again

ELIAS CJ:

Yes.

MR GODDARD QC:

– but I'm pretty sure that's right.

ELIAS CJ:

We don't have that Act in the material, only bits?

MR GODDARD QC:

Only – no we don't have that Act in the materials. I probably have the odd copy back in my chambers though so I'll check.

ELIAS CJ:

Yes. So have I.

MR GODDARD QC:

I would have thought I'd inflicted a few on Your Honour over the last year or so. So in answer to the question, what could the drafter have been thinking. If the drafter saw this as an adjectival provision, a parasitic provision sitting on top of Part 2 and governing the way in which certain Part 2 requests are dealt with, requiring them to be dealt with within a shorter timeframe and eliminating the ability to refuse under section 17, then all of these other provisions, in relation to delegation, work. The provisions are related to Ombudsmen review work. If you don't see it in that way, if you see it as free standing, then it just doesn't work and it makes no sense to put it in this Act at all.

McGRATH J:
Would not other statutory provisions in relation to local government provide necessary powers of delegation?

MR GODDARD QC:
In relation to delegation I'd have to look back at the 1974 Act, which was then in force, but if we take the Ombudsmen review provisions, that's not a very good example, of something which the Ombudsmen wouldn't otherwise have power to do –

McGRATH J:
Yes I appreciate that –

MR GODDARD QC:
Yes.

McGRATH J:
– but I'm just, you're sort of portraying a scene where by the authority's got duties and there's no one able to do it other than perhaps the Council by revolution or something of that kind. It seems to me that if section 44A is outside of those other parts, Parts 2 to 5, it may well be that the general legislation, which you advise me is the 1974 Act, would have the necessary powers of delegation.

MR GODDARD QC:
And I will look at that but if that were the case then it's a little odd that sections 42 and 43 were included at all in this Act Your Honour. So if we assume that Parliament included them for some purpose, that they added something to the generic local authority powers, then it's difficult to see why you wouldn't need that in relation to LIM requests as well as other requests.

McGRATH J:
Well it maybe a bit of surplus to think – the submission your making, I think, does require some consideration of whether general legislation might not fill the gap that would be bare if your argument is not upheld.

MR GODDARD QC:

I'll look at that also over the lunch adjournment and deal with it either later this afternoon or in reply but the submission at this stage, I mean it goes no further than suggesting that for this to –

ELIAS CJ:

The purpose of LIMs would not be served by recourse to Ombudsmen's reviews. One can see that this provision must stand outside that regime.

MR GODDARD QC:

I'm, as I think I tried to suggest earlier –

ELIAS CJ:

Fees maybe – well fees maybe but that's not the only power of review that the Ombudsmen has. It's in respect of the, any basis for withholding information and so on.

MR GODDARD QC:

The ability of the Ombudsmen to review fees for consistency with this legislation, as opposed to doing a general Ombudsmen act, good administration review stems only from this act and –

ELIAS CJ:

Is there a provision that permits fees to be set for LIMs? A specific charging provision?

MR GODDARD QC:

No. If we look –

ELIAS CJ:

In the Local Government Act?

MR GODDARD QC:

No the provision for fees – if we look at –

ELIAS CJ:

I don't mean in the Local Government Official Information and Meetings Act.

MR GODDARD QC:

There's provision in the old Local Government Act for fees to be set for any matter where legislation doesn't expressly provide for fees to be charged. So there's a generic catchall fee provision, there was at that time, and there now is also but you can look at it as enacted, but I think what is reasonably clear from the scheme of 44A, which refers in the subsection (4) to an application for a LIM being accompanied by any charge fixed by the territorial authority in relation thereto, is that this is seen as linking into the power in section 13, to fix charges, subject to any charges that are prescribed by regulations made under this Act. So what we have back in section 13 was a subsection (2), which set a charge of display of official information under this Act, shall not exceed the prescribed amount, that includes, obviously in my submission, LIM information. And subsection 1A which says, "Subject to section 23, every local authority may charge for the supply of official information under this Act".

So that's the generic empowering provision to charge, and then subsection (4) says, "The application must be accompanied by the charge that's been fixed by the local authority, or prescribed if regulations have been made to that effect", and the regulation making power in the section 55 is quite general. It provides to the Governor-General by Order in Council to make regulations among other things, (b) prescribing reasonable charges or scales of reasonable charges for the purposes of this Act.

So there is a power to prescribe fees in section 55, which links into the prescribed fee being the sealing under 13(2) and which plainly must also apply to 44A but that power hasn't been exercised in relation to any Local Authority Official Information, there is no prescribed fee and regulations, so local authority's set charges under section 13, which they can require the requestor to provide at the time of the request under subsection 4, of section 44A.

ELIAS CJ:

Do they charge, as a matter of practice, do they charge different fees for LIMs than for Official Information Act requests?

MR GODDARD QC:

Yes, there's normally a particular fee associated with application for a LIM because it's a defined body. Whereas in relation to Official Information Act request, you have to charge in a way that's proportionate to what's requested.

ELIAS CJ:
Yes.

MR GODDARD QC:
So, you can have a standard fee for a LIM or for different types, LIMs for different types of property, but when it comes to Official Information Act what usually happens is that most local authorities won't charge for small –

McGRATH J:
No, well that's the same throughout the whole public sector isn't it? Yes.

MR GODDARD QC:
Exactly. It's exactly the same as throughout the whole public sector.

McGRATH J:
It's only when the information's getting particularly bulky or time consuming in retrieving it –

MR GODDARD QC:
That there'll be a charge.

McGRATH J:
Or for other reasons seen as good by the authority, local authority.

MR GODDARD QC:
And then what one usually finds is that the charge comes accompanied with a breakdown in terms of photocopying costs and time, sometimes, and it will depend on what's requested.

McGRATH J:
But as you say, in most cases, there is no charge at all.

MR GODDARD QC:

Yes. And if I, say, were to write to the Wellington Regional Council asking for information about water rights associated with a particular farm on the edge of Martinborough, I would hope that they would write back with that information, without sending me a bill. But if I asked for more extensive information I would probably get one. So, the other thing, the last thing I wanted to look at specifically, in the Act was section 44A itself and just to emphasise in passing, a couple of things in relation to it. The first, that is of course, that although all the other request provisions are expressed in terms of local authorities, what we see in 44A, is a person may apply to a territorial authority for the issue of a LIM. So Parliament didn't have as any part of its policy, in introducing this provision, a right of access throughout New Zealand to information about water permits. In most parts of New Zealand you cannot get a LIM from the local authority responsible for water permits because it's not a territorial authority.

ANDERSON J:

The LIM, the term is not defined in the LGOIM Act but it is defined in the Local Government Act?

MR GODDARD QC:

That's right Your Honour. So a territorial authority is an authority with certain types of responsibility, if City Councils and District Councils basically under the Local Government Act, then there are regional councils and then there are some councils like the Marlborough District Council which is a territorial authority which has conferred on it, the powers of a regional council, that's the way it's defined in the Local Government Act, and the reference to the definition and provisions are in my submissions. So what we have here is a territorial authority which has had conferred on it the powers of a regional council, but in many areas, it can be Auckland, Wellington Christchurch, there's a distinction and what I think can be said with some confidence, is that whatever the intended scope of section 44A, it was not to provide a right of access, backed by a right of compensation to accurate information about water permits. If that had been what Parliament intended this would've been hopelessly inadequate as a provision to achieve this. It wouldn't have achieved it in relation to the vast bulk of New Zealand. And on the Court of Appeal's approach, what section 44A did was create such a right of access backed by a right of compensation in some parts of New Zealand but not others, based on the accident of whether there's a unitary authority or not in that area. And that's the sort of arbitrary

outcome which, in my submission, the interaction between the common law and statute law should strive to avoid.

ELIAS CJ:

Is there any ability to get a LIM equivalent, no?

MR GODDARD QC:

No, not at all. If you want information about water permits from regional council, you ask under Part 2, and it's absolutely clear that section 41 applies. In my submission declaring what would be the position anyway, that there's no duty of care because that would be inconsistent with the scheme of this legislation, which is designed to facilitate provision information. A regional council that receives a request for information about water permits, should just say, we've been asked for this information and we should provide it. They shouldn't be saying, oh dear we're terribly worried in the light of liability, we might consider whether we can withhold it or perhaps we should charge more for it and not just mail it out. There should be a charge to cover insurance risks. Consistent with the scheme of the legislation what one wants is the starting point to be availability and availability at the lowest feasible cost, and that is how information of this kind would be accessed in almost all parts of New Zealand, and there shouldn't be a special rule for the few regions with unitary authorities. That would be the most extraordinary policy intention to attribute to Parliament and it would be extremely unfortunate if the Court were to develop the common law in a way which produced an interaction between the statute and common law which couldn't be defended as a coherent policy. Common law should not do that.

TIPPING J:

Just for being helpful, the unitary authority is in effect being pinged, is in essence, your proposition isn't it? If it had included the water rights information in a separate piece of paper, purporting to issue from it as the regional authority, then you're saying that there couldn't have been any liability attaching to that, because it must have to be treated as having been done under Part 2.

MR GODDARD QC:

Yes, that's exactly right. If Her Honour the Chief Justice is right to say that there's no obligation to provide that information under subsection (2).

TIPPING J:

Well –

MR GODDARD QC:

Yes on that approach, yes.

TIPPING J:

– subject to that point.

MR GODDARD QC:

Subject to that point Your Honour's exactly right, and it becomes, one can stand that on its head as well and say, can a reasonable conveyancer, can reasonable conveyancing practice proceed on the basis that authoritative information about water permits is obtained through LIMs? And the answer is, no because in most parts of New Zealand you cannot get a LIM that extends to the existence of water permits, so a reasonable conveyancer cannot proceed in most parts of New Zealand on the basis that when they ask for a LIM, they're getting information about water permits backed by a right to compensation if that's carelessly wrong.

TIPPING J:

So if they did get a request for a water permit, you drew us to the transfer provisions earlier, the correct stance for a territorial authority would be to transfer it to the regional authority?

MR GODDARD QC:

Exactly Your Honour.

TIPPING J:

And the regional authority will then supply the information pursuant to that transfer.

MR GODDARD QC:

Under Part 2.

TIPPING J:

Under Part 2 because there's no other basis for them to supply it under.

MR GODDARD QC:

Exactly.

TIPPING J:

The anomaly is if you get a unitary authority that seeks to be helpful and non-beaurecratic, if you like, you get pinged whereas if you'd done it in a more sort of technically efficient way, or technically correct way, you wouldn't get pinged.

MR GODDARD QC:

Your Honour is exactly right and that's really my paragraph 6.5 of my submissions, I tried to make that, as usual less concisely, the same point which is we're talking here about the day to day practical administration of local authorities and it would be completely unsatisfactory, in my submission, to reach the result that a matter of form, a technical approach to how you provide this information, would have the distinct or would have the result of either liability attaching or not attaching. The idea that in response to a request for information of the subsection (3) kind, that's not just water permits, it's all sorts of other information, if you include it in the LIM, if you staple it to your cover sheet for the LIM and send it back you're liable, but if you have a separate cover sheet headed Part 2, Official Information Act information and you put it in a separate envelope and you post that back, then there's no negligence liability, even though you've provided exactly the same information and make exactly the same mistake. That's a technical refinement of a kind which is inimical to sensible local authority administration and to the scheme of this legislation which is not designed to bring about highly technical and refined administrative procedures.

ELIAS CJ:

So territorial authorities are not defined to include regional authorities?

MR GODDARD QC:

No, very clearly not.

ELIAS CJ:

And where's then the protection for regional authorities applying official information about water rights?

MR GODDARD QC:

Section 41.

ELIAS CJ:

Is that not specific to territorial authority?

MR GODDARD QC:

No that's all local authorities.

ELIAS CJ:

I see. I'm sorry. I hadn't understood –

MR GODDARD QC:

Everything else in this Act is about local authorities –

ELIAS CJ:

I see, yes.

MR GODDARD QC:

– but then what we've got sitting on top of that –

ELIAS CJ:

Yes.

TIPPING J:

That's why 44A, this anomaly arises because it's confined only to territorial.

ELIAS CJ:

Yes, yes I understand.

MR GODDARD QC:

If we just go, just to get those definitions straight, under tab 4 of volume 1, we've got section 5 is the interpretation provision. It begins on 66 of the stamped numbers and the first relevant definition is on 68, local authority means a regional council or territorial authority and then what we get on 69 is regional council means a regional council named in Part 1 of Schedule 2. Then over on 70, territorial authority means a city council or a district council named in Part 2 of Schedule 2. So the Wellington Regional Council, for example, is not one or other of those. But then we get unitary authority means a territorial authority that has the responsibilities, duties and powers

of a regional council conferred on it under the provisions of any Act or an Order in Council giving effect to a reorganisation scheme.

And the practical response to administrative scale that results in some territorial authorities being given the functions of regional councils, because it's not sensible to have two layers of local government in certain areas, should not, in my submission, produce completely different liability regimes in those areas. If that had been suggested in a Bill submissions would quite rightly have said, well that's whacky. Why should there be different rights in Marlborough and in Canterbury and to attribute that intention to Parliament, or to produce that result through interaction of common law rules and statutory provisions is, in my submission, irrational and unacceptable. The law should form a coherent, workable whole while applies in the same way in the Wairarapa and in Blenheim.

That really – oh no, I was going to look at subsection (5) of section 44A.

TIPPING J:
Well if that point's not sound, you're not going to win, really, that's your best point.

MR GODDARD QC:
That's as good as it gets.

ELIAS CJ:
But it's –

MR GODDARD QC:
It's not a bad point though Sir.

TIPPING J:
I'm just saying we don't need to go into the interstices of this. If that high level point is sound –

MR GODDARD QC:
Yes because really when I go through my proximity and policy analysis I keep coming back to this time and time again.

TIPPING J:

Yes, you must.

MR GODDARD QC:

Yes.

ELIAS CJ:

But the effect is that we have to reconsider the ground on which you were declined leave.

MR GODDARD QC:

Not necessarily Your Honour.

ELIAS CJ:

Explain to me why that is so.

MR GODDARD QC:

There are two was in which the court could avoid producing this really strange result. One is, as Your Honour just suggested in the question to me, to revisit that question and find that section 41 applies to all official information including official information provided under section 44A and Part 2, because it's Part 2 information in 41 applies. The other way is to find that section 41 is merely declaratory of the result that would be reached in any event carrying out the classic duty of care analysis contemplated by *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA), which has at its core, where the activities are statutory, an analysis of the statutory scheme and what I am suggesting consistent with the scope of leave that has been granted is that even in the absence of section 41, if this Court had looked at this Act and its purposes and its scheme, the Court would have concluded that there should be no negligence liability on the part of an authority providing official information because that would be inconsistent with fundamental objectives of the legislation and that applies to information provided under any part, any provision of this Act. So all that section 41 does is declare the position that would apply in any event on a proper *South Pacific* consistent approach to liability for activities carried out under this legislation –

TIPPING J:

That would require us to say section 41 has a negative effect but it should not be read as having an affirmative effect in relation to section 44A.

MR GODDARD QC:
Exactly.

ELIAS CJ:
But on that view we would have to say that there is never liability for negligent LIMs.

MR GODDARD QC:
Yes.

ELIAS CJ:
You're using the inconsistency in relation to the water rights and their separate administration but the matter would have to be much more through going than that.

MR GODDARD QC:
And I develop in my submissions first of all the point that there are many other types of information –

ELIAS CJ:
Yes.

MR GODDARD QC:
– that could be provided under subsection (3) as a matter of discretion but also the fact that any of the items listed in subsection (2) could be separately requested from a territorial authority and if one were just to write in and ask for information about subsidence, for example, say I'm concerned about whether this property is prone to subsidence, could you please provide me with all information you have about subsidence so that I can make a decision about whether or not to buy this land with a view to building on it. If you get a letter back from the territorial authority which negligently omits information which it holds, there's no liability.

ELIAS CJ:
Then what's the purpose of a LIM?

MR GODDARD QC:

The purpose of a LIM –

ELIAS CJ:
Just the timeframe and the –

MR GODDARD QC:
Yes and –

ELIAS CJ:
– convenient –

MR GODDARD QC:
– no refusal, yes, so it's streamlining. It's administrative and it means that within – it means that instead of having to wait for a timeframe that's inconsistent with most commercial transactions, most land purchases, you can be sure of getting the information that you would've got anyway under Part 2 in time, to take into account, and it may well contain information which is helpful to you, but what it doesn't do is give you a right of recourse against the provider in the event that it's wrong. That wasn't the position before section 44A was enacted, and section 44A didn't change that, it just meant that you got the same information faster and in a more convenient package.

TIPPING J:
Well, everyone will ask if liability attaches to a LIM. Understandably everyone will ask for it in the form of a LIM, but they would've done that anyway wouldn't they? Even though you could've asked for it, and can still ask for it outside the LIM arena if it qualifies and you might hope to pick up a bit more. But are you asking us to make a distinction between the mandatory and the voluntary?

MR GODDARD QC:
No.

TIPPING J:
No.

MR GODDARD QC:

I'm not. And it seems to me that it would be very hard to find that that was open on the statute as it stands. It's just –

TIPPING J:

It's either all in or all out?

MR GODDARD QC:

I think that's right Sir. And there's really good reason for saying that there's no duty of care in relation to the mandatory either because if you ask for just one of those things, or two of those things, then Parliament didn't consider that it was desirable for the provision of that information to attract negligence liability, why, because you asked for a catalogue of 10, suddenly magically this negligence liability pop into existence. And in particular, and this is where my argument, I think, ties back into the case law on liability for negligent mis-statement, normally one would think that the more specific the request and the more explicit the purpose for which it was required, the easier it would be to make out a case for liability in terms of the basic principals outlined in *Caparo, Boyd Knight, Attorney-General v Carter* [2003] 2 NZLR 160 (CA), all those core decisions on negligent mis-statement liability, but what the Court would be saying, and in my submission is a very peculiar result, is that a very specific request that's explicit about the purpose for which the information is required, would not found liability, but a routine generic request involving crossing a box, saying, "We'd like a LIM please", involves liability for anything that comes back, mandatory or optional. And the more helpful the local authority is, the more it's liable, I think Your Honour's term was, "To get pinged for".

TIPPING J:

I regret it was.

MR GODDARD QC:

And in terms of the scheme of this legislation, the idea that the more helpful a local – a territorial authority is, and the more it provides, the more it's exposed, is simply anomalous. It's directly at odds with everything this legislation's intended to bring about. So Your Honour's right, that's the high point of my argument. In my submission it has real force and the result produced by the Court of Appeal decision is just extraordinary in the implications it has for the administration of requests by territorial authorities who are strongly discouraged from being helpful, by unitary

authorities who are encouraged to adopt all sorts of artificial and technical approaches to minimise liability, or to refuse information under subsection 3 at all, and geographically in that quite different rights will exist in different parts of New Zealand, based on the accident of whether there's a unitary authority there or not.

BLANCHARD J:
Will that accident affect the result in relation to requests about anything other than water rights? In other words, are there other things that might fall within subsection (2) of section 44A which, on the basis of what the Court of Appeal has said, would be affected by whether it's a unitary authority or an ordinary territorial authority? I'm just trying to get a handle on how much this is an argument of the tail wagging the dog.

MR GODDARD QC:
The –

BLANCHARD J:
Is it a big tail or a small tail?

MR GODDARD QC:
I think my argument is that there is no dog, just a collection of tails. And I think that sounded a little odd. But –

ELIAS CJ:
Sounds like you can't see the wood for the trees.

ANDERSON J:
Or Canterbury Tales.

MR GODDARD QC:
All of the items listed in the subsection (2) of section 44A are items which could be the subject of specific inquiry in particular circumstances, and in response – it's not – it really is just a catalogue of a lot of quite disparate information, some physical information about the land, other's financial information about rates owing, information about use to which the land may be put, zoning issues, paragraph (f), information notified by the territorial authority by certain other organisations or by

network utility operators. So there's a real ragbag of information here and my key point is that if one asks for any one of those, explaining why one wanted it and how important it was, no liability would attach. It seems really odd that just because you ask for it altogether you get a different result. So lots of tails, no dog.

TIPPING J:
So if you weren't to ask for a LIM, but you were to write in and say, are there any rates owing?

MR GODDARD QC:
Yes.

TIPPING J:
That's all you want to know?

MR GODDARD QC:
Yes.

TIPPING J:
Are there any rates owing? Which is not an uncommon as I remember in practice. It may all be different now. You wouldn't have asked for a LIM you say?

MR GODDARD QC:
Yes.

TIPPING J:
You would've asked for something that could've been asked for in a LIM?

MR GODDARD QC:
Yes.

TIPPING J:
But not as a LIM?

MR GODDARD QC:
Yes.

TIPPING J:

And if the information was wrong, you would have no recourse?

MR GODDARD QC:

Yes.

ANDERSON J:

But you wouldn't be charged for it?

MR GODDARD QC:

You might be but if that's all you're asking, you'd hope that you wouldn't be. If you asked on the other hand for all building consents granted in relation to the property and it was a central city commercial property and it involved photocopying your way through some rather large files, it wouldn't be unusual for a council to ask you for a photocopying fee.

ANDERSON J:

Can I just, just keep coming back as a fact, that why was a LIM considered necessary if you could do all this without a LIM? Just following on from that, the contents of a LIM are fairly specific. There is the official information held under, held general by local authorities, could be immense, could cover many, many things, but the information required for LIMs is the sort of information that would generally be relevant to a developer, a builder or a purchaser , generally speaking. And so there must have been some reason why the LIM process was invoked on that restricted basis.

MR GODDARD QC:

And I think there is, and I mean Your Honour's right, that the classes of person who were expected to benefit from it, were pretty much as Your Honour's outlined and that's why it began life in the Building Bill, people were thinking about people who might want to build on some land and say, well what information will be useful to them. But then as ever, once you start listing information it will be handy to get in one place, some other things like rates may creep in, but the purpose of doing this was to ensure that you could get this information in a timely way, because the standard timeframe for local authorities to provide official information is 20 working days with an ability to extend during that, and it's just not much use to have to wait that long.

ANDERSON J:

Well the other thing that sort of perplexes me slightly is the fact that there was a specific immunity in the Bill and a four day turnaround requirement, but when it was transplanted from the Building Act into the one we're dealing with, the time for compliance was extended, but the specific immunity dropped out. And that rather looks like a trade-off against extended time for liability.

MR GODDARD QC:

That is an inference or an argument that might be made, but in my submission it's not one that's warranted, it's at least as likely that the idea that this could be done in four days, not even working days as Your Honour pointed out to me earlier, was simply seen as fanciful in response to submissions. You have to bear in mind we're back in 1987. Most local authorities did not have computerised records.

ELIAS CJ:

I think that we are back in 1987 really.

MR GODDARD QC:

Sorry 1991.

ELIAS CJ:

No, no, I think we're back when section 44A was –

MR GODDARD QC:

In 1991.

ELIAS CJ:

1991, yes.

MR GODDARD QC:

Which is still at a time when most local authorities did not have computerised records.

ANDERSON J:

Even the Courts had them in some measure in 1991.

MR GODDARD QC:
Your Honour has seen, or the Court has the evidence from this Council showing that all these files are kept in hard copy form and not computerised and that's –

ANDERSON J:
And that's because they mightn't have been transferred –

MR GODDARD QC:
That's actually not, by any means, unusual.

ELIAS CJ:
Do you have the Minister's speech on the introduction of the Building Bill and does it refer to LIMs in the scheme of that legislation?

MR GODDARD QC:
I can provide that and I think yes there is passing reference to LIMs and how convenient that will be. I'll provide a copy of that.

ELIAS CJ:
And how they're noticed to people seeking to deal with –

MR GODDARD QC:
It doesn't go that far.

ELIAS CJ:
No but I'm just putting to you that I'm thinking along the same lines, I think, as Justice Blanchard in suggesting that there are a lot of tails but there maybe, there maybe a dog there and that is the scheme of the Building Act.

BLANCHARD J:
The collection of all these things in subsection (2) to me is an indicator that what the legislation is concerned about is the provision of advice to people who are about to deal with the land or may deal with the land, hence the need for speed.

MR GODDARD QC:

Yes that's plainly part of it and also existing owners.

BLANCHARD J:

And one would think that it's of fundamental importance that the information is correct.

MR GODDARD QC:

And –

ELIAS CJ:

Prima facie reliable.

MR GODDARD QC:

The question then becomes if that was the intention why is there no express provision for compensation in the event of errors and why is it, for example, that the evidential provision is limited to a presumption in the absence of evidence to the contrary and a reference to evidence rather than being conclusive as to those matters –

BLANCHARD J:

Well it can't be conclusive.

MR GODDARD QC:

Well that's how the Australian provision operates actually in relation to environmental planning issues that I suspect was a – it provided for certificates to be conclusive. This doesn't, it's set out in the *Mid Density* decision.

ELIAS CJ:

Well what does that mean though in terms of a right like this, that it would be provided? You cant really have it –

MR GODDARD QC:

It is treated as conclusive in the context of certain legal proceedings so for example if a local authority then sought to prosecute someone for non-compliance –

BLANCHARD J:

Yes, well that's fine vis à vis the local authority but it obviously can't be so as between other people.

MR GODDARD QC:

No that must be right and that again is why one can't build too much on subsection (5) in my submission because these are not certificates with any sort of conclusive or right changing effect and even the recipient is exposed to the possibility of proof to the contrary even vis à vis the local authority so although this is a provision of convenience in that given its context, and one doesn't usually –

BLANCHARD J:

But it's surely an indication that these LIMs are not issued E and OE.

MR GODDARD QC:

No in my submission it actually points the other way because it says you can't, these are E and OE and if it turns out they're wrong and proof to the contrary is provided then you're still exposed. You can't make decisions about your rights and obligations and reliance on the LIM because if it's inaccurate then even the provider of the LIM can proceed against you on that basis. Actually Your Honour it's a very strong signal to exactly the opposite effect.

BLANCHARD J:

Well I don't agree with you.

MR GODDARD QC:

If it had been intended to provide a secure basis for the making of financial decisions about land than either it would be conclusive, at least vis à vis the Council, or in my submission one would expect to see some sort of –

BLANCHARD J:

It could never be conclusive as against the Council because it would then give people right to insist on the continuance of a state of affairs, for example, it might be dangerous.

ELIAS CJ:

Or impossible.

MR GODDARD QC:

Or prejudicial to neighbours because –

BLANCHARD J:

I think it's an indicator that this information is supposed to be correct in the sense that the Council will stand behind it in terms of least of monetary compensation if it's inaccurate.

MR GODDARD QC:

If that's what it was intended to do that would have been a very simple matter to provide expressly for in the legislation and as –

BLANCHARD J:

They don't normally do that though in legislation. How often do you actually see the consequence of a government agency or a local authority getting something wrong spelled out.

MR GODDARD QC:

In relation to governmental organisations that's relatively rare. It's much more common in relation to obligations imposed on others by legislation, for example, under the Fair Trading Act or the Consumer Guarantees Act, it's more and more common where an obligation is imposed to see civil liabilities intended express provision for that civil liability and that, in my submission, is why Lord Nicholls, for example, in *Stovin v Wise* was right to say that the absence of any express provision for compensation in the event that a benefit is not provided by a public body, is a pointer against, not decisive, and His Lordship went on to find that it wasn't decisive in that case, or even that it didn't tip the balance of the minority, but both the whole of the House, all Their Lordships were in agreement that the absence of express provision is a pointer against compensation being intended but then of course one has to look at the whole of the statutory scheme and how it fits in the broader fabric of the common law.

TIPPING J:

There is a slight complication about subsection (5) because the prima facie correctness only applies for information supplied pursuant to subsection (2), not subsection (3).

MR GODDARD QC:

The mandatory information, that's right and – so the argument that's being made that information in a LIM carries some sort of stamp of authority which requires liability to attach, can't be extended to optional information, discretionary information under subsection (3) and yet it seems to me, the answer I gave to Your Honour before the morning adjournment, very difficult to suggest that there should be different liability regimes for subsection (2) and subsection (3) information.

TIPPING J:

Well that, one would instinctively shy away from such an outcome, but I don't think you should completely ignore the possibility.

MR GODDARD QC:

And if that's the approach that's taken then the question of whether this was information that was required to be provided –

TIPPING J:

Becomes critical.

MR GODDARD QC:

Becomes extremely important and in my submission the focus of section 44A on applications to territorial authorities and if we look at the paragraph that's relied on here, which is paragraph (d) of subsection (2), "Information concerning any consent, certificate, notice, order or requisition affecting the land or any building on the land previously issued by the territorial authority." In most parts of New Zealand that won't catch water permits because territorial authorities –

BLANCHARD J:

Could that mean by the territorial authority, qua-territorial authority –

MR GODDARD QC:

Yes it could.

BLANCHARD J:

– as opposed to qua-unitary authority?

MR GODDARD QC:

Yes it could Your Honour and I argued that in the Court of Appeal but without special success. But in my submission that is a very sensible reading of that provision that would produce a uniform operation of the LIM regime throughout New Zealand.

TIPPING J:

If you had a unitary authority what would this qua-territorial authority mean in practical terms?

MR GODDARD QC:

It would mean that the various consents and certificates and notices that are issued by a Council exercising the powers and functions of a regional authority, would not be supplied under subsection (2), paragraph (d). The Council would, in fact, happen to have that information and might supply it in order to be helpful under subsection (3) –

TIPPING J:

Yes, well that would seem to me, with respect, to be the reading of it even without the qua.

MR GODDARD QC:

And if that's the position, the question then becomes, what happens if it's helpfully supplied in subsection (3)? It doesn't benefit from even the presumption in subsection (5).

BLANCHARD J:

It's not sufficient evidence, no.

MR GODDARD QC:

That's right. And it would be very odd if the fact that it was helpfully provided in the same document, produced a different outcome in terms of liability from the lawyer run territorial authority, neutral authority next door, that sends them out in a separate document headed, "Part 2 Official Information Act".

BLANCHARD J:

But it would still leave it open to councils to adopt that practice in relation to water rights and thus avoid liability. That wouldn't fall on them if they were merely a territorial authority.

MR GODDARD QC:
In relation to paragraph (d) that would be right, and one would have to read the other paragraph that refer to information obtained by the territorial authority, in the same way as confined to –

BLANCHARD J:
This is why I was asking the question about whether there was anything in the other paragraphs that created or could create, the same curious anomaly that you're using as a basis for your argument.

MR GODDARD QC:
The issues, well, paragraph (c) potentially of course in relation to rates, because you can be rated by two distinct authorities so the question becomes which rates information must be included and whether some is mandatory and some if optional, whether it's only rates –

BLANCHARD J:
Any unitary authority, you only have –

MR GODDARD QC:
There'd be one rate.

BLANCHARD J:
– you only have one sort of rate don't you? You have the two when you have a reasonable council.

MR GODDARD QC:
Your Honour, I think Your Honour's right actually, so it probably, it doesn't apply.

TIPPING J:
It would be pretty odd if in the case of the two, you'd have recourse against the territorial authority but not against the regional authority.

MR GODDARD QC:

Yes.

BLANCHARD J:

Well, presumably, I don't know what the practice is, but presumably where you'd have the two, you'd have to make separate requests to the two bodies.

TIPPING J:

One would be LIM for negligence of which you'd be recover, and the other wouldn't be a LIM –

MR GODDARD QC:

Yes.

TIPPING J:

– for negligence for which you wouldn't recover?

MR GODDARD QC:

So exactly the same peculiarity arises that you can be asking exactly the same question to two different bodies and get different legal results –

TIPPING J:

It seems to –

MR GODDARD QC:

– on the Court of Appeal's approach.

TIPPING J:

And there is something that's been gnawing at me, and I've not been able to pin it down in my mind. It would encourage people to make LIM requests, when all they really wanted was information about one particular aspect.

MR GODDARD QC:

Yes. If all you want is information about rates. I think Your Honour really put this to me earlier in just a slightly different format. Suppose all you wanted was information about rates, actually you just write in and ask about the rates to a territorial authority,

the answer you get back doesn't attract negligence and liability, but if you say, oh, I asked for LIM because that will include the rates information you get a completely different result. So again you'd have a matter where the form of request and the form of response drove a different outcome and where you were producing administrative costs greater than necessary to address the person's actual question.

TIPPING J:
It's all very curious. All very curious.

MR GODDARD QC:
It's very curious. It all works perfectly well if there's no negligence liability in respect of any information provided under this Act.

TIPPING J:
Well I'm sure your client takes that view Mr Goddard.

MR GODDARD QC:
All these problems drop away.

ANDERSON J:
Well who's going to pay $275 to get rates information, with all the other relevant information in a LIM and all they really want is the rates information? They've overlooked the reality how people function.

