IN THE SUPREME COURT OF NEW ZEALAND SC 77/2010

BETWEEN **NORTH SHORE CITY COUNCIL**
Appellant

AND **THE ATTORNEY-GENERAL (AS SUCCESSOR TO THE ASSETS AND LIABILITIES OF THE BUILDING INDUSTRY AUTHORITY)**
Respondent

Hearing:	1-3 November 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	D J Goddard QC, S Mitchell and N K Caldwell, for the Appellant D J Collins QC, M T Scholtens QC, T G H Smith and S J Leslie for the Respondent

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CIVIL APPEAL

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour, I'd like to begin your Honour, by providing to the court a one page road map of how I intend to tackle my oral submissions this morning, and also a small bundle of supplementary authorities, which Madam Registrar has. The supplementary bundle addresses two deficiencies in the legislation, contained in the existing bundle, some material in the Building Act that was added by amendment and wasn't included, a recent decision of the Supreme Court of Canada delivered after the submissions were prepared, and a decision of the Ontario Court of Appeal, which

I think is of assistance to the Crown and which I felt it proper to draw to the attention of the court.

ELIAS CJ:

Thank you.

MR GODDARD QC:

I'll begin briefly by outlining the focus of this appeal and then dive into the legislation which provides the essential framework for analysing the role and responsibilities of the Building Industry Authority. So beginning in section 1 of my written – my principal written submissions. And I say principal written submissions because the Crown sought leave to add an additional ground, limitation ground to this appeal, and the court should have as a result, not only my principal submissions, but also the supplementary submissions filed by the leave of this court in response to the Crown's argument on limitation.

So, beginning at the beginning. The 1991 building reforms about which this court has heard so much over the last two years, much of it I'm afraid from me, made a number of significant changes, not only to the substance of building regulation in New Zealand, but also to the institutional framework for administering the regulatory regime. Before 1991 councils, such as the appellant, set the rules in relation to building in their areas through bylaws and they administered those rules through granting appropriate building permits, carrying out inspections and so forth. One of the significant changes effected by the 1991 legislation, as well as introducing a national Building Code prepared – was to introduce a national body which would be responsible for recommending that Code, effectively substituting for the territorial authorities' rule-making function, and which would have particular expertise in matters relating to building control, which would be the final arbiter on issues such as whether a building consent should be granted and whether a building complied with the Building Code and which would have what was described by the Building Industry Commission in its report which was the origin of the 1991 reforms, a responsibility to monitor and direct the administration of the Building Code.

Territorial authorities for their part were to be responsible for the day-to-day administration and enforcement of the Code. So what used to be essentially the role of the territorial authorities against the backdrop of which *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC) was decided and the

cases which led up to it, what was their responsibility was parcelled out in part to territorial authorities but in part to the BIA.

It's notorious, that's why this court has heard so many appeals in the area already, that there's been a systemic failure in the building control system, introduced by the 1991 Act, producing tens of thousands of leaky homes being built in the 1990s and early 2000s. Numbers are not known precisely but the best available estimate prepared by Price Waterhouse Coopers for the Department of Building and Housing gives a mid point figure of perhaps around 42,000 houses within quite a wide band.

Many of the leaky homes were built using monolithic face fixed cladding over untreated pinus radiata timber, a construction technique that became widespread following the passage of the 1991 Act and the move away from prescriptive building standards that told you what timber you could use, what length of nails you could use and how you should insert them, to a performance based regulatory regime.

It wasn't long after the formal approval by the BIA of the acceptable solution, B2AS1 about which this court has heard in other appeals, in early 1998, that concerns about monolithic face fixed cladding over untreated timber began to be drawn to the attention of the BIA and there were a series of letters from Prendos in particular building inspectors and advisors that were sent through 1998 and the following year. But the issue only came to the attention of the public and territorial authorities generally in 2002.

The claim by the plaintiffs in this case, the owners of the Grange, is in many ways typical of the leaky building claims that have come before the courts. The building features monolithic face fixed cladding over untreated timber and it fails to comply in a large number of respects with clause E2 of the Code concerned with external moisture, weathertightness, and B2 durability, major remedial works required and the Council is the first defendant because as is so often the case the primary players are not on the scene.

The essence of the complaint against the Council, and this is important because the Crown suggests that really it was just a failure to look properly at the deck and a few other things on the part of the inspector. But the complaint against the Council is that it didn't carry out enough or proper inspections. That it should have been aware of the weathertightness risks associated with monolithic cladding and it breached the

Hamlin duty of care, confirmed by this Court in *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZSC 158, by failing to appreciate these risks and guard against them when granting consents and carrying out inspections.

TIPPING J:

So the allegation against the Council is not only failing to inspect on an individual error basis but failing to appreciate that the whole system was shonky, if I can be colloquial.

MR GODDARD QC:

The pleading at –

WILLIAM YOUNG J:

It's not shonky though is it?

MR GODDARD QC:

Sorry?

WILLIAM YOUNG J:

No one really says that, or am I wrong, but face fixed monolithic cladding over untreated timber can work?

MR GODDARD QC:

If it's done properly.

TIPPING J:

Well yes.

WILLIAM YOUNG J:

So it's not a shonky system?

MR GODDARD QC:

It's not that, which is the shonky system. The shonky system is the Council's way of going about issuing consents and carrying out inspections. The allegation is two-fold in relation to the inspections in particular your Honour –

TIPPING J:

Well my brother's brought up what was going to be my next step. Is it said that this system monolithic over whatever you call it, is per se unsatisfactory –

MR GODDARD QC:

No.

TIPPING J:

– or is only if it's done or put there in an unsatisfactory way?

MR GODDARD QC:

It's the latter but it involves some systemic risks and one sees the same issues come up in case after case after case. Penetrations that aren't properly sealed, taking the cladding right down to ground level, a whole set of issues that systemically have caused these problems and that councils simply were not looking for at the time.

TIPPING J:

So it is capable –

MR GODDARD QC:

Yes.

TIPPING J:

– of doing the job but it's got to be put there properly –

MR GODDARD QC:

Yes.

TIPPING J:

– is that a fair summary?

MR GODDARD QC:

That's a fair summary.

ELIAS CJ:

It's a risky system.

MR GODDARD QC:

That's exactly right your Honour. It's a system which involves a range of risks that are not associated with traditional building techniques in New Zealand. It requires a level of expertise on the part of those installing it and on the part of those inspecting it, which was not a feature of the previous building environment, and the evidence that has played out in a number of cases, and it's described in *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 (HC), a decision of Justice Baragwanath in the first instance, is of a council saying, but we just weren't looking for these issues, and no council was looking for these issues. So councils regularly produce evidence that council inspectors were not alive to these risks and were not looking for them and that what their inspectors did was what any council inspector would have done in those circumstances and the response of the courts, and it's most, I think, clearly expressed, perhaps, in *Dicks*, is, but that's not good enough. You haven't got a proper system. You're not alive to these risks. You weren't inspecting often enough so that at each stage of the building where these risks were visible before being covered up, you could check that they, that things had been done properly, and you weren't, you just weren't asking the right questions.

So, I'm getting a little ahead of myself, but what the court will see when we come to the 2003 review by the BIA of this Council is the BIA saying, but you don't have enough staff. They're not properly trained. Your checklists are hopeless and here are some new ones. You're just not looking for the right issues when you inspect and you're not inspecting anywhere near often enough. So the way you are going about this systemically is flawed and that was not only applicable to this Council in 1998 through 2000, it was applicable, we will say, at trial, if this matter is permitted to go to trial, to all councils. It was a general level of ignorance of these risks and absence of proper systems for dealing with those risks.

Now the courts could have said that was acceptable if you were doing no worse than other reasonable councils, there's no negligence, but the courts, perhaps unsurprisingly, have set their face against that argument and they've said, no, it is negligent to fail to have proper systems for identifying and responding to risks of this kind and it's really that systemic failure by councils, not enough inspections, looking for the wrong things, which has resulted in these issues not being detected in this case as in thousands of others.

TIPPING J:

Is it looking for the wrong things or not looking for the right things? I don't want to sound pedantic Mr Goddard but…

MR GODDARD QC:

It's both I think Sir.

TIPPING J:

It's a mixture of both. All right.

MR GODDARD QC:

Looking for the things that were issues in relation to traditional construction techniques in some –

TIPPING J:

Well clearly this was a new system so they, the suggestion is, and it's been upheld as far as the councils are concerned, that they should have been alive, if you like, to the risks that this particular method involved?

MR GODDARD QC:

Yes and that that required many more inspections than traditionally had been the case and on those inspections there were particular things you should be looking for.

TIPPING J:

So it really goes back to a lack of awareness of the risks?

MR GODDARD QC:

Yes, a lack of awareness of the risks. And that's really the complaint, is that the councils weren't aware of the risks. They had a significantly new and different level of responsibility in administering a performance based regulatory regime rather than a prescriptive one and the body that they looked to, to assist them in doing that through information and education, and through its review function, was the BIA and that was one of the key purposes for which that body was created. The task that territorial authorities had post-1991 was qualitatively different from what they were doing before that date, because instead of assessing whether boards were free or not to the required extent, as in *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) and whether the nails used were of the right kind and the right length. Suddenly, there were performance standards that could be met by any of a wide range of

building techniques and territorial authorities were expected to be able to assess whether that performance standard, that outcome, would be achieved by novel techniques that many of the inspectors, by definition, had not encountered in the course of their previous experience working in the industry, and the question was, "How was the system supposed to respond to this?" and our case is that responsibility for understanding this type of risk and addressing it was shared. It was shared by the BIA and by territorial authorities, it was not –

ELIAS CJ:

Sorry, did you say, "Responsibility for understanding the risk"?

MR GODDARD QC:

For understanding and responding to the risk, I should have said, and developing proper systems for doing so, was a shared responsibility. It wasn't any part of the scheme, which among other things, was directed to efficiency, that each of the more than 70 territorial authorities throughout New Zealand would reinvent each and every wheel in relation to each and every building innovation, rather the body with primary expertise in these matters, BIA, and I'll go through –

McGRATH J:

So they shared responsibility for quality control, you say?

MR GODDARD QC:

For the proper administration of the new regulatory regime, which included understanding and responding to risks associated with novel building techniques, yes.

TIPPING J:

It would be highly inefficient if each individual council had to, as you say, reinvent each individual wheel.

MR GODDARD QC:

To suggest that that's what this statutory regime contemplated, is very surprising when one looks at the emphasis on efficiency, and on cost reductions, and I'll develop this as I go through the statute, in my submission that just was not in contemplation. The BIA was supposed to be, what the Australians refer to as a peak body, I think, with particular expertise in building matters, responsible for

recommending the Code to the Minister and so in turn for regulations, with final authority for deciding whether building consent would be issued, if there was a disagreement between an applicant and a council for deciding whether code compliance certificates would be issued in the event of disagreement, for educating – I'll go to this function soon in the statute.

ELIAS CJ:

Before you go to the statute, I'm just looking at your outline. It doesn't seem that you're going to take us to the pleading. Now I'm conscious that this is a strike out, and so the pleadings aren't set in concrete, but I haven't gone to your pleading against the BIA and I would find it useful to see.

MR GODDARD QC:

I will your Honour, and that's my item 5, the Council claims against the BIA.

ELIAS CJ:

Oh, I'm sorry, yes.

MR GODDARD QC:

No, no, no, your Honours, it's a bit cryptic there's no – but that's where I was planning to go through –

ELIAS CJ:

I see.

MR GODDARD QC:

– the pleading.

ELIAS CJ:

Thank you.

BLANCHARD J:

Mr Goddard, did either the Building Code, or what I think are called, an approved solution –

MR GODDARD QC:

Acceptable solution, your Honour.

BLANCHARD J:

Acceptable solution, spell out how monolithic cladding should be installed in particular, when there was untreated timber?

MR GODDARD QC:

No.

WILLIAM YOUNG J:

Does the supplement – I mean it depends on what level of generality you approach it, but doesn't the acceptable solution require that the timber moisture be 18% or less?

MR GODDARD QC:

It basically says that one of the acceptable ways of meeting E2 and B2, is by using untreated timber provided a moisture content of under, I think it's 18%.

WILLIAM YOUNG J:

Yes, so at that level of generality, it's saying yes how to do it.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

But it's not saying, "Do this, do that, do that"?

MR GODDARD QC:

Exactly right your Honour, so it's not for example saying, and you just won't be able to maintain that in a warm damp climate like New Zealand's, in particular Auckland's, unless you pay particular attention to the following risk, unless you have cavities, unless it's not taken hard down to the ground. That sort of level of detail is not present.

So the first, and I think fundamental point that I wanted to make in introduction, is that the claim against the Council inevitably focuses on particular defects in the Grange. First, one of the complaints is that the Council didn't carry out enough inspections, and we'll see in 2003 the BIA saying exactly that to the Council. In respect I should say, of exactly the same system that it was quite happy with in 1995 and 2001, but I'll

go through that in more detail. And the particular matters that the plaintiffs say the Council failed to pick up, are matters that the Council says it didn't pick up because it wasn't looking for them, and nor were other councils, and these are not one-off issues, they are precisely the same issues that my instructing solicitors live with in, I don't know how many thousands of cases, penetrations through the face fixed cladding that are not properly sealed. Wing walls with flat surfaces that are not properly waterproofed, I have hardly done one of these cases I think, in which the phrase "wing wall" has not occurred. I think I almost understand what they are now, but –

ELIAS CJ:

I don't, so if it's necessary you'll have to explain.

MR GODDARD QC:

It's not. It's a painful experience, having some of these things explained, and I don't think I need to inflict on your Honour as well.

ELIAS CJ:

Thank you.

MR GODDARD QC:

That's for trial, where the trial Judge will have the joy of understanding what these defects were in this case, why they weren't being looked for, how they weren't looked for in thousands of other cases, and will look at relative responsibility for that failure, as between the Council and the BIA. The suggestion in this case is not that the Council is devoid of any responsibility for these matters, it is that the BIA is also responsible, and that the –

TIPPING J:

So it's contribution, not indemnity, putting it –

MR GODDARD QC:

Realistically that must be right, and the claim for damages is inevitably going to be met by contributory negligence argument, which will then be hard fought out at trial.

WILLIAM YOUNG J:

What's happened to the claim by the plaintiffs?

MR GODDARD QC:
It's been settled your Honour.

WILLIAM YOUNG J:
Has it?

MR GODDARD QC:
It wasn't reasonable to hold –

WILLIAM YOUNG J:
Defer them, no.

MR GODDARD QC:
– a resolution for them while this process continued, and so the Council and other defendants, but primarily the Council, have settled on a basis that expressly preserved the ability to pursue this claim. And a very substantial payment was made, I can say, by the Council.