MR GODDARD QC:
And then you get Your Honour, the very strange result that two people interested in buying the same property who make the same, who make an inquiry to same local authority, one of whom thinks, oh the other information might be useful, I'll get a LIM, and the other, who is a bit meaner with their money, especially if they're looking at a few properties, and decides, I'll just ask about rates, get's the same answer, both get the same wrong answer, one can sue, one can't. It just makes no sense.

ANDERSON J:
It's like that old proverb isn't it? Two men look out of the same window, one sees mud, other sees sky. Just one's a bit luckier.

MR GODDARD QC:

But really Sir that's not the way the common law should operate if it's avoidable, and again I do think that what one has to pause and ask here is, how should the common law operate in the context of this legislation to produce a coherent workable law of New Zealand?

ANDERSON J:

It is ultimately a common law issue not a statutory issue.

MR GODDARD QC:

But it's a common law issue that's inextricably intertwined with the legislation under which these activities take place. And if one were to get weird and wonderful discontinuities in the legal regimes that apply to people based on conduct that shouldn't produce that sort of difference, or based on geography, then in my submission one should pause and ask whether that really is how the common law should operate here?

ANDERSON J:

Is it reasonable to impose a duty of care in this context?

MR GODDARD QC:

Exactly Sir. I think that that really deals with the duty of care issue and that given the time, I should move on to the second issue on which leave was granted and I have talked to my learned friend and I don't anticipate there's any difficulty about timing in terms of the two days allocated for this appeal, and that is the issue dealt with in section 8 of my submissions. The inter-relationship between the liability of the vendors, under section 6 of the Contractual Remedies Act and the liability of the council against whom it's said, you've been negligent as a result of your carelessness, we entered into this transaction and we are worse off. And the council's response is, well no hang on, actually you aren't worse off, you have a property worth $2.55 million and you have rights under the section 6 statutory deemed warranty, which entitle you to recover on the basis of the Court of Appeal decision, a million dollars, the third parties say it should be less, it should be $400,000, by the way an amount which when added to the value of the property, exceeds the purchase price of 2.675.

TIPPING J:

Is this essentially an argument that this negligence of your clients did not induce the entry into of a loss making contract?

MR GODDARD QC:
Exactly Sir.

TIPPING J:
And that because the operative negligence is said to be that inducing –

MR GODDARD QC:
Yes.

TIPPING J:
The question is, whether this was, in the end, a loss making contract?

MR GODDARD QC:
Exactly.

TIPPING J:
And you say it wasn't?

MR GODDARD QC:
It wasn't a loss –

TIPPING J:
So your negligence has caused no loss, putting it in the simplest of terms?

MR GODDARD QC:
Exactly right. So there's a case which is quite relevant to this, which in the vagaries of research, I actually stumbled across for another reason after I prepared my written submissions, *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560, which is included in the authorities Your Honour, well familiar with it, and that was an example where a warranty claim had resulted in payment of $500,000 by the vendor of a company, and that $500,000 was deducted from the amount that was recoverable from the negligent accountants.

ANDERSON J:

Does your argument draw a distinction between judgment for the liability, or judgment plus payment, or payment? The warranty being satisfied by payment?

MR GODDARD QC:

At the point where the value of the warranty has been ascertained and there's no suggestion, but that the amount ascertained is recoverable, then in my submission the absence of loss is very clear. The –

ANDERSON J:

It might be a question of fact in a particular case whether the warranty is actually worth anything mightn't it?

MR GODDARD QC:

Yes it absolutely must be Sir, so if the warranty's worth nothing, plainly the tortfeasor has to be liable.

BLANCHARD J:

That's a loss making contract.

MR GODDARD QC:

It's a loss making contract. And that would be so, whether the problem arose because what was promised to be conveyed under the contract wasn't in fact conveyed, or whether it's because what was conveyed didn't have certain characteristics that were warranted. And there's no sensible distinction between those in my submission. It shouldn't make any different to the answer to this question, whether that clause 20 was, in its very general form that I took the Court to earlier, coupled with a representation that all the water rights associated with the property means these three water rights, or whether the contract specifies those but for whatever reason some of them are not conveyed effectively on settlement or if it's plant and machinery the vendor wrongly removes the plant and machinery that should have been left on the property. If you can get it back and the result is the land plus the plant and machinery is worth more than you've paid, it's not a loss making contract.

BLANCHARD J:

At what point do you judge that? I mean let's forget about the third parties and their insurers here. Let's assume that the only defendants are the Moorhouses. At what point do you judge whether the Moorhouses are going to be worth powder and shot and what if something intervenes and they're not?

MR GODDARD QC:
It's always necessary to quantify damages on the basis of the information that's available at the time –

BLANCHARD J:
Or could you stack them up? I remember a case called *Duncan v McDonald* [1997] 3 NZLR 669 different area, Legal Contracts Act, where the Court of Appeal's order, as I recall it, I haven't gone back and looked at it, was for liability of I think it was with Mr Duncan, a lesser liability for the McDonalds but on the basis that if the innocent trustees couldn't collect from Mr Duncan for any reason, then the McDonalds would be liable for a greater amount.

MR GODDARD QC:
Now. –

BLANCHARD J:
That of course was able to be tailored because of the fact it would have been done under the Legal Contracts Act where there was a lot of discretion and I don't know whether you could do it here but –

MR GODDARD QC:
I think you could Your Honour simply by entering judgment for an amount less any amount, in fact, recoverable from the vendor pursuant to – in the same way that one could get, if one has claims against two tortfeasers, a judgment entity is two tortfeasers, on the face of it the judgment is for the whole amount of the loss. A classic personal injury case, for example, where there are two cars, both hit the same person, but obviously you can't seek to enforce both judgments for the full amount to the extent that one is satisfied, the other abates, and then issues are left to be dealt with as a matter of contribution between those two. But so far as the plaintiff is concerned there's absolutely no problem with stacking them up or providing alternate pathways to recovery as long as that's –

TIPPING J:

Well you can execute against both subject to not getting more than the whole.

MR GODDARD QC:

Well the question here is whether orders can be made which would require execution to be carried out in a particular –

BLANCHARD J:

Yes.

MR GODDARD QC:

– order and if this were to be a case where – and one option for approaching that is to take that. another way of tackling this would be effectively to treat this as a mitigation issue and to say in respect of the claim against the tortfeasor, well have reasonable steps been taken to mitigate the loss and what is the outcome of that and if proceedings have been taken against eh contract breacher, which have in fact issued in recovery like *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560, then obviously you take that into account in assessing the tort liability. If proceedings are being pursued in parallel then the amount awarded is a relevant deduction unless the Court considers that there is a risk of non-recovery and that just becomes a matter for evidence. What is the value of these mitigation steps which are currently being taken and that's an issue of evidence in fact which is not unfamiliar. It arises whenever you have to consider the extent to which a loss has been mitigated. It arises –

TIPPING J:

Or is capable of mitigation.

MR GODDARD QC:

Or is capable of mitigation, Your Honour's right. It arises, there's an illustration given in the in the *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627 case by the House of Lords, whenever you have to value a lease because you find yourself valuing the lessee's covenants under the lease including an allowance for the risk that they may not be able to pay at some future time. It's the sort of issue that arises whenever negligence proceedings are brought against solicitors who allow a claim to become time bar because you have to assess what the prospects would have been of recovery against the defendant including not only what would

have happened in Court, but also whether in fact judgement would have been recovered. So these are issues that are well capable of being dealt with as matters of fact by the Courts.

TIPPING J:
But procedurally you could, if necessary, I would have thought, withhold the entry of judgment against the tortfeasor until steps had been taken against the – the mitigatory steps –

MR GODDARD QC:
Yes.

TIPPING J:
– had fully borne fruit or otherwise.

MR GODDARD QC:
Absolutely and in any – and I'd have thought that in any case where a plaintiff indicated some concern about the ability to recover that would be the fair thing to do. In this case because of the third party claims and the indemnifiers –

TIPPING J:
Well we know full well what the position is here.

MR GODDARD QC:
We know full well what the position is and we don't need to be worried about that but of course the rules that the Court adopt have to work in a range of situations where solvency of a contract breacher is less obvious. But these are ways, two ways, stacking them up or, you know, in one way doing it just to withhold the entry of judgement, that would work well and fairly to bring about a principled outcome.

ELIAS CJ:
It does treat the contractual claim as the prior claim?

MR GODDARD QC:
Yes and that's because the complaint that's made against the tortfeasor is that entry into the contract was induced and it's a loss making contract –

ELIAS CJ:
Yes.

MR GODDARD QC:
– so is it a loss making contract and if it's not a loss making contract, why would you pretend it was and award damages against the tortfeasor?

TIPPING J:
Well it has to be a loss making contract before there was a cause of action on that pleading.

MR GODDARD QC:
Yes. And that's an issue which this Court has had to deal with in the context of accrual for example, in *Davys Burton v Thom* [2009] 1 NZLR 437 (SC) and that's the context in which it's been considered by the English Courts as well as when interest starts running. You've got a contract which involves both burdens, paying a purchase price, and benefits and where the complaint is you negligently induced me to enter into this contract there's only a cause of action in tort when there's loss. And there's only loss when it can be said that the burdens outweigh the benefits.

ANDERSON J:
In a sense there's different types of damage isn't it?

MR GODDARD QC:
Absolutely Sir.

ANDERSON J:
It's the damage referable to the breach in warranty and the damage referable to entering into the contract.

MR GODDARD QC:
And they are different types of damage. They are not the same damage in a relevant sense and that is illustrated by the fact that depending on the relationship between purchase price, value and value of the properties as warranted, you can get completely different outcomes. You can have a situation where contract damages are payable for breach of the warranty but there's no tort claim because the value of

the property exceeds the purchase price even if the warranty is not performed. You can get situations where exactly the reverse holds. It all depends on whether it's a good bargain or a bad bargain and what that illustrates is not just that you're talking about different measures of damage for the same damage but that actually you're talking about different types of damage, different types of harm.

McGRATH J:
It's different types of damage not because one cause of action is in contract and one cause of action is in tort, it's because proving the cause of action in contract requires that you show it's a loss making contract?

ELIAS CJ:
In tort.

MR GODDARD QC:
No.

BLANCHARD J:
In tort.

MR GODDARD QC:
That requires that it's a loss making –

McGRATH J:
I'm sorry –

MR GODDARD QC:
Whereas a contract for example you don't have to so in contract if you had a situation where the purchase price for this property had been $2 million, so it's quite clear that this was a great contract, nonetheless proceedings could have been brought against the Moorhouses on the section 6 warranty to seek to obtain the benefit of the promise that the water rights described in clause 20 –

TIPPING J:
Then it would become an even greater contract. You can't simply say that because this was a great contract you've got no claim for breach of warranty. I mean that's heresy.

MR GODDARD QC:

No exactly. Whereas you can say because it's a great contract you've got no claim in tort. If someone negligently induces you to enter into a profitable contract you can't sue them. You should probably write them a polite letter of thanks but that doesn't often happen.

COURT ADJOURNS: 12:59 PM

COURT RESUMES: 2:15 PM

ELIAS CJ:

Yes Mr Goddard.

MR GODDARD QC:

Just a quick provisional report back on my homework so far. The first question was whether there are any references to – oh perhaps I could hand up to the Court photocopies of an extract from the Building Act and an extract from the select committee report back on the Building Bill. First, and I do apologise for this being a horrible computer printout, but it's legislation that's no longer in force and this was the easiest way of getting hold of it over the lunch break. It's Part 4 of the Building Act 1991. This contains the only reference to land information memoranda in section 44A in the whole of that 1991 Act and that was in section 27. Section 27 is the record keeping provision, require territorial authorities to keep certain information relevant to the Act reasonably available to enable the public to be informed of their obligations and to participate effectively. It had to be kept for the rest of the life of the building. Had to include plans and specifications, certain other documents including building consents and certificates and then, I'm not sure that this is especially enlightening but it's what there is, subsection (3) provides that, "subject to the Local Government Official Information and Meetings Act 1987 [and to section 23F(2)]," which was an ability to request confidentiality for certain plans, "every person has the right to inspect the information kept by a territorial authority during ordinary officer hours." And subsection (4) says, "Subject to section 44A … a local authority shall make photocopying facilities available to persons who inspect documents under subsection (3) of this section, and may charge a reasonable fee for their use." Those are the only cross-references to the LIM regime in the Building Act itself as enacted and their precise effect is actually a little difficult to discern what it means to confer a right to inspect information subject to LGOIMA. I'm not quite sure, perhaps it means

subject to the ability to withhold certain information on the grounds that exist except where it's LIM information where those grounds don't apply.

So it's certainly not the case that land information memoranda were an integral part of the Building Act regime as enacted in that legislation. It's, to some extent, a supplementary but clearly related provision. The Hansard record of the Building Bill provides only limited assistance in relation that legislation as is so often the case with legislation, significant parts which are dealt with under urgency and in the lead up to an election, and there's rather more politics than there is legal information contained in it.

But turning to the next question I was asked the only reference that I and my learned juniors were able to identify over the lunch break is in the report back of the select committee. The chair of the select committee, Mr John Carter, touches on the topic at page 5297. It says the Bill also introduces a project information memorandum and a land information certificate. The label's wrong but I'm sure it's LIMs that Mr Carter was referring too, perhaps I should tell the House about those two provisions. The land information certificate means that local authorities will be required to have land information documentation which means anyone who is building a home or wanting to acquire one can go to their local authority at any time to find out any details relating to that land and building if there's a building on it. The local authorities will build up that information. The local authorities already have a lot of that information available but from December '92 they'll be required to have the information available for anyone who has a particular interest in a piece of land or a building that's on a piece of land.

So there's certainly no suggestion in there that there is a policy of making certain information available in a form with some sort of enhanced reliability and with an associated right against the local authority in the event of any error in that information. It's touched on very glancingly and very much in a way that's consistent with Your Honour Justice Tipping's description of this earlier as a streamlining of the provision of certain information. That deals with references to LIMs in the Building Act and with the legislative history of the Bill, Hansard, Your Honour Justice McGrath asked me about Ombudsmen decisions reviewing local authority decisions in relation to LIMs and the case notes aren't available online so it hasn't been possible to do that over the lunch adjournment but we'll look at that overnight Sir.

And Your Honour also asked me about whether there were powers of delegation elsewhere that might operate in respect of section 44A if sections 42 and 43 of LGOIMA didn't apply. The general delegation powers in the Local Government Act 1974 were sections 715 and 716 and they only provided for delegation of powers conferred under that Act. So I'll do a little bit more research overnight but I'm not aware of any other generic legislation applicable to local authorities that would be likely to contain a delegation power and I think that means that unless sections 42 and 43 apply there's no applicable delegation power in respect of section 44A. So I think my submission, having tested Your Honour's possible concern about it, is still sound.

I had embarked just before the lunch adjournment on the second issue in the Council's appeal which is discussed in section 8 of my written submissions and the first part of section 8 is an analysis of the issue from first principles which I think really is pretty much what I explored before lunch. Only a claimant cause of action tort if a loss has been suffered and where the complaint is that negligence has induced entry into a contract then in the phrase of Your Honour Justice Tipping there's only a claim if it's a loss making contract. That's basic. Well was this a loss making contract, 8.2. No, once one does the maths, it was not a loss making contract because AJVL paid away $2.675 million, received land and water rights worth $2.55 million and received the benefit of a statutory deemed warranty from the vendors that they held and were able to transfer class A water rights at a rate of 1500 cubic metres per day, a warranty which the Courts have now confirmed entitles the purchaser to recover from the vendors a sum well in excess of the difference between the purchase price and the value of the land and water rights that actually were transferred.

So 8.3, the plaintiff simply hasn't suffered any loss as a result of entering into and completing the transaction. I deal at 8.4 with the position they would obtain if the agreement had expressly provided for a transfer of these class A water rights to take 1500 cubic metres a day rather than having the rather more general clause 20 I took the Court too and then go on to say at 8.5 that that position is not altered simply because here the claim has been put forward under section 6 of the Contractual Remedies Act. It's hardly, I suspect, necessary to take the Court to section 6. It's under tab 1 of volume 1 of the authorities and what it provides, of course, is that, "If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract –

(a) he shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken."

So the statement that the rights associated with the land referred to in clause 20 include a class A water right to take 1500 cubic metres a day is actionable in the same manner, i.e. an action for breach of contract, and to the same extent as if the representation were a term of the contract and paragraph (b) goes on to say that there is no right to damages from that other party for deceit or negligence in respect of the misrepresentation so no course of action in tort in respect of such statements. And of course what that reflects is what was seen by the Contracts and Commercial Law Reform Committee as an unsatisfactory and unilluminating distinction drawn by the pre-Act law between two types of statement that were made prior to entry into a contract. Statements which became part of the contract and statements which were treated as mere representations and this rather artificial inquiry into which category a statement fell into drove significant differences in relation to relief.

TIPPING J:

Why are the parties calling this a statutory deemed warranty when the Act expressly eschews the distinction between conditions and warranties and uses the neutral word "term".

MR GODDARD QC:

I should have, yes, that's my fault because I suspect because I wrote that in an early memorandum to –

TIPPING J:

But it just seems to me, with great respect, to be simply unhelpful.

MR GODDARD QC:

Your Honour is exactly right. Statutory deemed term would be better.

TIPPING J:

Yes.

MR GODDARD QC:

I agree completely and I should have used that phrase. Because of course that was yet another distinction –

TIPPING J:
Well I didn't want it to be carried into any judgment for example –

MR GODDARD QC:
No.

TIPPING J:
– it would be highly retrograde.

MR GODDARD QC:
It's completely my fault and it's completely wrong. Statutory deemed term is a much better way of putting it and of course that was yet another of the distinctions that the Committee sought to do away with the decision warranty –

TIPPING J:
Yes, quite.

MR GODDARD QC:
– and conditions looking rather at the significance of the relevant statement, whether a term – the assimilation of pre-contractual statements and provisions of the contract, terms of the contract, in terms of cancellation is what section 7 then of course goes on to deal with. So this is a statutory deemed term proceedings can be taken by the purchaser in the same manner and to the same extent as if the contract said namely 1500 cubic metres per day of class A water and dum de dum de dum.

It would be odd if that weren't the case because we would have to embark once again, as between other parties such as the Council and the vendor, on that unilluminating enquiry as to whether or not the pre-contractual statement was incorporated in the contract.

TIPPING J:
If the law of contracts says that in contract these are adequate damages or this is adequate compensation for breach, I don't see how the law of tort can come along

and say, well they should add a bit more or should take a different view. It's either adequate compensation or it's not.

MR GODDARD QC:
It is – just to be precise –

TIPPING J:
I mean that's in your favour. I mean I'm not saying that against you.

MR GODDARD QC:
Yes, I know, exactly Sir. The one thing I wanted to say in association with that, and without disagreeing with it at all, is that of course it may be that the law of contract and the law of tort are seeking to compensate for –

TIPPING J:
Oh yes.

MR GODDARD QC:
– different things –

TIPPING J:
Exactly.

MR GODDARD QC:
– and I wouldn't want to elide that –

TIPPING J:
No.

MR GODDARD QC:
– but to the extent that the complaint is about the non-delivery of the water rights, the law of contracts says this is the compensation for that and in this case it entitles the purchaser to, even on the basis of the appeals before this Court, $400,000 but according to the decision of the Court of Appeal a little over a million dollars, to put them in the position they would be in if the warranties had been performed, the terms had been performed, and the question then becomes whether, having obtained that right by entry into the contract, and having established that it's enforceable and worth

at least 400,000, but on the judgments below one million dollars, it's open to the purchaser to say, "But this was a loss making contract and you should compensate me for the losses I've suffered" that's just as a matter of fact, not right. So having dealt with the issue from –

TIPPING J:
I take it Mr Goddard it's common ground that the only basis upon which the negligence is said to have sounded if you like, is inducement of the contract?

MR GODDARD QC:
Yes, that's the whole claim.

TIPPING J:
It's not pleaded in any other shape or form?

MR GODDARD QC:
No Sir.

TIPPING J:
No.

MR GODDARD QC:
And hence the argument.

TIPPING J:
Yes, quite.

MR GODDARD QC:
Having dealt with the matter from first principles, I then go on to look at the case law. There's surprisingly little case law on this issue and even less on the issue in circumstances where precisely the same question of quantification of tort damages and whether there was a course of action in tort arose, the principles are spelt out very clearly in *Nykredit*, I know this Court's had occasion to consider that case on a number of occasions recently, it of course was concerned with when a course of action accrued and therefore when interested started to run and made the point that where the – perhaps it's worth going to it very briefly. It's in volume 3 of the authorities, under tab 32. And it was a claim against negligent valuers in respect of

an over valuation of property which was security for an advance to a borrower who defaulted. And the question had already come before Their Lordships as to what quantum of damage was recoverable from the negligent valuer and that was the *Banque Bruxelles Lambert* decision, also slightly more conveniently for Anglophones, known as *South Australia Asset Management*. And having determined that, questions of interest were reserved, they then came back before the House in this decision.

The key point was that, under section 35A of the Supreme Court Act, the Court could aware simple interest on damages for the period between the date when the course of action arose and the date of judgment and so as Lord Nicholls, with whom all of Their Lordships agreed to principle speeches Lord Nicholls and Lord Hoffmann all commanding unanimous assent, so as Lord Nicholls said on page 1629 of the report, then little under letter H, it raises the question of the day on which the plan of course of action arose, and over on 1630, as every student knows, courses of action from breach of contract in tort arise at different times, in case of breach of contract, course of action arises out of breach, cases of tort course of action arises not when the culpable conduct occurs but when the plaintiff first sustains damage. Thus the question which has to be addressed is what is meant by damage in the context of claims for loss which is purely financial or economic as it's sometimes described and after looking at a simple purchase of a house, His Lordship, over on page 1631, turns to the case before the House, this is under letter B, paragraph, "More difficult is the case where as a result of negligent advice property is acquired as security. In one sense the lender undoubtedly suffers detriment when the loan transaction is completed, parts with money, which he wouldn't have done if he'd been properly advised. In another sense he may suffer no loss at that stage, because often there will be no certainty he will actually lose any of his money, the borrower may not default, financial loss is possible but not certain, it may not even be likely. In some cases, depending on facts, even if the borrower does default, the overvalued security may be sufficient. When then does the lender first sustain measurable relevant loss?

The first step in answering this question is to identify the relevant measure of loss since it is our issue. It's axiomatic that in assessing loss caused by the defendant's negligence, the basic measure is the comparison between (a) what the plaintiff's position would've been if the defendant had fulfilled his duty of care, and (b) the plaintiff's actual position. Frequently, but not always, the plaintiff would not have entered into the relevant transaction had the defendant fulfilled his duty of care and

advised the plaintiff, for instance of the true value of the property. When this is so, the professional negligence claim calls for a comparison between the plaintiff's position had he not entered into the transaction in question and his position under the transaction, that is the basic comparison. Thus typically in the case of a negligent valuation of an intended loan security, the basic comparison called for is between (a) the amount of money lent by the plaintiff, which he would still have had in the absence of the loan transaction, plus interest at a proper rate, and (b) the value of the rights acquired, namely the borrower's covenant and the true value of the overvalued property." And it's that concept the value of the rights acquired that is central to the argument here.

Over the page, at under letter B, "The basic comparison gives rise to issues of fact. The moment at which the comparison first reveals a loss would depend on the facts of each case. Such difficulties as there may be are evidential and practical difficulties, not difficulties in principle." And I say that the same is true of this case. "Ascribing a value to the borrower's covenant should not be unduly troublesome. Comparable exercise regarding lessee's covenant is a routine matter when valuing property." And goes on to explain that. And then just under letter E, "Should be acknowledged at once that to a greater or lesser extent quantification of the lender's loss is bound to be less certain and therefore less satisfactory if the quantification exercise is carried out before rather than after the security's ultimately sold. The constraint weighed heavily with the High Court of Australia in *Wardley.* But the difficulties of assessment at the earlier stage, did not seem to me to lead to the conclusion that the earlier stage lender has suffered no measurable loss and there's no course of action, that's it only when the assessment becomes more straight forward or final that loss first arises and with it the course of action."

And Their Lordships then go on to look at how practically that can be dealt with, make the point, Lord Nicholls makes the point at 1633 letter C, "The amount of the plaintiff's loss frequently becomes clearer after Court proceedings have been started while awaiting trial, this is an everyday experience. No reason to think the approach spelled out will give rise to any insuperable difficulties in practice." The same with my argument. And then more issues that are of less immediate relevance arise.

Lord Hoffmann's speech begins at 1637. His Lordship agrees with Lord Nicholls and over at 1638, beginning a little above letter C, His Lordship focuses on what the course of action was. Breach of duty of care owed by the valuer to the lender, in

effect of any loss the lender might suffer by reason of the security being worth less than the sum the valuer advised." And then just under letter D, "What he must show is that he's worse off as a lender than he would've been if the security had been worth what the valuer said. It is of course also the case that the lender cannot recover if he is on balance in a better or no worse position than if he had not entered into the transaction at all, he would've suffered no loss." And again, the last few lines on this page, "Proof of loss attributable to a breach of the relevant duty of care is an essential element in a course of action for the tort in negligence." And there must be loss when, over the page, three lines down, "The lender can show that he's worse off than he would've been if the security had been worth the sum advised by the valuer. Comparison of then the lender's position what it would've been if the valuation had been correct." And again it's very much to the same effect, just above letter D, "Relevant loss is suffered when the lender's financial worse off by reason of the breach of the duty of care than he would otherwise have been."

So that basic idea that you have to look at, the swings and the roundabouts and strike a negative balance, for there to be a loss recoverable in tort, is the foundation of Their Lordships' reasoning referred to by this Court with approval in *Davys Burton v Thom* Your Honour the Chief Justice, set out one of the passages I've just taken the Court to, at paragraph 17 of Your Honour's judgment in the context of accrual of courses of action against this basic point, that it's, and I quote this in paragraph 8.9 of my submissions so I won't go to it, but what Your Honour said was, "When the damage claimed is based upon the consequences of the plaintiffs entering into a transaction (as is common in cases of misrepresentation), economic damage will often not be suffered at the time of the transaction. Where a plaintiff has been induced by a misrepresentation to part with property, make payments or incur liabilities in the context of an executory contract, the plaintiff may not suffer any loss until the net position obtained after benefits gained through the transaction are brought into account. *Nykredit (No 2)* was a case of this sort."

The other New Zealand case which adopts this approach is *Boon v AGC and others* HC AKL CL 71/89 20 February 1992, a decision of Wylie J in 1992, it's in the materials, I won't go to it, but Your Honours might note it's in volume 2 under tab 12. That was a case where AGC had recovered against Mr Boon on a counter-claim for a debt and Mr Boon complained that accountants had failed to properly document a partnership that would have enabled him to spread that loss across the intended partners. So he sued the accountants in negligence and the accountants sought to

join the intended partners and what His Honour Wylie J said is no you can't claim contribution against the partners because their liability is of quite a different nature, their alleged liability, it's a liability direct to Mr Boon to share in losses and rather if the partnership existed then the partners would be required to bear their shares of the partnership liability so far as they were able to do so, so far as they were solvent, and Mr Boon's claim against the accountants would be reduced by the amount that he could lay off on his partners. So it was precisely the approach that I contend for here.

And as I say at 8.12, "*Boon* confirms that where one party is strictly liable in contract in respect of a particular loss … their liability should be determined and met first." And another party sued in negligence in respect of entry into the arrangements shall be liable only for the remaining loss after the extent to which loss has been suffered from those arrangements has been ascertained. The strict contractual liability is logically and legally prior to the negligence liability.

There's also surprisingly little academic commentary or textbook discussion of what I would have thought was, in practice, a not infrequent issue, but Professor McLauchlan has touched on the issue in an article written in 1987. The Professor described as well established the principle that in calculating tort damages under the price paid minus value formula, "Account must be taken not only of the matter misrepresented but also of all offsetting gains or advantages in others part of the transactions. The purpose of the inquiry is to determine the net loss incurred by the plaintiff through having acted in reliance on the misrepresentation and accordingly, any appreciable value received … as the result of the transaction must be brought into account in reduction of the damages."

There is one other New Zealand case which I should go to, even though it's not referred to in my submissions, but logically this is where it would have gone had I found it in time, and that's *Allison*. That's in volume 2 of the authorities under tab 8 and this was a decision of the Court of Appeal and the proceedings were proceedings brought by a purchaser of a business against the vendor and against accountants who prepared financial statements in respect of the company that was sold. The concerns about the state of the company that was sold, Holmac Holdings Limited had been identified sometime prior to commencement of the proceedings and the purchaser had gone back to the vendors in respect of the warranties about the state – about the financial statements and a settlement had been entered into

under which the vendor, Fletcher Development and Construction Limited and Holman Construction, paid $500,000 in full and final settlement of the warranty claims. In these proceedings the purchaser was attempting to do two things. First, and rather ambitiously, to reopen the claim against the vendor despite the settlement and the Court had little time for that attempt. But second, the purchaser was seeking to recover from the auditors of the company that was sold in respect of the audit that they had carried out and the report they had provided on the financial state of the company that was sold, Holmac, knowing that it was to be provided to the purchaser. What the High Court – the findings in the High Court are set out in paragraph 23 of the Court of Appeal decision and Your Honour Justice Anderson found that the appellant's claim against the vendor failed. The settlement was comprehensive and could not be reopened. Found that KPMG had been negligent in their audit and they were liable in negligence for the sum of 100,000 being the difference between the consideration paid for the purchase of the shares, taking into account the true value of the company, and the compensation paid by Holman in settlement. So that was the value of the company, its true value, plus compensation, still $100,000 less than the purchase price so that was the amount that was awarded. The contractual damages backed off the tort claim against KPMG.

I think – and that again is captured very neatly at paragraph 33 where the Court of Appeal recorded that the learned Judge held that the loss suffered by the appellants was that they paid $2.1 million consideration for a contract worth in the result $2 million and that $2 million was made up of a company worth $1.5 million and warranty rights worth $500,000. So what was the contract worth? It was worth $2 million. Why was it worth that? Because that was the total of the company value plus the value of the warranties as ascertained through the settlement.

The purchaser raised what the Court of Appeal described at 44 – sorry, the purchaser raised four issues by way of appeal and KPMG raised what was described by the Court of Appeal at 44 as a proliferation of issues by way of cross-appeal and a number of those issues were different ways of attempting to formulate the proposition that the warranties were actually worth more than $500,000. In fact they were worth the whole of the deficiency between the true value of the company and the purchase price so there had been no real loss and we at 46 the Council contended, the Judge failed to value, as at the date of entry into the share purchase agreement of September '98, all the benefits received by the appellants under that agreement and

in particular the appellant's contractual right to be indemnified against the shortcomings of the audited accounts.

The settlement agreement is discussed in the next few paragraphs. At 66 the Court agrees that the settlement agreement was a valid discharge of the vendor should not be set aside. Some other issues raised in that respect, and then at paragraph 85 and following, the Court turns to cross-appeal, duty of care issue dealt with very briefly, and then the headings under which this issue is tackled begin at heading 2, "Value of Benefits Received" paragraph 90. And at line 23, and following Mr Keyte acknowledged that KPMG's sole act, giving rise to loss, was to audit the accounts negligently, and the audit was a factor which induced the appellants to enter into the share purchase agreement at the purchase price of $2.1 million. He argued however the appellants were only entitled to recover from KPMG to the extent that the bundle of rights contained in the share purchase agreement was worth less that $2.1 million, which is right.

TIPPING J:
But there wasn't really any argument about that point. The argument was about the valuation methodology as I –

MR GODDARD QC:
And that was upheld in the paragraphs I've just skipped over.

TIPPING J:
Yes, so it's authority for the proposition that you're advancing, but not really after, not after argument. It was taken as a given was it not?

MR GODDARD QC:
The question that was raised was whether the settlement should be disregarded and the rights valued in some other way, notionally, at the time that the contract was entered into.

TIPPING J:
But no one disputed that whatever the benefits were –

MR GODDARD QC:

They should be –

TIPPING J:

– they should be taken into account. It was simply how much were they worth?

MR GODDARD QC:

Yes, Your Honour's exactly right. So this is authority for the proposition that – it supports it to the extent that everyone saw it as self-evident, but it wasn't a contested issue.

TIPPING J:

Well none of the learned Judges who sat in that case felt troubled by it, shall we say.

MR GODDARD QC:

Yes sir, that's a neat way to put it. What is perhaps worth pausing to note, is because it ties into some of the practical questions the Court asked before the lunch adjournment and also to my learned friend's arguments about concurrent liability. First of all at 99, the warranty wasn't intended by the parties to exclude tortious liability and negligence. The fact the contract may provide a remedy which is coextensive with that in tort does not mean the tortuous remedy is excluded. Concurrent liability and contract and tort is now accepted and of course nothing in my argument is inconsistent with that. One hundred open to the appellants to elect to sue Holman under the warranty and contract or KPMG in tort. To hold they could not sue KPMG in tort because no loss had been suffered. The value of the warranty retrospectively equating with the difference between the purchase price and the value of the shares would be to diminish the principle of concurrent liability, would require the appellant to sue in contract when, apart altogether from that contract, they have a sustainable cause of action in tort. You don't have to exhaust the contractual remedy. But what happens, when as in this case, enforcement action has been taken and at 101, His Honour Thomas J said, "Another way of making the point is to accept that the warranty has no particular value until it is enforced. It remains or offers a potential remedy in respect of a future unliquidated amount which is subject to proof and the uncertainties of litigation."

TIPPING J:

The problem in this case was that the parties had settled the amount of the value of the warranty in a way that didn't bind the plaintiff –

MR GODDARD QC:
Yes.

TIPPING J:
So in KPMG. So that's where the battle ground was.

MR GODDARD QC:
And at 103, that's picked up. "Open to the appellant to sue KPMG notwithstanding the warranty. I consider, however, that KPMG would have a legitimate complaint if the settlement between the appellants and Holman was not a reasonable settlement. If the settlement was inadequate it could be argued the appellants had failed to mitigate their loss. But there has been no suggestion the settlement was unreasonable. Nor is there any evidence to that effect … cannot be said … failed to mitigate." So it was dealt with as going to quantum of damages as being a mitigation point where mitigation had occurred to the extent of $500,000 but no more, and where the failure to obtain more was not unreasonable.

TIPPING J:
Well here we're a fortiori.

MR GODDARD QC:
Yes.

TIPPING J:
The Court has assessed the loss.

MR GODDARD QC:
That's all I'm – that's right it's disappeared completely. Though the Court has quantified it and as a result the loss has disappeared completely. And I don't need to go any further with Allison, I just wanted to –

TIPPING J:
I don't, with great respect think it's much of an authority supporting your argument, it just simply happens to have followed that course without argument.

MR GODDARD QC:

Your Honour's right, and in circumstances where there was more directly relevant authority I wouldn't have referred to it, but given as the really quite surprising paucity of cases considering this issue, I thought it was one relevant New Zealand case by way of illustration at most. There is an English case which is directly, at least on its face, against me, which I should take the Court to. I discussed it at 8.14 and following of my written submissions and that is *Eastgate Group Ltd v Lindsey Morden Group Inc* [2002] 1 WLR 642 (CA), it's in volume 3 in the bundle of authorities under tab 24. It's a decision of a two Judge English Court of Appeal. A little unusual, I'm not sure how that came about. And that was a – an appeal in respect of a strikeout decision. A claim for contribution was struck out, the claim was made by a defendant vendor of a business. The defendant denied breach of warranties and also made a Part 20 claim for contribution against accountants who had prepared financial statements.

So it's that same very familiar three party situation where a company is sold, the accounts paint a more optimistic picture of the state of affairs of the company than proves to be warranted and the disappointed purchaser brings proceedings. In this case the purchaser elected to proceed against the vendor alone and it was the vendor who sought contribution from the accountants. At first instance, applying the Civil Liability Contribution Act 1978, and I'll say a little bit more shortly about the differences between that Act and the law as it applies in New Zealand, the Judge at first instance found that the contribution claim didn't come within the scope of the Act because it wasn't a claim for the same damage. But on appeal the appeal was allowed on the basis that the complaint made and the damages sought were the same than in each case what the vendor and the accountants were arguably liable for, was the difference between the price paid, which it was alleged would have been the value of the company with the accounts if they'd been true and fair, and the actual value of the company.

The judgment of Longmore LJ begins at page 645 of the report and we see the claim made against the vendor in paragraph 5, that's on page 646 of the report, letter D, "Eastgate claim damages from the vendor in the following terms. "As damages for breach of warranty Eastgate claims the difference between the value of the business as warranted (being the price paid by Eastgate) and the value of the business in fact." So there was no difference in that case between the value of the business as warranted and the price paid on the plaintiff's case, the claimant's case. The

plaintiff's case. LMG, the vendors, claim they are entitled to look to Eastgate's accountants to contribute to whatever damages they may have to pay. Before 1978 only joint tortfeasors could claim contribution from one another, but not so under the 1978 Act. Now any person liable to someone who has suffered loss can claim contribution from another person who is also liable to the sufferer of the loss, but it is a requirement of the Act that the liability of that other person must be in respect of the same damage, and if that threshold requirement is met, then rather like our section 17, there's a broad discretion to apportion liability.

Some of the recent cases are discussed, the fact that there are different courses of action doesn't preclude claims being in respect of the same damage. There is a reference to friends Provident Life Office, where the Court held that liability and restitution might qualify, and that's since been overruled in England, but I don't think it's terribly important. Paragraph 7, one accepted restriction on the width of the statutory wording is that a person who's liable to a claimant in debt cannot seek contribution from the person who's liable to the claimant in damages, partly because they're not liable in respect of damage at all. But also because of course payment of the damages doesn't discharge the debtor.

TIPPING J:
How did the purchasers' accountants owe a duty of care to the vendor in this case so as to set up the –

MR GODDARD QC:
It was the vendor's accountants who were said to owe a duty of care to the purchaser. So you have a claim by the purchaser against the vendor for breach of warranty.

TIPPING J:
If you look at paragraph 5, wasn't Eastgate the purchaser?

MR GODDARD QC:
Yes.

TIPPING J:
And –

MR GODDARD QC:

Oh no, you're quite right sorry, Eastgate retained their own accountants to carry out an investigation of the value of the company before they purchased. So they retained their own accountants to investigate the value –

TIPPING J:

And the vendor were looking to them, the purchasers' accountants for contribution –

MR GODDARD QC:

Yes.

TIPPING J:

– to a claim for breach of warranty by the vendors.

MR GODDARD QC:

Yes.

TIPPING J:

That seems extraordinarily odd.

MR GODDARD QC:

Yes.

TIPPING J:

Just at first blush.

MR GODDARD QC:

Yes. What – just to do a sort of headline summary of the case. The Court said this is the same damage, it's the same amount. Payment by one would reduce the liability of the other. But went on to say, His Honour said at paragraph 20 that, so page 652, does not of course follow the trial Judge must make some apportionment entirely free to make any apportionment or none at all because the amount of contribution is to be such as they be found by the Court to be just and equitable and the accountants maintain it's so obvious a contribution from them would not be just and equitable. The case against them should be stopped now for this reason also and the first instance Judge had acceded to that but the Court of Appeal decided that should be dealt with as a matter of discretion after –

TIPPING J:

At the risk of tedious Mr Goddard, could you help me with paragraph 12, after the reference to *Nykredit*. The Lord Justice is saying that the first instance Judge held that if it came to assessing the damages which Eastgate, the purchaser, could recover from S&W, it would be wrong to ignore the value of the warranties given by LMG it therefore followed that any sum actually paid by S&W could not reduce. It seems to be counterintuitive.

MR GODDARD QC:

Yes. What I think is being said here – the first sentence in my submission is exactly right. That if one asks what the vendors could recover from the accountants -

TIPPING J:

I agree with the first sentence –

MR GODDARD QC:

Yes.

TIPPING J:

– but the second sentence seems –

MR GODDARD QC:

But the second one is just a non-sequitur I think.

TIPPING J:

Exactly.

MR GODDARD QC:

And that may have caused some of the confusion. Their Lordships went on to disagree with that inference –

TIPPING J:

They say that the conclusion follows from the premise.

MR GODDARD QC:
Follows from the premise, in my submission it just –

TIPPING J:
It doesn't.

MR GODDARD QC:
No it doesn't.

TIPPING J:
Demonstrably doesn't.

MR GODDARD QC:
No indeed Your Honour. This is not a very –

TIPPING J:
Peculiar case this.

MR GODDARD QC:
It's a very peculiar case, I have –

McGRATH J:
I thought that paragraph 14 seemed somewhat against you. Is that –

MR GODDARD QC:
Oh –

McGRATH J:
You're working your way through the case and you've been interrupted but I'm – it does seem to me this case was quite important. It was relied on by the Court of Appeal.

MR GODDARD QC:
No it's absolutely right that paragraph 14 is against me. I say it is at best an analysis that's applicable under the English Act but the better view is that, in fact, it is wrong and let me go through why that's so.

McGRATH J:
Thank you.

MR GODDARD QC:
I think I can probably –

McGRATH J:
The point that caught my eye is that breach of contract cases were different so it's –

MR GODDARD QC:
Yes. In fact it's not what the Court is saying here. *Nykredit* is set out including the point about the basic comparison that I took Your Honours to a moment ago and then 14, first sentence, must be right "The logic of this approach is that, when damages fall to be assessed against a negligent valuer, the value of the buyer's covenant to repay must be brought into account." Plainly right.

TIPPING J:
I don't see how that's against you.

MR GODDARD QC:
No that's with me. It's the –

McGRATH J:
That part's with him.

TIPPING J:
Oh I see, it's the next sentence.

McGRATH J:
You've got to read on, yes.

MR GODDARD QC:
No it gets worse Sir before it – a few lines down. "But it does not follow that the same approach is correct for cases not of a borrower's covenant to repay his loan but of breach of contract, for example, by a vendor." So His Lordship is here distinguishing here between a claim on a covenant, a promise to pay or presumably

also a promise to deliver particular property, and a claim for damages. What the Court says, "This is a liability for damages not a covenant to repay a debt."

TIPPING J:

But this isn't the same point. This is the question of whether or not the claim was different. The point I thought you're grasping, grappling with at the moment is whether or not you do an unders and overs in assessing loss.

MR GODDARD QC:

And it seems to me that – and I don't –

TIPPING J:

And I don't think – this doesn't trench on this point at all.

MR GODDARD QC:

No. What I think Their Lordships are saying is that you can do that in either claim and that they get treated in the same way. So you do the unders and overs if you sued the tortfeasor but also if you sued in contract for breach of warranty you could say the same. If you've recovered something from the tortfeasor you'd do the unders and overs so there's no difference between them, they're all liable for the same damage because a payment by either would reduce the liability of the other.

TIPPING J:

But whether they're all liable for the "same" damages is not the same question as what is the loss, if any.

MR GODDARD QC:

Absolutely. So this is a secondary issue that arises –

TIPPING J:

I don't think – you're not on this issue at the moment, you're simply on the issue of no loss aren't you? You haven't descended into the abstract realms of same damage and so on.

MR GODDARD QC:

What –

TIPPING J:

Or are you treating them all as a sort of, your three ways of looking at it that you mentioned at the start, you're treating them in a rolled up sort of way, are you, as you're going through? Because I just thought, your simple proposition is that the negligence has not caused the loss to which I wouldn't have thought this –

ELIAS CJ:

This is a fall back.

MR GODDARD QC:

It is. The Courts below tended to run the issues together and my preference is to deal with them separately and sequentially and to say there is no loss –

TIPPING J:

Well with respect they're not the same.

MR GODDARD QC:

No. I agree Sir.

ELIAS CJ:

So you're not dealing with them as the same. You're now dealing with your third point aren't you?

MR GODDARD QC:

The –

ELIAS CJ:

Oh no you have got it under –

TIPPING J:

Yes.

MR GODDARD QC:

Yes I'm wondering if I've slipped into the same confusion.

ELIAS CJ:

I think you have.

TIPPING J:

I think you've fallen into the same hole Mr Goddard.

MR GODDARD QC:

I have and I'm grateful to Your Honour for helping dig me out. Let me be clear –

McGRATH J:

Please do.

MR GODDARD QC:

It's always better. So my first proposition is simply that there is no loss and that in order to identify whether there's a loss, whether it's a loss making contract, one must value all the rights obtained.

TIPPING J:

At their enforceable value.

MR GODDARD QC:

That have an enforceable value and there may be circumstances in which a right exists on paper but has no value in reality and of course then it will not be treated as having any value when it comes to proceedings against the tortfeasor but whereas here a contractual right has been found to be enforceable and has been quantified, either by virtue of a settlement, *Allison*, or by virtue of a judgment of the Courts, this case, that value must be taken into account in identifying whether the contract is a loss making contract and if it's not one stops there.

ANDERSON J:

From the point of view of the commencement of the cause of action damage occurs at the time the contract is entered into. The qualification of loss can't be ascertained.

MR GODDARD QC:

Not necessarily Your Honour. I think that's the thrust of *Nykredit* which is that if at the time the contract is entered into the value of rights under the contract is greater or no less than the consideration paid, there is at that stage no loss and it's only when it

becomes apparent that the balance will tilt to the negative that there's a loss and that a cause of action accrues.

ANDERSON J:

I doubt that. I think it's the difference between damage as an ingredient of the tort and the quantification of loss.

MR GODDARD QC:

It's certainly the case that damage may be suffered and a cause of action in tort accrue, but that the quantification of loss is not possible until a later time when further events have occurred. That I absolutely accept, indeed it's a key part of my argument.

ANDERSON J:

And that depends then in an appropriate case on the assessment of the likelihood of payment.

MR GODDARD QC:

Among all the other factors that go to the value of a contractual term.

ANDERSON J:

And there's no evidence in this case of any risk of payment?

MR GODDARD QC:

No, no suggestion at all that there's any uncertainty in this case.

McGRATH J:

Now I'm sorry, were you half way through your –

MR GODDARD QC:

I was in the process – I'm –

McGRATH J:

I'm finding this, I need to understand this a bit more clearly and maybe you want to leave it to your opponents, but I – it seems to me that what you may be saying in this area is, that this is a case of diminution as far as you're concerned, that there is no –

you end up with no damage because of these various diminishing factors, which is something that Longmore LJ does acknowledge.

MR GODDARD QC:
Yes, I think I'm halfway through –

McGRATH J:
You're halfway through – that's fine, yes.

MR GODDARD QC:
– the process of digging myself out of the hole into which I have inserted myself.

McGRATH J:
I thought you were about to leave it, which was leaving me a bit stranded.

MR GODDARD QC:
No I'm not. I'm going to keep digging until I reappear above the surface.

McGRATH J:
I think you're on your second heading now are you?

MR GODDARD QC:
So my primary argument is that there's no loss, because the value of the rights is now known and it exceeds the purchase price. Then I turn really to ask rhetorically, if one didn't adopt that approach, what would one do? And that is the context in which it's necessary to look at, *Eastsgate*. Because what the Courts below have said is, well that's not a problem, it doesn't mean you end up with over recovery, because principles of equitable contribution can be brought to bear as between the vendor liable on warranties and the negligent inducer of entry into the contract. And my argument is not so, especially not so in New Zealand where claims for contribution must be brought either under the Law Reform Act, which its common ground doesn't apply here, or in equity where the preponderance of authority is that equal sharing or proportionate sharing will be directed as between parties liable to contribute in equity.

Now there are suggestions in the case law that that's not the position, Your Honour Justice Tipping in *Trotter v Franklin* [1991] 2 NZLR 92 (HC) suggested that equity was more flexible today than that.

TIPPING J:
Did I?

MR GODDARD QC:
Your Honour did. That was subsequently greeted without total enthusiasm by the Court of Appeal in another case also obiter. Justice Kirby was of the same view in *Burke v LFOT Pty Ltd* [2002] HCA 17 –

TIPPING J:
Well the equity started normally from the co-surety, that was the seminal case, wasn't it, from which you would have a presumption of equal share, and when it doesn't seem that you would inevitably have equal share?

MR GODDARD QC:
Or co-insurers?

TIPPING J:
Yes.

MR GODDARD QC:
And there were adjustments where, for example, sureties were liable for different amounts of the whole, but their adjustments were always strictly proportionate to the amounts of the surety, and similarly –

TIPPING J:
But are we going to get there?

MR GODDARD QC:
No I don't think we need to get there sir. Because what I want to say is quite simply that an essential prerequisite for solving a problem like this with equitable contribution has to be that the liabilities are co-ordinate and for precisely the reasons I gave earlier in relation to the nature of the claim against the tortfeasor, which requires the contractual rights to be taken into account, these are not coordinate

liabilities, they are not in parallel, rather logically and legally they're sequential. You can only know what the liability in tort is, once you know what the rights and contract are.

ELIAS CJ:

But you're now going back to the second argument. I had understood you were putting forward a fallback position on the basis that we might hold that these are concurrent liabilities. Are you not doing that?

MR GODDARD QC:

I – my primary argument, and it's not only primary but has 90% of the waiting.

ELIAS CJ:

Your overwhelming arguments.

MR GODDARD QC:

My overwhelmingly emphasised argument is that we never reached that point.

ELIAS CJ:

Yes.

MR GODDARD QC:

And that this is not an issue that should be addressed by bringing principles of contribution to bear. But what I do say is that if contribution, equitable contribution is to be extended to this sort of scenario, even though the nature of the claims is very different, simply because there is some overlap in the amounts recoverable. Then, it must necessarily be the case equity having widened its embrace, that it also adopts the flexibility that Your Honour suggested in *Trotter v Franklin* and contemplates the possibility of something other than equal sharing of liabilities, and in particular looks to issues like unjust enrichment, looks to issues like the nature of the different claims, to inform how liabilities should be apportioned with the result that in this case liability should be allocated wholly to the vendor, who has been paid for something they did not provide, overpaid to the extent of 125,000. Equity it seems to me, must require that that 125,000 be disgorged and that discharges the tort visas liability with any incremental liability on the part of the contract breacher being a matter that has no bearing on the position of the tort visa.

Burke v LFOT was a case in the High Court of Australia where a similar analysis was adopted, and that case to say contribution wasn't available that the liabilities weren't coordinate because the liabilities were of such a different nature, that it would be inequitable for the negligent solicitor to contribute to part of the claims. Let me go very quickly to –

ELIAS CJ:

Well Mr Goddard, I'm getting a little concerned about the time we're taking. What's the – is it possible to wrap this part up fairly succinctly?

MR GODDARD QC:

Yes.

ELIAS CJ:

Because you do seem to be at the end and urging us that we don't need to go here, and we do have your written submissions which we have read.

MR GODDARD QC:

Yes, I think I can wrap it up very quickly. Because Your Honour's exactly right, I am now down in my 10% argument and at some of the finer and subtler aspects of that. So the primary argument here, it's very simple, is that no loss was suffered because the value of the rights obtained under the contract has been ascertained and exceeds the purchase price. In the alternative, I say if the Court were to consider that that's not the correct analysis, and that the problem of over recovery must be solved some other way, the only way one could do that would be by extending the doctrine of equitable contribution. If one were to do that, then one would also need to introduce the sort of flexibility in relation to recovery that is provided by statute in the English 1978 Act, and that Your Honour Justice Tipping suggested in *Trotter v Franklin,* if one does that and pays attention to the relationship between the two types of claim, one would end up in the same place, saying, "Well the vendors should pay first, as strictly liable to deliver what they have promised to deliver, and what they've been paid to deliver. And once they do that there's no loss left. Unless the Court has any questions. Thank you Your Honour.

ELIAS CJ:

Yes Mr Ring. Counsel I should indicate that tomorrow I have a difficulty and I can't sit after 12 until after the lunch adjournment, so from 12 we lose an hour. We can

start sitting tomorrow at 9.30 or we could consider sitting on until 5.00 tonight, if we take an adjournment now, which is not the preferred option. But how do you think we're going in terms of time?

MR RING:
Well it might help you to know that I'm not proposing to say anything about Mr Goddard's arguments at all. I will leave that to people much more qualified behind me to deal with those, and I'm only going to be addressing the Altimarloch measure of damages point and I would hope that I'd finish by 4 o'clock.

ELIAS CJ:
All right.

MR RING:
I'm always nervous about making predictions like that but that's what I'm –

ELIAS CJ:
All right, we'll sit till four and we'll sit again tomorrow at 9.30 if that's acceptable, thank you.

MR RING:
Your Honours I've reduced what I want to say to a page. The issues as we see it, there are essentially two. The first is, was the Court of Appeal wrong to effectively uphold the High Court's decision to award damages to Altimarloch based on the cost of cure, rather than on the difference in values. And we say that the High Court's decision was contrary to the evidence and that the Court of Appeal failed to properly address that issue, or properly deal with that issue. And then there's a second subsidiary issue that appears to be raised on Altimarloch's submissions that are – we nonetheless precluded from advancing this argument, because the choice between these alternatives was not a live issue in the Lower Courts and our simply answer to that is, yes it was.

If I can turn to the evidence submissions and judgments in the lower court and start with the evidence at the High Court trial, the unchallenged evidence of loss that was given by Mr McNabb on behalf of Altimarloch, and Your Honours will find that in the second booklet and first if I can take you to page 233, at paragraph 44, Mr McNabb said in the middle of that paragraph, "If we had not received signed transfers of the

three water permits in anticipation of settlement, I would've sought advice on options for cancelling the contract or otherwise acquiring at a reduced price, to recognise the absence of water". Now I don't think that takes us very far. But he takes it further and in our submissions the key passage in the evidence is on the next page, 234, at paragraph 51. "Had I known there was only limited class A water and no B class water, either I would not have proceeded with the purchase at all or we would not have purchased at the price which was ultimately agreed. The absence of water to develop the land into vineyard or the additional capital cost required to build a dam to store water, would reduce the return that we thought we would earn from the property. To put it another way, the land is simply not as valuable with the limited water available." And the key points that we emphasise in this are, he described the loss in terms of the difference in return in values, not in terms of the additional capital costs they would have to incur to build a dam.

ELIAS CJ:
This is evidence thought isn't it? I'm just wondering how it fits with the claim.

MR RING:
Well the claim as presented in the statement of claim was neutral as to what the measure of damages was based on. It simply claimed that there'd been a loss and it claimed a dollar amount in relation to that.

TIPPING J:
Was there any claim for particularity, or elaboration?

MR RING:
No.

TIPPING J:
So you were vulnerable at trial to whatever turned up so to speak?

MR RING:
Oh yes.

TIPPING J:
And you say this evidence bound to a particular measure?

MR RING:

Well what we're saying is that you could never get more than the plaintiff's evidence support, and the plaintiff's evidence here is that he looked at it in terms of return, and in terms of diminution in value.

TIPPING J:

But he was thinking when he wrote this, that he was going to have to pay for the dam. Not that he was going to get compensation in the form of money to pay for a dam, that's how I would read it.

MR RING:

No, he's talking about what his state of mind would have been at the moment, at the theoretical moment, that he's about to settle but he finds out what the true position is and he's saying what he then, how he then would have viewed things. And what he's saying is that I wouldn't, what he's not saying, specifically not saying, and it would be inconsistent with what he's saying, he's not saying I would have wanted to reduce the purchase price by the amount it would have cost me to build the dam.

ANDERSON J:

I've always doubted the eventual value of expost facto hypotheses. He's looking back to a situation which didn't actually exist and saying what he would have done and unless he said why he would have done or that or how – whether he turned his mind to it, or something like that, it's simply one of the weaknesses of written briefs.

MR RING:

Well this, this is a written brief by a qualified lawyer who was also a merchant banker so this is a man who knows only too well what return and diminution in value are all about in transactions.

ANDERSON J:

Of course that would be so but whether he would actually have done that is only a submission by him in effect.

MR RING:

Well it's the only evidence that there is on this point.

ELIAS CJ:

What's to preclude him seeking performance damages? The cost of putting right or whatever it's called?

MR RING:
Oh the cost of cure?

ELIAS CJ:
Yes, cost of cure. What's to preclude him in this evidence?

MR RING:
Well what we say is the precluding factor is that he's saying I looked at this water provision as a matter of return and value of the property I was purchasing.

BLANCHARD J:
Well you would do but once you've settled it's a different situation. You've got the property, you're stuck with it and then you've got to decide what the measure of damages is to get you into the situation that you were promised. I wouldn't read this against Mr McNabb. It seems to me he's talking about the inducement factor here.

MR RING:
My submissions may turn out to be even shorter than I anticipated.

BLANCHARD J:
Well if you continue on this line, yes.

ELIAS CJ:
And he indicates that he'd looked for a reduced price and one could express it as a reduction to enable him to build a dam.

TIPPING J:
Exactly.

MR RING:
Well one could except that's not what he's saying and that would be inconsistent with what he's saying.

TIPPING J:

He says he's spent very little time practicing law. That seems to me to be the most significant piece of evidence on this point, Mr Ring, that one could fine.

MR RING:
Well except that in the same breath, of course, he is a merchant banker –

TIPPING J:
Well we all know how they look at damages.

ELIAS CJ:
Well he's talking about the additional capital cost required to build the dam to store water.

MR RING:
As reducing the return. In other words –

BLANCHARD J:
And in order to get that return he needs the compensation at the higher level so he can build the dam without having to pay for it himself and then get the return.

MR RING:
Well this perhaps has to be also viewed in the context of the other evidence that the dam wasn't immediately required and perhaps it's that context –

BLANCHARD J:
Where's that?

MR RING:
Well it's in a number of places. If I can just first say that –

ELIAS CJ:
Just tell us why that is? Is that because the vineyard was having to be developed?

MR RING:
Yes.

ANDERSON J:

The plants were young and used less water?

MR RING:

Yes.

TIPPING J:

Well I can't, with respect, see how that bears on it very much.

ELIAS CJ:

No.

ANDERSON J:

It'll allow them to –

TIPPING J:

Either he's bound himself in evidence to a certain measure or he hasn't and you've got to show, very unconventionally, that someone has bound themselves in evidence to a certain measure.

MR RING:

Well perhaps let me try and come at it another way because Your Honours if the evidence is not capable of the interpretation that I'm putting on it, I frankly concede that this argument isn't going to go anywhere. This is not put on a basis that the High Court and the Court of Appeal were bound by some rule of law or by some principle or even by some guideline that they had to award damages on the diminution in value basis. I accept entirely it's totally discretionary. I accept that there's no hard and fast rules and that it depends on the evidence. But what that means is that you must be able to contemplate a situation where a plaintiff gives evidence and that evidence is only consistent with one measure of damages over another and if that is so then it would be unreasonable as between the plaintiff and the defendant to award the plaintiff damages based on a measure which his evidence doesn't support. So against that background we're now looking at whether this evidence achieves that purpose or not and it must be possible, as I say, for a plaintiff to give evidence which effectively binds him but the way I would put it is effectively only supports a particular measure of damages, which only supports the diminution in value measure of damages as opposed to the cost of cure and –

BLANCHARD J:

Is there any other piece of evidence on which you can take this submission any further?

MR RING:

No. No. There was no challenge to this evidence in any of the cross-examination. It was –

TIPPING J:

Well you wouldn't, would you, if you were going to run this argument.

MR RING:

Well indeed, indeed. There was some discussion of it in one place in the evidence but the discussion was more focused on what's the value of the property now and there was re-examination but that was on that point as well. So this is the sum total of that evidence apart from that other aspect of evidence that I referred to where there was some postponement of the question of when the dam would be built and certainly as at the date of the trial, which was some four years after the settlement of the – three or four years after there'd been no dam built, and 12 months or so later when the judgment, the second judgment came out from the High Court, there'd still been no dam built and the evidence at that stage that even if the dam was commenced right then and there, there would be no dam before the beginning of the 2008/2009 season.

TIPPING J:

Isn't that a quantification point within a measure rather than a point directing measure?

MR RING:

Well what I'm saying Your Honour is that in principle a plaintiff must be able to give evidence which only supports a lower measure of damages. The question is, does this evidence do that and the reason we say it does is simply because that's exactly what he says and that it would be inconsistent –

BLANCHARD J:

That is what you say he says.

MR RING:

Well yes that is exactly what I say he says but it would be inconsistent with what he said to say that the absence of the water meant to me that I would have to incur a loss by way of the cost of building the dam, because he says it would reduce the return, to put it another way, the land is simply not as valuable with the limited water available. If you just take that last sentence, that is a classic exposition of the diminution in value point.

ELIAS CJ:

But you're taking it entirely out of context because –

TIPPING J:

What is the diminution?

ELIAS CJ:

He's not, yes, he's not talking about a straight land valuation, he's talking about the fact that he can't get the return that he expected to get. Mr Ring, do you think that there's any aspect of this argument we don't understand because if so carry on but –

MR RING:

No, no, I –

ELIAS CJ:

But if you think you have sufficiently brought it to our attention I'm not sure that there's really very much more to be said.

MR RING:

No the – I was about to bring it to a close for that very reason. There's no point in my going on if you're not accepting this proposition because everything else hangs off it, I frankly accept that. So you have the summary which effectively gives you the rest anyway so unless I can help you with anything further then that is all that I need to say.

ELIAS CJ:

Thank you Mr Ring. Now Mr Casey are you next or? Oh Mr Barton, thanks.

MR BARTON:

Your Honours, I wanted to pick up where my learned friend Mr Ring has left off.

TIPPING J:

I wouldn't have thought that was a very comfortable place to start Mr Barton.

MR BARTON:

In my submission it's quite clear what the case law says in this area about the difference, the two measures of damages, whether it's a cost of cure or a difference in value and one can look, for example, by way of analogy at what happens in the Sale of Goods Act, section 52, 53 where the market price is what determines things. The difference in value of the market price. And that's a prima facie test and if the difference in value isn't going to give the answer then the, one looks to a substitute. Now in the present case when one looks at the case law it really comes down to a question of what's needed to do justice in the circumstances of the case. There's no presumption, effectively one way or the other, in terms of is it difference in value or is it the cost of cure. So when we then look at what are the relevant circumstances of this case I would look perhaps a little bit more widely than my learned friend Mr Ring has done and refer to more than just those statements of evidence at page 224 of the bundle. And I would start when one compares it, if you like, with the Sale of Goods type context where there the situation really is, is the product a standard product or is it unique? If it's a standard product it's quite easy to apply the difference in value type test, and that's, you know, you can look at that from the point of view of say your traffic accident and the car and also the damage to the car, it's a standard product thus you need a standard car and you can go out to the market and you can work out the difference in value as opposed to the cost of cure which might be the cost of fixing the car which might exceed the market value. So that's where you're dealing with a standard product and perhaps you can extrapolate out from there and say well this is a non-standard product, if it were a very unique car for example. So one then comes to our situation in terms of what was it that was being bought here and in my submission, on the evidence, it was land suitable for viticulture with adequate water. It wasn't Altimarloch. It was land –

TIPPING J:

It was a bit more specific than that Mr Barton, wasn't it, it was land plus a defined amount of water for irrigation?

MR BARTON:
Yes I agree Your Honour. When I say with adequate water I mean –

TIPPING J:
Well adequate is a weasel word.

MR RING:
I didn't mean to use it in that context.

TIPPING J:
No, no, I'm sure you didn't but we have to bear in mind that the contract required the delivery of land and rights to specific amounts of water.

MR BARTON:
Yes, yes. I accept that and we can –

ANDERSON J:
In Marlborough.

ELIAS CJ:
Up the Awatere Valley. It's rather lovely.

ANDERSON J:
If there's such a market for land, why was this one chosen? It was chosen for some qualities that were attractive to the purchaser.

MR BARTON:
When one looks at Mr McNabb's brief and he started on this quest he was based in Toronto, wanted to come back, wanted to get more involved in viticulture because he did have an interest already via his father and his investment company, and he looked in Gisborne, Nelson and Marlborough and so what, when one looks at his brief what he was looking for was land suitable for viticulture, and perhaps you can

imply into that, but suitable viticulture, it's got to have enough water to grow the grapes.

ANDERSON J:

I don't question the theory that you've advancing I'm just wondering about the evidential basis of saying that well you could just go out and buy another farm somewhere.

MR BARTON:

Well the, and that, I suppose the evidential basis Your Honour is when one looks at what Mr McNabb was looking for which was land suitable for viticulture. He looks at a number of areas. He then focuses in, hones in on Altimarloch. This was a business proposition, a financial transaction. He needed suitable viticultural land, X number of hectares that would produce Y number of tonnes of grapes and –

McGRATH J:

You're saying we should be looking at this as an investment transaction?

MR BARTON:

Yes.

McGRATH J:

We should distinguish it, therefore, from the person's swimming pool in the *Perry* and *Dynes* case where their own land, or perhaps from a long owned family farm which someone was doing something. You're saying we should focus on this as an investment but can I just ask you where you're going because I think you'd accept, would you, that the starting point is that he's entitled to the work done to achieve conformity with the contract the qualification being as long as that's reasonable. Are you saying it was unreasonable for him in the circumstances of this investment transaction to insist on conformity with the contract?

MR BARTON:

What I'm saying is that he's certainly entitled to relief, entitled to damages and in the circumstances, however, he could have been properly remedied by damages that reflected the difference in value.