So these matters, the systemic nature of the failures by the Council, will be dealt with in evidence at trial, and really the thrust of the claim against the BIA is summed up in 1.6 in my introduction. If it was negligent for a territorial authority, one of the 70 plus territorial authorities, responsible for day-to-day administration and enforcement of the Code, to be negligent in failing to appreciate these weather-tightness risks in the 1990s and failing to have systems in place to identify and guard against them, then it's even clearer that the BIA, the national expert body in this field, should have been aware of those risks, and should've had an understanding of the systems and processes required to identify and guard against those risks, so that when it went out to review what territorial authorities were doing, it should have been saying, well where are your check lists? Why are you doing only this number of inspections? That's not good enough for this widespread system of construction that we're seeing all over New Zealand now. And the reasonableness of this expectation is underscored by the fact that from 1998 onwards, the BIA was actually being told by industry experts that there was a problem with this widespread construction technique, and the likelihood of very widespread problems. The –

TIPPING J:

That goes to negligence, not to duty of care.

MR GODDARD QC:

The knowledge of risk, may –

TIPPING J:

Well you'll need to develop that.

MR GODDARD QC:

– of itself when coupled with a statutory role –

TIPPING J:

Just because they're negligent doesn't mean they owe a duty of care.

MR GODDARD QC:

No your Honour is right, that level of generality that's plainly right and that was a key theme of the Court of Appeal's decision in *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) *("Sacramento")*. The Court identified the allegations made against the BIA and said, well if that's right then that falls far short of what one might expect of a public body of this kind but that maladministration by a public body doesn't mean you have a right to sue it for damages. The question of duty of care still needs to be addressed and that's what I'm going to spend some time troubling the court with.

TIPPING J:

You just want to soften us up.

MR GODDARD QC:

Yes, it doesn't hurt, I think, your Honour, to start by identifying some fairly spectacular negligence to really give a sharp –

WILLIAM YOUNG J:

I mean they sat on their hands is the complaint. Is that – the Prendos report is coming in – what is their response to that, just as a matter of interest? Has the BIA ever said, well there was a jolly good reason why we ignored what Prendos was saying or we didn't look at what had happened in Vancouver or…

MR GODDARD QC:

I don't know we haven't got a defence in this case yet so it hasn't been addressed in the context of this case. My learned friend may be able to help the court with that but I'm not aware of any particular explanation other than we were a very small body and we were doing a lot, being proffered. That's really as far as Mr Porteous, the former chief executive, goes in his affidavit in support of the application to strike out.

WILLIAM YOUNG J:

He never really responds to the complaints about –

MR GODDARD QC:

No. He says there were 13 of us, later 15, and we had a lot to do and not very much money. These are arguments that if they were defences would be successfully deployed by many councils, especially the smaller ones, but that doesn't seem to have worked for them and that is another one of the themes that I will be returning to, the sauce for the goose, sauce for the gander argument in relation to constraints on resources.

McGRATH J:

The argument has no relation really to the statutory provisions, does it? You can't link the lack of resources argument to anything in the statute?

MR GODDARD QC:

No.

McGRATH J:

Which is where we ultimately have to find the duty of care I suggest?

MR GODDARD QC:

And my argument is very much the one that's been brought to bear in relation to the territorial authorities which is that it was their responsibility to work out what needed to be done and they had the ability to obtain the appropriate resources for that. One of the things I'll be taking the court to a little later on is the funding mechanism for the BIA and what the court will see is that the way the BIA was funded was by a levy that was charged to building owners when they obtained a building consent. Now that's important because the BIA had a responsibility to identify what funding it needed and prepare a budget and make recommendations about the level of levy which

ultimately required Ministerial approval. But it's important because the BIA relies heavily on cases like *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA). We say that this case is very different for a number of reasons but perhaps the starkest reason is that the duty, we say, was owed to building owners undertaking construction and every one of those building owners, in order to get a consent to carry out its building work, had had to pay a levy to the BIA to fund its work. So the BIA knew how many consents had been granted. It knew the value of the building work being undertaken and it had received an ad valorem levy in respect of each and every one of those and if it needed more resources to do its job properly, then it should have retained those resources, made the case to Ministers, and recovered the cost of it from the people doing the building work who were looking to it to perform its share of the responsibilities.

McGRATH J:

And is that levy fixing process provided for by regulations, do you know?

MR GODDARD QC:

It's provided for in the primary legislation and I'll take the court to that, it's Part 3A of the Building Act 1991 and it's one of the parts that, because it was added by amendment got, in 1993, it got left out of the primary legislation but in the end it's quite important so I've added it in my supplementary bundle.

So we have a body that has particular expertise in this area with national responsibility and it was being paid an amount by each and every person undertaking building work to fund its functions. So if you obtained a building consent in those days you got an invoice from the territorial authority which identified the charges of the territorial authority and which would have under it, Building Industry Authority levy at the prescribed rate. Initially I think it was $1 in a thousand of the value of the building work and in later years it was reduced to 80 cents and then something lower. Mr Porteous explains that in his affidavit very helpfully. But the short point is that for every $1000 of building work that was done in New Zealand, the BIA received from the person carrying out that work a prescribed levy and it was supposed to use that to perform its functions for the benefit of those people, we say.

So this is not a case of the Securities Commission not knowing how much activity is going on out there, being potentially responsible to an unknown number of investors and an unknown number of schemes. The BIA knew how many consents were being

granted and there are figures in the material before the court, about 20,000 a year residential buildings for example at the relevant time –

TIPPING J:

Well doesn't the BIA have some educational function which might distinguish it from the Securities Commission at least relevantly for our present purposes?

MR GODDARD QC:

It has a range of functions that are different from the Securities Commission function. It has the education function. It has –

TIPPING J:

It has an inspection function, or a review function?

MR GODDARD QC:

And it has the review function, exactly your Honour, so it was rolling its sleeves up and getting out there with the territorial authorities saying, show us your checklist, show us your systems, tell us what staff you've got and what skill levels they've got. Tell us what training they undertake and now let's go out and look at some of the buildings, and the court will see this when we go to the review, and they were actually getting out there and comparing a sample of buildings with the Code and with the checklists and saying, do we think these territorial authorities are uniformly across the country and to an acceptable standard ensuring compliance with the Code. So it's a very different hands on role.

TIPPING J:

Would the outcome of your submission being successful be this? That those who happen to be inspected by the BIA would be in a better position than those who weren't?

MR GODDARD QC:

They might have a still stronger case but the Grange was not a building –

ELIAS CJ:

But it would have a different claim though?

MR GODDARD QC:

A different claim, your Honour is right, that the Grange was not a building that was actually inspected –

TIPPING J:

No, no I mean the subject of review. There were seven Councils, weren't there, that were the subject of review?

MR GODDARD QC:

Oh I see.

TIPPING J:

Do you see what I mean? Your case is very largely based on the fact that that review was done negligently. Well a council that wasn't the subject of review wouldn't be able to assert that.

MR GODDARD QC:

As I understand the position there was a rolling system of reviews that worked its way around the territorial authorities so I would expect –

TIPPING J:

In due course everybody would have been reviewed, is that the idea?

MR GODDARD QC:

Yes, so in the timeframe that we're looking at here, the North Shore Council was reached three times, for example.

TIPPING J:

I see.

MR GODDARD QC:

And so yes your Honour is exactly right. If the BIA had decided that some small council somewhere in New Zealand was too small to be worthy of notice and had never visited it, then it wouldn't have the same claim that –

TIPPING J:

It may have a different claim –

MR GODDARD QC:

It might.

TIPPING J:

– but it wouldn't have the claim that's at the forefront of this case.

MR GODDARD QC:

Exactly. It would have, potentially, it wouldn't have the same three causes of action which involve a direct duty owed to the Council. It would be able to invoke the fourth cause of action, the claim for contribution –

TIPPING J:

Well it would be in the same case as all the others in that respect. But in a different case in relation to the first three causes of action?

MR GODDARD QC:

Yes.

TIPPING J:

The first three causes of actions are basically negligent misstatement, or negligent failing to speak.

MR GODDARD QC:

Yes.

TIPPING J:

When it's all boiled down –

MR GODDARD QC:

Arising out of the review.

TIPPING J:

Well if there was no speaking going on –

MR GODDARD QC:

Then those drop away and so the only question then becomes whether, either there's a different duty to get out there and review which I think would be –

TIPPING J:

But it is a slightly odd situation but you say it doesn't actually arise on the facts?

MR GODDARD QC:

It doesn't arise on the facts before the court and it's not, there's no suggestion that this was something that applied to this Council uniquely and indeed each of these reviews was addressed to half a dozen or seven Councils so the court will see when we go to the reviews that there were a group of councils done at the same time –

TIPPING J:

Yes, I realise that.

MR GODDARD QC:

– but one of the concerns –

TIPPING J:

What I hadn't appreciated was that it was that over time everybody would get reviewed.

MR GODDARD QC:

That's my understanding of how it worked. And that would be consistent with the statutory role of the BIA that the appellant says, it flows pretty directly, pretty naturally from the statutory scheme.

BLANCHARD J:

It wasn't obliged to carry out reviews, unless the Minister asked for them.

MR GODDARD QC:

Yes, it had a power to carry out reviews of its own motion, and an obligation to do so if asked by the Minister.

BLANCHARD J:

And had the Minister ever asked?

MR GODDARD QC:

Not that I'm aware of.

TIPPING J:

But – yes, well my brother's touched on a point as it's arisen. One of the functions, leaving aside the question of how, and obligation, one of the functions was to undertake reviews.

MR GODDARD QC:

Yes. And so if it simply did none at all, I think there would be an issue about whether it was performing its public duties.

TIPPING J:

Public duties.

MR GODDARD QC:

Again, obviously that doesn't translate immediately and directly into a private law cause of action, but I think when asking what was contemplated by the statutory scheme, that this was a function, and that it would be virtually impossible for it to discharge its responsibility of monitoring the administration of the Act and the Code without asking what the frontline people were doing, really point to the fact that it had no choice, but to do reviews. The BIA simply could not have any sort of national oversight of how the Code was being implemented, unless it got out and looked what the frontline people were doing, it would be like trying to understand what a – how an airline business was operating, without asking what the check-in staff were doing, and what – whether the pilots were qualified. It's not good enough just to look at – sit there thinking about high strategy.

Coming back then to my written submissions, I refer in 1.7 to the 1995 review and I'll take the court to that in a moment. What is particularly striking in this case is that the BIA looked at essentially the same systems on three occasions, was pretty happy in 1995, pretty happy in 2001 and completely horrified in 2003. What it was looking at hadn't changed, but we say that the 2003 review was an example of what a careful review, by an expert body that understood the risks associated with this widespread construction technique, would've looked like back in 1995.

ELIAS CJ:

Why do you say what they were seeing hadn't changed? Is that apparent on the face of the report, or is that a matter for evidence at trial?

MR GODDARD QC:

It will be a matter for evidence at trial, but in the affidavits filed by the Council in opposition to this application, there is an affidavit from a Ms Geddes, who was director of the relevant division, saying that the systems had essentially not changed from 1995 to 2003, except that specific issues identified by the reviewers, had been picked up, and they were pretty fine grained.

ELIAS CJ:

But if – if it's in the doing that the problem occurs, why would the system, why do you say that the systems hadn't – the fact that systems hadn't changed, is the answer?

MR GODDARD QC:

It's only part of the answer. I'm referring to the Council systems.

ELIAS CJ:

Yes.

MR GODDARD QC:

And what I'm saying is essentially they had broadly the same type of staff, with broadly the same type of expertise, carrying out essentially the same number of inspections.

ELIAS CJ:

But they might have got it right on some occasions. I'm just probing for, and it may be that it's simply a question of fact, it's just not evident to me that from the fact that they were carrying on doing inspections, they were doing it wrong at the time of the inspections by BIA.

MR GODDARD QC:

I see what your Honour's saying. The primary defect, in how councils were going about inspecting buildings of this kind, is that they weren't inspecting often enough, and that was systemic, because they had certain rules about when they would inspect, and they just weren't looking for the right things, and that was common across a very large number of buildings, and across many territorial authorities, again, this will all be a matter for evidence obviously. But we say that what should have been apparent to a careful national expert body, even before it got out into the

field, and looked at particular buildings, was that the systems that the Council had, did not provide for enough inspections, that its check lists were inadequate, and your Honour will see all those things being said in 2003, saying, "But you're just – of course you're not going to find these risks, because you don't know what you're looking for, and you're not looking often enough, and you're not asking the right questions". And it's a phenomenon that lawyers can suffer from, as much as anyone else, if you don't ask yourself the right question, you're inherently unlikely to stumble on the right answer. And that was basically the problem.

And, as pleaded, and as the evidence filed in opposition to this application confirms, when these concerns were drawn to the Council's attention by the BIA in 2003, it responded to them. It promptly took steps to address them, and it says, and if you had written the same report in 1995, we would've taken the same remedial steps in 1995, and the problems with the Grange would never have come about, and many other buildings as well.

The three courses of action against the BIA in respect of a duty owed to the Council and the fourth course of action, the contribution claim, are outlined in paragraph 1.9. The first course of action, negligent performance of the 1995 review. The claim is that if the review had been carried out with reasonable care, these issues, the lack of proper systems, the lack of proper staff, the inefficiency of number and quality of inspections, would have been identified and drawn to the Council's attention, and would've been addressed.

The second course of action, as your Honour said, really is very much the same thing, and one sees this in relation to most claims against auditors as well, for example, is it the audit process that one says is negligent, or is it the report that's a negligent misstatement. These are different ways of putting essentially the same issue.

The 1995 report, which is described as a report for the North Shore City Council, conveyed to the Council that it had adequate systems and processes in place, for performing its responsibilities, including in respect of consenting and inspection. These clean bill of health statements, were incorrect and were made negligently. And again we have both a pleading and evidence that the Council actually understood the reports in this way, and actually relied on them in not making changes. So this is not, so far as the Council's claim against the BIA is concerned, a

case about general reliance. It's a case about specific reliance on comfort, provided, and that reliance effectively took two forms, taking at face value what the national expert body was saying about performance generally being adequate, but also, and critically, but being lulled into a false sense of security and not seeking other external expert review in respect of the Council systems, because what's the point if the national expert body, the one with final authority to tell you whether you were doing your job properly or not, has come and said, "This looks good to us."

TIPPING J:

Would it be the case, that say there'd been a dispute between the builder and the Council about what was to be done, that would've gone to the BIA to resolve as to whether what the builder was proposing was in accordance with the rules would it?

MR GODDARD QC:

Yes.

TIPPING J:

But there they would've had a kind of adjudicative function, but they would equally have been looking at, you know, whether what was proposed was satisfactory.

MR GODDARD QC:

They would've been looking at whether what was proposed was consistent with the Code. So if for example, one applied for a building consent, and the Council said, "No, we don't like this construction technique". Then the building owner could ask for the BIA to review that decision, and the BIA would consider it and issue a determination, under I think section 17 of the Act, I'll come to it later, which could grant the building consent. And what we then see, although your Honour's quite right, that in a sense it's an appeal, and there was a right of appeal on questions of law from that decision to the High Court, is nonetheless express contemplation in the limitation period provisions of the Act, that where the Authority had issued a building consent, or a code compliance certificate, it would be liable in negligence in the same way as a territorial authority could be.

TIPPING J:

But then we'd be looking at the per se issue as opposed to the whether it was actually done right issue, wouldn't we? Like we close to started with. It might have been approved per se, but then the Council would then be responsible for monitoring

whether it was done properly. Not the BIA, wouldn't have been responsible for monitoring whether it was done properly.

MR GODDARD QC:

No, it was then up to the Council to do the day-to-day monitoring, but if the Council at the end of the day then considered that it hadn't been done properly, and declined to grant a code compliance certificate, again one could go back to the BIA and seek a code compliance certificate and the BIA could look at it, and say, yes we think this complies with the Code. And then subsequent complaints about the building having been given a tick, and people relying on the code compliance certificate, would the Act contemplates, be addressed to the BIA.

TIPPING J:

So if the BIA had signed it off, if I can use that expression, under its adjudicative function, the limitation provision looked as though they could be responsible?

MR GODDARD QC:

Yes.

TIPPING J:

Even though they were acting in a kind of an adjudicative role?

MR GODDARD QC:

Yes. And that's one of the – there are a number of respects in which I don't know that the court in Sacramento was given all of the – was taken to all the relevant aspects of the legislative framework. It seems to me that one critical aspect that wasn't discussed, was the levy regime and the fact that the people, the building owners were actually paying the BIA ad valorem to do its job. I think that's quite important, it narrows down the class that you're looking to, and creates much more of a relationship I think. But also critically, there was a lot of reference to the BIA's quasi judicial and legislative roles, but the statutory scheme clearly contemplates that some of those quasi judicial roles may nonetheless be the subject of negligence claims. So I don't think that the bright line contemplated –

ELIAS CJ:

Well you don't accept that characterisation do you?

MR GODDARD QC:

No.

ELIAS CJ:

Because it was – it became a consent authority.

MR GODDARD QC:

It stepped into the shoes –

ELIAS CJ:

Yes.

MR GODDARD QC:

– of the consent authority.

ELIAS CJ:

And had to therefore take responsibility.

MR GODDARD QC:

Yes.

ELIAS CJ:

But I'm not sure – you've slid over the position here by talking about a level of comfort, and I'm just trying to understand that, because here you didn't have an impasse, you didn't have the Council refusing to give a certificate. It didn't get escalated to the BIA.

MR GODDARD QC:

No. What –

ELIAS CJ:

And so explain what you say the responsibility of the BIA was in those circumstances?

MR GODDARD QC:

The – when the Grange building consent application came in, the Council evaluated it using the systems that the BIA had reviewed in 1995. When the Council went out

and did its inspections, it did the number of inspections contemplated by the systems that the BIA had reviewed. It used the check lists that the BIA had seen, and it looked for the sorts of issues that it had been looking for, both according to its systems and in the particular buildings that the BIA had looked at. It did what the BIA had told it was fine. And so the complaint is that the Council continued to administer on a day-to-day basis, the system for which the BIA had ultimate responsibility in a way which the BIA had said was acceptable, when in fact fundamentally it was not.

TIPPING J:

Is it perhaps better to concentrate on false sense of security, than they were actively given comfort? I can see you put it –

MR GODDARD QC:

Both ways.

TIPPING J:

It seems to me that's the real gravamen of the complaint. You're saying, well they told us we were doing all right –

MR GODDARD QC:

Yes.

TIPPING J:

– and we had no reason to think otherwise and now we're found to be doing all horribly and you should cop some of the blame.

MR GODDARD QC:

Exactly.

ELIAS CJ:

But the inspections –

MR GODDARD QC:

That covers the next two hours really Sir.

ELIAS CJ:

The inspections could have discovered deficiencies.

MR GODDARD QC:

Which inspections your Honour? The Council's ones?

ELIAS CJ:

The inspections – the Council's ones. You are saying they should have had more frequent inspections and the check list didn't – and you'll take us to that – didn't sufficiently alert them to what they should've been looking for.

MR GODDARD QC:

The individual inspectors.

ELIAS CJ:

But don't you have to go further than that, and join up the dots a little bit more here, because –

MR GODDARD QC:

The evidence at trial would be that these were not – while it was possible that an inspector might, you know, stumble on these in an ad hoc way of particular cases, the basic problem was that inspectors were not properly skilled to look for these issues, were not supervised by people with the relevant skill set, were not using systems which made it likely that they would find it, it's like a doctor trying to carry out diagnoses with inadequate array of equipment –

ELIAS CJ:

So – sorry –

MR GODDARD QC:

– if you set – sorry.

ELIAS CJ:

It's just that – I just probably don't need to take time by going to those analogies. Are you saying that you – they had to have a systemic response to this risk, and they didn't have one?

MR GODDARD QC:

Yes. There was no way that these risks could be managed, other than through a systemic response, and that was precisely what the BIA told the Council in 2003, that you just cannot continue to operate in what the BIA described as pre-weather tightness mode, you need new systems which will enable you to identify these risks at the stage of processing consents, and insist on a much greater level of detail in the documentation that's provided and you need systems that will enable appropriately skilled people to carry out enough inspections and look for the right things, in order to ensure that this risk doesn't happen again and again and again. I was about to enter into another analogy but I just won't I think.

ELIAS CJ:

I'm slightly allergic to analogies.

MR GODDARD QC:

Yes, it's not the first time your Honour's pointed that out to me. I'll do my best to remember. So those are the first two courses of action. The third course of action is really a variant on those. It says, well not only had you lulled us into a false sense of security in 1995, so that we tweaked the few small things you told us about, but otherwise kept doing what we were doing, but from 1998 through to 2000, you were actually being told about these risks, and yet you didn't come back to us and say, that review we did in 1995 that said your systems are basically fine and your staff have the right skills, and things like that. We are no longer so sure that's right. They didn't even – and it needn't even have been a, we are confident that's not right, and you need to make changes. At the least we say that the existence of serious concerns, the existence of a risk should have been the subject of a warning. And this Court addressed the question of duties to warn, once you're aware of a risk in *Couch v Attorney-General* [2008] NZSC 45; [2008] 3 NZLR 725, and I'll go to a few relevant passages in that later today.

Those are the three courses of action that Her Honour Justice Andrews declined to strike out in the High Court, and that were then struck out in the Court of Appeal. The fourth course of action, the direct duty owed by the BIA to the plaintiff homeowners, the appellant counsel accepted had to be struck out in the High Court because of *Sacramento*, and in the Court of Appeal, but reserved its position for argument in this Court, and leave was granted to argue that here. So this is the first time this issue has been argued in this proceeding. There is no judgment on it below and it is to that extent, a matter of first impression. But the argument is, well the BIA

assumed part of the mantle of the regulatory regime on which general reliance has been placed by New Zealand homeowners for, I think it was said to me forcefully, 30 years or more, in the context of *Sunset Terraces* and having assumed that mantle and having received funding from each of the people who were undertaking building work over this period, it owed a duty to them to perform its share of the task with the skill and care that could reasonably be expected of the national expert body. This was not a system that could work if it was left to the territorial authorities alone. It would be inefficient and it would be unlikely to succeed. The Building Industry Authority understood that, Parliament understood that, that's why the BIA was included as part of the machinery and if it fell down on the job then the general reliance that New Zealand homeowners place in the building regulation system to deliver safe, healthy houses, and to take – protect them from certain forms of economic loss, would inevitably be disappointed.

TIPPING J:

You're going to have to address the control and reliance issues quite sharply, aren't you Mr Goddard, in due course?

MR GODDARD QC:

I am your Honour. And the control –

TIPPING J:

I don't want you to anticipate now unless you feel it –

MR GODDARD QC:

No, no I think I will come to them in quite some detail later.

TIPPING J:

Could you just assist me? Assume you were able to establish that there was this duty. How does your client, how does the Council seek to take advantage of that duty?

MR GODDARD QC:

By way of a claim for contribution.

TIPPING J:

Would you mind elaborating a sentence or two?

MR GODDARD QC:

These are proceedings in which the Grange –

TIPPING J:

You say joint tortfeasors?

MR GODDARD QC:

They're joint tortfeasors, yes.

TIPPING J:

I see.

MR GODDARD QC:

Vis à vis the homeowners –

TIPPING J:

Okay. That's enough for the moment.

MR GODDARD QC:

That's all. They're joint tortfeasors and their respective contribution to this problem is a matter for determination on the evidence at trial.

McGRATH J:

And it's covered by statute?

MR GODDARD QC:

Yes, section 17 of the Law Reform Act. I think that rather than go through my introductory submissions on proximity and policy it's best to deal with those issues at a little more length when I come to those topics. The proximity argument is really obvious and it stems from the direct dealings between the BIA and the Council, so it's a mix of both a statutory relationship but more importantly actual dealings between these two parties that were the subject of specific reliance by the Council and from a policy perspective the argument in a nutshell is that everything the BIA says by way of policy objection to liability can equally well be said by territorial authorities. The number of people affected, the scale of liability, the limited resources, the limited budgets, and really, in my submission, councils and the BIA stand or fall together on

those policy dimensions. This Court has held that the policy of the law requires that councils be liable and that they not be able to invoke those policy arguments to deny the existence of a duty of care. There is no principled basis for distinguishing between these two sets of players in the regulatory regime.

The fourth cause of action I think I've really outlined in sufficient detail as well. I don't need to dwell on the point at 1.19. It was made very forcefully by this Court in *Couch* that the court should be very slow to strike out a novel claim in tort, especially where proximity is arguable. The court should be especially slow to accept the invitation to pre-judge at this stage whether it was matters of high policy that led to the events that are the subject of the claim or whether rather it was operational blunders, practical day-to-day issues.

ELIAS CJ:

That would really only apply to the fourth cause of action?

MR GODDARD QC:

The BIA seeks to invoke it in relation to the first three as well.

ELIAS CJ:

Yes, except they're at a much higher level of generality, aren't they? It's hard to see that they turn on specific facts?

MR GODDARD QC:

I'd actually put it somewhat the other way your Honour.

ELIAS CJ:

I suppose you'd say it's the systems in the –

MR GODDARD QC:

Yes, it's the systems and the –

ELIAS CJ:

– of the North Shore Council –

MR GODDARD QC:

This is a case where the BIA, we're not saying the BIA should have done lots more reviews. It made a policy decision to do reviews. It rolled its sleeves up and it went in and it looked at the systems the Council actually had and pronounced them fine. So we say that if a council could be expected to know the systems weren't fine, the BIA could be expected to know the systems weren't fine, and it's simple negligence on the part of its reviewers. So I actually think, if anything, the argument that the failures are operational in nature, is strongest in relation to the first three causes of action, particularly the first two.

I think it is helpful, before looking at the detailed claims, to go through the legislation in one of the decisions of the High Court of Australia I may take the court to later. It was described as tedious but necessary to do so in cases of this kind and the 1991 Act, in the form in which it was originally enacted, is in volume 1 of the authorities under tab 1. I can do this, I think, quite fast, highlighting the aspects of the Act that are particularly relevant to these proceedings.

I'll come back to the definition of building work when I deal with limitation. There's nothing else we need, I think, to notice at this stage in the interpretation provision. Part 2, Purposes and Principles, which is on page 9 of the stamped numbers at the top right-hand corner of the page. The court is well familiar with, "The purposes of this Act are to provide for necessary controls relating to building work and the use of buildings, and for ensuring that building are safe and sanitary and have means of escape from fire; and (b) The co-ordination of those controls with other controls relating to building use…". Particular matters that are to be taken into account to achieve the purposes of the Act, including safeguarding people from possible injury, illness or loss of amenity and so on down. And subsection (3), "In determining the extent to which the matters provided for in subsection (1) of this section shall be the subject of control, due regard shall be had to the national costs and benefits of any control, including (but not by way of limitation) safety, health, and environmental costs and benefits."

So the very sharp focus on necessary controls and on national costs and benefits which is the first of a number of pointers against the idea which appeared to gain some traction in the Court of Appeal in particular. That each territorial authority should have been independently scouring the world for information about building methods and doing its own ground up research on these matters and was responsible completely and alone if it failed to do so.

Section 7 requires all building work to comply with the Code and again prohibits, in subsection (2), a requirement that any person achieve performance criteria additional to or more restrictive than the criteria in the Code. So it was both necessary and sufficient. Territorial authorities weren't allowed to ask for more and the emphasis on timeliness of performance of functions is in section 9. Part 3 then brings us to the Building Industry Authority. That's where the Act starts at the top of the regulatory pyramid. Section 10 establishes the BIA, subsection (3) confirms it's capable of being sued but that doesn't take us very far. 11, the membership of the Authority is rather more important. "Not more than eight members appointed by the Minster. When considering whether a person is suitable to be appointed… the Minister shall have regard to the need to ensure that the Authority possesses a mix of knowledge and experience in matters coming before the Authority, including knowledge and experience in (a) Building construction, architecture, engineering, and other building sciences." So that's the, unsurprisingly the primary area of expertise that a Building Industry Authority is required to have, to be contrasted of course with local councils made up of elected councilors who are not required to have any particular subject matter expertise at all.

McGRATH J:

How far does it matter if the Authority largely works through its members but a council largely works through its specialist staff, its specialist engaged professionals?

MR GODDARD QC:

The Authority works through a mix of its members and a staff, as Mr Porteous who was chief executive at the time explains, but –

McGRATH J:

What I'm saying is that the Act envisages that certain expertise comes in through the membership of the Authority.

MR GODDARD QC:

Yes.

McGRATH J:

But with the councils obviously when you've got a democratic process for electing them, you're going to get your expertise either through staff or engage professionals but does that really matter?

MR GODDARD QC:

It matters in this sense your Honour. That the ultimate decision makers in the Council in terms of resource allocation to a particular area of Council activities, are not expert and so part of my argument is that the mayor and councilors are entitled to look to the national expert body, the BIA, to tell them whether the area of the council, including those specialists, is adequately skilled and adequately resourced. They don't have the expertise of their own. I'll take the court later to the cases like *Stringer v Peat Marwick Mitchell & Co* [2000] 1 NZLR 450 (HC) which find that innocent partners of a firm can have a claim against auditors for failure to detect defalcations by another partner and –

McGRATH J:

But really the system of government in local authorities depends on the expertise being provided within, if you like, the public servant element of the body and providing recommendations. It's just the same as sort of central governments in which the departments provide material to Cabinet and there's not necessarily any specialist knowledge in the matters that are being decided.

MR GODDARD QC:

And then immediately the question arises, how can we be sure that our advisors on this have the relevant expertise and part of the argument for the Council here is that one of the ways that the ultimate decision makers, who would have had to decide to spend twice as much on building control as they were before, obtained comfort that they need not take that dramatic step in 1995 was that the national expert body was telling them your team is fine.

McGRATH J:

I certainly understand that part of the argument but what I don't understand is that in some way the legislation envisages that councils aren't in the same position as the Authority in relation to their own expertise. I'm suggesting to you the Act clearly knows how those authorities work and knows they'll have their own expertise or they'll get it.

MR GODDARD QC:

Yes. And then the question is, how does the Act envisage achieving the sort of national uniformity, in terms of substance and quality of delivery, that it envisages –

McGRATH J:

Absolutely –

MR GODDARD QC:

And that's all I'm really –

McGRATH J:

– and that's a separate question I suggest.