McGRATH J:

Because it would be unreasonable for him to be awarded expectation damages. Is that, you'd have to say that much –

ELIAS CJ:
No. I think the argument that was put is that the usual measure of damages is the diminution in value. That's the proposition that you base your submission on?

MR BARTON:
Yes.

ELIAS CJ:
You don't accept that he's entitled to performance damages?

MR BARTON:
That's correct Your Honour.

TIPPING J:
Well you just said a few minutes ago that there was no sort of presumption either way.

MR BARTON:
Well –

TIPPING J:
I'm getting lost Mr Barton frankly. I think you should articulate in a sentence or two exactly what it is you say was wrong with the Court of Appeal's approach in principle because we're certainly not going to tinker with, unless they've made an error of principle.

McGRATH J:
And I'd like to know the principle you say is the one we should approve.

MR BARTON:

In terms of, where two tests, the measures if you like, the cost of cure versus the difference in value.

McGRATH J:

Yes.

MR BARTON:

And we don't, the case law doesn't give us an invariable solution to that problem. It is a – and I think one quote is it's a minefield and so what the Courts do, or the Courts have done is they choose the solution which does justice between the parties. The reasonable solution in the circumstances, and what I'm seeking to do is to draw Your Honour's attention to the circumstances that in my submission are relevant to the exercise of that decision and that's where I started off drawing my parallel with the Sale of Goods, is this unique or is it a standard product and we then look at how Mr McNabb came to acquire, or came to sign the contract and what he was looking for was suitable viticultural land. Now we come – we know there's other land available because he was looking for it. We then, soon after settlement, very soon after settlement, the problem emerges which is that there's not enough water, there's been a misunderstanding. Now at that point in time, at that point in time a decision can be made, an election about what you're going to do. In my submission it was open, at that time, to say I haven't got enough water. This land is not suitable for my purpose. I will sell it. I'm going to take a 400, with hindsight we can say with the figures, I'm going to take a $400,000 loss on it. I will collect 400,000 in damages from the guilty party and I will have the money that enables me to go out on the market and buy suitable viticultural land, which is what I wanted in the first place. So that's why I'm talking about it being non-standard product. Sorry, being a, that can be replicated and if you're talking about X number of hectares that will grow grapes you can find it elsewhere.

By the time we got to the High Court, and ultimately the Court of Appeal, the election had been taken by Altimarloch and Altimarloch had chosen to stay with the land and to plant, continue planting and converting it for viticulture. At that point in time, when one looks back, it looks as though well the only way of compensating Altimarloch, that's fair, is to provide them with a substitute product which is the construction of a dam. My submission, the starting point for this should be at the time that election is made. That is when a conscious exercise of volition at that time to go down the path of committing to this land and planting it. So there were two potions available. To

cancel and get out of it and get damages, which would have done justice to the parties, because 400,000 plus the sale price of the land at that point in time would have put Altimarloch into the position it should have been in or it could have been in. Now instead the more expensive option has been taken and we're talking about, when you look at the relevant circumstances here, it is a significantly more expensive option. Now 400,000 versus one million plus and when you look at it from that point of view, when you look at the value of the initial contract price, 2.65 million, and then you look at the damages here, or the cost of building a dam, over one million dollars, that's a very high proportion of that first purchase price, some 40-odd percent and so when one – now, I readily accept we haven't got the extreme position that we had with the *Ruxley Electronics & Construction v Forsyth* [1996] AC 344 case about the swimming pool but that is a really good example, the application of the test in extreme circumstances. So that's another factor that we've got that disparity in value and it's a huge difference which I would suggest is disproportionate.

And we've also got the situation where the cost of building the dam is wildly fluctuating versus the certainty that came with dealing with difference value and you can see throughout this case the statement of claim, the prayer for relief was a moving feast, it kept on going up. 540,000 it started at, and you can see from the statement of claim in the bundle that was amended the day the trial started and it started at 699,000 and then it went up, you can see that's in handwriting –

TIPPING J:

Did the Court of Appeal misdirect itself in law or did they simply treat as reasonable what you suggest was unreasonable?

MR BARTON:

I would submit they misdirected themselves in law in improperly applying the test to the circumstances of the case.

TIPPING J:

So they got the test right but didn't apply it correct?

MR BARTON:

Correct.

McGRATH J:

It might be helpful if you go to the judgment in that respect because I think –

TIPPING J:

When it comes to damages Appellate Courts don't normally intervene unless there's been an error of principle or a wholly different, you know, disproportionate assessment. I mean that's pretty fundamental, isn't it?

MR BARTON:

Yes.

TIPPING J:

You're really having to argue, aren't you, that they erred in principle?

McGRATH J:

Paragraph 61 of the judgment may be worth having a look at. The Court does reach its conclusion quickly but I think that's what you've got to address.

MR BARTON:

Yes. Well –

McGRATH J:

60 and 61.

MR BARTON:

I mean the difficulty we have with references to unchallenged evidence about expectations and the like is that the way the case evolved there was no particularisation in the statement of claim as to how the damages figure was made up and there were briefs of evidence exchanged and the plaintiff put forward briefs, both of the cost of dam construction and the difference in value. So this $400,000 came from the plaintiff's evidence. So we have – so it's – and in the High Court it was certainly, there was certainly argument on the point of that it should have been difference in value as opposed to the cost of cure. So it's not, in my submission, fair to categorise that as being, you know, it was unchallenged by the parties that Altimarloch's expectations could only be satisfied by the building of the dam.

McGRATH J:

I suppose, Mr Barton, what's in my mind is this. That if the Court was saying that this was a reasonable approach, you've got a finding of fact and I think you're really acknowledging this is very much a factual area that would be against you but it may be that you've rather got in mind attacking the principle that *Ruxley* is regarded as a narrow exception, I think that's what the Courts say, to the general rule that expectation damages rule, or performance damages rule, and if so you may want to develop what's said in *Ruxley* a little more tomorrow because I think I – we will need, I think, to be satisfied that something went wrong in principle here. And what the Court's saying doesn't seem to be, for example, quite on all fours with what the High Court of Australia was saying in *Bellgrove v Eldridge* [1954] 90 CLR 613 which is –

TIPPING J:

I don't think it's entirely – if the Court of Appeal is saying there's a presumption towards expectation damages, when the dichotomy is difference in value or reinstatement or cure, I'm not 100% sure off the cuff that that is correct. I would have thought you were more correct in your submission that you don't start off with any presumption – that's why I was asking you to show us where there was a suggested area of law. I mean – my brother McGrath I think is on the same point. But there are earlier decisions that are Court of Appeal too. What's the case Justice McGrath mentioned about another swimming pool that I was in at first instance?

McGRATH J:

Perry and *Dynes*.

TIPPING J:

Perry and *Dynes*.

McGRATH J:

Blackhall & Struthers.

TIPPING J:

Blackhall & Struthers.

McGRATH J:

Perry and *Dynes* is in your materials Mr Goddard.

MR BARTON:

Well those are points perhaps I can expand on further tomorrow. I was expecting my friend to take the rest of the afternoon so I hadn't –

ELIAS CJ:

Would it assist if we took the adjournment now? We're within five minutes of doing so.

TIPPING J:

In other words Mr Barton are the Court of Appeal correct in the last sentence of paragraph 60? In the context of this sort of case?

MR BARTON:

Perhaps if I –

TIPPING J:

I'm not talking about generally.

MR BARTON:

Yes.

TIPPING J:

In the context of this sort of case. Because I'm not sure about that.

MR BARTON:

Perhaps if I can come back to you tomorrow on that Your Honour?

ELIAS CJ:

Thank you. We'll take the adjournment now and resume at 9.30.

COURT ADJOURNS:3:53 PM

COURT RESUMES ON WEDNESDAY 16 FEBRUARY 2011 AT 9:33 AM

MR BARTON:

Thank you Your Honour. When we finished yesterday we were discussing the flaw that we saw in the Court of Appeal judgment and when one looks at paragraph 60 and 61 of that judgment, there was particular attention given to the last sentence of paragraph 60 which is in other words, "The primary measure of damages is expectations based." Now on its own that's – there is nothing wrong with that. The problem is, when one reads this in the context of those two to three critical paragraphs here, dealing with the question of damages. Now in paragraph 60, immediately before that, there was an expression of – in relation to *Ruxley*, where it was said, it was fairly regarded as an exception to the general rule that the purpose of award of damages is to place the injured parties as nearly as possible in the position it would have been in if the contract had been performed. Now in my submission *Ruxley* is not, in fact, an exception to that general rule, but an example of its application in extreme circumstances and I refer in particular, if one looks at the case, at the reference I'm just going to read out is on, it's in the case tab 40 at page 745 where Lord Lloyd of Berwick, in the left-hand column.

ELIAS CJ:

Now which volume in the bundle?

MR BARTON:

Sorry Your Honour, that is volume 4, behind tab 40 at page 745, left-hand column, first big paragraph where His Lordship said, "Once again, one finds the Court emphasising the central importance of reasonableness in selecting the appropriate measure of damages. If reinstatement is not the reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff's loss. If there is no diminution in value the plaintiff has suffered no loss. His damages will be nominal."

And then a bit further down that page where His Honour, His Lordship, refers to Lord Cohen and after his quote says, "There seems little doubt that if it had not been reasonable for the employer to assist on reinstatement, Lord Cohen would have chosen as the alternative measure of damages, the diminution in value." So the point I make is that *Ruxley* is just an example of the application of the ordinary test, in extreme circumstances.

At paragraph 61 the Court of Appeal refers to the unchallenged evidence that Altimarloch's expectations as to the availability of water could only be satisfied by the building of a dam. This is a difficult proposition to accept because when one looks at the statement of claim the format or the precise measure of damages was not particularised. There was a prayer for relief for a figure and then going into the trial, the plaintiff put forward two evidential bases for calculating damages. One of them was the construction of a dam, the other was the difference in value. So that was evidence put forward by the plaintiff and going into the trial it was accepted that there were two ways that this could be calculated. Now when their Honours say it was unchallenged, it is unchallenged in the sense that no one attacked the engineer to say a dam should not be built here, or it should not be built in this way or it should not be built to add cost. Those aspects certainly were not challenged and indeed my recollection is the engineer wasn't even called.

TIPPING J:

But if you put forward two measures, why are you not putting forward the second one, if you like, as a fall back in case the Court is not satisfied, contrary to your submission. That it is reasonable to have the expectation measure; there is then got to be some evidence to support the alternative measure.

MR BARTON:

I accept that a plaintiff can put forward the two measures and one is a fall back position, that is certainly correct but –

TIPPING J:

I do not understand what your point is then.

MR BARTON:

My point is the reference to unchallenged expectations, that that was the only way the plaintiff's expectations could be met.

BLANCHARD J:

Well it was, in accordance with everything I have seen. I think you are taking the wrong meaning from that sentence. It is referring to expectations. When you start talking about diminution in value, you are not talking about expectations.

TIPPING J:

You don't buy a piece of land with the intention of having a diminution in value measure or expectation of a diminution in value, I agree with my brother. It is just –

MR BARTON:

Well Your Honour, in my submission there are different ways of measuring one's expectations and their circumstances.

ELIAS CJ:

But that sentence is not dealing with the measurement of expectations. It is simply saying that the evidence was that the expectation could only be satisfied by the building of the dam. That is just – that is really to accept that there was not any other source of getting the water to the property, isn't it. Doesn't that follow from the accepted fact that not all of the water could have been obtained by buying other permits?

BLANCHARD J:

Well I think at that stage, there were no other water rights available.

ELIAS CJ:

Yes that is right.

BLANCHARD J:

Surely then it wouldn't have been unchallenged that it was only to be satisfied by building a dam. The possibility of satisfying it, at least in part, by buying water rights would have been mentioned. I think you are taking far more out of that sentence than is ever there.

MR BARTON:

Very well Your Honour.

TIPPING J:

The more important sentence is the next one.

MR BARTON:

Well Your Honour, that simply wasn't correct that the –

TIPPING J:

Well you had better demonstrate that proposition.

MR BARTON:

– the position taken in the High Court by the defendants, or on behalf of the Moorehouses, let's say, was that the correct measure of damages was the difference in value. Now, so there is a focussing there on the construction of the dam but if there is a suggestion in that paragraph that the argument was not put forward, that the correct measure of damages was the difference in value –

ELIAS CJ:

That is not what was said in this paragraph and the second sentence is saying that the only challenge was that in any event the Moorhouses, or that someone on the property would have to put in a dam for frost control purposes. So it is just directed at the fact of how else was the expectation to be realised, it is not a paragraph that deals with a choice between expectation damages and loss of value.

MR BARTON:

Very well Your Honour but when you work through the next paragraphs, where it is then suggested that when this argument is put in a Court of Appeal, that this is a new case on appeal, that this argument had not been put before. It had, in fact, been put before in the High Court and indeed in Court, Your Honour, there was a lot of time spent on dealing with valuation evidence, because the two valuers gave evidence viva voce and they were cross-examined and so there was a lot of Court time devoted to difference in value.

But, so we have this, and in my closing submissions, the written submissions, refer to going through this test in terms of the difference in value but we have the Court of Appeal, that appears to be approaching on the basis that those matters were not, in fact, put before His Honour in the High Court.

BLANCHARD J:

If you look in the middle of paragraph 63, isn't there an acknowledgement in that sentence beginning "The truth is an award of damages etc was not, on either of the bases, contended for by Gascoigne Wicks, would not satisfy AJVL's expectations." Isn't that recognising that you were arguing for diminution in value?

MR BARTON:

That was the argument put in the Court of Appeal, that we were arguing for diminution in value.

McGRATH J:

Isn't that recognised in that part?

MR BARTON:

Yes that is a recognition of that, I mean the difficulty we have is we don't have any real analysis here, nor do we have in the High Court, of the formulation of the damages claim.

BLANCHARD J:

What you have got to satisfy us, is that contrary to what the Court of Appeal has said, in paragraph 63, there is a reason why Altimarloch shouldn't be compensated for the actual cost of obtaining the functional equivalent. That is your task.

MR BARTON:

Yes the points I am seeking to put forward is that on what case law there is, you have got to do this calculation of damages, that you have to approach it on an even handed basis. There is no presumption one way or the other in favour of cost of cure versus diminution in value. Now this has been a subject of some debates over the years and you can see it in academic writings and that sort of thing as well. But in my submission what is tolerably clear is that when confronted with a situation you approach it in an even handed way.

ELIAS CJ:

Well a few moments ago, I recorded you as saying, and I might be wrong in this, that you have no quarrel with the Court of Appeal's approach that the primary measure of damages is expectation based.

MR BARTON:

Well yes that leads on to the submission I am going to make Your Honour about the definition of expectations and in my submission, expectations – there are different ways of measuring one's expectations and in my submission a diminution in value is also an expectation. Mr McNabb, Altimarloch bought this land, with water for

viticultural purposes, paid $2.65 million, he got a bargain because if it had what he thought it had, it was worth $2.95 million. So his contractual expectation, the bargain he was buying, was something worth $2.95 million. In fact he got something worth $2.55 million, he was $400,000 short. Now I contrast that expectation with a reliance analysis which is, he paid $2.6 odd million and got something worth $2.55 million and if you are looking at it from a reliance point of view, $125,000 was the difference but the contractual expectation here was to acquire something worth $2.95 million and right throughout, right from the start, this was a business proposition, an investment, where the returns were important.

ANDERSON J:

I just wonder whether we are getting confused by using definitions instead of concepts. The idea of functional performance or functional reinstatement referred to by Justice Blanchard is part of the dichotomy. The other part of it is diminution, so we are looking at functional performance versus diminution and the Court of Appeal and the High Court Judge awarded damages on a functional performance basis and as Justice Blanchard said, you have to persuade us that they should have adopted a diminution basis. So if we just look at it in those terms, instead of talking about expectations which can be ambiguous, we might get there faster.

MR BARTON:

Well the difficulty is the basic tests are easy to express but hard to apply and so –

TIPPING J:

Is the key point you are making, that this is a business transaction, rather than one where there is more emotion, if you like, attached to a particular piece of land like a family home or that sort of thing and therefore that is why it should have been done on a compensation for loss of value basis, rather than what one might call financial specific performance.

MR BARTON:

Yes that is one of my propositions Your Honour.

TIPPING J:

Well can you articulate very, very shortly, what your other propositions are to support the proposition that the Court of Appeal got it wrong, because we are all over the place at the moment.

MR BARTON:

Your Honour my submission is that one approaches this from an even handed point of view, then looks at the circumstances.

TIPPING J:

Yes I know all that. What I am asking you to say in a one, two, three basis, is why the Court of Appeal were wrong. One is that this is a business transaction.

MR BARTON:

Yes.

TIPPING J:

Rather than a specific performance type transaction, if you understand me.

MR BARTON:

Yes.

TIPPING J:

What are the others – shortly – and then elaborate.

MR BARTON:

It was a – as I was saying yesterday Your Honour. It was a business proposition, it was a general quest for suitable viticultural land and that is quite clear, driven by returns.

TIPPING J:

Well I think even I have got that point.

MR BARTON:

There was other land available.

ELIAS CJ:

That is the same point.

MR BARTON:

The problem here, with not enough water was discovered early on, this wasn't some sort of latent problem that emerged two years, three years down the track.

ANDERSON J:
It was two months later, two and a bit months later.

MR BARTON:
Yes and by that, why I refer to that Your Honour, is that there is an election made, by the plaintiff in those circumstances.

TIPPING J:
Is this a submission that the problem was discovered before the purchaser was finally committed. They could have cancelled?

MR BARTON:
No, no, the settlement had occurred and it was only when they went to register the transfer of the water permits, some time after settlement, briefly after settlement, that it was discovered they weren't getting enough water. So, at the date of settlement they believed they were getting what they wanted, the problem emerged soon thereafter.

ELIAS CJ:
Did they get a transfer in relation to the water permits?

MR BARTON:
On the settlement –

ELIAS CJ:
You said they tried to register it.

MR BARTON:
On the settlement, as with land, you have a memorandum of transfer.

ELIAS CJ:
Yes.

MR BARTON:

And so they got that bit of paper and they settled on that basis but there wasn't enough water and so that was discovered soon thereafter. So the point I make there is that at that point in time, the options are open, an election is made, that is another –

BLANCHARD J:

You mean the option was open, they could have turned round and sold.

ANDERSON J:

Or is another way of looking at it, that they hadn't gone on to do anything by way of planting or anything of that kind, it might have made, you stilted the balance.

MR BARTON:

Effectively.

BLANCHARD J:

Was this ever explored with witnesses, the suggestion that they could simply have sold, recovered their value and then started their project again, somewhere else, there being appropriate properties available?

MR BARTON:

No that was not explored, any further than the evidence that has already been referred to, particularly by my friend Mr Ring.

BLANCHARD J:

Well how do we know that there were appropriate properties?

MR BARTON:

Well we know from the evidence of Mr McNabb that he had been looking around a number of regions and he had focussed his attention on this particular property but there were other properties on the market.

BLANCHARD J:

Yes but he had not elected to buy those and one has to assume was because they were not as suitable. You are never going to be able to find a property that is substantially identical I would have thought, they all differ in various aspects.

MR BARTON:
Yes.

BLANCHARD J:
That is why I used the word fungibility yesterday, this is the antithesis of fungibility.

MR BARTON:
Sorry it is not a term I am familiar with.

BLANCHARD J:
Fungibility means the ability to replace like with like, particularly with common chattels where you can just go into the market and buy more or shares or something like that. Land is not like that. It is one of the reasons why you can get specific performance.

MR BARTON:
Yes.

BLANCHARD J:
In relation to land.

MR BARTON:
I accept that Your Honour and that no two properties will be identical however, the evidence here was that this was an investment proposition and returns were important, or were critical and those returns can be replicated elsewhere.

BLANCHARD J:
Well I am sorry but I am not sure I accept that proposition, particularly if it wasn't put to the witnesses that it was unreasonable to have pursued the course that they did because that is really what you are saying. That it was unreasonable for them to make the election they did, and seek the damages on that basis. That is what you are saying I think because Lord Lloyd, I think, quite aptly said, "It all comes down to reasonableness in the end."

MR BARTON:
Yes.

BLANCHARD J:

Can you point to any case where because it was a business proposition, the Court has said to a plaintiff, in effect, what you ought to have done is to have disposed of this asset and bought something else, which would have been suitable for your business?

MR BARTON:

It is inherent in my submission, in all cases, looking at that diminution in value, there is a notional resale and you look, for example, at that *Brownlie v Shotover Mining Ltd* (CA 181/87 21 February 1992) case where it was questioned, the depth of the gravels bearing gold and that sort of thing, you get the notional resale effectively and that is just the way – and so from that point of view, that is a valid alternative.

BLANCHARD J:

Notional resale will establish what the diminution in value measure is but we are addressing the appropriateness of it, of requiring the plaintiff to adopt that measure.

MR BARTON:

My submission Your Honour, that is inherent in the proposition of looking at the diminution in value and it comes down to the reasonableness in the circumstances, which and in my submission I am saying that it is an investment proposition, this is not a unique property and that those are factors.

ELIAS CJ:

But you do not really have the evidence to support that. The case wasn't really run on that basis, from the answers you have been giving to the questions, put to you by the bench.

MR BARTON:

What I am saying Your Honour, is that from the evidence that is available, those are valid.

McGRATH J:

I think Mr Barton, your point as I understand it really, is the Court was required to evaluate a question of fact which came down to whether or not, in the end, factored judgment the diminution in value was more appropriate and, in fact, the only reasonable basis in the circumstances, were awarding damages in this case and your complaint is that that test is not reflected in the Court of Appeal's judgment.

MR BARTON:
Yes.

McGRATH J:
And if they had, on the evidence they had, whether or not there might have been further evidence, but on the evidence they had, they would have come to the conclusion that the only reasonable basis was diminution in value?

MR BARTON:
Yes that is correct Your Honour but that correct test hasn't been expressed and in the end there hasn't been the analysis, the application to the facts of the case which are those facts that I was going through.

McGRATH J:
Because really it is not whether or not one, the Court of Appeal was in error, I mean if the Court of Appeal breached a judgment in this matter, you might well have difficulty if they had looked at the two situations in that way, you might have difficulty bringing it to this Court anyway, on appeal because it is hard to see there was an error of principal but you are saying, that this principal just doesn't reflect it. I think that is behind your even handedness comments.

MR BARTON:
That is what I am saying Your Honour.

McGRATH J:
I understand that.

MR BARTON:

And so I then go on to submit that one then needs to look at the various circumstances as to what was the, what is the reasonable way of imposing a test of damages here and looking at those various issues, and I talked about the investment and I talked about the fact that the problem was discovered soon after settlement, and even if there had been grapes put in the ground, in that time, grapevines put in the ground, then –

ELIAS CJ:

That is a mitigation point almost isn't it. I mean it occurs to me, I am just trying to think of – because you are right, there is not, the judgment is light on reasoning as to why this measure was accepted, although what seems to be the position is that the Court of Appeal accepts that the prima facie position is that you are entitled to performance damages and says that there is no obvious reason. That is really the full extent of its reasoning on the point. I was just wondering about, in terms of selecting between the options, because you are right. There is diminution in value and then there is the loss of the expectation of value, which is really what the High Court Judge awarded damages on and then there is performance damages and as between those, although you make the argument that this is to be treated as a widget as Mr Goddard likes to remind us we must always consider, but I think Justice Blanchard is right in saying, well land hasn't really been treated like that which is why you get specific performance and it may be that we are in the area where some of the principles applied in cases of specific performance and in some of the mitigation principles, need to be brought to bear in deciding which of those two measures you adopt in a particular case?

MR BARTON:

We do get an overlapping between various principles and I noted my learned friend Mr Goddard yesterday, referring to another approach was mitigation, you could analyse that test yesterday in a mitigation way as well so we do start getting into that.

ELIAS CJ:

Yes.

MR BARTON:

And I do know what His Honour Justice Anderson was saying before, that there is a difficulty with labels here and that the answer becomes a bit elusive. When I refer to

the various circumstances and the first one I referred to was, if you like, the widget principle, that it is one of a number of factors that I am suggesting the Courts below should have taken into account in deciding what was the reasonable test damages to apply in these circumstances and when I talk about the election being made, in my submission one goes back to that point in time when the problem was discovered and award of a difference in value at that time, certainly does justice between the parties because the value of the land, the true value of $2.55 million can be collected by someone and the difference is going to be collected from the vendors and if there is any other costs or damages, then they get added to the $400,000 and then, the vendor, the purchaser is in a position to go and do something else, aimed at the same rate of return, somewhere else. Now when one looks at it at that point in time, that would actually do justice between the parties and I appreciate this is all notional re-sales and that but in my submission, there is nothing inherently unjust in that approach.

The difficulty we have is that the plaintiff chose to commit to this land in a major investment, by the time it gets to the High Court and then the Court of Appeal, the vines are planted and how do you get water to the vines, it seems logical that the only way of solving that is with a dam and so, in my submission, the point in time to look at this, is when the problem occurs.

ANDERSON J:

No one ever put this to Mr McNabb, never put in issue. No one said to him, it was wholly unreasonable of you to carry on when you found out, early in October, that you didn't have enough water. You should have sold and bought something else, no one ever put that to him so what is the evidential basis of the submission.

MR BARTON:

Well Your Honour in my submission, the test of the Court is, which is the reasonable, it is a test the Court imposes. What is the reasonable measure of damages in those circumstances?

ANDERSON J:

You have got to give evidence to work out what is reasonable.

MR BARTON:

Well the evidence is before the Court, Your Honour, in a sense that it is clear you either build a dam here or you get a difference in value.

BLANCHARD J:

Where is the evidence about comparable properties being available, at the time when the problem was detected?

TIPPING J:

In that reasonable vicinity I would have thought.

MR BARTON:

Well –

BLANCHARD J:

Was it ever explored with Mr McNabb why he chose the Awatere Valley and why couldn't he have gone to another grape growing region and been perfectly satisfied by a property there?

ELIAS CJ:

Did he have a house on the property?

MR BARTON:

There is a house on the property.

ANDERSON J:

Did he live in the house?

MR BARTON:

Yes. So there is certainly not evidence of those points.

TIPPING J:

Don't you expect that Mr Barton. I mean forensically you may be literally correct, that the Court is not bound by what matters say, of course, it makes the judgment, but surely forensically, you would have expected McNabb to be challenged on the election he made, if you were setting out the proposition, that that was an unreasonable course to adopt.

MR BARTON:

Well, he hasn't been asked. There is not that evidence but in my submission, before the Court was the evidence on the different approaches that could be taken.

BLANCHARD J:

Yes but that is in the abstract.

MR BARTON:

Well the plaintiff put forward the evidence themselves, about a difference in value. That was their evidence. So inherent in putting forward that evidence, in my submission, and even if it is a fall back position, is the proposition that that is one theoretical approach to offsetting damages.

TIPPING J:

That is an incredibly naive submission, forensically, with respect. I mean really.

MR BARTON:

What I am saying Your Honour, is that on the evidence the two options were available.

TIPPING J:

Of course they were. And you put in evidence, just in case a crazy Judge doesn't see it your way. I mean we have all been there Mr Barton.

MR BARTON:

Well I can't, as I said, I can't point to any –

TIPPING J:

I think you had better move on. I mean I am not presiding but frankly I just think it is the business proposition that you keep coming back to that is your only point, coupled with the fact that it was discovered early on.

MR BARTON:

Those were the first points I was making, I have others, in terms of the circumstances that the Court weighs up.

TIPPING J:

I was trying to get a neat list of things so that we don't overlook anything, are you not able to do that Mr Barton, just headings.

MR BARTON:

I am working through my list Your Honour.

ELIAS CJ:

Well we have got two points so far so, at least I have. Do you want to go on to the next one?

MR BARTON:

The next point is the dam has still not been built.

TIPPING J:

Do they have to build before they get the money?

MR BARTON:

Not necessarily but it is another factor to take into account.

ANDERSON J:

In what way?

MR BARTON:

That you look at the parties' intentions and conduct.

BLANCHARD J:

But it is obvious why the dam hasn't been built. The damages haven't been paid so presumably Mr McNabb doesn't want to borrow money to build the dam until he is sure he is going to get the damages.

ANDERSON J:

Well that wasn't looked into either, was it. No one said to him, why haven't you built the dam so far. All those millions you must have in the bank somewhere, you should have built it. No one ever put that to him either as I read.

McGRATH J:
What is the relevant time at which we take account of the fact that the dam hasn't been built. I mean it certainly can't be now, can it be, because all sorts of economic situations may well have intervened.

MR BARTON:
Yes.

McGRATH J:
Probably have -

MR BARTON:
Hadn't been built at the time we were in the High Court.

TIPPING J:
Well you said before that the assessment of reasonableness must be taken at the time of the election to keep the property. Are you moving from that?

MR BARTON:
No I am not. I didn't think I was contradicting that Your Honour.
TIPPING J:
Well how could the dam have been built, not have been built at the time of the election to keep the property. I mean you have emphasised hugely how soon that was?

ELIAS CJ:
It is the case that in the cases and in the academic literature, this factor does cause difficulty and I don't think there are any clear answers to it so it is not surprising that you are perhaps having difficulty in answering some of these questions and it is not a criticism. But there is a line of thinking, mainly developed in academic writing, that well, too bad, if there is effectively a windfall in the end. That if the proper measure of damages is performance based, then you are entitled to get those damages and it is very difficult, for the reasons that have been put really to you, to work out how you take into account what people will do with the damages, when they get them.

MR BARTON:

Well I can't take that point much further.

ELIAS CJ:

No.

MR BARTON:

Than just to add it to my lists

ELIAS CJ:

Yes and say that it is a factor.

MR BARTON:

It is a factor.

ELIAS CJ:

That there is no guarantee that a dam will be built.

MR BARTON:

That's right. I then move on to the next point which is the disparity between the various outcomes, in terms of $400,000 versus $1.055 million.

ELIAS CJ:

Isn't the better point on that, this is one of – the result is disproportionate. Isn't the better point on that, the comparison with the value of the property as a whole?

MR BARTON:

Yes.

ELIAS CJ:

It is the same sort of thing really, isn't it?

MR BARTON:

In my submission that the $2.65 million purchase price and $1 million odd, roughly 40 per cent of the purchase price, or the other way of looking at it is to say 400,000 versus $1 million odd, that is two and a half times, which is a big discrepancy and in that regard I may refer to one of the cases that was discussed yesterday, the *Dynes* one, where that was where His Honour Justice Tipping's swimming pool case, where

there, you have got the cost of cure versus diminution approach and where His Honour said one is even handed but when one looks at the figures, the discrepancy between the two was a factor of some 50 per cent, one approach versus the other, so in my submissions, it is much greater than that 50 per cent. There is a major discrepancy here.

TIPPING J:
Doesn't that tend to show the value of the water rights that weren't supplied. I mean this could become a dog chasing its tail sort of argument.

MR BARTON:
Well yes, however, in my submission we are coming back to just the bald distinction between the two outcomes and there is just such a disparity and the contractual expectation was that Altimarloch receive 1500 cubic metres of water per day, that expectation per se can't be met. There was an expectation for the dam –

TIPPING J:
Well if that is the only way of meeting the so called expectation of X amount of cubic metres a day, why should the purchaser go without what he was promised?

MR BARTON:
But this is a problem –

TIPPING J:
This is the reasonableness point.

ELIAS CJ:
Yes it is a factor in assessing reasonableness that he gets not just the water which he expected, he gets a great big dam and there must be some stage at which that tips into being an unreasonable result. If you had to build the Clyde Dam for example, to hold its water.

McGRATH J:
But the law won't recognise betterment here will it. It won't make any account of betterment in these situations?

MR BARTON:

No, no. That was explored as you can see from the judgment and I suppose in terms of proportionality, there has got to be a moving scale, as to what is the effective way of dealing with things and a simple example that comes to mind is a car that is damaged and just in relation to how an insurer approaches it.

ANDERSON J:

Depends whether it is a Duesenberg or a Honda Accord.

MR BARTON:

That is certainly so, but the same principle applies in that the cost of repairs, up to a certain figure.

ANDERSON J:

I understand that.

MR BARTON:

Versus the cost of writing off so as I say it is a moving scale and it's got to be proportional.

ELIAS CJ:

Is an element in this also the length of the water rights? I know there is an expectation of renewal but that would have to be discounted to some extent.

MR BARTON:

I mean having a dam has got to be a lot better than having a water right.

ELIAS CJ:

Well it might not be because you might have an empty dam.

BLANCHARD J:

Do we have any evidence about the significance of the length of the water rights and the availability of renewal?

MR BARTON:

What I am aware of Your Honour, is it wasn't regarded as being an issue.