MR GODDARD QC:

It is but the BIA returns in a number of points in its submission to an argument that it's unreasonable for the Council to sue in relation to its own failings and my response to that is that that's an oversimplified picture of how councils work and that actually the people who make the decisions are ultimately the elected non-expert councilors and the people who bear the cost are the innocent ratepayers and that to say, well your specialist building unit was negligent so you can't recover, and that's poor policy, rather misses the point that those whose pockets are in issue, those who are making the decisions, were not the ones who were getting these things wrong to the extent that they had broader systemic choices, those choices were informed by what the Authority was saying. That's as far as it goes.

So membership of the Authority and then 12, the functions of the Authority. First, advising the Minister on matters relating to building control. Second, approving documents, acceptable solutions for use in establishing compliance with the provisions of the Building Code. Third, "Determining matters of doubt or dispute in relation to building control." Fourth, "Undertaking reviews of the operation of territorial authorities and building certifiers in relation to their functions under this Act." "Approving building certifiers," the particular function in issue in *Sacramento* but not here. "Granting accreditations of building products and processes," and I'll come back to that in a little bit more detail as we go through, because this is another generic function that the Authority had. It could say this particular product, or this particular process, is sufficient to meet the Code and again the legislation very clearly contemplates that a decision of that kind can result in negligence liability on the part

of the BIA. The Building Industry Commission report actively contemplates that as well and critically when we come to the limitation argument proceeds on the basis that the long-stop period will run not from the time that the accreditation is given but from the time it's relied on in the context of a particular building project. So it's very clear that there was no absolute policy that time would always expire 10 years after someone had done anything in this statutory regime.

ELIAS CJ:

But there is no issue relating to granting accreditations in this case and surely the duty is going to have to – I'm just trying to understand what the submission you're making based on paragraph F is, is that simply that this is consistent within some cases the BIA being under a duty of care.

MR GODDARD QC:

It operates at a number of levels, sorry your Honour. Yes, the principal reason for referring to the accreditation regime is that it supports a submission that the BIA's arguments before this court proved too much. If they were right about the fact that the BIA can't possibly be exposed to anyone who's building without their knowledge using particular – then you wouldn't expect them to be liable for accreditations and yet the statutory scheme clearly contemplated that they would be and that they would insure against that sort of liability.

BLANCHARD J:

But if they granted an accreditation, then presumably the territorial authority couldn't say to the building owner, no, no, you can't use the building product.

MR GODDARD QC:

Exactly. Section 50 would require them to accept it and liability would rest with the BIA, not with the territorial authority.

BLANCHARD J:

Yes but you expect liability in that kind of situation?

MR GODDARD QC:

Yes. At a more general level it goes to my argument that this was a shared responsibility. That decisions could be made at different levels and whoever made that decision owned that decision. So if the BIA had said this product or process is

fine, they could do that and territorial authorities couldn't second guess it, but the BIA had responsibility, liability.

ELIAS CJ:

I was just wondering whether that doesn't rebound against you, that argument.

BLANCHARD J:

Yes.

ELIAS CJ:

Because the responsibility here was that of the territorial authorities to carry out the inspections?

MR GODDARD QC:

If this was the only function of the BIA that would be right but if we loop back to undertaking reviews, it's quite clear, not only that there are some elements, domains of separate responsibility, but also that the BIA comes in over the top of the territorial authorities and has a responsibility for ensuring that they are doing their job properly requiring neither too little nor too much of applicants.

ELIAS CJ:

Well is that ensuring not a little too strong? If there was a –

MR GODDARD QC:

Monitoring, assisting, all those words are plainly justified. Ensuring, yes ultimately the BIA was responsible for the consistent and proper administration of the regime.

TIPPING J:

One could ask what was the purpose of a review. The purpose of a review, presumably, is to make sure that the territorial authorities are doing things properly.

MR GODDARD QC:

Properly, yes.

BLANCHARD J:

Or the purpose of the review is so that the BIA can advise the Minister about whether territorial authorities are doing things properly.

MR GODDARD QC:

The answer, which in my submission, is consistent both with the statutory scheme and with what the BIA thought it was doing, is that it had both purposes, and that that is a false dichotomy to stray briefly into that terminology. So –

ELIAS CJ:

Sorry, sorry, you said both purposes –

MR GODDARD QC:

It has both purposes, the BIA and carrying out –

ELIAS CJ:

– one is to report to the Minister and the other is?

MR GODDARD QC:

To advise and assist the territorial authority, and the reviews I've described as serving both those functions, and there's nothing –

BLANCHARD J:

Sorry, where are they described?

MR GODDARD QC:

In the reviews. The BIA says we're doing it for these reasons, and in my submission the statutory scheme supports.

McGRATH J:

It's got to be in the statutory scheme really though, that really defines it doesn't it? Rather than the accident of how or it's described in a particular document.

MR GODDARD QC:

Provided that it's within the scope of the functions to carry out reviews to assist the territorial authority to perform its functions, which it plainly is in my –

BLANCHARD J:

Well that's begging the question isn't it? You've got to point us to something in the Act that says that's the purpose of the review, and when you get to section 15, it's quite plain that the remedy, if the review reveals a problem, it is that the – there shall be a report to the Minister.

MR GODDARD QC:
That's what –

BLANCHARD J:
There's nothing said there about reporting to the territorial authority or giving the territorial authority advice in a direct way.

MR GODDARD QC:
That's one of the consequences of a review, but it's plainly, I think, contemplated by the list of functions that –

TIPPING J:
We're here concerned, not with the case where there was a failure to fulfil functions, but where it was found that they were fulfilling the functions. So there wouldn't be a report to the Minister.

MR GODDARD QC:
Yes.

TIPPING J:
And one assumes, if it's not unreasonable for a council too then, well we must be doing things all right.

MR GODDARD QC:
That's exactly right your Honour. That was the next point that I was going to make, is that I'm not trying to argue here that a review should've been undertaken which wasn't undertaken, it actually happened, and it was passed on to the Council and the Council was told what you're doing is basically fine. So unless –

TIPPING J:
Well even if it hadn't been passed on to the Council, presumably when it makes it stronger that it was, but even if it hadn't been, the absence of any report to the

Minister, of which no doubt, the Council would hear quite promptly, would presumably and – but that doesn't mean there's a duty of care, I'm not saying that, but it's – it's focus on the Minister, for me at least at the moment, is not all important or all powerful.

MR GODDARD QC:

No. And –

BLANCHARD J:

It's just – it's very strange that there isn't requirement that I've found, that the report shall be furnished to the territorial authority, or that advice shall be given to the territorial authority, it almost seems to be assumed that if there's a problem, the Minister will get told, and the Minister will do something.

MR GODDARD QC:

There is contemplation of an opportunity to make submissions in 15(2), but that's not – that's a rather different –

BLANCHARD J:

But that would be – that's perfectly consistent –

MR GODDARD QC:

Yes.

BLANCHARD J:

– with doing it to the Minister.

TIPPING J:

But it's a failure to warn this case, I mean I'm just using that as an ineffective label.

MR GODDARD QC:

It's a failure to warn, and an actual lulling into a false sense of security by saying, "No, no, keep walking along this path, in circumstances where there was a cliff –"

TIPPING J:

Well that's the consequence of not being warned, really, it's the mirror, it's the opposite side of the same coin. You say really, you have to say that they should,

they had a duty – a duty, common law based on the statute, because there's no specific statutory duty.

MR GODDARD QC:

Exactly.

TIPPING J:

To tell us that we were not doing things right.

MR GODDARD QC:

But it's not a free standing duty to tell us that we weren't doing things right. At least in the first courses of action. It's a duty to tell us we weren't doing things right, and to refrain from telling us that what we're doing is fine, having actually embarked on the process of looking at what we're doing, and led us to expect that your expertise would be brought to bear.

TIPPING J:

Are you, and I think you are really, in the area of they have, in effect, assumed responsibility?

MR GODDARD QC:

Yes.

TIPPING J:

Or should be deemed to have assumed responsibility?

MR GODDARD QC:

I say there are two sources of the responsibility in this case. Firstly, the statutory scheme but also, and the recent decision of the Supreme Court of Canada that I'll be going to a little later is quite helpful on this I think, that the specific dealings between the parties of themselves entailed an assumption of responsibility, and one which perhaps the BIA didn't have to assume. It wasn't under a positive obligation to you but which it was consistent with its functions for it to assume and which it did in fact assume, and that's one of the things that we want to go to trial on, is to say, that even if the statutory scheme did not compel it to assume this responsibility, nonetheless it elected to do so, it could hardly be suggested it was ultra vires for it to do so, and the evidence at trial will show that that's what it thought it was doing, that's what the

Council thought that it was doing, and that that had immediate and practical consequences for the way in which the Council went about its building regulation tasks.

TIPPING J:

But that was foreseeable and reasonable reliance?

MR GODDARD QC:

Yes.

TIPPING J:

On a statement made in the course of voluntarily assuming a responsibility?

MR GODDARD QC:

Yes. And it's essentially a factual inquiry, and we've pleaded facts which are sufficient for that –

TIPPING J:

That might get you to proximity but it might not, necessarily, take you past policy.

MR GODDARD QC:

It seems to me that, in my submission, is the proximity argument is very strong here and that the crunchy issues do arise in relation to policy. About that I say two things. Firstly, that this is not an appropriate stage of the proceeding to be making those policy judgments. And second, and related, it's not appropriate, and in fact it would be wrong to do so, because what went wrong here, was not the result of high policy choices, not to carry out any reviews of territorial authorities, for example, it was operational failure on the part of the reviewers –

WILLIAM YOUNG J:

But it's not a dichotomy, is it, because it may be a high policy issue as to the intensity of the review. So you can say, okay, we haven't got enough money we're not going to do any reviews at all, we've got a bit of money so we're going to do a once over lightly review, and if anything's egregiously wrong we pick it up, but we're not really going to delve down. And a third option, and these are really just points on a continuum, we're already going into it in huge detail, and they're all policy issues aren't they?

MR GODDARD QC:

Your Honour quite rightly began by saying, "It might be that" and that's a factual inquiry, and your Honour's quite right, that this could be the product of a considered policy choice about the level of resourcing.

WILLIAM YOUNG J:

But no, it's just a de facto policy choice, we've only got $400,000 or whatever, we don't really have to have a policy paper in pros and cons and exposure drafts and everything else, we just have to say as a matter of reality we've got $400,000 we're going to do seven Councils and –

MR GODDARD QC:

And we're going to do them carelessly.

WILLIAM YOUNG J:

No, we're not going to do them carelessly we're going to do – we're going to expose them to a level of scrutiny that is consistent with the amount of money at hand.

MR GODDARD QC:

It's possible that that was the path of reasoning.

WILLIAM YOUNG J:

But it's not necessarily going to be a hugely developed policy, it's just going to – but it's still, because the whole thing won't have been gone into in terms of you know, what you might think of as a policy decision, but it's still an outcome of the amount of money available.

MR GODDARD QC:

There are a couple of issues with that. One is that it seems to me that it puts the cart before the horse because in fact the Authority had the ability to decide what it ought to be doing in order to perform its functions and then propose a level of levy, to be set to enable it to do so, so it's I think as problematic as the argument that's been regularly advanced and rejected for local authorities that their fees only enabled them to carry out a certain level of inspection and provide a certain level of comfort.

Second, it seems to me that whether that was the explicit or implicit reason for the level of intensity of the review, is a question of fact, just as the cause of the probation service's failings in *Couch,* was a matter that this Court, both the majority and minority considered, could only be properly determined at trial. And third, I think it would be surprising and I think that's an understatement, if the – that sort of implicit choice about resources was held to be an answer for the BIA but not for territorial authorities, I really struggle to understand how the law could in a principled way, say that, it's not good enough for councils to make that sort of implicit choice, based on the level of fees and resources that they want to devote to building regulation, but that it is good enough for the BIA.

TIPPING J:

Can you just –

WILLIAM YOUNG J:

Well; partly – sorry.

TIPPING J:

Sorry, can you just remind me, something I should remember from earlier cases, the fixing of the fees for consents by the territorial authorities, are they set by regulation?

MR GODDARD QC:

No, they were set under the Act, under this Act. The fee charging power for –

ELIAS CJ:

By the territorial authorities.

MR GODDARD QC:

By the territorial authority.

TIPPING J:

So a territorial authority could decide, well we need more money from this so we can devote more resources, we'll put up our consent fees.

MR GODDARD QC:

Yes, section 28 is the relevant provision.

TIPPING J:

Yes, well the BIA can't do that. The BIA has got to get a Ministerial approval to put up the levy hasn't it?

MR GODDARD QC:

I'll go to the levy provisions in a bit of detail, but essentially the start point is for the BIA to decide what it thinks it should be doing, and in the light of that, to put a proposal to the Minister for what the levy should be.

TIPPING J:

Mmm, but it's not its decision.

MR GODDARD QC:

No, and if –

TIPPING J:

It can't just say, we need more money, the levy goes up.

MR GODDARD QC:

Again I think we're in the territory of factual inquiry here. If the BIA had said, we need more resources in order to do reviews, and we would like the levy to be X, and Ministers had said, no, we think that's too much for building owners to bear, we're going to make it 75% of X, then that would be a policy choice which it would be difficult for a court to review, but –

TIPPING J:

But it's a Ministerial decision rather than a BIA decision?

MR GODDARD QC:

Only if the Minister decides not to allow the estimates of the BIA, and it seems to me your Honour that's essentially a factual question, did that happen here? Or did the BIA simply fail itself to identify the level of resource it needed? Or again, was there no issue of resource here at all, but simply a hopeless review.

ELIAS CJ:

That's really a third point it seems to me, that you might have made. That it's not evident on what we know, that substantial resources would've been required by BIA,

because on your submission, this was a failure to warn of a risk that was known, rather than in fact doing more intensive reviews.

MR GODDARD QC:

Yes. Perhaps in 1995, some sort of investment in acquiring information and understanding might have been needed, but by 1998 we say it had been brought to the BIA on a plate, so you didn't need much more resource, you just needed to read your letters.

TIPPING J:

It was known later, and should've been known earlier, is I think your case isn't it?

MR GODDARD QC:

That's right, your Honour.

WILLIAM YOUNG J:

Well you're saying it was known in 1998 which is early enough for you.

MR GODDARD QC:

Yes, at the latest, and that probably it should've been known earlier, so yes.

COURT ADJOURNS: 11:34 AM
COURT RESUMES: 11.54 AM

ELIAS CJ:

Thank you. Yes Mr Goddard?

MR GODDARD QC:

Your Honour I was in section 12 of the 1991 Act and just very quickly paused to note after the accreditation provision (f); function (g), "Disseminating information and providing educational programmes on matters relating to building control." And the generic (h) and (i), "Taking all such steps as may be necessary or desirable to achieve the purposes of this Act."

Moving across to section 15, to which the court took me briefly before the morning adjournment. It expressly refers to reviews, talks about the Authority undertaking "of its own motion or at the request of the Minister…" and a provision in subsection (3)

picked up again in the provisions relating to territorial authorities that, "If the Authority believes that a territorial authority is not fulfilling its functions under this Act it shall make a written report to the Minister." As your Honour Justice Tipping suggested to me, even from the absence of such a report following a review one can, I think, take a measure of comfort that the Authority does not believe that the territorial authority is failing to fulfil its functions under the Act. In this case though the reviews and reports go much further.