ELIAS CJ:

No but really, we all know that water is a resource under huge pressure and these are class C water rights, which means they are the last ones to be taken aren't they.

MR BARTON:

Yes.

ELIAS CJ:

So if there is a reduction in take, these ones miss out. Anyway, I mean it is all pretty speculative, it is only yet another straw in terms of assessing whether the option of going with the dam as the correct measure of performance damages was reasonable.

MR BARTON:

Yes that is so and flowing on from that in terms of the cost of the dam, is the fact, we had the problem that the cost was fluctuating wildly, it was an unknown, and I accept when something hasn't been built, you have always got that problem but here, it really, really was moving wildly.

McGRATH J:

This is between the two hearings in the High Court is it?

MR BARTON:

Yes and when you read His Honour Wild J second judgment and he had noticed what the price of diesel was that morning, when he was writing his judgment, which had gone up and he refers to it there, as a significant increase from the time of the hearing which was some eight months before.

ELIAS CJ:

I didn't understand why diesel, is that for pump reasons for something?

MR BARTON:

There is a lot of earth moving machinery involved in building the dam so apparently the cost of diesel is a very, very high component as I understand it, Your Honour and so we had this wild fluctuation but by the time we got to the Court of Appeal, the price of diesel had dropped again and it is up again now, so we have just got this roller coaster. So the point I am making, in terms of this point in time, when an election is made, you've got something fixed which is a difference in value. You will have that right's damages, once it is assessed and calculated, versus something that is fluid, that cannot be pinned down and in my submission that creates uncertainty. That makes it – the uncertainty is also difficult for the parties and how they approach a case such as this and so you have got this thing that is moving wildly and so in my submission, that is another factor that is desirable to go for a more certain and a more fixed factor, than something that is moving and that that creates certainty for the parties and it is good for parties to make their decisions on the basis of something that is certain. So that is all I want to say about the cost of the dam and the fluctuations.

My learned friend Mr Ring, in his submissions, was referring to various statements of Mr McNabb about what he might have done at the time, if you had known about the problem, on the date of settlement he might have cancelled or tried to reduce the price or whatever. Now I refer to that evidence, simply as supporting the proposition that this was an investment, an investment proposition. That this was about returns on money and that just supports that earlier submission I made, as to what the whole venture was about and so it can – this is something that can be compensated for with money.

McGRATH J:

I suppose the corollary of that is that it is not a property in which the plaintiff had a particular relationship, as a family home or something of that kind.

MR BARTON:

Not prior to that point in time, no.

ELIAS CJ:

This is quite important to your argument. I think you should tell us what parts of the evidence you are relying on for the submission that this was, as far as Mr McNabb was concerned, was just an investment and was as fungible as you are trying to

suggest it is. Just give us the page references, you don't need to take us there. Or is that where we look, we look in Mr McNabb's evidence?

MR BARTON:

Yes or in fact I am simply referring to those passages that my friend Mr Ring relied on but I am making a different submission than the one he is making yesterday.

McGRATH J:

They are written submissions.

MR BARTON:

They are set out in written submissions.

ELIAS CJ:

Thank you.

MR BARTON:

Perhaps backtracking slightly but the decision, the *Dynes* decision, which is the swimming pool one, that talks about – this is at where His Honour says "The Court must select the measure of damages which is best calculated fairly to compensate the plaintiff for the harm done while at the same time, being reasonable as between plaintiff and defendant and says, a number of factors will be capable bearing on the ultimate assessment, and then works the way through which is, I had hoped which is what I was doing here but you know, and I should say Your Honours that is at 143 and the authority is behind tab 23 at page 508, where His Honour is talking about the number of factors. Firstly, there is the nature of the property and the plaintiff's relationship to it. If the property –

TIPPING J:

What page are you on Mr Barton?

MR BARTON:

Oh sorry, page 508.

BLANCHARD J:

This is a very long time ago, is it the same Justice Tipping?

ELIAS CJ:

Was his father, isn't that what was said about Sir Ivor Richardson.

TIPPING J:

This was the swimming pool that fell down the hill isn't it? I remember the evidence of the poor lady who was having a cup of tea in the house below, it is vivid, you know. She said her morning calm was shattered by this gushing of water that came from above.

MR BARTON:

The facts are quite complex because it is quite a lengthy case so that first proposition was about the plaintiff's relationship with her. The property itself is a special or particular value to the plaintiff, such as being a family home as opposed to a property acquired for income or investment purposes and that may be a pointer to reinstatement as being the fairer approach and then discuss diminution and various other factors and so the relationship with the property is obviously important which is why I talked there about the investment aspect and ultimately in the *Dynes* case it was a diminution in value.

TIPPING J:

Has there been case law since then which would tend to detract from what I then thought about there being no prima facie rule and all that sort of stuff?

MR BARTON:

No, not that I am aware of. Your Honour, in the –

ELIAS CJ:

It is a bit on the one hand or the other hand. Prima facie rule is either diminution in value in certain circumstances or reinstatement restoration in other circumstances.

TIPPING J:

The Court should not approach the task. I think you are being with respect unfair, although no doubt justified.

MR BARTON:

I think –

TIPPING J:

You tend to do that as a High Court Judge, you hedge your bets.

MR BARTON:

And I think Mr Harrison, who was for the architects, had submitted that the cost of cure approach, was a prima facie approach there but see also in one of the bundles, academic writings, and I just mention this not because I want to rely on it but just as an example of how uncertain this area is and that is in bundle 6, academic writings, one here 55, Mr McLauchlan assessment of damages for misrepresentation inducing contracts and I just refer to page 1041.

McGRATH J:

So which volume are we in again, here?

MR BARTON:

It's six, the skinny one at the end and that's on page 1041, on the left-hand column, which is 374 of the Otago Law Review, the last sentence of that paragraph where the author says, "In the case of a misrepresentation which is held to constitute a breach of contract, prima facie the measure of damages is the difference between the value of what the representee received and what he would have received if the representation had been true." So that was being written at about the same time as the *Dynes* case. Now I only refer to that, my proposition is that it is an even handed approach but there is uncertainty in this area.

McGRATH J:

Well does *Ruxley* say anything about it, because as you say, well you have referred to that already and that seems to be one of the latest cases?

MR BARTON:

Does it refer to – no well –

McGRATH J:

The movement that Justice Tipping suggested they might have taken in the law, to really set up a presumption of performance damages.

MR BARTON:

No, no, in my submission, coming out of that is it is still, it is an even approach and one looks at the circumstances of the case to decide what, how you do justice between the parties.

McGRATH J:

Well have you looked at Australia on this because there was that judgment, *Sir Owen Dixon and others* in *Bellgrove v Eldridge*, that I mentioned yesterday in 1954, that was referred to in *Ruxley*.

MR BARTON:

Yes it is referred to. The *Dynes* case went to the Court of Appeal and the High Court decision was upheld and in the Court of Appeal there is reference to the Australian case. So no I don't, it is not in the bundle, the Court of Appeal but I could supply it.

McGRATH J:

Is there anything you can draw from that or other cases in Australia, that indicate how they see the principle, because I think we have got to start with the right principle, even though obviously reasonableness is still the ultimate criteria.

MR BARTON:

No, no change to that basic principle which is the even approach which as expressed in *Dynes,* which is endorsed effectively by the Court of Appeal by upholding that decision and the Court of Appeal had discussed the Australian case at the same time, as referred to it so in my submission, this is the basic principle, the even handed approach.

McGRATH J:

So that is your term, the even handed approach, is it not, and does that mean there is no presumption?

MR BARTON:

There is no presumption.

McGRATH J:

And so the position stays, as Justice Tipping expressed it, in that passage you have just referred to?

MR BARTON:

Yes that is my submission and yes that is the case and another parallel I suppose is you look at the Sale of Goods and under sections 52 and 54 there is assessments of how damages are to be calculated there and that is difference in value but that is the prima facie rule, but I refer that also as being, there is an expectation, that is one way of working out an expectation loss, difference in value and you can get that from 52 and 54 of the Sale of Goods Act. Now I appreciate that is specific statute, dealing with goods but there is a relevant parallel.

McGRATH J:

A lot of the cases seem to concern building contracts don't they because someone already owns the land.

MR BARTON:

Yes.

McGRATH J:

And like the *Dynes* case, they then look to such factors as what the contract was for and what was to be achieved by the contract but that perhaps isn't quite so applicable here.

MR BARTON:

No and that is where the sort of scenario where one looks at what tests is most appropriate to apply in the circumstances, to do justice rather than saying the starting point should be this way or the starting point should be that way and so in my submission, that test wasn't expressed in that way by the Court of Appeal and after that one, should then apply, that is the circumstance of this case. Unless Your Honours have any further questions, that is probably as far as I can take the damages matter and in terms of MDC and the LIM, I don't propose saying anything more than is already put in, in written submissions.

McGRATH J:

Are you going to address or is someone going to address the *Eastgate* argument at all?

MR BARTON:
Um –

McGRATH J:
Well that may be just left to Mr Casey, I am not quite sure where this common ground between you and your opponent –

MR BARTON:
I am on the same side on this point Your Honour. My learned friend is volunteering, yes.

ELIAS CJ:
Thank you Mr Barton.

MR CASEY QC:
I do feel in relation to that last point as if I am a third of the Billy Goats, I wasn't really expecting.

ELIAS CJ:
Does that make us trolls?

MR CASEY QC:
I wasn't altogether expecting to have the carriage of that particular issue and, depending on how the Court prefers, I'm happy to deal with the MDC issue first, although in my written submission I deal with the claims in relation to the award of damages under the Contractual Remedies Act as my first point.

I respectfully adopt the written submissions that have been prepared by both my learned friends Mr Ring and Mr Barton, in opposition to the MDC appeal, and I have developed some submissions of my own, and I'm not sure that I should do more than try and address some of the issues that were raised with my learned friend Mr Goddard yesterday, because Your Honours will have the benefit of being able to go back to those written submissions and take from them what you can.

The first point of my learned friend Mr –

ELIAS CJ:

Sorry, are you dealing first with the MDC appeal?

MR CASEY QC:

I'll deal first with the MDC appeal if that's in order.

ELIAS CJ:

Yes, thank you.

MR CASEY QC:

Thank you, Your Honour. The first – well, MDC's appeal is in two parts. Essentially, one is that there is no duty of care owed in the provision of the LIM, and the second is this question of whether damages come first or last and whether any damage at all has been suffered.

If I deal with the first point. The point I want to make is that my learned friend hasn't addressed you at all, in his oral submission at least, on a first principles approach as to the construction of a duty of care where the circumstances in which a duty of care can be derived, the authorities on that. He skipped over that entirely and I'm not sure whether that's because he accepts that but for his arguments surrounding the Local Government Official Information and Meetings Act and the various other arguments that he developed there would be a duty of care. The situation that I argue is that if one goes to the *South Pacific* and the *Body Corporate* in those other cases, *Rolls Royce* and the like, as has the Court of Appeal and the High Court in this case, then you are driven to the same conclusion that they come to, which is on the tests of proximity and relationship and policy, all of those pointers drive you to the same conclusion that they came to, which is that there is a duty of care in these circumstances. None of the parties refer to the recent decision of this Court in the *Sunset Terraces* and *Byron Avenue* appeals, *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* (SCNZ SC27/2010, SC28/2010, 17 December 2010). I refer to it at this point by simply saying or, I guess, reiterating the point of His Honour in the Court of Appeal in my case, that what's sauce for the goose should be sauce for the gander, and if the Councils, as they seem to seek to rely on the non-obtaining of a LIM as contributory negligence in the leaky building type claim, that is, there's a duty of care or a contributory negligence of a party not obtaining a

LIM, then it would be disproportionate and anomalous, in my submission, for the Council not to be under a duty of care in the provision of the LIM.

Dealing with, I think, the first point –

ELIAS CJ:

Well, what the argument though may do, I agree that there is that connection, but it may point up, if it's accepted, difficulties with the approach adopted towards LIMs, in terms of contributory negligence for example.

MR CASEY QC:

Well, yes. If you were to uphold my learned friend's submission that a Council owes no duty of care in the preparation and provision of a LIM, then it will have far-reaching consequences obviously –

ELIAS CJ:

Yes.

MR CASEY QC:

– well beyond its impact on leaky buildings. My friend drew your attention to the agreement for sale and purchase, and I do likewise, that's at volume 4 of the bundle, at tab 63 page 591. Now, practising in Auckland, I'm not aware of the widespread use of the Auckland Law Society's form of agreement for sale and purchase, but it was clearly used in this case and I'm assuming it's used commonly around the country. But you'll see that there is explicit provision on the form of agreement for sale and purchase about the provision of a LIM and there are conditions at 8.2, which is at page 595 in the bundle, as to what that means and what the implications are of a condition or a LIM condition in the standard agreement for sale and purchase.

ELIAS CJ:

Sorry, where's that? In 8. –

MR CASEY QC:

8.2.

ELIAS CJ:

Sorry, I was looking at 6. Yes, 8.2.

MR CASEY QC:
Yes.

McGRATH J:
So which particular paragraphs in 8.2 are you relying on?

MR CASEY QC:
The ability to approve or disapprove the contract, based on what is in the LIM, and therefore effectively a condition precedent to, or a condition in the contract, but it can be terminated if the LIM is, or according to what the LIM does or doesn't disclose.

McGRATH J:
Sorry, where's that at?

MR CASEY QC:
8.2. – sorry.

McGRATH J:
I'm not as familiar with it as you probably are.

MR CASEY QC:
8.2(1)(c), "That agreement is conditional upon the purchaser's approval," sorry, "A purchaser approving that LIM," the wording is a bit hard to read.

McGRATH J:
Thank you.

MR CASEY QC:
And then it goes on, "If the purchaser doesn't approve the LIM," so on and so forth.

Now, in the evidence that was before the High Court, there was an acceptance by the Council's witness that LIMs were relied upon extensively, knowledge of that, and also there were two well-experienced legal practitioners, Mr Eades was one of them, and in my submission I've provided you with the extracts of the evidence of both of those witnesses about the importance that is placed, and the knowledge of that

importance. The consequence if the Council owes no duty of care in the preparation of a LIM would be to undermine what I submit is a main purpose for LIMs, which was so that you no longer had lawyers and other advisers having to attend at the Council, ask for the Council's records, go through them and try and discover for themselves what the Council is now expected to provide in the LIM. If the law is that the Council can proceed as carelessly as it likes and that you have no assurance, no reasonable assurance, that the LIM has been prepared carefully, then those advisers themselves, to avoid being found careless in the advice they give to their clients, would have to undertake that work and could no longer place any confidence in what the LIM provides.

So that builds on my submission that I've already addressed in my written submission, that one of the purposes for which LIMs were introduced or the LIM procedure was introduced, was to streamline that process and keep it under the control of the Councils, so the Councils could maintain their records and be confident that they weren't all over the show from people looking at them. But that situation would have to return if there was a finding that the Councils had no duty of care.

ELIAS CJ:
Are you going to take us to anything further in the statutory scheme in particular, that supports that argument, as opposed to the way people have assumed LIMs work?

MR CASEY QC:
Not –

ELIAS CJ:
You know, because the agreement for sale and purchase, for example, and the practice that's been adopted on the appellant's argument on this point are perhaps misconceived.

MR CASEY QC:
Yes, the – obviously the point in the statute is subsection (5), which talks about the assumed reliability of the information under, at least under subsection (2) in the LIM. In my submission that's not been put there by accident. I don't entirely follow my learned friend Mr Goddard's position that there is no distinction between subsection 2 information and subsection (3) information, where there clearly is a distinction in subsection (5). I think it's because he wants you to find that information

provided under subsection (2) is the same, in the same category as information provided under subsection (3). The situation we have in –

ELIAS CJ:

And that is all official information under Part 2 as – or whatever, the other parts as well, yes.

MR CASEY QC:

Yes, under Parts 2, 3 and 4. I will be taking you through the statute obviously –

ELIAS CJ:

Yes, thank you.

MR CASEY QC:

– and why I say that my learned friend is wrong on a number points he makes.

TIPPING J:

I'd also like you, and I'm sure you're going to deal with this so-called anomaly point.

MR CASEY QC:

Yes.

TIPPING J:

Because that struck me, with respect, as being Mr Goddard's strongest argument.

MR CASEY QC:

Strongest argument. Well, I've got a few bits and pieces of paper that I'd like to hand up.

ELIAS CJ:

Well, would it be sensible – unless you want to continue your introduction – to take the adjournment now and you can pass those…

MR CASEY QC:

Well, perhaps I can just pass up the paper and tell you what I've just provided for you?

ELIAS CJ:

Yes.

MR CASEY QC:

On a completely unrelated topic, the first on the pile is reference to a case called *Ellmers v Brown* and a one-page summary by me of that case. That relates to the appeal in respect of damages by my learned friends Mr Ring and Mr Barton, and I pass over that for the moment. Then under the, the next one is some extracts from the Resource Management Act, and the first is section 33 and the transfer of powers. Now that's relevant, as I'll come on to, because what it tells you is that a regional council can transfer to a district council its consenting powers including, for example, in relation to the issuing of water permits. So through that mechanism the district council could well be, not only in relation to water permits but other possible consenting powers of the regional council, the local authority that has that information, because it was the council that authorised the consent. So it's not simply through the accident that my learned friend Mr Goddard refers to of a council being a unitary authority, that a district council or a territorial authority as we call it, can be seized of the consenting powers or the consenting regime that otherwise would be a regional council regime.

ELIAS CJ:

But the anomaly then is that regional councils may be the consenting authorities and maintain the records.

MR CASEY QC:

It may or may not be, and it's not only in the case of unitary authorities that they're not.

ELIAS CJ:

No.

MR CASEY QC:

The other point while I'm on it is, if I just refer quickly to the Local Government Official Information and Meetings Act, section 44A subsection (2)(b) or (bb)(iii), which is at the top of page 112.

TIPPING J:

I've forgotten which volume.

MR CASEY QC:

Sorry, it's at volume 1 of the casebook. One of the mandatory requirements to be included in the LIM under that subsection or sub-clause (iii), is if the land is supplied with water by the owner of the land any information the territorial authority has about the supply, so that could include for example that the territorial authority has information about the regional consent that may or may not have been granted, and if it has that information it's got to provide it

McGRATH J:

So what section's this?

MR CASEY QC:

This is section 44A subsection (2) sub-clause (bb) sub-clause (iii), which is at the second of the paragraphs at the top of page 112 of the bundle.

McGRATH J:

Yes.

TIPPING J:

Does that mean that if the owner gets the water from anywhere and the territorial authority knows about that, they have to say?

MR CASEY QC:

They have to provide what they know. Now, it may be – I mean, there's a duty of care here, but I think the point that's overlooked by my learned friend is that –

ELIAS CJ:

Sorry, I missed that.

MR CASEY QC:

If you've got page 112, Ma'am?

ELIAS CJ:

Yes. I've got section 44A, which provision were you referring to?

MR CASEY QC:

It says, the one at two paragraphs down, "If the land is supplied by water by the owner of the land."

ELIAS CJ:

Sorry, which – just tell me the section number?

TIPPING J:

Subsection (2)(bb).

ELIAS CJ:

(2)(bb), thank you

TIPPING J:

Level (iii).

ELIAS CJ:

Thank you, yes, I see. Yes, thank you. Isn't this all about drinking water, this? I know it doesn't repeat, "drinking water" in (iii), but if you look at it in context all that seems to be about drinking water.

MR CASEY QC:

Well, that may be so, in some contexts, but in the usual context if the owner is supplying water, even if it is drinking water, it will be supplied pursuant to a water permit, so it's not unlikely in that event that the territorial authority would have information about it.

Now, I might break there and –

ELIAS CJ:

It's not as specific of course as like consents issued by the territorial authority, it doesn't add consents of which it knows issued by anyone else.

MR CASEY QC:

Yes, but on the other hand it doesn't lead to this point that my learned friend makes, which is information about water permits is such an anomaly that it drives the rest of the question of whether a duty of care exists in respect of the –

TIPPING J:
It waters down the anomaly, if you'll forgive me.

ELIAS CJ:
Right, thank you, we'll take the short adjournment now.

COURT ADJOURNS: 10:46 AM
COURT RESUMES: 11:03 AM

ELIAS CJ:
Mr Casey before you get underway, there is just a question I have relating to the public notice imposed on regional councils. It occurs to me that a major plank of Mr Goddard's argument is that there is official information or there is LIMs or that LIMs is included in the Official Information Act and that the regional councils, if you went to the regional councils seeking information about a water right, it is official information and therefore subject to section 41 and that is the anomaly. It occurs to me that consents may not be official information, in that I wonder if there is any system imposed under the statute for the regional authority to maintain a register that is available for public inspection, because that would substantially water down Mr Goddard's anomaly, it seems to me.

MR CASEY QC:
Well as it turns out, the next page in my bundle is section 35 of the Resource Management Act and that applies to all local authorities which include regional councils and it is an obligation to keep records. "To gather information, monitor and keep records," and they include records, if you go across the page, of all applications for resource consent under subsection (g); of all decisions made under (ga); of all resource consents granted (gb); and of the transfer of any resource consents (gc), so there is obligation on the councils, to keep and maintain those records.

ELIAS CJ:

And what about inspection of those records, is that provided for? One would think that it must be.

MR CASEY QC:

If I just go back and it is under subsection (3). "Every local authority shall keep reasonably available at its principal office, information which is relevant to the administration of policy statements and plans, the monitoring of resource consents, and current issues … to enable the public – (a) to be better informed…" in this way and the information that is required to be kept, is then, that listed in subsection (5) I have just referred Your Honour to.

TIPPING J:

Does this mean that if there were no Official Information Act, anyone would be inclined to bowl up to the Council and say, show us your record about consents relating to property X?

MR CASEY QC:

I don't want to take, I mean I could if you ask me to, to take you further about whether they fail to do that.

BLANCHARD J:

Well no, I think this is a very important point.

MR CASEY QC:

Well with respect, so do I.

TIPPING J:

Does this over ride the Official Information Act in the sense that there is this statutory duty to make them available?

MR CASEY QC:

Well there is a statutory duty to keep them up to date and if that duty was, if there was a carelessness in the exercise of that duty, there could be separate action against the regional council for carelessness.

BLANCHARD J:

Well what do the words "keep reasonably available" mean if they don't mean available to somebody who wants to search?

MR CASEY QC:
That's right, well that is what they must mean if you go on to read, "To enable the public to be better informed and to participate."

ELIAS CJ:
But do you know whether there is a specific provision dealing with inspection of records?

MR CASEY QC:
Not so far as I am aware, under the Resource Management Act, other than this one here, about the keeping available for public.

ELIAS CJ:
What are regional, sorry to display such ignorance, but what Act governs the operation of regional councils, the Resource Management Act?

MR CASEY QC:
Well a number do. The Local Government Act of course provides for their establishment. If I can – perhaps it might be of assistance if I was to read out to you the submission I made in the Court of Appeal about this subject, I wasn't expecting my learned friend to develop it, because in my view it is an area that he was not granted leave to address you on. If I just quickly read through this and if there is anything in there that you think is of assistance to you. Under section 2 of the Local Government Act 2002, a unitary authority is defined as a territorial authority. It has the responsibilities, duties and powers of a regional council. A regional council is defined in the Local Government Act by reference to those councils listed in Part 1 of schedule 2, of which the Marlborough District Council is not one. According to the Local Government Act the unitary authority is a territorial authority with additional functions, rather than being a regional council or a hybrid. If I can call it LGOIMA, that's how local body practitioners use local government Official Information Meetings Act, it is awful I know but it is simple.

LGOIMA does not define territorial authorities in regional councils, schedule 1, Part 1 schedules of Local Authorities to which Parts 1 to 7 LGOIMA reply and includes separately regional councils. Schedule 1, Part 1 of LGOIMA schedules the local authorities to which Parts 1 to 7 of LGOIMA applied, include separately regional councils and territorial authorities within the meaning of the Local Government Act. Now the Resource Management Act, on the other hand, defines a regional council by reference to its definition in the Local Government Act and says and includes a unitary authority within the meaning of that Act so for the purposes of the RNA, a unitary authority –

ELIAS CJ:

Is a regional council.

MR CASEY QC:

Can be both a regional council and a district council. So thus for the purposes of the RMA, the unitary authority is both a territorial authority and a regional council but that doesn't alter its status under LGOIMA as a territorial authority.

Now the functions of the regional councils under the RMA are set out in section 30 and include under subsection (1)(e), the control of the taking and the use of water and under subsection (fa)(i) the making of rules and the regional plan to allocate the taking or use of water. Water permits are resource consents granted under Part 6 of the Resource Management Act, consent is required to take water by reason of section 14 by which the taking and using of water is prohibited unless expressly allowed by a rule in a regional plan or by a resource consent. Neither section 14 nor Part 6 are specific, as to the consent authority by whom such a consent is granted.

Consent authority is defined in the definition of section 2 as, "A regional council, a territorial authority or a local authority that is both a regional council and a territorial authority, whose permission is required to carry out an activity for which a resource consent is required under this Act." And so by combination of those sections you'd come to the conclusion that the granting of water permits to allow the taking of water which would otherwise contravene section 14 is a regional council function where there are separately a territorial authority and a regional council. However, where a unitary authority is concerned, it is the consent authority without any differentiation being made between its regional or territorial authority functions.

ELIAS CJ:

Mr Casey, I'm not so concerned about that. I'm more concerned about the official information matter and matter of record divide –

MR CASEY QC:
Yes.

ELIAS CJ:
And whether the scheme of the legislation is that whether it's a unitary authority, a territorial authority or whether it's a regional council, the responsible body maintains a register of consents which is publicly available because if that's so, it doesn't seem to me that there is the anomaly because it's not within the Official Information Act bag, it's a matter of public record.

MR CASEY QC:
Look, I understand that but the only thing I've been able to come up with is what's in section 35, which in my respective submission, does answer Your Honour's point. There is an obligation to keep the record, to keep it current and to make it available.

TIPPING J:
Well, there's potentially a clash between this and the Official Information Act but this must prevail, I would have thought.

MR CASEY QC:
This is specific to that information, that's correct.

TIPPING J:
Yes, which means that it's publicly available without the constraints and other attributes of the Official Information Act.

MR CASEY QC:
Yes, now –

ELIAS CJ:
And one can understand that they'd be no, in principle, inhibition on requiring a duty of care in the maintenance of public records unless there's some specific statutory immunity, because people must be able to rely on them whereas the Official Information Act is just the, you know, includes the correspondence between people.

MR CASEY QC:

Yes, well, there is no doubt that official information under the Official Information Act can cover a whole raft of things and I think I have to say that it includes information about consents, but whether a section 35 obligation under the RMA carves our specifically some additional obligation in relation to those, to that information including consents.

ANDERSON J:

Information of a public nature is envisaged, isn't it, by section 35?

MR CASEY QC:

Yes.

ANDERSON J:

To be made publicly available at the office.

MR CASEY QC:

Well, not just to be made publicly available but is to be kept up to date.

ANDERSON J:

Yes and is to make complaints of non-compliance.

MR CASEY QC:

Yes.

TIPPING J:

Well, I suppose it would come within the general principle with the, the specific prevails over the general?

MR CASEY QC:

Yes.

TIPPING J:

This is a specific provision as to this category, if you like, of "official information".

MR CASEY QC:

Yes, with respect I accept, I agree with that.

TIPPING J:

Well, at least that's the argument. I mean, we haven't heard the contrary yet but it's certainly an argument.

MR CASEY QC:

I'd also, just if I can move on from that point, I don't know whether I can develop it much further other than what Your Honours have already said, point out that what section 41 protects against is not the sort of blanket immunity from liability. Section 41 says that where any information is made available in good faith, pursuant to Part 2 or 3 or 4. Now, that in good faith qualification, has been considered in Australia, at least, in the *Mid Density* that I refer to in my submissions.

TIPPING J:

You can be in good faith albeit careless, can't you?

MR CASEY QC:

Well, yes and it hasn't been tested as far as I'm aware in New Zealand but in *Mid Density*, and that's at tab 30 in volume 3 of the casebook, and I'll just read from the head note because I think it adequately catches the point, "The statutory concept of good faith with which the legislation in this case is concerned, does not operate to leave the council liable only in respect of dishonesty. There must be a real attempt to answer the request for information at least by recourse to the materials available to the authority. The respondent did not act in good faith where no real attempt was made and it had no proper system of dealing with requests for information of the type in question."

BLANCHARD J:

Are you saying that's what happened here?

MR CASEY QC:

Well, we didn't explore that in this case because in the High Court there was an exception that section 41 didn't apply. It's only been, it was only sought to be raised later but what I'm saying is that if a regional council was derelict in its duties, for

example, under section 35 of the RMA, then it may well not avail itself or be able to avail itself of the section 41 indemnity or immunity, because there could be a finding in that situation that hadn't kept its records in good faith.

TIPPING J:
Well, I don't think, I don't see if it wasn't ventilated at trial how we can come to the conclusion there was an absence of good faith.

MR CASEY QC:
No, look, I'm not suggesting that. I'm addressing the issue my learned friend has raised –

ELIAS CJ:
You're addressing anomalies?

MR CASEY QC:
Yes –

BLANCHARD J:
Oh, I see.

MR CASEY QC:
Yes, about there being an anomaly. He's not able to raise the argument that there's no particular duty on care in relation to the supply of water permits because he's been declined leave on that. His argument is that there's no care at all, no duty of care at all in the provision of limbs and he's trying to found that argument on the anomaly. As you said before the tail wagging the dog because there is an anomaly in relation to water rights, then there can be no duty of care in relation to anything is his argument.

BLANCHARD J:
So the tail's only wagging rather weakly?

MR CASEY QC:
Yes or maybe the tail has been cut off, would be my – it's been docked, is my submission. Now, if I can then address my learned friend's about the purpose of the statute and he took you to section 4 of LGOIMA and he used the phrase which I think

is apposite which is that s 44A was parachuted into the Act after it was passed and if you look at the purposes in section 4 there's no a happy fit between the purpose for which information, sorry, the purposes of the Act relating to the provision of official, public or official information and the specific purpose for which section 44A provides which is limbs specific to a property within information about the property and it must be assumed that the legislature looked around for the most appropriate place to put the section 44A and forward it was probably most convenient for it to be in the Local Government Official Information Meetings Act rather than in the Building Act when its purpose obviously extends beyond just information about buildings but information about, more generally, about the property concerned.

BLANCHARD J:

Well, they actually drafted it more widely when they were making that change.

MR CASEY QC:

That's right and I think, you know, with the idea of open public access to statutes, if you were looking for, where to find the statute about limbs, you're more likely to look in the Local Government Official Information and Meetings Act, then you would in the Building Act so it was better to be there but that doesn't mean that it has to fit the purpose of the Act and, clearly, it steps outside the state of purposes which still apply to Parts 2, 3 and 4. The other point I just want to draw your attention to is that my learned friend tried to, well, sought to draw some strength from the fact that potentially other parties, other provisions are set, of Parts 2, 3 and 4, can apply, for example, the recourse to the Ombudsmen in relation to the level of charge imposed, may not may not. It's not clear whether there's a separate regime for charging under section 44A then there is under the other provisions of LGOIMA but he says because some other parts of the Act might apply to section 44A then the, in the inclusion of liability in section 41 must by inference also apply. Well then my answer to that is, well, you can have other parts of the Act applying without it being, without extending the exclusion of liability to those other parts. But also, he talks about the request being made under, for example, section 10. What section 41 purports to protect is information that's made available under those other parts. So you could indeed have a request under Part 10 or you could indeed have the costs being assessed under section 13 or being reviewed by the Ombudsmen, but the issue about section 41 is under what part of the Act or under what section of the Act is the information being made available? It's being made available under section 44A, not under Part 2, 3 or 4.

Now, there was also a request or a question asked of my learned friend during his submissions about other examples of certificates or certification. There is of course the code compliance certificate that is issued under the Building Act. There's nothing in the Building Act that talks about what that means or what effect it has. Clearly, it's not an absolute certificate, because it can be questioned and often is these days, in the leaky building cases. The only other examples that I could readily lay my hands on were the provisions of section 139 and 139A of the Resource Management Act, where the Council can grant certificates, first in relation to compliance and second in relation to existing use. And there's not much in those sections which I've provided to you that helps, other than that under subsection (10) and (11) in relation to certificate of compliance, it says that it's to be treated as if it was a resource consent, but it's subject to a number of other sections and –

ELIAS CJ:
Sorry, what is treated as if a resource –

MR CASEY QC:
A certificate of compliance, it's issued by a district council.

ELIAS CJ:
I see.

MR CASEY QC:
Just to give you a – well, not just a district council, it can be a regional council as well. Where you believe that your activity meets the requirements of the district plan or the regional plan, you can ask the Council to warrant that by means of a certificate of compliance, which you can then set up as proof positive or some evidence that you are complying. And also, if there's about to be a change to the district plan or the regional plan that will render your proposed activity in need of a consent, by getting a certificate of compliance before that change occurs you can avoid that risk. Likewise, existing uses are provided for under section 10 of the Act, and you can get the Council to issue you with a certificate that records your existing use.

TIPPING J:

Is there anything in the point, Mr Casey, that because of the different time limits that pertain to Part 2, as against 44A, it is hard to see a LIM as supplied pursuant to Part 2?

MR CASEY QC:
Well, I'd say that's a make or break point, if I might put it that way, in my favour, that there's no real match up at all between Part 2 and section 44A.

TIPPING J:
Well, if it was supplied pursuant to Part 2, you would have thought that it was have had the 20 day –

MR CASEY QC:
Yes.

TIPPING J:
– factor applying to it, whereas under 44A, this may be thought to be a bit pedantic, but it just demonstrates that the two just don't really fit together.

MR CASEY QC:
That's right, Your Honour, and it's not just a machinery provision or –

TIPPING J:
It's a different regime.

MR CASEY QC:
And it's very specific, I guess one might say, other than in respect of subsection (3), which gives the Council a discretion to add more information if it chooses.

TIPPING J:
Yes.

MR CASEY QC:
But it's very specific about the mandatory matters that are required to conclude it. And I don't know whether or not the LIM in this case was typical, but you will see in the LIM that's been provided in the evidence that there are the various categories listed, and in our case the consents were inserted as being covered by subsection

(d), “Information concerning any consent, certificate, notice, order, or requisition,” they weren’t included as a subsection (3) matter. I might also make the observation, just in passing, that while the LIM included section 44A, it didn’t include section 41, either by setting it out or by reference to it. And don’t overlook the fact that the evidence in this case was that at the time of the over-the-counter enquiry made by the Vining person, they were required to sign a disclaimer, drawing their attention to the fact that there was no comeback on the Council, that's at volume 4 tab 47. And it infers, if it doesn’t say so directly, that if you want information reliable, then you should seek a LIM. The disclaimer says, “The information is made available under sections 10 to 18 inclusive only, it doesn’t warrant the accuracy and disclaims all liability for error and accuracy or incompleteness, shouldn’t rely on the information without seeking appropriate independent and professional advice, the information provided does not constitute a LIM or any similar document.” Now, His Honour in the High Court treated that, in my respectful submission, correctly, as being a clear signal that if he required the increased level of accuracy and –

TIPPING J:
Sorry, the page you were referring to, Mr Casey?

ELIAS CJ:
501.

MR CASEY QC:
It’s at tab 40 – sorry, tab 47 of the bundle 4.

TIPPING J:
Thank you.

MR CASEY QC:
It’s the release of information form. Now, we’re also told that was kept on the file. So the Council no doubt has fixed with some notice that there has been a recent enquiry about the property. My learned friend addressed you on this point about whether the additional cost that would be required to cover off the liability was an unreasonable impost to spread across requestors for LIMS. In my respectful submission – well, the evidence that we have for a start is that the $275 that was being charged was more than enough to cover the Council’s costs, and so I think His Honour found there was no reason why the Council couldn't ensure against it and, in my respectful

submission, that people requesting LIMs rather than just turning up for or asking information for general purposes, people requesting LIMs, would be prepared to pay the extra cost in return for the assurance that some care was being taken, and it's a not insubstantial cost, $275 back in 2004, it would be more than that now. Otherwise, of course, why bother if the law is to be that the Council can be careless and the information can't be relied on. It's of no value whatever. So the fact that you could get that discrete information at little or no cost, and the knowledge that section 41 tells you, you can't rely on it –

TIPPING J:
It's not really conducive to good administration.

MR CASEY QC:
No.

TIPPING J:
I mean, maybe there's a good policy reason for it in relation to general Official Informant Act enquiries but…

MR CASEY QC:
Yes, because my friend is right, those sorts of enquiries can cover a whole range of all sorts of things, even what's in the mind of the council officer theoretically can be official information, whether it's recorded in writing or not but here, coupled with the obligation to keep these records and the clear obligation under 44A(2)(d) to provide information about them, in my respectful submission, all of the other indicators that are discussed in the Court of Appeal and the High Court judgments, point to the imposition of a duty being reasonable.

ANDERSON J:
Someone said I make a request under Part 2 for all the information that you put in a LIM and counsel would say well, that's actually a LIM request.

MR CASEY QC:
Yes and they're under an obligation then to, in Part 2, to treat it as a LIM request.

ANDERSON J:

And charge accordingly.

MR GODDARD QC:

And charge accordingly, yes.

TIPPING J:

Was there a case called Sharp and the Minister of something or other in England, where you applied to some Ministry official for information and the English Court of Appeal held that there was a duty of care? Am I dreaming Mr Casey, or – Sharp and somebody or other? It's just – housing, was it Minister of Housing?

MR CASEY QC:

Yes, my learned friend tells me, it's *Ministry of Housing and Local Government v Sharp*. In the bundle at volume 6, paragraph – sorry, volume 6, tab 52, we've provided you with some extracts from the text by Cherie Booth & Squires, called *The Negligence Liability for Public Authorities* and in the extracts that I refer to in my submission, there is a distinction drawn between over the counter or over the telephone casual enquiries, where liability doesn't attach and those where the person seeking the information makes a formal request.

If I take you to page 100 and – oh sorry, 1026, I'm just not sure whether the case that Your Honour has – oh yes, the case Your Honour has asked about is referred to in footnote 257 which is discussed at paragraph 3.93.

TIPPING J:

Not quite the same, is it?

MR CASEY QC:

No but the discussion that I respectfully submit is of more assistance and relevance in this case, is the next paragraph, 329 and onwards which talks about inaccurate advise and the duty of care that arises. At 3.95, across in the other column, "Claims have however tended to fail in practice because claimants have been unable to establish that it was reasonable for them to rely on the statements of the public authority in the manner in which they did without further enquiry. Claims have failed because claimants relied on brief telephone or other informal conversations to make decisions with sufficient financial consequences –

TIPPING J:

Yes, I was a bit off target but it was this, it was this sort of outfit was really what I think I was thinking of and these cases make that distinction, as you say, between a more casual enquiry, if you like and a more formal enquiry.

MR CASEY QC:

That's right. Now, my learned friend says well, even a formal enquiry under Part 2 fails because of section 41. My submission is that but for section 41, a formal and specific enquiry under Part 2 would give rise to a liability and that's why section 41 purports to exclude it. You wouldn't need section 41 if my learned friend's submissions otherwise would correct that no liability would attach.

And of course, begs the question as to what is the liability if the, as in *Mid Density*, the information was provided otherwise that in good father, that is there hadn't been a thorough search. Is it to say that with or without the good faith qualification there is no liability?

TIPPING J:

The last statement in paragraph 3.94 of the textbook that you're referring to, "If however it could be shown that it is reasonable for the claimant to rely on the defendant without further enquiry, there is no reason why liability out not to be imposed if a public authority makes a careless statement directly to a claimant which the latter foreseeably relies to his or her economic detriment." I mean –

MR CASEY QC:

Yes, well that's my case of course and that's why section 41 presumably would exclude that liability in a case to which it applies and we have the finding in the Court below in respect of which leave has not been granted, that section 41 does not apply under section 44A.

ANDERSON J:

The footnotes at 265 are quite helpful to you I think Mr Casey.

TIPPING J:

There's that Australian case of Gibbs CJ , who is missing his 's' here. It seems to me, with respect, that the answer is pretty straight forward unless the statutory

scheme clearly is inconsistent with the common law duty and you say it's not, if any it supports it.

MR CASEY QC:

Yes, very much so. Why else have section 41 if you weren't intending to oust, at least in part, the common law?

Now, the only other additional point. My learned friend addressed you yesterday, my learned friend Mr Goddard, on the question of delegation under subsection (3). I think he's right in relation to the Local Government Act as it was at the time in – which was the 1974 Act. I've provided you with section 32 of the 2002 Act where delegations are now more extensive. It used to be that the power to delegate two officers was in specific legislation and Local Government Act only provided for the power to delegate powers under that Act, or functions under that Act and others Acts provided for their functions to be delegated. There's now more general power of delegation under section 32 of the 2002 Act.

I'm not sure where that leaves us and one might say it was just a gap in the legislation and some legislation is passed with gaps. That doesn't mean that there was a contrary intention when they were passed.

Now, I don't want to resolve from or detract any of the other points I make in my submission, my written submission but I want to move on now to the other point about the damages question, if that's appropriate, convenient.

Now, in my submission, my learned friend's arguments have a number of fundamental flaws. His argument is that because – or, his assertion is, that because the claim under section 6 of the Contractual Remedies Act is a deemed statutory term then it is to be taken as if it is a term of the contact for all purposes.

If I can address the argument – well, if I can encapsulate his argument at being at two levels. One is that if there is a contractual obligation, or if there was here, a contractual obligation to provide this water then that obligation has to have been either fulfilled or valued before a loss can be demonstrated that is recoverable against a tortfeasor, in this case the Council. So he says, his argument is that any contractual term in a contract which has been induced by negligence has to be

played out before you can demonstrate whether there's a loss or not recoverable against the tortfeasor.

The second level that his argument comes down to then is to equate the misrepresentation with a contractual term in that context and it's probably appropriate if I try and deal with each of them, acknowledging that there is a separate between the two because I don't accept his premise that the misrepresentation elevates to a term of the contract for the purpose that he's identified.

ELIAS CJ:
What? For the purpose of damages?

MR CASEY:
Well, no, for the purpose of liability. Because he says the contractual liability logically goes first and I'm saying it's not a contractual liability, it's a measure of damage, according to a contractual measure, but it is not a contractual liability.

ANDERSON J:
It's a statutory remedy.

MR CASEY QC:
It's a statutory remedy. There are two wrongs in play here, the wrong by the council, whose negligence induced the contract and the wrong by the vendor, whose misrepresentation induced the contract.

TIPPING J:
But does not that misrepresentation become a term under section 6?

MR CASEY QC:
No, the recoverability of damages for the misrepresentation is as if it was a term, but the nature of the claim is still one for inducement. You have to, for example, prove that is an essential element before you can get to that point, that there was a materiality in inducement.

ANDERSON J:

Because section 6 doesn't say it becomes a term of the contract, provides a remedy for damages in the same manner and to the same extent as if it were a term of the contract.

MR CASEY QC:

Yes, now in my submission I go though that section 6 was intended to be remedial but it was not intended to produce the result that my learned friend contends for, which was to confer a benefit on other tortfeasors. It was to convert, if you like, the tort of misrepresentation to extend it to innocent as well as negligent or fraudulent and to convert the measure of damages recoverable under it to a contractual measure.

MCGRATH J:

But there was no tort of misrepresentation.

MR CASEY QC:

That's what I'm saying, extent of the tort to innocence.

MCGRATH J:

Oh, I see what you mean.

MR CASEY QC:

Yes, but not to benefit another tortuous actor, who may also have induced the contract by some other means.

MCGRATH J:

Just give us the paragraph methods as in your submissions that you've just been referring to. There's no need to go to them.

MR CASEY QC:

No.

MCGRATH J:

I'm perfectly happy with the way you're explaining your points, yes.

MR CASEY QC:

Paragraph 123 onwards here at page 27 of my submission, I expressed it quite briefly, because I was happy to pick up on what the other parties, my learned friends, Mr Ring and Mr Barton had said because of course I had the benefit of their submissions.

TIPPING J:
I think you're putting a rather different spin on it from them.

ELIAS CJ:
I'm not sure that I quite understand your point, because why does section 6 enter into it at all as between the counsel, the tortfeasor and the plaintiff?

MR CASEY QC:
Well, that's because of my learned friend's argument that section 6 converts the representation into a term of the contract and if it was a term of the contract, his argument is that applying the *Nykredit* approach, you have to exhaust your remedy or at least have that remedy valued before assessing whether there's a loss.

ELIAS CJ:
I thought the approach was rather more direct, which was that the tort induced the entry into the contract.

MR CASEY QC:
Yes.

ELIAS CJ:
Sorry, I thought your argument here was directed at liability.

MR CASEY QC:
Well, it is, because my learned friend says there's no liability on the tortuous inducer unless damages suffered by the plaintiff.

ELIAS CJ:
Yes, but the damage is entering into the contract.

MR CASEY QC:

Yes, well, parting with your money and getting less for your money that what the inducement told you, you would get.

TIPPING J:

But his whole argument is that the contract was not lost make, no, as I understand it, are you saying that there was a loss consequential upon the entry into the contract?

MR CASEY QC:

Yes, and it comes back to at what point in time do you measure the loss. At the point in time that Altimarloch entered into this contract, it acquired under the contract land and a certain number of water, or certain permits, so the cold hard fact is that the land and the permits were what it acquired under the contract, because clause 20 says, "The permits that relate to the land will be transferred," and as a matter of fact those permits were the lesser ones, not the missing one, so Altimarloch suffered a loss when it passed over its money and got back and returned the land and less or fewer permits than whatever had been represented by the council. Now, the quantification of that loss is a subsequent matter and the issue then becomes, is the loss that it incurred as a result of the council presentation of the same nature as the loss that it incurred as a result of the other representation in my submission.

ELIAS CJ:

So why is it necessary to do that if the position is reached, that the bundle of rights it has against the contract breaker, eliminates any loss in entry into the contract?

MR CASEY QC:

Yes, well, the bundle of rights that it has against the contract breaker are not contractual rights. It's as if there were two inducers, there might have been the council being negligent and someone else being negligent, both of whom are inducing the contract. The contract is entered into. What the plaintiff then has is a bundle of rights, which includes a right of claim against each of the inducers, why should one inducer say, you must exhaust your remedy against – you must exhaust the bundle of rights that you have against the other inducer before you can come to me.

ELIAS CJ:

Because damage is part of the tort.

MR CASEY QC:

Yes, but if both were tortuous wrongdoers, then – and if I succeed in full against wrongdoer A, wrongdoer B can say, well, you have not suffered any damage anymore, you can't succeed against me because you've suffered no more loss, but I can sue them both, A and B and one can't say, well, because B is good for his money and he'll pay you and he's liable to, you haven't suffered any loss.

BLANCHARD J:

Are you saying and I may be being a bit slow here, that in the case of an innocent representation, silently section 6 creates a tort and then provides a contract measure of damages?

MR CASEY QC:

No, no, section 6 gives rise to a cause of action for inducement.

BLANCHARD J:

What's the nature of the wrong? Is it a cautious cause of action or a contractual cause of action?

MR CASEY QC:

It's a statutory cause of actions that's conferred by statute.

BLANCHARD J:

Equated whether a breach of a contractual term –

ELIAS CJ:

Yes, it's deemed to be a contractual term.

MR CASEY QC:

For the purpose of assessing damages against the wrongdoer, yes it is, it's equated to be a contractual term for assessing damages, but the liability involves not just the contract but the inducement, so there has to have been the inducement as well as the contract.

ELIAS CJ:

Well, you don't get to section 6 and the deemed term of the contract unless there's an inducement.

MR CASEY QC:

Yes, but my learned friend's argument is you get there just by having a contract. It's a right that is conferred by contract, it's not, it's a right that's conferred by a combination of the contract or a bundle of rights, a part of the bundle of rights conferred by the contract, by the statute and by the inducement.

BLANCHARD J:

It's not conferred by the contract because it's not part of the contract.

MR CASEY QC:

Well, in the sense that you have to have entered into the contract to be able to sustain the claim.

BLANCHARD J:

In a way it's equating innocent and fraudulent misrepresentations and saying the measure of damages shall be the contractual one and not the tortuous one.

MR CASEY QC:

Yes.

BLANCHARD J:

But does that mean that the wrong suffered is a tort in both cases?

MR CASEY QC:

No, I don't, with respect I don't submit that it –

BLANCHARD J:

I don't see if I could help you if it did.

MR CASEY QC:

Yes, yes, I know, but I don't think I can submit that.

ELIAS CJ:

Well, you can't, because of the statute.

BLANCHARD J:

Well, I'm not sure about that, it's actually silent.

ELIAS CJ:

Oh, doesn't it go on to say you can't sue in tort?

ANDERSON J:

The statute does two things in section 6(1A), first of all it creates a cause of action.

MR CASEY QC:

Yes.

ANDERSON J:

She'll be entitled to damages and then it describes how the damages are to be assessed, so the cause of action, not the remedy, but the cause of action is essentially statutory.

MR CASEY QC:

Yes.

ANDERSON J:

And therefore more analogous to tort than to contract, so you have the analogy of joint tortfeasors, not by the nature of how the remedy is assessed by the right to damages as it arises.

MR CASEY QC:

That's right, that's how I'm trying to express it. With respect, I think that it's been quite careful to avoid categorising the cause of action, other than just to state it as an entitlement to damages.

BLANCHARD J:

Well statutory entitlements to damages usually aren't categorised.

MR CASEY QC:

No.

BLANCHARD J:

But they are, as my brother Anderson said, more normally treated as the equivalent of a tort.

MR CASEY QC:

Yes and in my respectful submission, that is probably the correct approach to start with.

TIPPING J:

I am not at all convinced that any of this matters. Your client has put them into a contract, induced them. Now surely if they have suffered no loss, as a result of entering into that contract, never mind why, your negligence has caused them no loss, sorry the other way round. Their negligence has caused your side no loss.

MR CASEY QC:

But that depends on which cart comes before which horse.

TIPPING J:

Well no, I don't think it does. Well that is the issue I suppose.

ANDERSON J:

If you have joint tortfeasor, the plaintiff can elect to sue both or either of them.

MR CASEY QC:

That's right.

ANDERSON J:

Doesn't have to sue them in any particular order. The one who sued, well as a matter of practice, join the other one, but if that doesn't happen, the plaintiff's debt or a plaintiff's claim is discharged by the person whom it suits.

MR CASEY QC:

That's right.

ANDERSON J:

That person may have an equitable right to a contribution and a separate action against the other joint tortfeasor but the plaintiff is out of it at that stage.

MR CASEY QC:

If I can just take that analogy a little bit further and postulate in this case, it would sue the council alone and not the vendor for misrepresentation, at what point could the council have set up our potential claim against the vendor for misrepresentation, in saying that we hadn't suffered any loss. It is different in the *Nykredit* case, where within the terms of the contract it is clear that there is a contracted for obligation, but there is no contracted for obligation to provide the extra water. It depends on bringing and succeeding in, a claim not just that there was a contract but that there was an inducement and a representation, well a representation that induced it. So what we have acquired in our so called bundle of rights, is a cause of action, not a contractual entitlement.

TIPPING J:

Does this capture your proposition that section 6, sets up a cause of action equivalent to a tort, but redressable by contract measure of damages?

MR CASEY QC:

That would be a fair way of expressing it with respect. I know that Wild J in the High Court didn't treat it that way in his judgment on the apportionment of damages. He said it wasn't tortuous, it was essentially contractual.

TIPPING J:

I have to say that I think the architects of the Contractual Remedies Act might be a little startled at this proposition.

ELIAS CJ:

And I was just wondering about the report of the contracts and whatever it was, committee, because I thought they were trying to get away from all of this complexity.

MR CASEY QC:

I guess I shouldn't jump too quickly to agree with you but I say that I think His Honour Justice Anderson probably had it more appropriately, which is that it is a form of a statutory remedy, akin to a tort.

TIPPING J:
A course of action, equivalent to a tort.

MR CASEY QC:
Akin to.

TIPPING J:
Akin to.

ELIAS CJ:
And *Nykredit* is not applicable because that applies only – why should the result be so different, according to whether there is a term of the contract that you will supply these water rights?

MR CASEY QC:
Well, that comes back to the first level that I guess I haven't come on to, as to whether it is right to say that in any contract the *Nykredit* principle applies because *Nykredit* was, at least in the *Eastgate* case, was confined for its particular facts, where there is a covenant by a debtor, whereas other terms, that's right. A covenant by a debtor to pay, in the case of a term, if this had been a term in the contract which had been breached, then it gives rise to a cause of action for the breach, it is of a different character to the covenant that is in the contract.

TIPPING J:
Well this actually introduces quite a serious complexity into this case because if you look at section 5 of the Contractual Remedies Act, you see the well known provision that if the contract expressly provides that takes precedence over the sections. Now it could well be argued that this contract does expressly provide, it is just a little short on horsepower as to describing precisely what those section 10 or whatever it was, rights actually were but you could fill that up as a matter of express contract, without the slightest difficulty. I mean this is quite a serious and tricky point Mr Casey and has it been sufficiently explored below.

MR CASEY QC:
Well I am not sure that it has.

TIPPING J:

No.

MR CASEY QC:

But can I just indicate that I am not sure that I am –

TIPPING J:

I am not criticising you at all but I am just sort of thinking aloud because you see, this contract. Everyone sort of proceeded on the premise that it was a section 6 term but if you are faced with this argument, which I have to confess I find pretty ingenious, then you could easily turn round and say it is an express term.

MR CASEY QC:

Well no because section 5 talks about displacing sections 6 to 10.

TIPPING J:

Well what I am saying here is that it is more than arguable that there was an express warranty here, if you want to use that word or an express term, because of that hand written addition, wasn't it at the end of the contract and if it is going to turn on whether it is an express term or a section 6 term.

BLANCHARD J:

Is that handwritten term a remedy?

TIPPING J:

Well –

ELIAS CJ:

No it is not a remedy, but it is a term.

BLANCHARD J:

Yes but section 5, which is troubling Justice Tipping, is about a contract expressly providing for a remedy.

MR CASEY QC:

Your Honour, two answers I think to your question. The first is it was never pleaded and pursued as an expressed term in the contract. It might have been –

TIPPING J:

If it was an expressed term it would carry with it, by necessary implication, a remedy wouldn't it, I take my brother's point but I am just finding this argument interesting, very interesting but I don't think it is what they intended by section 6.

ELIAS CJ:

I don't think it fits within the structure of section 6.

MR CASEY QC:

You mean my argument or my learned friend's?

ELIAS CJ:

Well your argument. You don't get to the deeming provision until you accept that there has been an inducement but once it is accepted that there is an inducement, the damage is in the same manner and to the same extent as if a term of the contract. What can that mean, except but that? It is treated as if a term of the contract.

MR CASEY QC:

Yes and you are entitled to the contractual measure of damages, but the cause of action in terms of the relationship between the wrong doers is not a contractual cause of action, it is not foundered on the contract and my learned friend Mr Goddard says, that unless and until damage is suffered, no cause of action arises and so the logical extension of this argument is that until you have either exhausted your claim against another wrong doer, another inducer in this case, you have no ability to bring a claim against the Council. Now he has extended to, he has advanced a logical extension of the argument and I say there is certainly logic to what he says, and so what it means, what it does is, it takes away altogether the ability to sue a tortuous wrong doer when the inducement entering into the contract has been by both a tortuous inducer and an inducer against whom there can be a claim under the Contractual Remedies Act.

ELIAS CJ:

And a party to the contract, I mean that is the distinction. You're not talking about two people in a tortuous, you know, a duty of care relationship, you are talking about an inducement by the other party to the contract.

MR CASEY QC:
Yes but that was so when it was a tort, although it was negligent or fraudulent.

ELIAS CJ:
Yes.

MR CASEY QC:
And there wasn't an ability then – well I would respectfully submit, an ability then for the other tortious inducer to stand back and say, because your other inducement tortious was by the other contracting party, you must exhaust your remedy against that wrongdoer before you can show a loss. So, in my respectful submission, the fact that the inducement is by the other contracting party is not determinative of the issue here.

ELIAS CJ:
And are you going to take us to any authority for this interpretation of section 6?

MR CASEY QC:
Ah, authority. Well, with respect, the only authority – I appreciate the time – the only authorities probably are the *Allison* case and the *Harvey Corporation Ltd v Baker* [2002] 2 NZLR 213 case, where there has been a claim made against both the other contracting party under section 6, well, claiming under section 6, in a tortious claim under the Fair Trading Act, I should say, in the *Harvey* case, against the agent who was also party to their representation. But they don't address this issue head on in my submission. We'll break now for lunch?

ELIAS CJ:
Yes, we'll break now. We will resume at 2.15, thank you.

COURT ADJOURNS: 12:01 PM
COURT RESUMES: 2:15 PM

MR CASEY QC:
May it please Your Honours.

ELIAS CJ:
Yes, Mr Casey.

MR CASEY QC:
You were asking me before the break if there was any authority –

ELIAS CJ:
Yes.

MR CASEY QC:
– in support of the proposition that I advanced. I'll address you on that shortly and then I propose to move on to, well, what if it was a term of the contract and it's to be treated as if it was, and I'll then discuss whether the approach that's adopted in the *Nykredit* case ought to be the law in New Zealand.

ELIAS CJ:
Right, Mr Casey just pause a moment. Right.

MR CASEY QC:
So, I'll address you on whether the approach in *Nykredit* is or should be law in New Zealand, and I'll address you on some of those cases.

ELIAS CJ:
Yes, thank you.

MR CASEY QC:
In the context of that, I'll address the practical issue that are raised in some of my learned friends' submissions, and then I'll be addressing you on what I submit is the appropriate approach, which is that it should be subsumed into the question of contribution and apportionment rather than the approach that my learned friend Mr Goddard has adopted.

Now, on the question, have there been any cases dealing with this? Well, His Honour Wild J in the High Court in our case dealt with it from paragraph 31,

which is in volume 1, the pleadings volume, at tab 8 page 116, and talks, he sets out section 6 and says –

ELIAS CJ:
Sorry, what – tab 6, yes.

MR CASEY QC:
Yes, this is the High Court judgment No. 2, the apportionment issue. Sorry, it's tab 8, tab 8 of volume 1, at page 116. He says in his paragraph 31 that by treating and inducing representation as if it were a term of the contract the section neatly side-steps the issue upon which the committee could not agree, and then disentitles the party to damages calculated upon the tortious measure if the inducing representation was either negligent or deceitful. What section 6 doesn't do is to constitute the misrepresentation of the term of the contract. Section –

TIPPING J:
I haven't got a 116, have I?

ANDERSON J:
Volume 1, 116.

TIPPING J:
Volume 1.

MR CASEY QC:
Volume 1, sorry.

ANDERSON J:
Case on appeal.

ELIAS CJ:
Case on appeal, not the…

TIPPING J:
Case on appeal, volume 1, tab 6.

ANDERSON J:

8.

MR CASEY QC:
Tab 8.

TIPPING J:
Tab 8, solves that problem, beg your pardon.

MR CASEY QC:
So His Honour there says it does not constitute a misrepresentation of term of the contract. The section's aimed at remedy or, to be precise, a measure of damages, and not at the quality of the liability. He says, "I reiterate that I think the section neatly side-steps that question."

ELIAS CJ:
So he says that this was something on which the Committee had split. So is this a matter discussed in the report of the Contracts and Commercial Law Reform Committee?

BLANCHARD J:
Yes, at the top of the page, paragraph 28.

ELIAS CJ:
What distinction is it that's – oh, a distinction between an inducing representation and a term of the contract.

MR CASEY QC:
Yes. The discussion about which there was disagreement in the Committee was, I think, and obviously there's a few issues they might have disagreed –

ELIAS CJ:
We don't have it, do we?

MR CASEY QC:
No, we don't, and I've obtained a copy from the library and I'll just, and I haven't been through it in great detail. I didn't present this argument of course in the High Court –

ELIAS CJ:

No.

MR CASEY QC:

– and there's nothing in the materials that tells us exactly. At page 74 of the 1978 reprint of the report, under the heading, "Recommendations general," "We regret that we have not been able to achieve unanimity upon the full measure of reform necessary to meet the criticisms we've mentioned. We are divided in our concepts but united in the objective. Some of us are of the opinion that the distinction between a representation and a term is unreal and that both should be regarded as part of the agreement and enforceable at law. Those of us who are of that opinion would abolish the parol evidence rule to allow the Courts to ascertain by direct means the true agreement between the parties. Others are of the opinion that the distinction is real, the reality residing in the position that a representation is ex hypothesi, not an agreed term," and it goes on –

ELIAS CJ:

I don't know why it said in the judgment then that there was a side-step, because –

MR CASEY QC:

Well – sorry.

ELIAS CJ:

Oh, in their recommendation, which –

MR CASEY QC:

Yes.

ELIAS CJ:

– may not have been what has been carried into the Act, is that it?

MR CASEY QC:

Yes, and it concludes that discussion by saying, "Notwithstanding these conceptual differences, we are all of the opinion that the remedies for misrepresentation in breach of contract should be assimilated by adopting the code we propound."

ELIAS CJ:

And it was enacted in the form suggested?

MR CASEY QC:

Well, pretty much, I think, yes. So they disagreed about whether the misrepresentation should be treated as a term –

TIPPING J:

Well, historically it never was, but there was quite a strong argument to equate it with a term, which is essentially what they've done for remedial purposes. So they have been quite clever in not addressing the precise issue.

MR CASEY QC:

Well, with respect, Your Honour, section 6 does not say the representation becomes a term. What section 6 says is that the damages are to be as if a term had been breached.

TIPPING J:

I know, but you can cancel for misrepresentation of a sufficient quality. So it's pretty artificial to say it's a statutory tort for damages purposes but a remedy that goes to the root of the contract for cancellation purposes. I mean, with great respect, I'm admiring the ingenuity of the argument but it just seems to me to be unreal.

MR CASEY QC:

Well, I'm not claiming to have invented the argument, I'm just picking up on what's said in this judgment, that is, by Wild J. He goes on to talk, at page 117, acknowledging that his view is not that expressed in the *New Zealand Motor Bodies Ltd & Anor v Emslie & Ors* [1985] 2 NZLR 569 and the *Manderson v Violich & Anor* (1992) 5 TCLR 124 cases, but disagrees with them.

TIPPING J:

Well, in *Emslie* Barker J specifically said it was a term.

MR CASEY QC:

Yes.

TIPPING J:

Yes.

MR CASEY QC:
That's right.

TIPPING J:
And everybody's tended to follow that, sort of perhaps –

MR CASEY QC:
Well –

TIPPING J:
– without the astute attention to this precise point.

MR CASEY QC:
One of the academic, one of the writings that you're provided with is an extract from *Gault on Commercial Law*, it's at volume 6 of the authorities of the case bundle, at tab 54, and this is at page 1036 where the commentator says that while section 6 provides that the damages entitlement is on the same basis as if the misrepresentation were a breach of the term of the contract –

ELIAS CJ:
Sorry, 1036, whereabouts in the page?

MR CASEY QC:
Under CR6.03, sorry.

ELIAS CJ:
I see, yes, thank you.

MR CASEY QC:
Equating representation in terms of measuring damages. The basis of the claim under section 6 is a pre-contractual misrepresentation and not a breach of contract and cites *Pan Pacific Forest Industries (New Zealand) Limited v Norwich General* (1997) 7 TCLR 560 in support of that. Now, I have a copy of *Pan Pacific,* it's not in the bundle. And a particular passage that I think is picked up by the authors of *Gault* is at page 564 line 25, under the heading, "Section 6 Contractual Remedies Act

1979," "This is in effect a claim for a pre-contractual misrepresentation pleaded as a breach of contract rather than a misrepresentation claim, as it is sometimes pleaded. While section 6 provides that the damages entitlement is on the same basis as if the misrepresentation were a breach of the term of the contract, the basis of the claim is in my view a pre-contractual misrepresentation and not a breach of contract.

TIPPING J:
No reference to the contrary authorities?

MR CASEY QC:
No, that's right.

TIPPING J:
I see Mr Ring and Ms Tipping were in the case.

MR CASEY QC:
Well, yes.

TIPPING J:
Need one say more?

MR CASEY QC:
No. So, I mean, I support the submissions to the same effect that have been made, at least in writing, by my learned friends, Mr Ring and Barton. I want to move on though, and I don't think there's much more I can say, because there's not much more to put before you on that.

I want to then move on to say, well, what say my learned friend Mr Goddard's argument is correct, that is, that is it be treated as a term of the contract. Should the principle that he espouses be the law in New Zealand, and he bases it pretty much on the *Nykredit* approach that was taken, and of course you have the contrary or the rather contrary view expressed in the *Eastgate* case, that there's a world of difference between a covenant to pay in a mortgage agreement and a term or warranty, whatever it might be, that has breached in other forms of contract.

Now, my learned friend's submissions pick up some of the extracts from the judgment of Longmore LJ in *Eastgate*, and if I can take you through the *Eastgate* judgment from about para 12…

ELIAS CJ:

The volume?