We then come to the matters of doubt or dispute for determination by the Authority and the matters that can be brought before the Authority are listed in section 17. Any doubt or dispute in relation to whether particular matters comply with the provisions of the Building Code, or a territorial authority decision in relation to issuing or refusing a building consent, notice to rectify, code compliance certificate and so forth, or conditions, or the grant or refusal of any waiver or modification in respect of the Code and so on down. "Any of the parties may apply to the Authority for a determination…"

The process for dealing with those is then prescribed and over in section 20 there's provision for a determination by the Authority to incorporate waivers or modifications and to either confirm, reverse or modify the disputed decision or determine the matter which is in doubt. So you can have a dispute or you can have a doubt and in any of those cases what one does is ask a national expert body. The one that's supposed to know better than the territorial authorities what does and does not comply with the Code.

WILLIAM YOUNG J:

Just looking at section 17, I mean it's not directly an issue here, but the jurisdiction of the Authority is almost expressly substituted for what would otherwise be the jurisdiction of the courts. If you look at section 17(3).

MR GODDARD QC:

Yes, subsection (3) in particular. You can't – section 17(3) your Honour. You can't go to the court in relation to a matter which can be the subject of a determination until you've already gone to the Authority and it's made its determination.

WILLIAM YOUNG J:

So the function of the Authority is to determine a doubt or a dispute?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Which is not auspicious for a duty of care in this particular context which I accept is not hugely germane to the case on hand?

MR GODDARD QC:

On ordinary principles I think that's where one would land, which is why it's all the more striking that the Act expressly contemplates negligence actions in respect of such decisions.

WILLIAM YOUNG J:

Where do you say expressly in respect of such decisions? Is this the limitation provision?

MR GODDARD QC:

Yes. If we can jump to that now perhaps just to see the fit with that provision. It's section 91 which is on page 70 of the stamped pages in the top right-hand corner. "Limitation defences". I'm going to have to go through the relationship between subsections (1) and (2) in some detail later, I won't do that now, but –

WILLIAM YOUNG J:

Accreditations –

MR GODDARD QC:

Yes if we look – well and determination. If you look at subsection (3) your Honour for the purpose of subsection (2), that's the long-stop, "If civil proceedings are brought against a territorial authority, a building certifier, or the Authority and the proceedings arise… building consent, a building certificate, a code compliance certificate, or an Authority determination…" so that's the section 17 determinations. So part of what my submission will be is that actually the Authority's responsibility and liability in tort was expected to go beyond what one might otherwise have expected of a body performing some of these functions.

WILLIAM YOUNG J:

Alternatively it's a long-stop in case the courts were to hold it as a duty of care then here's the limitation. I mean that was sort of debated a bit in *Sacramento* wasn't it?

MR GODDARD QC:

It would be a pretty unsatisfactory way of doing it, I think, your Honour, especially if we rewind two sections to section 89. The legislature had no difficulty in ruling out civil proceedings that it didn't want brought at all. So we've got an absolute bar on civil proceedings against members, building referees or employees of the Authority, like members and employees of a territorial authority, but no such bar in respect of the Authority itself and then a long-stop provision in relation to claims against the Authority so the parallel with territorial authorities seems reasonably clear. And your Honour will see when I go to the Building Industry Commission report that it was explicitly contemplated that where the Authority made a decision of this kind it would be –

WILLIAM YOUNG J:

It might be sued.

MR GODDARD QC:

Yes. So some of the assumptions that might otherwise be made about what would and would not entail tort liability, are not sound in the context of this particular statutory regime, where a much greater accountability for the Authority in tort was clearly contemplated by the legislature, and I'll pick up a couple of other similar things as we go through. So that's determinations and that provides a context both in which its clear that the Authority is considered to have more expertise than a territorial authority and in which it's clear that where that expertise is brought to bear, it's expected that it would be liable in tort.

The charge fixing provision in respect of services like determinations, is over at section 23. There are a couple of different ways in which the Authority was funded. It could fix charges for exercising or performing its functions, powers or duties, and it also had the levies, which I'll come to in a minute and the charging provision is essentially parallel to the charging provision for territorial authorities in section 28. What is missing in this version of the Act, which is logical to deal with next, is part 3A in relation to levies. That's in the supplementary bundle I handed up this morning under tab 1. Part 3A, Building Industry Authority levy. And after 23A the interpretation provision, what we have is 23B "Applicant liable for levy". "Each

applicant to whom a building consent is issued under section 35", provided it was for more than $20,000 worth of work, that was a number that was fixed as the minimum threshold, "shall be liable to pay to the Authority a levy on the estimated value of the building work in respect of which that consent is issued, calculated at the rate which is at the time being prescribed under 23H" So an ad valorem charged every person seeking and obtaining a building consent, subsection 2, the way it worked was that the levy became due and payable by the applicant to the territorial authority as agent for the Authority. 23C "Payment of levy to the Authority", provides for the territorial authority to become liable to the BIA for levies, and there's then a process for accounting for that on a monthly basis. So not only did the BIA know what building work was being undertaken, but it was getting real time information, and real time payment in respect of all the building work that was being undertaken.

23E provides for the BIA to have the power to audit the issue of building consents, to make sure that it's getting its share of the revenue for performing these functions, and not only is there an ability to audit the information held by the territorial authorities, but in 23F the Authority can require the applicant for a building consent or the territorial authority to provide information relating to the estimated value of the building work. So again very different from the position of the Securities Commission, which has no idea what investments are being made, or by whom or to what value. Here there is real time information about that, coupled by payment, and the ability to check on the value of the work, which also is of course, a measure of the maximum risk undertaken by any public authority that might be liable in order to ensure that the appropriate proportion of levy is being paid.

The way to work out the levy is prescribed in 23H and following. The default rate is one dollar for every one thousand dollars of the estimated value of the building work, or such lower rate as may be set by Order in Council. So that I think answers your Honour Justice McGrath's question about how it was set, and the answer is a default rate in the Act, but you could lower it by Order in Council. No levy payable in respect of low value building work, 20,000 or less. 23I rate to be reviewed annually by the Minister, taking certain things into account, and one of the things that was critical in that was the process of the Authority submitting estimates of expenditure to the Minster. Under 23J, and the Minister and the Minister of Finance, either approving those under 23K or not approving them, and directing that a revised set of estimates be prepared. So that's the foundation for my submission, that it's possible that a political decision was made by Ministers, that the resources seen as desirable

by the BIA should not be provided. But it's essentially a question of fact, and I'm not aware of any suggestion that was the cause of resource constraints here. To be fair on that, there is an affidavit from Mr Porteous, the then chief executive of the Authority, just note that it's in volume 2 of the case on appeal under tab 12, which does talk about the year on year process of setting levies and says that levies were lowered and that the Authority wasn't permitted by Ministers to spend all of the levy money collected. Although I'm not quite sure how that worked, because that doesn't seem to be expressly contemplated by these provisions.

McGRATH J:
When was it again part 3A came in?

MR GODDARD QC:
In 1993. It would've been less than a year I think after the Act came into force in 1992.

WILLIAM YOUNG J:
So how was the BIA originally funded?

MR GODDARD QC:
In the absence of this levy regime, it would've been through a mix of charges for its services under section 23 and appropriation I anticipate. But once it was up and running, it – there appears to have been this shift to a levy system. And certainly the levy system was in force at the time that these proceedings are concerned with, and the owners and original developers of the Grange, will have had on their invoice, from the North Shore City Council, as well as the Council's charges, a Building Industry Authority levy. So when it comes to the fourth course of action, I'll be saying, "They've paid, the only question is, did they get what they paid for?"

Coming back then to the body of the Act, part 4, deals with the functions, powers and duties of territorial authorities, which included the administration of the Act and regulations, receiving, considering the applications for building consents and so forth. Twenty-six, section 26 is a provision that was given considerable emphasis by the Court of Appeal and that features I think as a result very much in the BIA submissions. "Every territorial authority shall gather such information, and undertake or commission such research, as is necessary to carry out effectively its functions under this Act." Now that territorial authorities had that responsibility, is not in

dispute, but the question rather is the relationship between that provision and the functions of the BIA in carrying out reviews and in disseminating information and providing educational programmes, and my submission is that what was contemplated by the Act was not that each of the 70 plus territorial authorities, including the tiny little ones in rural areas, would have full scale research programmes, but that rather one of the ways in which the territorial authority could perform its responsibility under section 26, was to look to the BIA and rely on the BIA for the information that it provided.

McGRATH J:

I suppose it's a matter of practical common sense, they look to their fairly well established local government authority trade association, if I can put it in that way. There are sort of local government collective, that presumably might ensure that individual local bodies, territorial authorities, didn't have to undertake these matters.

MR GODDARD QC:

There are a range of ways in which one could imagine it being tackled, but in practice, one would expect that to the extent that territorial authorities understood themselves to be receiving information and assistance from the BIA, they would refrain from seeking overlapping information and assistance elsewhere. So that loops back into my submission about lulling into a sense of security. Yes, there was the responsibility, but you could reasonably, as a territorial authority, believe that you had met it by paying careful and intelligent attention to what you were being told by the BIA. And certainly to suggest that you could say, yes I know the BIA has come in and done a review and said we're doing fine but we're going to spend a very large amount of ratepayers' money on another external review to see if we're doing okay, a cost that couldn't be directly recovered from any applicant, in my submission, is a surprising one.

I have already mentioned in passing section 28 in relation to charging by territorial authorities and section 29 deals with serious cases of non-performance by a territorial authority. It confers on the Minister the power if he or she considers that a territorial authority is not exercising or performing any of its functions, powers or duties, to appoint someone else to do so and that is obviously at the extreme end of the consequences that could result from a negative review. But to suggest that it's the only possible consequence and the only purpose of such reviews firstly doesn't have any foundation in the Act. Second, isn't consistent with what the BIA

understood itself to be doing and third, doesn't really address the situation raised by your Honour Justice Tipping of a report that says everything is fine and we're not going to exercise this power and the extent to which one can reasonably rely on that.

Part 5 of the Act then deals with building work and use of buildings. Provides for the issue of building consents and code compliance certificates and so forth. The machinery of that is not something that I need to dwell on but it's perhaps worth just pausing at section – no I don't think I need to worry about that part at all.

We can move on to part 6, the National Building Code, page 39 of the stamped numbers. That's where provision is made for the Governor-General by Order in Council to make regulations including the Building Code which, subsection (3), are made on the advice of the Minister following recommendation of the Authority.

Section 49, "Documents for use in establishing compliance with building code." This is the acceptable solutions that were issued by the Authority although when one looks at the Building Industry Commission report it's quite clear that a much larger volume of these was anticipated than ever actually emerged. Subsection (2) says, "Any document, prepared or approved by the Authority… shall be accepted for the purposes of this Act as establishing compliance with those provisions of the building code to which it relates, but it shall not be the only means of establishing such compliance." Again that's the safe harbour, the acceptable solution but not the exclusive solution idea.

Section 50, the court is familiar with from other cases that have been argued here. The mandatory obligation on a territorial authority to accept certain documents as establishing compliance. Not only documents issued by certifiers, paragraph (a), but also in (b), (c) and (d), determinations given by the Authority under section 20, where there is a matter of doubt or dispute, "A current and relevant accreditation certificate… issued under section 59," we'll come to that in a moment. "Compliance with the provisions to that effect of a document prepared or approved by the Authority under section 49," an acceptable solution. So three ways in which the Authority can effectively take the decision making role out of the hands of the territorial authority completely rather than simply influence or monitor it as it does through reviews.

We can move over Part 7, Building Certifiers, that's not of particular relevance to these proceedings, and look at Part 8, which begins on page 49, Accreditation of

Building Products and Processes. What is contemplated here is accreditation of proprietary products or processes. "A material, method of constriction, design, or component relating to building work." At 58(1) the process for considering those is set out. 59, "After considering any report and recommendations… the Authority shall accredit the item if it is satisfied that the item, if used under the conditions specified in the appraisal, will comply with specified provisions of the building code."

ELIAS CJ:

Sorry, I'm a little lost about the relevance of this. Why you're taking us to this.

MR GODDARD QC:

For two reasons your Honour. One to indicate –

ELIAS CJ:

The range of –

MR GODDARD QC:

The range of functions conferred on the Authority –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and the number of those that were expected to result in tort liability.

ELIAS CJ:

I see.

MR GODDARD QC:

But it's also relevant because one of the cases I've included in my supplementary bundle, an Ontario decision, relates to a not dissimilar function performed in Canada in which it was held no liability attached to and so generally when we look at the Canadian decisions I want to make the point that first of all the Authority was supposed to be making this decision on technical grounds. It wasn't a matter of high policy as the Canadian courts have suggested, and second, that it's quite clear that more pervasive tort liability was contemplated under our statute than under the

Canadian regime so one needs to be a little bit careful of the Canadian cases dismissing liability. So that's really a defensive submission by way of anticipation.

Moving on then to Part 9, Legal Proceedings and Miscellaneous Provisions, we don't need to look too much now at buildings that are dangerous or unsanitary, we can move across to section – well the court is familiar with section 76, "Inspection by territorial authority". This is the power of the territorial authority to inspect and in particular taking reasonable steps to ensure that "building work is being done in accordance with a building consent." And that the powers associated with that and then if we move on a couple of sections we come to 79, the further powers of the Building Industry Authority. And 79 is quite important because again it shows quite how hands on, quite how detailed, supervision of performance of territorial authorities by the BIA was expected to be. So for the purpose of monitoring the performance by territorial authorities and certifiers of their functions under this Act, that's what it's supposed to be doing, monitoring the performance by them, the Authority has full access to records, documents, (b) can require territorial authorities to supply information or answer questions, can obtain records, and (d) is able to enter and re-enter land or buildings with appliances, machinery and equipment, to make surveys, investigations, tests and measurements and generally do all such things that are necessary to enable those to be carried out. So what's contemplated here is an ability to go to building sites where a territorial authority or building certifier is performing a supervisory function and enter that land and make surveys, investigations and tests to see if the Code is being complied with and if the territorial authority is looping back to the statute, performing its functions under the Act. So this is not a passive sit in the office and wait for issues to come to you function. The Authority had the ability to roll its sleeves up, get out there and see what was going on, and that's the power it was using also when it carried out the reviews, as we'll see in a moment.

McGRATH J:

You used that phrase about the Authority's functions, monitoring the performance at various times in your submissions and this is where it really comes from is it?

MR GODDARD QC:

Yes your Honour. It comes from here and from the Building Industry Commission report which regularly described that as one of its functions so both the legislation

and the legislative history materials confirm that this is what the BIA was meant to be doing.

McGRATH J:

It's a body monitoring territorial authority performance in respect of this part of its functions?

MR GODDARD QC:

Yes and educating and informing all those other functions in section 12 which tie into it.

McGRATH J:

I appreciate there are other functions but yes.