MR CASEY QC:

That is in volume 3 at tab 24. And the discussion commences probably at the bottom of page 517, paragraph 12, through to about paragraph 16. At paragraph 14 there's reference to the logic of the approach taken, and the comment between lines G and H, "But it does not follow that the same approach is correct for cases not of a borrower's covenant to repay his loan but of breach of contract, for example, by the vendor of a business. The vendor's liability is to compensate the claimant for the loss suffered by his breach of warranty. This is a liability for damages, not a covenant to repay a debt. It's a matter of ordinary principle whereby a claimant is entitled to compensation for loss actually suffered. Any actual diminution of the buyer's loss would normally have to be taken into account when assessing the buyer's claim against the vendor. It cannot be the case merely because a valuer can require a claimant who brings an action for damages against him to bring into account the value of a borrower's covenant to repay a debt, that therefore any party liable to a claimant for professional negligence can require the claimant to bring into account the value of his claim against any other contractor for breach of warranty." He goes to say that's due to the essential difference between a claim for repayment of a debt, to which there can ordinarily be no substantive defence and in respect of which a claimant does not have to prove loss, and a claim for damages for breach of contract, to which there may be many defences and in respect of which the claimant must prove his loss. Now, that's obviously the approach that I contend should be applied as a matter of general principle, rather than that the *Nykredit* approach should be the one that's applied in more cases. And my learned friend Mr Goddard referred you to the *Allison v KPMG* case, which is at volume 2 of the authorities –

TIPPING J:

But wait a moment. If a claimant's loss has in fact been diminished, that diminution must be brought into account. Now, that really depends on what's meant by "in fact being diminished".

MR CASEY QC:
Yes.

TIPPING J:
I would have thought it's more than arguable, even if you're right that that reservation applies here.

MR CASEY QC:
Yes. But how it's brought into account is left a little bit unanswered. So that, for example, if you have got a situation where the nature of the damage is the same and you've got a tortfeasor and a contractual – you've got tortious damages and contractual damages, but the damages are addressing the same loss, then how you take it into account might not be by complete reduction of one, but by an apportionment.

TIPPING J:
But if you get compensation from the contract breaker, so that in fact the contract is not a loss-making one, what do you say the position is then?

MR CASEY QC:
Well, with respect, Your Honour, the contract was a loss-making one, it's just you've been able to recover damages for the loss. In our case, this contract was a loss-making contract, because the contracting party did not carry through, or was unable to carry through, his contract. We were in a position, or the plaintiff is in the position, where it can recover damages for that loss.

McGRATH J:
It's loss being the difference in value?

MR CASEY QC:
Whatever the loss might be, if it is a breach of warranty for example and the warranty is not correct or not true, then it has got a claim for damages for breach of warranty but if it was induced by the same warranty in a tortuous context, or induced by the same statement, which is the *Allison v KPMG* case I will come on to shortly. There was a contractual warranty of turnover and there was negligence against KPMG for having advised the same turnover figure and where there is those – the damage is the same, the contract was a loss making contract because the warranty was wrong.

There was a breach of the warranty and therefore a right to enforce that breach, or a right to recover for that breach through a damages claim, for breach of warranty.

ELIAS CJ:

This may be way too simplistic but I am not sure that these classifications matter at all. If one takes out of it the fact that there was also a misrepresentation by the contracted party in this case, for a moment, if there is a cause of action in tort for the damage in entering into the contract, you wouldn't have entered into the contract on those terms. Why doesn't one look at the effect under the contract, in determining whether there is a loss. Is there anything more to be said than that?

MR CASEY QC:

Well, because it is how you categorise what the rights or the entitlements are under the contract, that makes the difference. In the case of *Nykredit* –

ELIAS CJ:

I would say it is a loss making contract, oh I see what you mean. It is loss making here because the expectation you had, under the contract wasn't delivered under the contract?

MR CASEY QC:

Yes. And the KPMG case is probably a good example because there happens to be a close alignment between what was warranted in the contract, as to a state of affairs which was wrong, and what was advised by the negligent accountant, and you have got to understand that whatever decision you come up with, has to apply across a wide range of circumstances of which that would be one. In our case, if my learned friend Mr Goddard is right in saying that section 6 elevates the representation into warranty and presumably it is a warranty that clause 20 would say, under this contract you will receive 1500 cubic metres of water per day, or the water rights are for 1500 cubic metres per day, I am not sure there is a difference between those two. So what was conveyed under the contract, was not the contracted for performance, so it was a loss making contract and gave rise to a right of damages for breach of warranty.

TIPPING J:

It was a breached contract? Was it a loss making contract, we are getting pretty fine here.

MR CASEY QC:

I accept that Your Honour but I think just because there is a fine distinction, doesn't mean there is a distinction at all.

ELIAS CJ:

Well explain why it matters to maintain this distinction, as a matter of legal policy. What is the justification for it?

MR CASEY QC:

Right, now in that sense I am assisted by my learned friend Mr Ring's written submission about the practicalities of the outcome that is contended for by my learned friend Mr Goddard. Effectively what it must lead to by logic, is that the tortfeasor cannot be sued until the determination can be made, whether or not the contract was a loss making contract, according to that, if you use that terminology.

ANDERSON J:

I don't see why it can't be sued. It might not be amenable to a final judgment but he said –

MR CASEY QC:

With respect Your Honour, he says and I think he is right. That loss is an essential element of a tortuous claim, a claim in tort, unless and until the plaintiff suffers loss, then there is no claim in tort and his argument says, well you haven't suffered loss until it is known and he is saying, my client hasn't suffered loss vis à vis his client at all because we now know that my client will recover, more than the amount of that loss, from the contracting parties. So I am not able to sue, my client is not able to sue at all until that issue is resolved.

ANDERSON J:

Takes some persuading about that, I mean you may not be able to finalise it and there may be contingent damage or an unquantified damage but the thought that you have to sue one to the point of bankruptcy before you can even kick off against another, is just not very practical.

MR CASEY QC:

But that then highlights the very issue, have I suffered loss because his argument is I haven't suffered loss, until it is known whether my contract is a loss making one or not. And his argument goes on, beyond that and says it is an essential element of a tort claim for there to have been loss before the cause of action arises and I don't have a cause of action, until I have suffered loss.

ANDERSON J:

But that is subject to adjudication. I mean that may be the assertion but whether that assertion is correct will depend on the outcome of the litigation.

MR CASEY QC:

Well then, with respect. At the point in time at which I issue the litigation, I can say that I have suffered loss otherwise I can't sue. If I can sue, I can sue because I can say I have suffered loss at that point and in my case I am arguing that loss was suffered at the time the contract was entered into, at the very latest, at the time the contract was settled and the money paid and the transfer was found not to be of the full water rights. My learned friend Mr Goddard's argument, I haven't, my client hasn't suffered loss, because as it turns out there is no, the contracting party is good for his representation or good for the damages to equate his representation. What that will lead to, in my respectful submission, are the sorts of consequences that my learned friend Mr Ring has opened up. For example, in our case we could have sued the agents directly, we could have sued the solicitors directly, we could have sued a number of other parties directly in negligence and all of them could say, well until you have sorted out which claim is against the Moorehouses in contract, what are we doing here? You have suffered no loss. My argument is, that the better approach for the Court to take is that this comes down to a question of contribution and apportionment because if you pick it up at that point, you can then weigh up who suffered the more loss and who didn't.

TIPPING J:

And this would be in equity would it?

MR CASEY QC:

In equity yes, if it wasn't available to you under the law reforming.

TIPPING J:

I thought everyone accepts that it is not available under the law reforming.

MR CASEY QC:

I understand that and it is not my argument about contribution and apportionment but I do make a submission, in particular, in response to I think the points Your Honour the Chief Justice made in here before, which is we have a situation here where it is the vendor who is responsible for the misrepresentation and there is some purpose to the point, well why should the vendor be able to get from the council, a portion of $125,000 which effectively the vendor has for its own benefit as a result, not only of the council misrepresentation, but it's own. And it is at that point that the issue of damages is appropriately resolved between a contractual wrong doer on the one side and a cautious wrong doer –

TIPPING J:

But the vendor gets a contribution from the council, to whom - and the council owe new duty to the vendor.

MR CASEY QC:

That's right but the Council owed a duty to the plaintiff and this is the question as to – if you have got two tortfeasors who both owe a duty to the plaintiff, liable and damages to the plaintiff, one can get a contribution from the other.

TIPPING J:

But they are not joint tortfeasors.

MR CASEY QC:

Well I am moving on from there Your Honour. The equitable contribution approach is that if one is not a tortfeasor but is a wrongdoer of a different type, then equitable contribution will say that as between the two of those, even though they don't owe a duty then to say each of them owed a duty and caused damage to the plaintiff, then how do you resolve the question as to who should wear how much of that damage or how much of that loss.

TIPPING J:

One is a promise to deliver, the other is a negligence misstatement. It is very far from the concept of co-ordinate liability that equity worked upon.

MR CASEY QC:

Well that is so but we have a situation here where both have concurrently caused the loss. Now if I can take you to the *Allison* case, you may or may not agree with Thomas J's analysis in that case.

TIPPING J:

Well I did, because I would say it with you. Ah, well –

MR CASEY QC:

Ah, well, that helps me.

TIPPING J:

Surprisingly perhaps, one might say.

MR CASEY QC:

If I can take you to – I think the discussion I want to refer to commences at paragraph 90 on page – and sorry, this is at volume 2, tab 8 at page 198 and paragraph 90 of the judgment and there, His Honour or perhaps I should say Your Honour –

TIPPING J:

Well, I wrote separately only one point, basically not on this point.

MR CASEY QC:

His Honour therefore said, he identified at 90, the argument that I submit is the same argument being made by my learned friend, Mr Goddard, that the trial Judge failed to value all the benefits received by the appellants under the agreement, in particular, the appellant's contractual rights to be indemnified against the shortcomings in the order for the counts. The argument obviously being that because of the warrant fee there was a contractual right for damages for breach of that warranty and then I'm just skipping through this on account of the time, but I invite Your Honours to read it all.

At 95, there are two arguments or two aspects of the argument which may be dealt with separately in addressing Mr Keyte's submission. The first argument is that the

appellants did not suffer any loss at all, because of the warranty. The second argument is that the appellants were obliged Holman under that clause before the loss could be assessed and then he deals with the first question which is the one that I think is most similar to the one we're dealing with here. He, at paragraph 98, it describes the argument in these terms, notwithstanding it to apparent plausibility, I consider that there is a degree of pedantry in the argument and I'm not prepared to accept it. And then goes on in 99 to say why, "It cannot be fairly said that the warranty was intended by the parties to exclude any tortuous liability and negligence. The fact that the contract may provide a remedy which is coextensive with that which is available and tort does not necessarily mean that the tortuous remedy is exclude."

TIPPING J:
That's a different question.

ELIAS CJ:
That is a question.

TIPPING J:
Well, it is a question, but it's a different question from whether there was any loss.

MR CASEY QC:
Well, but the facts of the case tells you that there was the same loss, that it was just –

TIPPING J:
Well, I'm just querying whether this passage actually addresses the issue that confronts us, as opposed to the proposition that you couldn't sue in tort at all, i.e. that the tortuous remedy was excluded.

MR CASEY QC:
Well that's –

TIPPING J:
The learned Judge who wrote this judgment was an early exponent of concurrent liability in contract and tort, contrary to at least one of the Judges who sat with him and it's starting to come back to me now, this was very much a focus on whether you could sue both in contract and tort wasn't in this argument.

MR CASEY QC:
Well, no, they're pursuing one party in contract.

TIPPING J:
Yes.

MR CASEY QC:
And another party in tort –

ELIAS CJ:
But the liability was coextensive.

MR CASEY QC:
Well, the liability was that the liability arose out of the same –

ELIAS CJ:
But here it's parasitic isn't it, unless you've lost under the contract, you've got no claim.

MR CASEY QC:
But that was the very argument that His Honour was addressing here. Mr Keyte was arguing that because they could recover under the contract for breach of warranty, they had no tortuous claim against the auditor.

TIPPING J:
That's right.

MR CASEY QC:
And that's the claim that I'm facing here that because I can recover against the vendor under the warranty I have no tortuous claim against the inducer, the negligent inducer.

TIPPING J:
But the issue didn't arise here of the whole loss having being satisfied, it was only partial satisfaction as I recall.

MR CASEY QC:

Well that ultimately was what broke the case, because they only recovered $500,000, not $600,000, but the point of principle was the point being advanced by KPMG and which is addressed in that section –

ELIAS CJ:

So this is a case in your favour?

MR CASEY QC:

Yes, very much so.

ELIAS CJ:

In favour of your analysis, yes. I'm just still querying it.

MR CASEY QC:

I'm not looking forward to having to revisit it after sitting on it for six weeks at first instant. I think I'll make a lasting impression on how to have forgotten my head and at paragraph 100 His Honour equates it to what I equate it to which is effectively a requirement that you sue the contract wrongdoer before you can sue the tortuous wrongdoer.

TIPPING J:

I suppose that would apply if they were one and the same person. If the argument is correct, you'd be told, no, you can't sue in tort because you've got to sue in contract first and we'll see whether that recovers all your loss for you.

MR CASEY QC:

I'm not sure that that would be taken that far, but certainly in respect of other tort –

TIPPING J:

It seems to logically follow. I don't like it, but I think it's paragraph 100 that's actually more directly in your favour.

MR CASEY QC:

Yes, that's what I was –

TIPPING J:

On 99, as it appears in reaction to the argument.

MR CASEY QC:

So when we come to 100, effectively, what my learned friend Mr Goddard is saying is that I couldn't sue the council until I had sued and knew what I was going to get from the vendor or if I did choose to sue the Council, then my claim against the Council would be reduced or nullified altogether, if the Council could show had I sued the vendor, I would've got more than what I'm suing the Council for.

TIPPING J:

If we had to go on and look at 101 and 102, we can't, the trouble is that in the interest of time we're rather cherry picking.

MR CASEY QC:

Yes, that's right, but what I'm saying is and what I'm submitting is that the ramifications of a finding that in general rather than in limited circumstances in my credit, the practical consequences could be very significant, if the finding is that a contracting party must either exhaust or have valued the claim against the other contracting party and the risk of a finding that had they sued first, they would have recovered more than the damages they claim from the tortuous party, would turn a lot of what I would respectfully submit as current case law and understanding on its head.

ANDERSON J:

Suppose you're right Mr Casey, could the matter be approached on the basis referring to equitable contribution? The parties are sued together and it's obvious in the course of the case that the party who is liable under the Contractual Remedies Act or whatever is good for the full amount, wouldn't it then be appropriate for a Court in equity to say, well, the person who is primarily responsible, who didn't keep its promise is going to pay the lot?

MR CASEY QC:

Yes, and that's done with respect, that's done correctly by saying, I can have my judgment against the tortfeasor and I can have my judgement against the contract wrongdoer, but the contract wrongdoer has to fully indemnify the tortfeasor.

ANDERSON J:

I was just wondering what your position was on that.

MR CASEY QC:

And I know my learned friend Mr Ring and Mr Barton won't appreciate me saying this, but in my respectful submission, that picks up the very point here which is that as a result of the Council's inducement, misrepresentation in inducement, on the facts we have before us, the Moorhouses got paid $125,000 more than what they were entitled to, so you would say it's not equitable that they should recover any proportion of that from the Council, because they should have to disgorge the profit that they also wrongly induced, and so you could well get a situation where that equitable contribution means there's zero contribution from the Council but it shouldn't deprive the plaintiff of the right to sue the Council if there is an appropriate cause of action, now I have said that without really testing my learned friends on that point, because in my written submission I have said I support what they say about apportionment and contribution, but it's what I see as being the answer to the conundrum that the Court has addressed to me before that what if the wrongdoer is the other contracting party, the solution in my respectful submission is to be found in the contribution –

ANDERSON J:

It would be the same outcome if you just sued the Council here and the Council joined the Moorhouses, you'd get your judgment against the Council and the Council would get a judgment for full contribution, perhaps, against the Moorhouses?

MR CASEY QC:

Yes.

ANDERSON J:

It's just a matter of the procedure isn't it?

MR CASEY QC:

Yes. Oh, there was one other case that I thought I should touch on which is the *Thom v Davys Burton* judgment that my learned friend refers to in support of an argument that this Court has already adopted the *Nykredit* approach, that's *Davys Burton v Thom*, you'll see if in volume 3, tab 20 and it is at paragraph 17 of the Court's judgment which is at page 456 of the bundle.

BLANCHARD J:

This is actually the judgment of the Chief Justice.

MR CASEY QC:

Yes, the Chief Justice, sorry.

ELIAS CJ:

What volume is it?

MR CASEY QC:

Volume 3, tab 20. Now in my respectful submission, it is not a finding that *Nykredit* is applicable for the point that my learned friend advances, obviously it doesn't deal with the contrary view in *Eastgate* but just looking at what is said there by Your Honour, halfway through at line 15, "When the damage claimed is based upon the consequences of the plaintiffs entering into a transaction, as is common in cases of misrepresentation, economic damage will often not be suffered at the time of the transaction. Where a plaintiff has been induced by misrepresentation, depart with property, make payments or incur liabilities in the context of an executory contract, the plaintiff may not suffer any loss until the net position obtained after benefits gained through the transaction, are brought into account. *Nykredit* too was a case of this sort." That's right. My argument here though is that this is a different type of contract, it is not an executory contract, it is an executed contract and damage arose at the time the contract was executed or settled and that is an important point of difference too in my respectful submission. I don't know that I can address you any further on those points unless there is something else you think I can assist you with, and I hope that I have done my learned friends justice in their submissions as well.

I want to then move on to the real issue for my client which is the appeal by Vining and I would guess most of the argument that I have to face is that which was presented to you by my learned friend Mr Barton in support of that appeal. My submission, His Honour Wild J was perfectly justified in determining, as he did, that the cost of cure was the appropriate measure, appropriate quantification I should say, of the expectation damages and of course the expectation damages were the appropriate measure under section 6 and that is because the way the case was pleaded, presented and argued. Apparently facing is an assertion that the plaintiff

should have abandoned the project, resold the property and found another property somewhere else and somehow or rather, expected $400,000 to be paid to represent the difference in value. There is a lot of factual material that would need to be considered if that really was the argument that was being put forward.

I acknowledge that that was a simple argument raised in closing submissions and I would imagine treated as an assertion that there should have been mitigation and as this Court has identified, none of those prospects were put to Mr McNabb in evidence, for him to answer as to why he didn't do that. You also need to take into account – I mean this is a question of what is reasonable and appropriate. His Honour Wild J noted that at the time, that is in 2004, there was an understanding at least on the part of some parties, that the cost of a dam to provide the replacement water, would be $280,000 and that is in the judgment, and referred to in my submission, but it is also in a letter of December 2004 from the plaintiff's solicitors to Gascoigne Wicks and that is at volume 5, tab 89 and says – it is the 6th of December 2004 letter and says, "As far as remedying the problem was concerned, Warren McNabb advises that he has met with John Morris, something instruction, as a result of which the expected cost of the dam would be $280,000." So it is not right to say that Mr McNabb could have expected $400,000, because if that was the nine position and parties had endeavoured to settle his entitlements then, I am sure that he would have been told, go and build the dam at $280,000, we are not going to pay $400,000.

There was obviously communication with the defendants over that period, that was the communication of Gascoigne Wicks. They didn't pick up on the suggestion at the time, that that is what he should do, nor did they suggest that he should have sold the property and gone somewhere else. At the time the proceedings were issued, the estimated cost was more than that, it was in the order of $540,000. Again the argument that he should have abandoned ship, it would not take account of the fact that he had invested significantly and there is evidence that he had invested already before settlement even, because he had been allowed into part possession to do that and he would have been in a position to advance at what other costs he had incurred or losses that he would have incurred if he had taken up the suggestion that is now being advanced.

McGRATH J:

So you are saying, you had invested, went into possession early and invested. Do we know what he put his money into it?

MR CASEY QC:

There is some evidence about that but it is not complete. He had planted – I will just try and find it for Your Honour. He said that he had planted a certain number of hectares and this is both before settlement and before, of course, the October discovery.

McGRATH J:

And so this is, prior, of course, to knowing about the problem of consents?

MR CASEY QC:

Yes. In his evidence which is at volume 2 of the case on appeal, at tab 18, page 246, he just says that during 2004 I planted15 hectares of grapes and spent $22,365 on drainage. He doesn't give the cost of the grapes.

McGRATH J:

Sorry what page are you at again?

MR CASEY QC:

Page 246. And what I am saying is he doesn't give the detail that if it had been put to him, he could have expanded upon, as to exactly when and how much the investment of capital was. So the $540,000 cost of a dam, at the time of proceedings, or estimated cost of the dam at the time the proceeding was issued, was probably not disproportionate to the position that is now being advanced, which was that he should have been happy to take $400,000 and move somewhere else and presumably recover the wasted expenditure at that point.

It has become if it is, and I am not admitting that it is disproportionate but if it is, it has become so because of the delay then in getting resolution to the case. Now you will have the statements of claim and defence and they are in volume 1, which is the pleadings volume. The statement of claim which is in the bundle, was the third amended statement of claim, and that had a figure of $699,255 which was amended at the hearing, to $776-odd thousand dollars.

My learned friend has said that it wasn't pleaded on the basis that it was the cost of the dam, but the Moorehouses pleaded, in their statement of defence, at paragraph 28 which is in tab 11, on page 199 of the same bundle. They denied the allegations,

that's as to loss, without limitation they say that the plaintiff's concerns as to a lack of water could be remedied by building a dam at a cost considerably less than that stipulated for, in the second amended statement of claim.

ELIAS CJ:
Sorry what paragraph is that?

MR CASEY QC:
So there's certainly no misunderstanding. And bear in mind the plaintiff's claim was against that defendant, not against the third parties who are now pushing this argument.

TIPPING J:
And in effect the Moorhouses were pleading that the dam was the answer and that the cost was significantly less than that asserted.

MR CASEY QC:
Yes, and that was generally the approach, and while my learned friend Mr Barton is right to say that he did advance the submission in the High Court that the diminution in value should be the measure or should be the quantification adopted, by and large the argument was about the cost of replacement. And when you get to the Court of Appeal, as I have set out in my submissions and no doubt you've read it, the finding by Wild J in his first judgment was the finding that is now being criticised, that is, that he was going to award the cost of the dam. There was no appeal against that finding, nobody appealed the finding in the No. 1 judgment that that would be the basis on which damages would be awarded.

TIPPING J:
So in effect the Judge was deciding on the principle of the thing –

MR CASEY QC:
Yes.

TIPPING J:
– and then we'll have a look at quantum once we've decided how to do it.

MR CASEY QC:

The quantum is decided.

TIPPING J:

Yes.

MR CASEY QC:

So what then happened, and again it's in my written submission, was that he called for submissions. The reason he didn't quantify it was because between the date of the trial and the judgment Altimarloch had been able to, by fluke almost, because it certainly wasn't expected, been able to obtain part of that missing A-water from another source. And the Judge was aware of that, and also all that meant that a different size would be needed, and also was aware that costs were moving. So that's why he called for further submissions or further information, which was provided by the plaintiff in August 2008, and he called for further submissions on that and on the question of apportionment, which led to a second judgment. Now, the only submissions that were made in respect of the quantification was the bald submission by Gascoigne Wicks that it nearly repeated what it had said in the submission to the first hearing, to the main hear, which again was simply that the quantification should have been the difference in value. It didn't say that, it just said, we repeat what we said.

TIPPING J:

But the Judge had already decided that it shouldn't be.

MR CASEY QC:

That's right.

TIPPING J:

That was a pretty stupid sort of submission.

MR CASEY QC:

Yes. So, what I'm saying is there was no submission about the costs now being a million dollars, whereas it had previously been seven hundred and something thousand dollars and before that six hundred and something thousand dollars, so no submission about the lack of proportionality or about how it should drive a reconsideration of that issue. And then there were appeals against that decision, the second decision, and the appeal by Gascoigne Wicks asserted that the quantification

of the loss should have been $600,000, because that was taking the A-water that had been purchased and just multiplying that by the amount of A-water that was missing. So I think it was being purchased for some $300,000, therefore the whole missing A-water should be $600,000, so again, an appeal based on the point that the cost of cure ought just to be the cost of finding replacement water, assuming it could be found. Now, in submissions –

McGRATH J:
The problem with that being that there was no supply available.

MR CASEY QC:
Well, it had been accepted at the very first hearing there was no supply available but supply had become available, and therefore what they were arguing –

McGRATH J:
Available for 350 cubic metres.

MR CASEY QC:
Yes.

MR CASEY QC:
But what they're arguing was that that set the figure for the cost of, the value of replacement water was the cost at which he'd obtained some, was to be assumed he could obtain it all.

BLANCHARD J:
Well, that couldn't be right, in the absence of anything on the market.

MR CASEY QC:
Yes. Well, I'm not arguing that point here, I'm just saying what their ground of appeal was and what the relief that they sought was. Then in their written submissions for the hearing of the appeal, they modified it to say it's either about $600,000 or it's the $400,000 difference in value. Now, it may come out through your reading of the Court of Appeal judgment, but there was quite a lot of shifting of grounds and I, well, on behalf of my client, complained about that, and the Court said, well, we'll only think about that if it becomes important to, and of course they dealt with the case in the way they did.

Now, my learned friend Mr Ring says that, although it wasn't a ground of his appeal, in oral submission in support of his argument he raised the issue that he's not sought to raise in front of you, which is that some of the evidence that Mr McNabb gave was demonstrative of, I don't know, an intention that Mr McNabb only thought that the difference in value was all he should recover. But that was again raised only in oral submission and I don't think, well, it clearly didn't capture the attention of the Court, perhaps any more than it has Your Honours' attention. But other than that the case has been pleaded and evidence has been presented on the basis of the cost of cure, replacement for the water, principally in the form of a replacement dam. Now –

TIPPING J:

I just want to have this absolutely clear in my mind. You say in the Court of Appeal they didn't challenge the Judge's decision of principle that it should be cost of a dam?

MR CASEY QC:

No, they didn't challenge the Judge's -

TIPPING J:

They queried the quantum.

MR CASEY QC:

They queried the quantum on the basis that it should not have been the cost of a dam but should have been the cost of water, on the assumption that you could –

TIPPING J:

But once the Judge had decided in judgment No. 1 that he was going to go with the cost of a dam as the appropriate, both conceptual approach and driving quantum, how could anyone, without appeal against that, get it done on any other basis?

MR CASEY QC:

Well, I mean, that was an argument I raised, but you're right, and that's the point I now come to this Court with and say, well, this is how it unfolded, there was no appeal against that finding –

TIPPING J:

I understood you to say that, but it seems so bizarre, the way the case has been allowed to mushroom, if that is the case.

MR CASEY QC:
Yes.

ELIAS CJ:
Things changed, of course. Was it effectively treated as a variation of judgment No. 1, because the water rights had become available and provided, did the Judge revisit in – I'm confused – in judgment No. 2, the earlier determination that damages be measured as against cost of dam?

MR CASEY QC:
Well, what His Honour said in judgment No. 1 at para 233, which is on page 87 at tab 6 of volume 1, just this, I accept the plaintiff's submission at trial that applied here –

ELIAS CJ:
Sorry, tab –

MR CASEY QC:
Tab 6 –

ELIAS CJ:
Yes.

MR CASEY QC:
– page 87 of volume 1. He said at 233, "I accept the plaintiff's submission at trial that applied here the measure of damages as the cost of building a storage dam large enough to provide the plaintiff with the irrigation was it would have had, had it received the transfer of the whole of the A water permit," and then goes through what he had been advised about the availability of some other water, and then at the end of paragraph 228, well, during paragraph 228, he says, "I intend awarding damages fixed as at the date of this judgment and my directions for fixing the judgment figure are contained in 286 at the end of the judgment," and that's where he issued directions. He says, "I anticipate the judgment sum will comprise the purchase price of the additional A class water the plaintiff has conditionally purchased and an up-to-

date assessment of the costs of constructing the now smaller water storage dam required to provide the remaining 350 cubic metres per day of irrigation water.

TIPPING J:

But when we come to judgment two or maybe your – was there any revisiting of that statement as to how the damages were to be assessed?

MR CASEY QC:

No.

TIPPING J:

Because that's a ruling in principle, if you like, without prejudice to amount.

MR CASEY QC:

No he just qualified the amount because there hadn't been any – if you go to that judgment at page 111, tab 8, paragraph 9.

ELIAS CJ:

This is, in part, a recall judgment but not in relation to this.

MR CASEY QC:

No, the recall was in relation to certain findings he had made about apportionment and contribution and the damages part of it is, is covered very briefly in those few paragraphs from pages 111 to 112 and it was really a question of whether he should have asked for a further update, given the further time that had elapsed and the changes in the price of diesel and determined that he wouldn't do that and set the damages at the $1.055 million. Having given opportunities for parties to submit on quantum, presumably not on the measure –

TIPPING J:

There was an appeal against judgment No. 2 but not against judgment 1.

MR CASEY QC:

On this question?

TIPPING J:

On this question.

ELIAS CJ:

Do we have the notice of appeal?

MR CASEY QC:

No and I apologise for that because I indicated in one of my foot notes that I would provide all the notices of appeal and I haven't done so but I will undertake to do that. I set it out in paragraph 20 of my written submission, where I say, "The decision by Wild J in the No. 1 judgment was appealed by Vining and Marlborough but not by Gascoigne Wicks. Vining's appeal is on two grounds. Challenging the finding as to equitable contribution as among the defendants and third parties and challenging the apportionment as between Vining and Gascoigne Wicks." No appeal by the Moorehouses, Gascoigne Wicks or Vining, against the determination that the appropriate measure of damages for representation, was a cost for storage dam and then I go through what I have just said to you before, about what Vining, when His Honour asked for submissions, Vining said it had made no submissions and Gascoigne Wicks said there was nothing to add to its closing submissions at the hearing and I have set out what those submissions were, just so as to be complete.

And then at paragraph 27 I record that the following appeals were lodged against the No. 2 judgment by Vining, challenging the treatment and apportionment of the damages between the defendants and the awards of costs by the council challenging the findings or liability as between it and the Moorehouses and the award of costs and by Gascoigne Wicks, as I explain below.

The fourth appeal document shows that the basis of Gascoigne Wicks appeal was that instead of the measure of damages being the cost of the storage dam, the damages required to be Altimarloch as nearly in the position as possible, if the contract had been performed, were the costs of acquiring of 750 cubic metres of class A water and based on the price paid by Altimarloch for the unexpected acquisition of 400 cubic metres, Gascoigne Wicks' appeal quantified the equivalent cost for 750 cubic metres at $600,000 and the prayer for relief in their notice of appeal was that this figure should be substituting for the judgment sum of $1.056 million.

At paragraph 32 I have set out paragraphs from my learned friend for Gascoigne Wicks, Mr Barton, submission to the Court of Appeal, relying on the

Ruxley case and at paragraph 33 I summarise what is said later in those submissions. Now my learned friend Mr Ring took me to task, not in Court but before, that I hadn't included a couple of subsequent paragraphs but if I can just read to you what was said. "The submission was," and this is my learned friend Mr Barton's submission to the Court of Appeal, "The more appropriate measure of damages is the difference in diminution in value, the figure of $400,000 as Wild J has adopted as the valuation differential by awarding damages as Wild J said that he ignored the value Altimarloch received from having both the dam and the significant proportion of the shortfall in class A water. Justice Wild wrongly decided against giving any credit to the Moorehouses for placing Altimarloch in a position where it is better off than it would have been, had the Moorhouses transferred the full water rights. Altimarloch has received a windfall." So that was the basis of argument in the Court below that there was some windfall by having received both some water and the cost of the storage dam.

TIPPING J:

But the dam was smaller on account of the water.

MR CASEY QC:

Yes, so the argument didn't get very far.

ANDERSON J:

If the contract had been performed in terms of the representation, they wouldn't have had a dam but they wouldn't have needed one.

MR CASEY QC:

That's right.

McGRATH J:

This perhaps goes somewhat to explain, does it, the way in which the Court of Appeal dealt with these matters, 62 and 63?

MR CASEY QC:

Yes. So I have done my best to set out, as best I can, how the case was presented, was pleaded, presented and argued. To show that there has really been no challenge, certainly on the basis of proportionality that is now advanced, not to say that is the be all and end all of it but the proportionality, if you like, or the alleged

disproportionality arose as a result of a number of the things that happened during the course of the proceeding and you would need to have a lot more information about how that occurred before you could say that this is unduly disproportionate.