MR GODDARD QC:

Yes, that's where I get this language from, your Honour is right. And then I mentioned earlier today section 86, appeals on questions of law from certain decisions of an Authority. And again provisions of this kind are sometimes an indication that a quasi-judicial function is being performed and that liability shouldn't attach but it's clear from the scheme of this statute that that shouldn't be taken in that way, because, if we go on we have section 89, baring proceedings against members and employees of the Authority, but not against the Authority itself, and section 91 which expressly makes provision for limitation of proceedings against the Authority in relation to Authority determinations, that's subsection (3)(b) and also subsection (4) proceedings against the Authority arising out of the issue of an accreditation certificate, and just note in passing at this point that where civil proceedings are brought against the Authority and the proceedings arise out of the issue of an accreditation certificate. For example, saying that a particular proprietary product is an acceptable way of meeting the requirements of the Code, the date from which the long-stop period is counted, is the date at which that accreditation certificate was relied on in the context of particular building work, not the date of its issue, which could've been many years earlier.

I think that's all that I need to look at in relation to the Act at this stage. I'll come back in more detail to section 91 and the amendments that were made to it in 1993 which are in the supplementary bundle when I deal with the limitation argument at the end of my submissions.

I think next it's probably helpful to look briefly at the Building Industry Commission report, which was the genesis of the 1991 legislation. That's in the case on appeal in volume 6. My one at least is pink. I don't know if everyone's got the same colour.

WILLIAM YOUNG J:

Sorry, what volume?

MR GODDARD QC:

The pink volume 6. Thank you your Honour. And it's the whole volume. The draft legislation that was attached to it, which I'm not going to go to, is the whole of volume 7 of the case on appeal and it bears a striking resemblance to the Act that eventually was passed. There were some changes but they weren't dramatic. If any law reform exercise I'd been involved in had produced equally similar correspondence between recommendations and legislation, I would be much happier.

ELIAS CJ:

It was probably written to order.

MR GODDARD QC:

Yes. So the report by the Commission to the Minister of Internal Affairs, begins with a summary on page 899, I use the stamped numbers in the top right hand corner, because it notes at the beginning, was the culmination of a decade of research and study in the building control reform in New Zealand and its economic impact. Goes through some of the key recommendations, the bullet points listing the major features, the Building Code, the Building Act, a new national body of the Building Industry Authority will be appointed as the one source of referral and review for the building control system. Production of the Code it's updating, and the assessment of new techniques and solutions will be among its principal functions. The Authority will interpret the control documents and resolve differences between owners and territorial authorities in the application of the control functions.

TIPPING J:

Is there anything that precisely matches in the legislation, assessment of new techniques?

MR GODDARD QC:

That is the accreditation role of particular processes and techniques.

TIPPING J:

That's where that fits, yes.

MR GODDARD QC:

Yes I understand that, yes your Honour, it's that part 8 function. It could also –

TIPPING J:

And that is both product and process?

MR GODDARD QC:

Yes. Design, manufacture, all those things are listed in part 8. It could also be done using the acceptable solution mechanism, where it wasn't a proprietary product or process but a generic one. So there are those two avenues for assessing new techniques and solutions. And then obviously that role ties in to the education and information dissemination functions because of its assessing new techniques and solutions as they become – as they come to be adopted in New Zealand, one would then expect it, consistent with its functions, to be communicating the results of its analysis to territorial authorities in a way that dovetails them with their section 26 responsibility. So it's – we'll come to the heading, "Shared Responsibility", but a key theme in my submissions is that this is exactly what the regime did, it parcelled out in a practical and sensible way, responsibility between different players, and each of them was required to perform their functions and is responsible for failure to do so.

Territorial authorities, the next bullet point, charged with administration of the Code, and an extended co-ordinating role between all regulatory bodies, continue to be the office for building records and Ministry consents. Greater emphasis on the building owner and producers to ensure compliance with the Code. Draft legislation allows for alternative procedures, for certifying, that the building certifiers, and then occupancy and proposal funding the new authority, and the control system on a more equitable basis. The way in which the review was carried out is discussed in part 1, and I don't need to go through any of that I don't think. Part 2, the control system, the contents page is set out on page 920, the concerns with the present system, the economic framework for reform, and the criteria for the proposed system. The framework of allocation of risk is discussed. Discussion in for example, 2.35 about transfer of liability, regulations transfer some building decisions and the responsibility

to forward them to control authorities in order to reduce the risk that private decisions will not provide adequate safeguards to protect the public interest. This transfer to the regulators of responsibility and therefore of liability, lessens incentives of building producers and owners to consider risks to others voluntarily, and so forth. This is part of a general theme linking responsibility and liability that we see throughout this report.

The next passage that's worth just noting in passing I think is on page 935, the heading, "Control Tasks", and the Commission has identified 10 control activities that must be undertaken by someone, and then goes through working out who will perform those, including proving new products, techniques and solutions 5. Interpreting control documents resulting differences in approving modified requirements where appropriate for. 9, make available information relating to building control. 2.75 notes that that describes the whole control system. Each of those has been considered, and again that notes those links. Each has been considered in examining the options, managing the system, resources available, and the assignment of responsibility and therefore liability in each task discussed in part 4 of the report. Again that relationship, which is discussed and then we get into part 3, the New Zealand –

TIPPING J:

Just a moment, 2.76, would you mind just pausing there. Where they say, "In essence the three parties share the responsibility of the efficient operation of the system, and they are the control authority, the owner and the producer", now the control authority is presumably the territorial authority?

MR GODDARD QC:

It's the authority to which the relevant control function's been assigned. So that's sometimes the TA and sometimes the BIA. This is still generic your Honour, what they've done, and I think, I understand this to be, you've got a list of control tasks, some of those are listed in 2.74, and then what's being said is, in 2.75, is we're going to work out who is responsible for each of those control tasks, and then 2.76 says, "Whoever is responsible for the control tasks and the owner and the producer will be responsible", so –

TIPPING J:

Thank you.

MR GODDARD QC:
But the who question is yet to be answered.

TIPPING J:
We haven't got to who yet.

MR GODDARD QC:
We haven't got to who, who the control authority is and –

TIPPING J:
Well it could be quite important as to what, who's giving, or at least in this document, what responsibility.

MR GODDARD QC:
Yes what we'll see is the document parcelling out the responsibilities and explicitly acknowledging that with them goes liability in tort.

So this cliff-hanger suspense of who done it is dealt with in, not part 3, you'll have to wait a little bit longer, the Building Code is discussed and I don't think I need to go to any of that. You can move over to part 4, Managing the Control System, which begins on 955 and consistent with the submission I made a moment ago, that we know see – section 2 doesn't deal with the who is the control authority, that's discussed later, is page 958, the heading, "Assignment of Control Tasks and Responsibilities." Operation of the whole system outlined in part 2 is a set of 10 tasks. Control tasks currently involve many people in Government departments, local councils and industry organisations. What are the options for ongoing management of controls, over the page at 4.17, three options are identified. Government departments, statutory body or local territorial authorities. 4.18, dismisses the Government department option. 4.19, discussed the second and third of those.

Over the page 4.20, detailed consideration was given to the two remaining options with regard to many factors of which the fifth was readiness to accept responsibility and ability to meet legal liability where negligence has occurred. And 4.21, after weighing each option the Commission is convinced that the public interest in industry would best be served by placing responsibility for implementing the Building Code in

the hands of individual territorial authorities subject to monitoring by a national control authority, and the reasons for that are touched on below.

Then over the page, page 961, the heading, "Shared Responsibility for Implementation." The proposed Building Act makes provision for the constitution of the national authority and defines its responsibilities for the operation of building controls. The Act also defines the powers and duties of territorial authorities to manage the day-to-day administration and enforcement of the Code and the responsibilities of building owners and producers in the functioning of the new system. So shared responsibility with a national authority with responsibility for the operation of building controls and day-to-day administration and enforcement invested in territorial authorities.

And 4.24, in the details that follow the report examines the roles of the national and local control authorities, so again coming back your Honour to your question, control authorities, it's both.

TIPPING J:

National and local?

MR GODDARD QC:

Yes. Owners in industry need to accommodate the huge diversity of building operations and the importance of clarifying the potential liability for building defects that have shaped the Commission's recommendations. So the Commission's absolutely onto this issue, that allocation of responsibility will have liability implications.

Building Industry Authority, BIA, 4.27, the Commission proposes that the Authority set out by the Building Act to manage the system at national level be a small body with a core of technical administrative staff to draw on persons and organisations in Government industry as required to carry out its assigned duties. So absolutely contemplate it would be a small body with a core of technical administrative staff but no barrier to the imposition of tort liability as we'll see further on. Its constitution discussed in 4.28.

4.29, BIA will provide a single source for referral and review that does not exist in the present fragmented system. It affords a centralised and readily accessible forum to

which central and local government, the industry and the public, can look for rulings on interpretation of the principles embodied in the Code and the need for amendment of control provisions and procedures.

BIA control tasks and responsibilities. Responsibilities assigned to the BIA may be summarised as follows. First, recommending controls to go in the Code. Second, dealing with amendments of those from time to time. Third, interpreting control documents resolving differences and overseeing performance modifications and waivers. Fourth, approving new product techniques and solutions including accreditation procedures. Next, to monitor and direct the administration of the Code. So again, coming back to your Honour Justice McGrath's question earlier, this is the legislative history reference to this idea of monitoring and directing the administration of the Code with the detailed tasks, six, seven and eight being assigned to territorial authorities. To keep records of its decisions.

Next, to disseminate control information on local and overseas developments and new techniques among interested groups within the building industry with a corresponding invitation for comment and advice. Part of task 9, to develop the information base for building control. So part of the task of developing the information base for building control was to be assumed by the BIA. It's not just territorial authorities that were supposed to be doing this and it's neither consistent with the legislative history nor sensible, from a practical perspective, to suggest that this responsibility resided solely with TAs fixing charges for its services.

Discussion of the day-to-day responsibility of territorial authorities in 4.31 but as it continues, provide both flexibility and certainty exist in the industry and its clients must have access to decision processes for approval of innovative solutions and interpretations consistent with the purpose and scope of management provisions in the Code. So after some analysis of that at 4.34 a recommendation that the BIA be the final source of referral under rulings on matters of Code interpretation and product or type approvals referred to it.

Status of the BIA. The next paragraph is one that –

WILLIAM YOUNG J:

Is not so helpful.

TIPPING J:

Starts to slip away.

MR GODDARD QC:

Receives some emphasis, I was about to say, in the BIA's submissions. I'm not going to slip away from it, I'm going to tackle it head on. The BIA would not be an advisory body except to the Minister inconsistent with its powers of decision making and matters of interpretation, approval and monitoring, but also would have the lesser status as an advisory body to territorial authorities or any organisation in the building industry. So it's not a day-to-day advisor but that says nothing, and I'll come to this about its functions of review. Decisions on matters of interpretation referred to it from the local administration would be binding. It is explained there. 4.37, approval procedures for new products, techniques and solutions outside the local –

WILLIAM YOUNG J:

Just pause there. If you look at the end of 4.36 there's a rather loose analogy with the Planning Tribunal, now the Environment Court, and the last sentence, which doesn't really make any sense, "It is therefore recommended that like the Planning Tribunal the BIA would be exempt from claims heard in matters of fact." The Planning Tribunal was subject to an appeal on a point of law, there could be no suggestion of it being sued or subject to claims that are heard in matters of fact?

MR GODDARD QC:

No that's, I think, a sloppy expression of that point. That the review of a decision would be on matters of law, not matters of fact, it's not intended to address –

TIPPING J:

I think it really means allegations rather than –

MR GODDARD QC:

Yes, or complaints even.

TIPPING J:

It's not a claim for damages?

MR GODDARD QC:

No. Exactly your Honour. So I think this is just what happens when one allows non-lawyers to write things. Shocking results.

ELIAS CJ:

There were quite a lot of lawyers involved in it, including your former partner I see.

WILLIAM YOUNG J:

Sorry, who were the lawyers on the panel?

McGRATH J:

Mr Hannah wasn't it?

MR GODDARD QC:

He was there. The Commissioners at the time of the report are listed on page 897. There's Mr Hannah, Mr Jansen, as he then was, so perhaps I should –

BLANCHARD J:

I should perhaps disclose that Mr Hannah was my partner at that time.

McGRATH J:

But in fact I see, I think it's fairly well known, he was the solicitor to the Auckland City?

MR GODDARD QC:

Yes and with considerable expertise in matters of building control. That was a throwaway comment of no merit in relation to the last sentence of 4.36. But what remains the case is that it's a loose way of saying, review is only on questions of law.

TIPPING J:

Yes.

MR GODDARD QC:

It's not intended to address civil liability but we'll actually see negligence being tackled squarely in the next few paragraphs.

TIPPING J:

So you're going to get up onto better ground in a minute Mr Goddard?

MR GODDARD QC:

Yes. And I don't need to emphasise to this court the importance of reading documents as a whole and in context. It's a point that's been made to me very forcefully on occasion. So 4.37, approval procedures for new products, techniques, solutions. Outside the local administrative process would involve further consultation and presentation of BIA. A wrong decision by BIA in those circumstances, leading to its approving, but not rejecting an application, could have serious consequences for third parties who might have relied on the BIA endorsement to their cost. In such approvals the Commission considers there could be a basis for an action in negligence being mounted against BIA on the grounds that it did not exercise proper care in deciding to grant an approval.

BLANCHARD J:

That's the accreditation function.

MR GODDARD QC:

Exactly your Honour. 4.38, there does not appear to be an argument that would justify BIA being exempted from a lack of care on its part, causing loss to third parties who were not involved in the original faulty decision. Assuming BIA would consider proposals with proper care and consultation, would seem very unlikely. It could successfully be held negligent. Particularly having regard to the technical expertise that would always be available to the national body. However, it follows that BIA should take out insurance cover to protect itself against such potential claims, rare though they are likely to be. So these are decisions about accreditations, which were subject to an appeal on a question of law, and which would have ongoing consequences for a unknown number of people who might use the accredited technique over an extended period of time, made by a small body with only limited personnel. But none of those features, the smallness of the body, the limited resources, the unknown number of buildings that might be affected, were seen as arguments that would justify the BIA being exempted from a lack of care on its part, causing loss.

ELIAS CJ:

Although they did anticipate that the potential claims would be rare, so –

MR GODDARD QC:

The same was said –

ELIAS CJ:

They're not contemplating –

MR GODDARD QC:

– by Lord Denning in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA) in relation to claims against local authorities.

TIPPING J:

I think there is a slightly cynical observation made in *Sunset Terraces* about His Lordship's optimism.

MR GODDARD QC:

There was indeed.

WILLIAM YOUNG J:

What about 439 Mr Goddard, 439? It's slightly incoherent, but of course it's something that's written I think about the time or well just before *Hamlin* and Privy Council, added a time when tort liability principles were pretty fluid, or changing.

MR GODDARD QC:

Yes, and interestingly this was a recommendation that there be an exclusion of liability for the BIA unless it had acted in bad faith, which was not followed through in the legislation. So there was a conscious choice not to provide that level of exculpation.

TIPPING J:

Well there's also I suppose, and although points are self evident, there's also the specific reference to negligence and failure to take care in the preceding paragraph.

MR GODDARD QC:

In relation to a different type of decision. So 4.38, I think this is His Honour Justice Young's point, is dealing with accreditations and approvals –

TIPPING J:

This is an adjudicatory –

WILLIAM YOUNG J:

This is the adjudicatory function, yes.

MR GODDARD QC:

Yes, and that suggestion wasn't carried through into the Act, rather the exemption for actions done, other than in bad faith, was applied only to members and employees and determinations of this kind were expressly referred to in the long stop. Assurance of code compliance, which is then discussed and the various ways in which that will be done. Over in 967, territorial authorities and their control tasks and responsibilities, are listed at 4.48 and they're pretty much what we've seen in the Act. There's no need I think to go through those, but then we get to monitoring the control system by BIA, on page 968. BIA is to be responsible for monitoring the control system in an operation nationwide, and the performance of these control functions at the local level.

WILLIAM YOUNG J:

I'm sorry, I've lost the page.

MR GODDARD QC:

I'm sorry your Honour, 968. This is perhaps my favourite paragraph, although there's another one coming up which I also quite like, but we can all pick and choose the bits that are most helpful. BIA are responsible for monitoring the control system -

ELIAS CJ:

Sorry, which one, which paragraph?

MR GODDARD QC:

4.51, I do want to make sure the court has it.

ELIAS CJ:

Thank you, yes.

MR GODDARD QC:

Nothing like a punch line about a reference that no one else has. On page 968, paragraph 4.51 and in my copy it's got lots of yellow on it, and an asterisk in the margin, BIA responsible for monitoring the control system and operation nationwide

and the performance of these control functions at the local level. Checks would be made by BIA to ascertain whether a TA was administering the code in accordance with the Act and proper practices, and to require correction if it was not. An officer of BIA would have statutory powers to search TA records arranging administration of the building control system, to assess the justification of any complaint that might be made to it. If a TA were found to be acting in a manner that was open to severe criticism, BIA would report to the Minister accordingly, and the Minister would have the options that we've seen in section 29 I think it was.

Then interpretation and approvals over on 969, the role of BIA in giving rulings on matters referred to it. Page 971, accreditations and approvals. And the reference at 4.65 to these referrals extending the BIA's responsibility to encourage industry innovation and initiatives to manage controls efficiently at the local level. Alternative procedures. I don't think it's necessary to dwell on. Oh yes, 974, potential liability exposure.

ELIAS CJ:

Sorry, what –

MR GODDARD QC:

Page 974.

ELIAS CJ:

974, thank you.

MR GODDARD QC:

Paragraph 4.78. Applying the principles adopted by the Commission the alternative procedures and certification incorporated in the control system affect the potential legal liability for negligence and checking code compliance by the parties involved. And then the possibility of relying on producer statements, or certifier statements, is reviewed, and also the situation where the BIA issues an accreditation. So the first bullet point deals with producers, TA's got an option to select those, and if it chooses to, its liability remains intact, but if a certifier has given a certificate that must be accepted by the TA, the certifier assumes legal liability for any negligence that may occur and certifier compliance with corresponding reduction of potential liability of the TA. Potential for transfer of TA duties, if it completely fails, and the co-ordinating certifier then, last sentence, has the same legal liability in the case of negligence that

the TA would have if it had performed these control duties. And then lastly, accreditation certificates of products and systems issued by BIA, based on a technical appraisal of their performance by an independent body, and BIA rulings on type approvals and new solutions, must be accepted by the TA. BIA assumes legal liability for negligent type approvals and accreditation.

So that's not an exhaustive description of functions, but it's indicative that where BIA is carrying out a function, even one that has national and widespread impact, if it does so negligently, it's expected to bear liability, and it should insure accordingly. I don't think I need to go through the rest of that report. I think the next thing that it's useful to do, before I dive into the pleadings, is to look quickly at the 1995 review and the two successor reviews.

The 1995 review, this is where we see the BIA in action, doing what the legislation permits, and what the BIC contemplated, is in volume 3 in the case on appeal, under tab 18, it's purple.

ELIAS CJ:

Page? Sorry.

MR GODDARD QC:

The very first tab your Honour, tab 18. So this is the 1995 review on which this particular claim is founded, because it's the one that preceded the construction of the Grange. The Council says that the 2001 review was also negligent, but of course there's a slight causation problem in relying on that in relation to a building that was completed in 2000, and I'm not –

TIPPING J:

Slight?

MR GODDARD QC:

Enough for me not to feel it was worth pleading your Honour. But there may be other cases where that arises.

WILLIAM YOUNG J:

It's quite significant though, I mean, not significant really for our purposes but significant but in the broader context because it's 1998 that Prendos starts giving warnings.

MR GODDARD QC:

Yes, exactly your Honour and yet the 2001 review is just as sunny as the 1995 one. Beginning on the very first page, the cover page, Building Industry Authority, review of technical operation in relation to the issuing of building consents, so that's what they were doing, reviewing the technical operation of the councils concerned in relation to the issuing of building consents. Report for North Shore City Council. So –

TIPPING J:

Where does it say that?

MR GODDARD QC:

Sorry, in the –

ELIAS CJ:

Well, it's not –

MR GODDARD QC:

– big heading on the very front.

ELIAS CJ:

– report for –

TIPPING J:

Oh, the first page –

ELIAS CJ:

– the report in relation to. Were you making us –

MR GODDARD QC:

It could be but it's not here. It's quite clear that it was addressed to them and –

ELIAS CJ:

I see, thank you.

TIPPING J:

Who is Joyce Group Limited, what relevance, if any, does that have on this document?

MR GODDARD QC:

Consistent with the approach contemplated by the report –

TIPPING J:

They engage a consultant –

MR GODDARD QC:

– we've just seen, they engage consultants to do these, so we see Joyce Group doing this one. We see Opus International doing the 2001 one and I think it might have been internal BIA staff doing 2003 but I'll just check that when we come to it.

So, moving on past the contents page and the introduction, we see at 341, again using the stamp numbers in the top right-hand corner, the introduction, "Under the terms of section 15(1) the Building Industry Authority has commissioned a technical review of the building consent issue procedures and to undertake the review the Building Industry Authority has commissioned the Joyce Group". 1.02, purpose of review. "To review procedures within the selected territorial authorities to establish how they are coping with the Building Act requirements so that the Authority can advise on operating methods and consider any legislative changes that might be helpful." So those two functions.

"It was also proposed results and conclusions of the review work would be made available to the territorial authorities to assist them in evaluating their own internal procedures and to assist with the achievement of national uniformity and the increased efficiency envisaged by the building control reforms." So it's absolutely clear that one of the purposes, though not the sole purpose for carrying out this review, was to assist TAs to evaluate their own internal procedures. If you told them negative things, you'd expect them to fix it. Conversely, if you said positive things, you'd expect that to reassure them and lead them not to make material changes.

BLANCHARD J:

That's an interesting choice of words, "It was also proposed results and conclusions would be made available," which rather suggests that it's voluntary rather than something that is required by the statutory scheme and functions?

MR GODDARD QC:

Yes, I think that's one way one could read it. That doesn't mean that it's not within the functions, just that it's not required by them and that is the – my reading of the Act your Honour is that one could imagine reviews being done that were just to assist the Minister to deal with a rogue territorial authority and that were not really intended to help that territorial authority but rather to provide the platform for the exercise of the section 29 power. One might not share that with the territorial authority but it's also within the functions of the BIA to carry out reviews to assist territorial authorities to improve their processes and achieve national uniformity, all those other things and that's what it in fact elected to do and it would be a bold submission that this was ultra vires, the Authority to set out to assist TAs to evaluate their processes and to in fact do so.

WILLIAM YOUNG J:

Just a contextual issue again, not critical to what's before us but if Joyce Group were negligent in the performance of this review, would that really come home to roost for the BIA?

MR GODDARD QC:

This was a review by the BIA through its appointed agents so –

WILLIAM YOUNG J:

Well agent or consultant?

MR GODDARD QC:

It's described as a BIA review and that's certainly how –

WILLIAM YOUNG J:

Sorry, where's the description "BIA review", you mean just the heading?

MR GODDARD QC:

The heading and –

WILLIAM YOUNG J:

Well that could be the client of course. It's commissioned, the Building Industry Authority has commissioned a technical review.

McGRATH J:

They have a warrant under section 79(4) to, don't they?

MR GODDARD QC:

Yes, they're warranted to carry out the inspections.

McGRATH J:

Yes and that's provided for under the statute?

MR GODDARD QC:

So they're exercising the powers of the BIA by warrant.

McGRATH J:

Section 79(4)?

MR GODDARD QC:

Yes, your Honour.

WILLIAM YOUNG J:

And is BIA precariously liable for any negligence?

MR GODDARD QC:

In my submission, this is – has been presented to the council as the BIA's review and in particular as statements made by the BIA, so it's been adopted by the BIA and communicated on that basis –

TIPPING J:

Well the power to review is that of the BIA, how it chooses to get that done is, I would have thought with respect, not relevant to –

BLANCHARD J:

It's pretty clear from the second sentence of 1.01 that it's the BIA's review.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Oh yes. Well of course, that's right but –

MR GODDARD QC:

I did wonder, as I was working on this submissions actually, whether the Joyce Group ought not also to have been joined as a party –

ELIAS CJ:

Well, they might be joined as a party but the BIA must be responsible for it.

MR GODDARD QC:

Yes, that's my submission but –

WILLIAM YOUNG J:

Despite the fusion of confidence in that, so far I remained to be persuaded that, if I get someone, commission someone to do something for me, it necessarily follows that I am liable.

MR GODDARD QC:

It depends I think, in relation to negligent –

WILLIAM YOUNG J:

If it's done badly –

MR GODDARD QC:

– statement on whether your Honour then presents it as your Honour's work or not but if I have a young barrister do some research for me and then I send it out on my letterhead –

WILLIAM YOUNG J:

No, well I accept that –

MR GODDARD QC:

– adopting their work as my own, I am accountable for that and –

ELIAS CJ:

Particularly if you were under a duty to undertake, or you had a statutory power to undertake the review –

MR GODDARD QC:

Yes –

ELIAS CJ:

– it seems a bit far fetched.

TIPPING J:

Another one of your analogies Mr Goddard, for which there is an apparent lack of appetite.

MR GODDARD QC:

So far I've abandoned various possible plans against the Wellington City Council in relation to my house that's being built here. I've accepted liability, whereas people – not quite gone as far as Mr Farmer in accepting criminal liability for things found on his yachts I think but close.

BLANCHARD J:

Am I right in thinking that parts 1, 3 and 4 of this report, it would appear in all seven reports –

MR GODDARD QC:

Yes, that's my reading –

BLANCHARD J:

– and then part 3 it is changed for each one?

MR GODDARD QC:

Part 2?

BLANCHARD J:

Part 3 – sorry, you are quite right, part 2 is changed –

MR GODDARD QC:

Yes, that's my understanding of the document your Honour. So all – one, two, three, four, five, six, seven TAs listed in paragraph 1.04 would have got the same sections 1, 3 and 4.

TIPPING J:

You're jolly lucky to be on this list.

MR GODDARD QC:

If it hadn't been this year, it would have been 1996 or 1997.

TIPPING J:

I suppose that's the answer really, isn't it.

MR GODDARD QC:

Yes. It would have come round. It was a mixed blessing, given the comfort that it provided and the risks to which it left the local authority exposed. To say that one is lucky to have been seen by a doctor that didn't carry out a careful diagnosis, is a –

TIPPING J:

Mr Goddard, you're at it again.

MR GODDARD QC:

Your Honour, yes, I plead guilty.

ELIAS CJ:

It was a good response.

TIPPING J:

It was a very good response, that was all I could think of to say Mr Goddard.

MR GODDARD QC:

It's 12.59 and 12 seconds, I wonder if the other acceptable response –

ELIAS CJ:

Is the point about – are you going to take us to anything in this, or is it just a mix –

MR GODDARD QC:

Yes, I am. No, no, I'm going to go to a few explicit things.

ELIAS CJ:

All right, we'll take the lunch adjournment now, thank you. Resume at 2.15.

COURT ADJOURNS: 12.59 PM
COURT RESUMES: 2.16 PM

ELIAS CJ:

Yes Mr Goddard.

MR GODDARD QC:

You Honour, I was going to look very briefly at a couple of aspects of the 1995 report, which was in volume 3, the purple volume under tab 18. I'd gone to the purpose of the review on page 341 of the bundle, 342 lists the seven territorial authorities that were reviewed in that year, and the methodology of the review. A visit to each territorial authority to establish how the operation was structured, and to the control achievement of code of compliance during the construction process. In sections of four houses and various other buildings, to establish how the code of compliance had been achieved. Steps that were taken and listed, obtaining access to documents and staff, carrying out interviews. Five, preparation of a draft report relative to the TAs. Six, collection of standard documents used by the TA. Seven, an exit meeting where findings were reported and proposed recommendations were discussed, so there was an oral provision of feedback to the territorial authorities and a review of the draft, and an inclusion of comments raised at the exit meeting.

The North Shore specific section then follows, and there's quite a detailed discussion of how the system at North Shore operates, with various editorial comments from the reviewers, including for example on 345, after describing the building consent team in the second paragraph of text, noting that expertise is available within the operation to vet all aspects of compliance with the NZ Building Code, a detailed discussion of a number of inspections and how that's all carried out. Some statistics over on the next page. Discussion of the use of acceptable solutions on 348. 349 discusses field inspections, and then at the very foot of 349, the report refers to the use of check lists to guide vetting and inspection staff through their routines, adopted universally, evidence of completed check lists on file evidence.

Over the page, 350, compliance with Building Code. The review process that was adopted is described. Said that during this process it was clearly established whether acceptable solutions had been adopted, or alternative solutions may have been proposed and accepted, with the exception of the anomalies notes in the inspection section, compliance to the building code had been satisfactorily achieved. That has a particular resonance for this Council, given that one of the buildings inspected was subsequently the subject to a weather tightness claim, which was settled at no small expense to the Council, because that was not the case

Overview of operation, described on 351, including in the third paragraph beginning "Fully detailed documentation". Again reference in the last sentence to a comprehensive series of check lists also available to guide staff through document and vetting procedures, and on the selected job piles reviewed, completed check lists were filed. Reference to multi skilling of staff. The operation of a new system discussed at the foot of that page, and over to 352. On 352, third paragraph, even though evidence of items of noncompliance on site were few in number, one in particular was of a serious nature, e.g. no ventilation to a sub floor area, so there was a particular concern identified in one of the buildings. The review team believed the building control officers should be more careful in making these on-site inspections, so the remedy was for individuals to be more careful, it wasn't suggested there was a systemic problem. There's reference to no formal independent review system to monitor performance being in place.

We'll see over the page that they're talking about internal review here. Advised a system will be introduced. In the last paragraph it was pleasing to identify that the thrust of the operation was to achieve code of compliance whilst providing a service focused on the customer. Recommended comprehensive monitoring be continued to establish that the systems are operating as planned and that service delivery has not been compromised.

The recommendations over the page are 10 in number. The first that an internal reviewing system be implemented to monitor performance with respect to compliance. Officers used on review should not have been involved with projects. So there's to be internal review, but there's no suggestion that the staff as a whole are not appropriately skilled or don't know what they're looking for, having two people who don't know what they're looking for, look at something, obviously doesn't help

very much. Three, the only issue about inspections that's raised all together with the – 4. During onsite inspection, more careful attention should be paid to installation details of the materials to the manufacturer's recommendations, particularly with reference to durability, and then comment about ensuring built constructions, as per the approved documents, and so on.