I would also draw your attention to the *Ellmers v Brown* case which is the one I have just passed up this morning and in that case there was no value difference at all but that didn't mean that the positive cure measure should be refused or rejected and I say there was no value difference at all. The way the Court expressed it was that there was no direct evidence to the price paid for the property, was excessive for this reason and that is an example of a transaction involving a sale of a farm, sale of land, of warranty, in this case as to the quantity of fertiliser that had been applied and the measure of damages being the expectation measure and the quantification of that measure being the cost of cure, which was obviously far in excess of any value difference, there, well there not being proof of any.

ELIAS CJ:
What was it – putting on the fertiliser or something?

MR CASEY QC:
The cost of – the warranty that a certain amount of fertiliser had been applied in the years leading up to –

ELIAS CJ:
Yes, and it hadn't.

MR CASEY QC:
It hadn't, so the cost of cure was the cost of the equivalent amount of fertiliser to be put on.

TIPPING J:
Less what they would have put on, anyway.

MR CASEY QC:
That was –

TIPPING J:

On that occasion that was Somers J.

MR CASEY QC:

That was Somers J, he would have reduced it a bit more but he said there was not enough evidence of that so he would have allowed the appeal, a bit harsh.

TIPPING J:

Pretty tough call.

MR CASEY QC:

Luckily, in the minority – for the plaintiff that is. On the question, the point that is sought to be advanced in my learned friend's appeals that the dam hasn't been built, I submit and I think it was accepted by my learned friend, Mr Barton, that that can't be assessed today, it has got to be measured at the time of the hearing in the High Court or the situation at that time and there is good evidence then from Mr McNabb that he had planted young grapes that didn't require so much water, the acquisition of the extra 350,000 – whatever it was, 350 cubic metres, meant that he was in a position to be able to defer the building of the dam but it was still going to be done. Now in the *Tito v Waddell* [1977] 2 WLR 496 which is at volume 5 of the authorities, paragraph –

ELIAS CJ:

Probably takes up the whole of volume 5 does it?

MR CASEY QC:

Yes, tab 47 – I will only refer you to a little bit of it. I am referring to page 876 of the volume and paragraph 10, that starts about a third of the way down the page, "That damages for breach of the contract.

1520..

1520md

MR CASEY QC:

....paragraph 10, that's starts about a third of the way down the page, that damages for breach of a contract to do work on the land of another might be assessed either on the basis of the cost of doing the work or on the diminution and value of the land by reason of the work not having been done, that in determining which basis to apply the fundamental rule was that the plaintiff was to be compensated for his loss or injury and not that of requiring the defendant to disgorge what he'd saved by not

doing the work, that the plaintiff could establish that his loss consisted of or included the cost of doing the work, if he could show that he had done the work, or intended to do it, even though there was no certainty that he would. So there doesn't have to be absolute certainty, but in this case you've got clear evidence and I refer to it in my written submission that the evidence before His Honour was that the partners certainly intended that the money would be applied. They had committed themselves to the venture and there's no real basis to assert that it was uncertain, or so uncertain as to not justify cost of cure.

Now, if I can just tick off a few other points as I go through. My learned friend made much of the fact that evidence was called with the difference in value, it wasn't just, or it wasn't principally as a backup to the claim for cost of care, it was because we are also suing the Marlborough District Council in tort and the measure of damages there was the difference in value. As it turned out that was a different difference in value, but that's why you had valuation evidence principally. It wasn't in some way intended to represent to the Moorhouse defendant and third parties, that's what was being sought and I've already addressed you on the statement of defence that show they acknowledge that that was understood. I've addressed you on the fact that the proportionality argument hasn't been raised before, and the other thing is that what you're trying to do by raising that argument is to equate a late 2008 cost of cure with a mid-2004 difference in value. And as I said to you before there may not have been such a difference at the time the decisions were made, but those decisions were made and it would have to be shown that they were unreasonable.

The points about Mr McNabb's evidence that are relied on by my learned friend Mr Ring in particular, I pick up Your Honour's point that it was necessary to have evidence as to reliance and inducement and that's where that evidence sits. There was a lot of other evidence in the case about what was done and to be done on the land, why the land was being purchased, and I cover that in some brief outline in my submissions. And the other point that my learned friend Mr Barton raised was that it was a relevant factor that this was a commercial investment and that may have been relevant to the issue as to where the cost of cure or the diminution in value should have been adopted. Now he referred to the *Dynes v Warren Mahoney* (unreported, A252/84, HC, Christchurch, 18 December 1987, Tipping J) case and without taking you too much through that case, it's at volume 3 of the bundle, tab 23, and if I just take you to page 507 in the bundle, the extract from *McGregor on Damages*, which takes up much of that page. I pick it up about a third of the way through, referring to

Lord Loreburn delivering the leading speech in the *Lodge Holes Colliery v Wednesbury Corporation* case pointed out, "That a Court should be very slow in countenancing any attempt by a wrongdoer to make captious objections to the methods by which those whom he has injured has sought to repair the injury and in judging whether they, that is the plaintiffs have acted recently, I think a Court should be very indulgent and always bear in mind who was the blame."

And then among the factors that His Honour there, thought might be relevant, I should say Your Honour Justice Tipping, might be relevant, weren't the commerciality of the transaction but over on page 505 near the bottom, "The wrongdoers connection with the property diminution in value may be a fairer approach is the wrongdoer is a complete outsider as opposed to someone whose purpose was to produce or contribute towards producing a particular result." And that's certainly in my client's favour in this case. The nature of the wrongful act, and this was again a representation to induce the purchase. And another factor, another matter is the question whether it's reasonable possible to recreate what has been damaged or unsoundly constructed on the site as originally intended in our case, it has been shown to be reasonably possibly to produce the same results.

TIPPING J:

It's really reasonable as in genuine intent isn't it?

MR CASEY QC:

Yes, in my respectful submission. So even if you were persuaded that there were some disproportionality, that's by no means the only factor in my submission that's not disproportionate, but if you were persuaded that it was it would only be a factor, and you're really being asked to revisit what was quintessentially a factual assessment by the first instance Judge whether or not if persuaded that the Court of Appeal might have dropped the ball, in my submission it didn't, but it usually comes back to the appellant's Court's interference with the assessment of the first instance Judge.

I'm hoping that's all I address you on.

TIPPING J:

A first instance Judge, who, with respect, if you're writing the submissions you've made, wasn't really asked. Well who made the preliminary assessment and that was never really challenged.

MR CASEY QC:

Never really challenged. The argument is that he made it without considering the arguments but my submission is that he had – well from looking at the High Court's submissions he was addressed on this issue of diminution in value, so it's not as if it was something that was not in his contemplation, it was, he just preferred the submission as he said, "I prefer the submission of the plaintiff."

There was one other matter that I just wanted to touch on briefly that I overlooked. In relation to my learned friend Mr Goddard's first point about the LIM and the duty of care, I just wanted to emphasise that the standard to which the Council is being held is one to exercise care, is not some sort of absolute requirement that the information be accurate, it's just a duty of care, so the information could actually be wrong, in which case, wrong without negligence on the part of the Council, in which case there wouldn't be a remedy, but it's not holding the Council to any higher standard, and my question I ask in my submission, written submission, is what's wrong with Councils having to be careful. Unless there are other matters that I can assist the Court on, those are my submissions, may it please the Court.

ELIAS CJ:

Thank you Mr Casey. Now are we going to hear from Mr Ring first?

MR RING:

Well, we thought that given the way the argument's unfolded Your Honour, that would be more appropriate for Mr Barton to reply on behalf of us both.

ELIAS CJ:

Yes of course, thank you. Yes, Mr Barton.

MR BARTON:

In my submission Your Honours the position of Gascoigne Wicks has not shifted from the High Court to this Court, that throughout has been that the appropriate measure of damages was the difference in value, rather than the cost of cure. Now, as one would expect on various levels of appeal, that has been further refined and my

learned friend Mr Casey has referred to the fact that there's been no earlier reference to proportionality, I'd accept perhaps that word hasn't been used, but it underlies the whole dichotomy between these two measures of damages, and so that has been an issue that has troubled Gascoigne Wicks from day one, it was argued before His Honour Wild J and before the Court of Appeal on that basis. Now as I say, it has taken different shape as things have progressed, but there is no inconsistency in terms of the position that has been taken by my client on the way through.

In terms of the two judgments of Wild J, there was certainly no appeal by Gascoigne Wicks to the first judgment, which was an interim judgment. From the point of view of Gascoigne Wicks, it's liability to pay X dollars did not crystallise until the second judgment and that was the judgment it was appealed from. One can imagine in tortuous litigation such as this with multiple parties, that one needs to wait to see that judgment, to work out what one's liability actually is in dollar terms, to determine what options need to be taken, so that explains the position the client has taken or that Gascoigne Wicks has taken to get to that position.

ELIAS CJ:

Well, did the appeal from the second judgment address this point, did the notice of appeal, did it purport to say that the wrong measure of damages had been used?

MR BARTON:

Yes, in the sense that the cost of cure was not the appropriate measure of damages and there was reference, as my learned friend Mr Casey had said to the more specific figure of $600,000, I accept that. Before the Court of Appeal, it was argued on the basis of those alternative, that the difference in value was the appropriate figure. As I say, that doesn't, shouldn't come as any surprise to any of the other parties here, that has been argued throughout and it was argued throughout the Courts and our complaint is that both judgments below have approached the assessment of damages on the basis of the cost of cure, was the only way this matter could be remedied and without any discussion of those options. Now, my learned friend Mr Casey has referred to the case of *Ellmers v Brown*. My comment on that would be yes, it is an example of the cost of cure being the appropriate remedy in the circumstances of the case. In that case, fertiliser could be bought and applied. There was no satisfactory evidence before the Court as to difference in value, and so the case is not really authority for any proposition that there's a presumption in favour of cost of cure and I don't think my friend was saying

that, but my comment is, it's another example of the application for test, in no circumstances the cost of cure was appropriate. There was not satisfactory evidence before the Court on difference in value. Unless Your Honours have any further questions, that's all I want to say.

ELIAS CJ:

Thank you Mr Barton. Mr Ring, did you want to add anything?

MR RING:

No thank you.

ELIAS CJ:

Thank you Mr Ring, yes, Mr Goddard.

MR GODDARD QC:

Your Honour, anticipating that time might be a little tight, in my reply, I endeavoured over the lunch adjournment to reduce the key points to some bullet points. But if I can hand those up through Mr Registrar, and I'll begin by dealing with my second ground appeal, the argument that no loss was suffered by the plaintiff purchaser, as a result of entering into the agreement for sale and purchase. Now, my learned friend Mr Casey argued that the section 6 claim is effectively a tort claim and that the council and the vendors were effectively joint tortfeasors. Now, I might not be the best person to raise concerns about the scope of appeals and the scope of leave granted, but there was no appeal from the finding of the Court of Appeal that the vendors were not tortfeasors and that therefore section 17 of the Law Reform Act didn't apply. More fundamentally though, the argument is simply wrong, the Court of Appeal was right to reach that conclusion. The argument about the nature of the section 6 claim and its relationship to the tort claim against the council are inconsistent with the language of section 6 and depends on technical distinctions which the Contractual Remedies Act was designed to do away with. The first, of course, language of section 6(1)(a) that provides that a claim can be brought against the party in the same manner and to the same extent as if the representation had been a term of the contract. So, not just to the same extent, not to the same quantum, but in the same manner, that is in an action for a breach of contract.

Second, the two tort causes of action that might otherwise have been available are taken away by paragraph B and it was looking at the combined effect of those two

provisions that led His Honour, Wild J to say in the second judgment of paragraph 38, quite correctly in my respectful submission that the section 6 claim is essentially contractual. It a claim for, and His Honour said, misled by me, a statutory deemed warranty it should be a statutory deemed term. There are two more general points that need to be made here, the first is my 1.3 and this really picks up questions from the Court to my learned friend earlier today, there's actually a strong argument that the water rates was a representation was a term of the contract or alternatively that its relative context, when it comes to interpreting clause 20 of the agreement for sale and purchase, when you ask what are the water rates associated with the land, the general land which in clause 20. The context which that falls to be interpreted, which includes all the dealings between the parties and the information available to them, includes the communications about what water rights they had, so it seems to me there is a strong argument, an argument that could've been advanced if necessary, that the right to class A water rights, and to receive those rights at 1500 cubic metres per day is contractual, but of course, one of the purposes of the contractual Remedies Act was to do away with the need to enquire whether pre-contractual statements are incorporated into the contract.

TIPPING J:

There's that age-old debate, that – to gather it was collateral too or incorporated any –

MR GODDARD QC:

Was it part of the contract, was it a collateral contract or was it merely a representation inducing it and one of the key goals of the contract of the Law Reform Committee, one of the key goals of this legislation was to dispense with the need for that enquiry. How bizarre if it's being dispensed with, as between the parties to the contract, to reintroduce it, when it comes to the liability of a third party tortfeasor and it seems to me that the result here should not turn on this superseded enquiry that the Court should be very slow to reach a conclusion that well, the Council could've argued that this was a term, not a representation, if it had, there would've been a different result, but it didn't. That is just completely inconsistent with the scheme of Contractual Remedies Act of New Zealand's contract legislation.

We can go more generally, still necessarily picking up a point raised by Your Honour, the Chief Justice, before lunch, this is the – or does it really matter, the so what point. What is the claim against the Council? The claim against the Council is that its

negligence caused Altimarloch to enter into a loss-making transaction. The effect of section 6 is the right to recover contract damages in breach of the water rights representation arises on entry into the transaction and can be enforced in the same manner and to the same extent as if that representation were a term of the agreement. That's not surprising because the underlying intuition is that the vendor has made certain promises and made certain statements about what is being sold and a price has been agreed for what is promised and represented. The bundle of rights acquired against the vendor includes the section 6 right. What the purchaser paid for was the land with the water rights as represented. Whether the transaction with the vendor was a loss-making transaction, whether what was sold by the vendor was worth less than the purchase price, can only be assessed taking the value of the section 6 claim into account.

TIPPING J:

It would mean making a difference between what you might call a primary aspect, i.e. that which was intended to be conveyed in a secondary asset, the remedy for its absence.

MR GODDARD QC:

Yes, and that would mean that for example you could get a different result, depending on whether the contract said, "I promise to convey class A water rights to 1500 cubic metres per day," or whether you said, "I promise to convey all my water rights. I warrant that those water rights extend to." How can that be the basis for a sensible distinction to be drawn by the common law?

ELIAS CJ:

I just wonder though if you're overstating it here because it's not whether was sold by the vendor was worth less than the purchase price, it's not – it may not be right to characterise it as a loss-making transaction. It's a transaction in which you don't get the benefit you thought you were getting.

MR GODDARD QC:

No that's not against the tortfeasor Your Honour –

ELIAS CJ:

Oh I'm sorry –

MR GODDARD QC:
So I'm talking about the – Council's position –

ELIAS CJ:
Yes, yes, I'm sorry.

MR GODDARD QC:
And the right question exactly is vis-à-vis the council, was this a loss-making transaction –

ELIAS CJ:
Yes.

MR GODDARD QC:
– was what was sold worth less than the purchase price.

ELIAS CJ:
Yes.

MR GODDARD QC:
And what was sold is the bundle of rights, some physical things and some promises.

ELIAS CJ:
Yes.

BLANCHARD J:
Does this mean there is not statutory tort, if I can use that term until the exercise of working out the contract –

ELIAS CJ:
Yes.

BLANCHARD J:
– has been completed and that there therefore you can't sue the Council until that point?

MR GODDARD QC:

I would like to begin by shying away from the statutory tort language –

BLANCHARD J:

Yes, but even if you discard that language the point is –

MR GODDARD QC:

– it – does the section 6 claim arise only once you pursue those rights –

ELIAS CJ:

Mmm.

MR GODDARD QC:

– this is essentially a practical matter and it's consideration of those practicalities that led to my submission yesterday that this is best thought about in terms of mitigation. So my response is yes, the purchaser can sue and can allege that their loss is the difference between what they paid and what they've actually got to date but the defendant tortfeasor, council, can respond by saying, but one of the things you got was some rights that you haven't yet fully exercised.

If between now and the trial you exercise them and you get more than the loss, then we now, at that point, know that you've suffered no loss. And this is always the case with mitigation Your Honour, it will often happen after the wrong and it will mean that whether it's offset in part or in whole, the loss claimed, will be ascertained at a later date. This temporal difficulty is inherent in any mitigation issue and what – so it's open to – if the right – suppose that what you have is a right to payment of a $1 million from a bank and you haven't exercised that right, in those circumstances it's actually open to a defendant tortfeasor to say well you have this right and it's actually unreasonably for you not to exercise it. So we can just deduct the $1 million. Whether you can argue that there should be a deduction even though the right has not yet been exercised and hasn't yet been quantified will depend on whether it's a unreasonable failure, normal mitigation question.

TIPPING J:

And the next – the only other question is that if it's in – if it's conditional, it's the value of the right –

MR GODDARD QC:
Yes.

TIPPING J:
– that could raise some difficult issues but it doesn't affect the principle I wouldn't have thought?

MR GODDARD QC:
That's exactly right Sir.

BLANCHARD J:
So you could get – the plaintiff could get a judgment against the Council on liability but not at that stage on quantum because quantum would still have to be worked out?

MR GODDARD QC:
In circumstances where there was a real prospect that the exercise of a mitigation right would completely remove any loss, I don't know that it would appropriate to enter judgment on liability, rather what I think what would appropriate for the Court to determine, that unless the loss is fully offset through mitigation measures which are underway, there is liability and quantification will have to wait but it is still possible that the mitigation will more than offset the loss with the result that no judgment's entered at all. And that would obviously go to, for example, the reasonableness of having brought proceedings, the reasonableness of having occurred costs along the way in those proceedings.

Again if what you're talking about is an unenforced promise by a bank to pay $1 million and for whatever quirky reason the vendor has, the purchaser has chosen to sue the tortfeasor rather than exercise that right, and bring summary judgment proceedings that would certainly have borne fruit, the Court might well just say, well we're just going to enter judgment in favour of the defendant tortfeasor here, it's simply unreasonable not to have mitigated, but in circumstances where mitigation measures are ongoing and their value is as yet unascertained, the Court essentially has a practical choice and there are a range of ways that a Court can deal with it. A Court could value the rights as that time, that's an approach that's open as a matter of fact depending on what is the most realistic approach or the Court can wait and see. Stack them up, like Your Honour said yesterday. So there's a whole range of

perfectly orthodox practical ways in which the Court can determine this claim in a way that's consistent with basic principle.

What my learned friend, Mr Casey, was suggesting, which is to deal with it by means of equitable contribution, first of all I think is an acceptance of my fall-back argument, my 10% emphasis argument but secondly the reason that it was only a 10% argument is that it's extremely unorthodox and novel, it requires the Court to do two quite new things for New Zealand. First of all to find the equitable contribution is available in circumstances that have never been before regarded as coordinate liabilities so the concept of coordinate liabilities has to be stretched much wider than before, much wider than the High Court of Australia, accepted in *Burke v LFOT* for example and second the Court has to adopt the brave and innovative approach to equitable contribution as suggested in the some – first instance judgments such as *Trotter v Franklin* and say well we're not confined to equal contribution because the equities are equal which is what Meagher, Gummow & Lehane, for example, say must be the position. But –

TIPPING J:
Well they're very doctrinaire –

MR GODDARD QC:
They're a conservative bunch of equity lawyers, that's certainly true Your Honour, but there's quite a lot support for that in the authority –

TIPPING J:
Yes I agree.

MR GODDARD QC:
So it would require this Court to stretch the concept of contribution and then to manage that, introduce a whole new flexibility into equitable contribution. It seems to me that that's an extraordinarily complicated path, and in particular the first step of that's a rather dangerous step, as opposed to the second for which I think there are you know, is a much stronger case. That simply need not be taken. The way of dealing with any broader range of contribution that might be thought appropriate is by new legislation in New Zealand providing for a wider and more flexible approach to contribution like the 1978 Act in the UK.

BLANCHARD J:

Is that a commercial for the Law Commission?

MR GODDARD QC:

It's a strong commercial for the Law Commission, that it's –

BLANCHARD J:

I don't think that report's going anywhere.

MR GODDARD QC:

I don't understand what that should be so Your Honour, it seems to me enormously desirable and sensible. I do note with interest that another Law Commission report that has borne fruit in the form of the Limitation Act 2010 – if one looks at section 34 of that, provides for limitation periods in respect of contribution claims between tortfeasors and separately provides for contribution claims between people who are not tortfeasors but makes no provision at all for limitation periods in respect of claims between someone who's a tortfeasor and someone who isn't. So certainly the presumption on which that legislation has been drafted is that the sort of contribution claims suggested by my learned friend Mr Casey, does not exist, is not known to the law and therefore need not be addressed for limitation purposes.

TIPPING J:

I've got about another 20 years to go if the limitation history is any guide to the Law Reform Act.

MR GODDARD QC:

Yes. And anyway –

BLANCHARD J:

There's about 20 years to go before that provision will be interpreted as well.

MR GODDARD QC:

Hopefully by then it will have been changed because that's not its only problem. Anyway, it's not a happy provision section 34 of the new Act. Where was I?

TIPPING J:

You were talking about –

MR GODDARD QC:

I was distracted by commercials for the Law Commission. So there's a novel, innovative, surprising and unorthodox path to solving this problem but there's also a perfectly sensible practical one that involves applying very familiar concepts of mitigation and all the practical steps that the Courts take to manage that issue.

The only other thing I should just say. I'm really still interpolating in response to what my learned friend said after the lunch adjournment here, is my learned friend relied quite heavily on paragraph 14 of the *Eastgate* decision, so far as that deals with the implications of a tort claim for a breach of contract claim against a vendor. It is in my submission simply wrong and inconsistent with basic principles. It ignores the difference in what's recoverable in contract and in tort and the different harms that are being compensated. The approach is the issue my note to myself says back to front and upside down but that's perhaps a little uncharitable.

ELIAS CJ:

Mhm.

MR GODDARD QC:

Only a little – either one would have done, not both. Turning then to my first ground of appeal, the question of whether the duty of care in connection with a limb. There are a couple of things that it is important, I think, to get straight in terms of the nature of these proceedings. My learned friend referred the Court to section 35 of the Resource Management Act and the obligation it creates to keep certain records and have them available at the offices of the local authority. But this isn't a case where the Council's records were defective in any way. The records were before the Court and the file, the resource management file in respect of the A water rights, contained the transfer, it contained everything it should have. What the evidence established, and I have provided references to the relevant passages in the High Court and Court of Appeal judgments, is that the files were fine, this was a case of simple human error. The person who went to the class A water right file just didn't pick up the transfer of half the right, I should have said rather than the transfer, the part transfer. It was on the relevant file, but through human error, wasn't referred to.

TIPPING J:

I think Mr Casey's argument was at a somewhat higher level of abstraction, than the way you have treated it here.

MR GODDARD QC:
I am going to move on to that.

TIPPING J:
You're moving, oh, sorry.

MR GODDARD QC:
Absolutely. So the first thing I wanted to clear out of the way was that there was no suggestion of a –

TIPPING J:
But he didn't argue that.

MR GODDARD QC:
– breach of the Resource Management, no and couldn't really because it wasn't pleaded.

Well, what about the suggestion that there's some freestanding right of access to this information under the Resource Management Act and that it was being accessed under that and not under LGOIMA. A rather difficult argument I'd have thought with respect to the run of circumstances where what was requested was a LIM, something that's provided for under LGOIMA. But more importantly, the Court asked my learned friend, is there provision in the Resource Management Act for inspection or access to these records. There isn't. There isn't because that's provided for in LGOIMA. The Resource Management Act was enacted after LGOIMA and in the knowledge that it existed and there are a range of ways in which official information can be accessed under LGOIMA and if one looks at the different methods in access to documents, specifically provided for in section15, one is inspection of those documents at the offices of the council. Another is, making copies of those or asking for copies and then, of course, there's writing in and asking for copies to be sent.

So, in my submission it is not the case that it was a separate right of inspection under the Resource Management Act, it actually deliberately dovetails with LGOIMA and

the rights of access, the methods of access, the charging regime, all of which are provided for only in that statute, and sensibly so. Nor was this a case of exercise of inspection rights, in respect of records kept under section 35 at the offices of the Council. What happened was that a request was sent in writing, the fax LIM request for information to be collated and provided in writing. The information that was requested is plainly official information in terms of the definition in LGOIMA and the Council's obligation to locate and provide the requested information. It's obligation to go foraging, rather than simply say to someone, here is the file, have a look at it and make of it what you will, arises under that Act, as does its ability to charge for that.

This is not a case involving passive making available of a register or file. It actually involved an element of research and compilation and there's evidence from the council officer about the fairly elaborate steps that are taken in terms of circulating LIM requests through different departments of the Council, the research that's undertaken in order to do this, and it's that process that went awry, so it's the fact that the Council, when it was actively compiling and summarising information, missed something through human error, that is the subject of this claim and the obligation to do that compilation and research, arose under LGOIMA.

So, in my submission, it is quite clear that the information was requested and provided under LGOIMA and then we get to the question canvassed by Your Honour Justice Tipping with my learned friend this morning, well is it a different regime, is it a standalone regime from Part 2. With respect, I much preferred Your Honour's description yesterday of this as a streamlined form of request.

TIPPING J:

Just shows that I'm flexible in my approach Mr Goddard.

MR GODDARD QC:

Exploring all the options but I am suggesting with respect that Your Honour might like to settle on yesterday's formulation and the reasons for that are summarised in paragraph 6 of my little note here. First of all, very clearly, all the information referred to in section 44A is official information, the definition couldn't be broader in section2 and therefore Part 2 applies to it and it could all be requested separately. I won't go through 6.2, I made the submission three or four times in different ways yesterday, but basically if Part 2 doesn't apply to LIM requests, then key elements of the statutory scheme don't work. And it is a streamlining and the way that's achieved is

by removing the need to consider refusal of access and reducing the maximum timeframe for responding. But shorter timeframes and smoother processes don't take this out of the class, is in the same way that a summary judgment proceeding is still a civil proceeding before the High Court. A LIM request is still a request for official information under Part 2, it is just that one's subject to some special rules and tighter timeframes.

It was suggested, in the course of questions to my learned friend that a LIM is of no value at all, if it's not backed by liability. With respect, that can't be right, that's not right. A LIM is valuable because of the information that it can and usually will provide, even if errors don't result in liability. It's simply wrong to suggest that a source of information's useful only if the provider is liability in tort for errors. Consider Part 2 requests to regional councils for information about water permits or about rates. It's still useful to make those enquiries, even though it's quite clear that the response is not that by tort liability.

The other example I thought of giving and then decided against, but I guess my better judgement I will give it now, is legal textbooks. The fact that you can't sue the author of a textbook if they're wrong doesn't mean that it's not useful to read textbooks, it's a useful source of information which informs your process of decision making.

TIPPING J:

Can a responsible practitioner rely on a LIM if there is no backing liability?

MR GODDARD QC:

Yes, because they're relying on the public law responsibility of the Council and the practical expectation that errors will be rare.

ANDERSON J:

But the liability doesn't lie for the error, it lies for negligence.

MR GODDARD QC:

That was my next point. Is that my learned friend, Mr Casey, accepted that there's no liability simply for error and there are many ways in which error could creep into a LIM without negligence, so a practitioner has to proceed on the basis that it's possible that a LIM maybe wrong and there may be no right of action. But

nonetheless, a prudent practitioner will seek a LIM because it is likely, given the care with which public bodies perform their functions, that it will provide useful information and if there are problems, it is a useful alert to those problems.

ANDERSON J:
They're more likely to perform their functions with care if they're liable for not doing so.

MR GODDARD QC:
That's not necessarily the case in relation to public bodies that can simply pass those costs on Your Honour, there's an extensive law and economics literature on that and the way in which those principles apply to private actors seeking to maximise profit, which is along the lines Your Honour suggested, the paradigm that people like Richard Posner have written text books about, actually doesn't work in relation to public bodies because they are subject to quite different set of disciplines and constraints.

ANDERSON J:
I don't know about that. Council's responses to leaky homes, this is sort of notched up a few levels since they became liable.

MR GODDARD QC:
The central government response has also notched up a few levels, even though so far, no liability as been imposed, although I think I have case raising that issue before this Court to come later this year in relation to some aspects of central government's response, but it's basic- what that illustrates Your Honour, all flippancy aside, is that responsible administration will respond to public concerns about the quality of services provided and that there are accountability mechanisms, other than tort liability, which are effective and appropriate. So, for example, central government has completely changed its approach to dealing with water tightness issues and building regulation generally in response to concerns about leaky homes. It is always a course open to complain to the Ombudsmen under the general Ombudsmen Act jurisdiction about the way in which a council discharges its LIM responsibilities and I should say that a review has been carried out of the Ombudsmen's case notes to ascertain whether there were any decisions on charges for LIMs. They have been reviewed all the way back to the 19 – 1991 when LIMs were introduced and there's

no decision on that in the case notes, which of course are not a complete record of all Ombudsmen decisions, just the ones that the Ombudsmen think are interesting.

But what did emerge in the course of that was one complaint that was made to the Ombudsmen under the Ombudsmen Act about the way in which a council had gone about including information on a LIM and a resolution was reached between the council and the complainant, facilitated by the Ombudsmen in the light of concerns about that, because it was considered that what had been done was not consistent with the principles of good administration, which the Ombudsmen monitor, through the Ombudsmen Act. So there are public law accountability mechanisms, both in specific cases and more generally, that exist without tort liability.

The, and I pick this Your Honour Justice Anderson's point, is in my last two lines of paragraph 7, is also the potential for non negligent errors which there'd be no right to compensation, that doesn't mean that LIMs aren't useful.

The source for the goose argument, with respect, is wrong in logic and unsupported by any authority. It's wrong in logic because it doesn't follow that a source that it's careless to fail to refer to resource of information only if the provider of that information is liable in tort, and again, if one thinks of a solicitor giving advice on a question of law, a contract question, to fail to refer to standard textbooks, all of which explain that things work in manner A, could well be negligent, even though there's no right of action against the writer of those textbooks. It's just, however superficially appealing that old sore might be, it has no legal force, there's no authority in favour of it.

Section 41 of LGOIMA. A couple of points in my paragraph 8, as I submitted yesterday. It's not right as Mr Casey, my learned friend Mr Casey, suggested that section 41 would be useful only if it ousts the common law. Rather, what it does is declare the common law position, consistent with the scheme of legislation to provide certainty and clarity and that's something that we should always welcome in legislation.

My learned friend said in answer to a question from the Court about whether there was any case law on what good faith meant under section 41 that there wasn't. That's right in relation to section 41 of LGOIMA, but it is not right in relation to the identical provision in the Official Information Act, section 48. There's actually quite a

bit of New Zealand case law on that and it's different from the Australian approach in *Mid Density* reflecting the nature, statutory scheme of the Official Information Act. I refer to those cases in my submissions in paragraph 6.1 in footnote 2. But there are a number of decisions saying that good faith has the meaning of no ulterior purpose or dishonesty.

And finally, my learned friend chastised me for not having addressed that basic elements of a duty of care, not having worked through proximity and policy and stepping back, whether it's fair and reasonable to impose a duty. I do do that in my written submissions, but really, the high point of my case, as Your Honour Justice Tipping put to me yesterday, is that the central factor when one thinks about both proximity and policy here, is the statutory scheme, it's relevant to both, just as the Maritime Safety legislation was relevant to both in *Attorney-General v Carter* and when one looks at that statutory scheme, and the scheme of the Act as a whole in its policy of access to information and the way in which section 44A operates, by territorial authorities only, one reaches the conclusion that there is not proximity in the relevant sense, that there are policy factors pointing against liability, that it's not fair and reasonable to impose liability. In particular, in those territorial authorities that happened to be unitary authorities, or and my learned friend in his submissions, identified further potential for anomalies that happened to have had some regional council functions transferred to them under section 33 of the RMA, with the result that unlike most territorial authorities, they have information that you wouldn't get in a LIM and therefore, wouldn't normally be able to get with the backing of the negligence liability for which the plaintiff in this case contends.

Finally, I couldn't resist pointing out that as Your Honour the Chief Justice said, there's no assistance to be obtained from section 44A to (bb)(iii) here, the whole of (bb) is concerned with drinking water, subparagraph 1 says, you say whether the drinking water is provided by a network operator, or self-provided and then the two subsequent LIMs deal with each of those two possibilities. It's all about drinking water and to suggest that it helps us here is a red herring, a red herring out of water.

Unless there's anything I can assist the Court with, I've trespassed over 4 o'clock anyway.

ELLIAS CJ:

No thank you, thank you Mr Goddard, thank you counsel, we'll reserve our decision in this matter. Thank you for the argument addressed to us.

COURT ADJOURNS:4:04 PM