Then there follows some discussions of specific buildings that were inspected, three of them made some use of monolithic face fixed cladding and the one that's particularly similar to the Grange is the one that begins at 362, 6 City View Terrace, in Birkenhead, which, as is noted at 363, has an interior clad with Hardibacker with a selected plaster finish. The same technique as the Grange. So careful review of systems and processes, discussion of check lists, no comment that code of compliance is being achieved and no particular concerns.

I'll move very quickly to the 2001 report, because it sheds light on what the BIA thought it was doing, and that it was the BIA doing it, among other things. That's in volume 4 of the case on appeal. And the first tab to look at is tab 32, which was a letter sent by the BIA to the Council foreshadowing the 2001 review. It says, "The Authority is to undertake a technical review." So again it's described as the Authority's technical review. Your Council is one of the 10 selected. The review has three objectives. First, to investigate whether the processes and procedures employed by territorial authorities enable them to satisfy the requirements of the Building Act with respect to building consents, code of compliance certificates, and building warrants of fitness. Second, to encourage and assist each territorial authority to consider improvements to the processes and procedures they employ, and third to assess where the buildings being constructed, under building consents issued by the authorities, comply under the Building Act.

WILLIAM YOUNG J:

The work will be undertaken for the Authority by a team of two people from Opus International?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

At the risk of driving everyone bonkers with my obtuseness, for what – by what particular mechanism is the BIA responsible for negligence by Opus International Consultants Limited? Is it vicarious, or is Opus – are the actions of Opus to be attributed to the BIA?

MR GODDARD QC:

The principal argument that's been advanced to date is the latter, that it is a review by the Authority performing its statutory function, and that –

WILLIAM YOUNG J:

Why would it not be – could it not say we perform our statutory function in a non-negligent way, by commissioning competent people to do it for us?

MR GODDARD QC:

Then that's still commissioning people to be the Authority to do it. And I think –

WILLIAM YOUNG J:

It's not a self-evidently correct proposition.

MR GODDARD QC:

The alternative approach is vicarious liability.

WILLIAM YOUNG J:

Well isn't the alternative sue Opus if we want to?

MR GODDARD QC:

And that's yet another option, and that's one to which I imagine consideration should be given.

WILLIAM YOUNG J:

Probably not so good in 2001, because it's a bit late, but –

MR GODDARD QC:

In tort I'm not so sure, it depends when the losses –

WILLIAM YOUNG J:

No, because the work was done in this case, in 2000. Wasn't the building in this case constructed in 2001?

MR GODDARD QC:

Oh, for this one yes, yes, it wouldn't be for the Grange it's an issue for other cases. But the primary argument here is that these reports were adopted by the Authority as its reports on reviews which it conducted by –

WILLIAM YOUNG J:

But what – would the local authority say, gee this has got the BIA's informata or would they say, look the BIA have got independent people to look at it. The people who are really responsible for this are Opus.

MR GODDARD QC:

It was understood as the former of those, and that's how it's consistently recorded in the Council's internal documents.

WILLIAM YOUNG J:

But how would the BIA have added its informata to onsite inspections made by two people from Opus?

MR GODDARD QC:

By selecting the persons to carry out the work and authorising them under section 79 to –

WILLIAM YOUNG J:

So this is the warrants?

MR GODDARD QC:

This is the warrants.

WILLIAM YOUNG J:

And that's to go on to land is it?

MR GODDARD QC:

And carry out inspections and seek information.

WILLIAM YOUNG J:

So they were warranted?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

But where's that, where's the evidence for that?

MR GODDARD QC:

That's expressly recorded in the 1995 report I think. Page 341 your Honour.

WILLIAM YOUNG J:

Sorry, I'm just looking at 79(4) first.

MR GODDARD QC:

But back in volume 3, tab 18, page 341, 1.03 personnel involved, at the bottom of the page, Joyce Group, "Review officers warranted in terms of section 79 of the Building Act, Mr Thurlow and Mr Aitken". And it's consistent I think with the description in the BIC report of how it was in the BIA, a small agency was expected to perform its functions.

WILLIAM YOUNG J:

Well they are acting on behalf – they must be acting on behalf of the Authority if they're entering land?

MR GODDARD QC:

Yes. And requiring the TA to provide this information. Those were all powers of the Authority, they're not powers that a mere consultant exercises.

Again coming back to the 2001 letter that was under tab 32, there's a reference at the foot of the page to the team spending four days in the offices, and the last sentence, "We're confident the team members will be able to establish a good working relationship with your own staff to ensure that the exercise will be of greatest value". I understand that to mean to the TA. The proposal for visiting certain buildings is identified at the top of the second page, 676 and again your Honour we'll see in terms of section 79 that the review team's responsible for obtaining permission

from the owners to visit the buildings. The authority will issue an inspection warrant to the review team as required by the Building Act to section 79(4). So again in 2001 these were warranted reviewers. And the description of the review in the last paragraph's also helpful because I think it sheds light on what the BIA was consistently doing, both before and after this. Authority sees the review as – essentially as an examination of procedures to see how territorial authorities are coping with the Building Act requirements, so the Authority can advise on operating methods and can consider a legislative change might be helpful. Results and –

TIPPING J:

That's exactly the same language, word for word.

MR GODDARD QC:

Except that that proposed to has been firmed up rather, so –

TIPPING J:

Yes.

MR GODDARD QC:

So, yes your Honours, the results conclusions will be available and –

TIPPING J:

There's also a representation that they're going to advise?

MR GODDARD QC:

Yes. And express again reference in the last sentence to the Authority being confident that all parties can gain from these reviews. Presumably including the TA, that's the whole point of this. So it's meant to benefit from them and the Authority as your Honour has said, it's going to advise on operating methods. This becomes more explicit all the time. Then there's a letter under the next tab, 33, from the reviewers, setting out what they're going to do, and over on 678, the last, second to last or third to last paragraphs, "We'll arrange a time to summarise findings and recommendations if any, on the last day of our visit. We look forward to meeting with you and your team and we are confident this exercise will be of great benefit to you." And then, I won't go to it, but tab 34 is an internal report from Council officers to the Mayor and Councillors, reciting that this review had happened and that the BIA was happy.

The report itself is at 35 and what we see on page 684 are the four objectives that were in the letter, including encouraging and assisting TAs to consider improvements to the process and procedures they employ. In 1.1D, the legislative basis for the technical review, second paragraph is interesting. Although the Authority's fundamental purpose is to manage New Zealand's building legislation, it is in turn reliant upon TAs to apply the requirements of the legislation at local level throughout New Zealand. One of the key functions of the BIA is to monitor the performance of TAs. Reference to 12.1D is the Authority undertaking reviews. 1.3, approach to the reviews for the consistent and effective application of the Act and the Code by the Authority throughout the country greatly assisted by the maintenance of an effective and harmonious relationship with building control sections of TAs who administer the requirements of the Act and the Code on a day-to-day basis. So that concept of shared responsibility with the BIA having national responsibility for the consistent and effective application of the Act and Code but with day-to-day work being done by TAs.

And then interestingly the third paragraph under that section, "The reviews are not intended to evaluate the performance of individual building control officers, but rather to demonstrate, determine whether TAs on the whole have the appropriate systems and resources available to enable building control officers to properly undertake their work." Just so. We say there could not be a better description of what it was that the reviews were intended to do and what it was that the Council took from the favourable report. Namely that it did have the appropriate systems and resources available to enable individual officers to undertake their work.

There is then a discussion of the methodology and I don't think that matters too much. If we turn over to the summary of inspections on 705. Under heading 6.4 there is reference to the inspectors being competent in the inspection procedures with a good knowledge of the Building Code. Then the whole document is summarised on pages 706 to 707 including over on 707, third paragraph, "Building control functions well documented but are presently under review. Inspection of residential buildings for which code compliance certificates had been issued indicated general compliance with the Building Code." And then four lines down from that, "Most of the recommendations of the 1996 technical review have been implemented." So the BIA understood itself to have been making recommendations to the Council and was checking on whether those recommendations had been

implemented and was happy to note that they had. And apart from a need for the building group to meet the statutory timeframes in all cases, which conjures up idyllic garden images, apart from that absence of statutory, the group was fulfilling its obligations and administering the requirements of the Building Act.

And then over under tab 36, the letter transmitting the review to the Council. "Please find enclosed a copy of the report for your Council arising from the Building Industry Authority review of territorial authorities." So it's described there as a BIA review. "Undertaken between April and July this year." Some findings specific to the visit to North Shore and then third paragraph, "Generally the reviews have found that territorial authorities are working well towards meeting the requirements for legislation and providing a service that's customer focused." And so on and so forth. An expression of regret in the last paragraph that it's taken longer than anticipated to get the reports back to the TAs concerned. Looking to correct this for all future reviews. Why? Because part of the point was to help the TAs in a timely way. And the last sentence, I think, is of interest as well. "You might like to consider requesting a follow up visit by one of the reviewers at the Authority's expense to look at specific aspects that arose from the original review." So we're going to help you fix that.

And then finally, and very quickly, we see what these two reviews should have looked like. Volume 5, tab 37 is the report that should have been written and tab 38 is the letter that should have been written and I think the contrast is illuminating because it sheds light on what the BIA understood itself to be doing and what it should have found. If we turn over to –

ELIAS CJ:

Sorry, what volume are we in now?

MR GODDARD QC:

Sorry your Honour. Volume 5, it's the yellow one. The first tab, tab 37, and I was going to jump through to page 728 using those stamped numbers in the top right-hand corner.

TIPPING J:

Who actually – was this contracted out or was this an in house –

MR GODDARD QC:

This doesn't appear to be. There are some individual names listed on the front page prepared by but there's no organisation referred to your Honour.

ELIAS CJ:

Why have you put a marked up copy, is that explained in the affidavits?

MR GODDARD QC:

I think this must have been the copy that was held by the Council at the time.

ELIAS CJ:

I see, yes.

MR GODDARD QC:

It's the one that was exhibited in the original affidavit rather than the one that's been marked up on the way through the court process if that helps?

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

And it would be fair to say that some of the comments suggest to me that they were written by a Council officer who was not in all respects happy with the reviewer's comments.

ELIAS CJ:

But we don't have evidence about that?

MR GODDARD QC:

No, you don't, your Honour. One or two of them seem a little grumpy so that's the inference I drew.

WILLIAM YOUNG J:

The personnel involved are at 733.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

So there's two from the BIA and two from a company called Alpha Building.

MR GODDARD QC:

Alpha Building Consultants, yes, thank you your Honour. And just to deal with your Honour's point, author, Building Industry Authority, two lines up from that.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

Back to 728 then. The nature of the review is explained. The fourth paragraph down, the review of the express consent operation identified the following issues of which the fourth was lack of appreciation of weathertightness issues. Poor quality and incomplete documentation is being accepted and approved and two paragraphs down, "The review team accompanied building inspectors during inspections to assess on site procedures, levels of technical competence, resourcing and investigated Council's performance with respect to weathertightness. The following items of concern were noted. Inconsistent levels of inspections practices. Producer statements being accepted inappropriately. Varying levels of technical competency. Inadequate level of peer review." And then, critically, there appears to be a limited appreciation of weathertightness.

In some cases inspection time allocations too short to allow adequate inspections. Too few inspections are undertaken of some elements to reasonably enable compliance to be confirmed. Exactly one of the issues pleaded by the plaintiffs in this case. Inspections methodology is not always appropriate. Some check lists used are not robust enough to address current construction methodology. In other words your check lists just don't fit with what's now being done. A list of comprehensive weathertightness inspections check lists has been provided, so we see the BIA actually saying, here are some decent check lists for you to use, because the ones you are using are sub-optimal, to put it politely. Over the page, insufficient inspection staff and so on down.

And interestingly the BIA understands exactly what this means for the Council in terms of the damages issue. If we come down to the third paragraph beginning,

"Insufficient attention to producer statements, lack of internal audit peer review, lack of care audit trail, and a lack of attention to weathertightness details, could potentially expose North Shore City Council to litigation." And that was indeed somewhat prophetic and the reasons for that are touched on below.

There's a series of recommendations about both the structuring of the Building Act consent activity and the systems to be adopted including, over at 730, right down the bottom of the page at the heading, "Weathertightness. Council can no longer continue to function in pre-weathertightness mode. It's imperative that Council develops a clear policy that articulates how weathertightness compliance can be verified. It's a policy that needs to be translated into clear procedures for both processing and inspection staff. Use of producer statements, check lists and additional inspections. Review team recommends that…" and then there are two last recommendations, in particular about the number of inspections allocated to consents and adequate time and resource.

BLANCHARD J:
What do you understand of the expression, "pre-weathertightness mode"?

MR GODDARD QC:
How the Council was doing things before weathertightness attracted significant public attention in 2002. Business as usual. Business as reviewed in 1995 and 2001 I think your Honour. The idea is that the Council was just continuing on in a business as usual mode but this issue had now been identified and more was required, I think is what's being said.

The purpose of the review, expressed in very familiar terms on page 733 and legislative basis again, very similar and the review brief, on 734, very familiar. I won't go through the report because, at the end of the day, the case is not about this report but it is consistently critical of the staffing levels, the skill sets of staff, the systems that have been adopted, the number of inspections carried out, the checklists used and generally the systems of the Council for managing weathertightness issues.

So, for example, on 754 to 755, the weathertightness issue is discussed and we see under 20, assessment of weathertightness, the heading "On site inspection of weathertightness," second sentence, "In the review team's opinion, gauging from the sample of documentation reviewed and staff interviews held, both Council

management and processing officers have a limited appreciation of the magnitude of the current weathertightness issues facing the industry."

Over on 755, under the summary, comments about acceptance of producer statements, in the last sentence, "Council potentially very vulnerable as there is no one undertaking a technical review prior to issue of CCC." So the BIA understood that if the Council did this badly it was exposed to liability and I doubt that that was a new appreciation and there's very detailed discussion of some particular sites that were visited.

If we turn to tab 38, we see, as I say, the letter that should have been written in 1995, given that it was the same systems that were being looked at. It's from the chief executive of the BIA, it's to the chief executive of the Council. It's about a technical audit. It begins, "As you will be aware, the Building Act sets down the law for building work in New Zealand." Explains, in the second paragraph, "Although the BIA's fundamental purpose is to manage New Zealand's building legislation," quite so, "it's in turn reliant upon TAs to apply the requirements at a local level." Refers to the functions undertaking reviews and then the last paragraph, "A recent technical audit of North Shore City Council was undertaken in accordance with the above legal requirement, audit confined to the environmental services regulatory building control functions. The results of this audit are contained in the draft report enclosed. I would appreciate it if you would give the report your careful consideration," this is addressed to the chief executive, "because it contains a number of concerning examples of recent construction in North Shore City that may not be code compliant. I would like to come to North Shore City in about two weeks time to meet with you to discuss the audit findings and recommendations and in particular how the BIA can assist Alison Geddes," that's the relevant Council executive, "and her staff to put together an agreed response plan that addresses the issues raised in the audit.

So that's what the BIA thought its job was to do, to review, to inform and to assist in responding and the only mystery, the Council says in these proceedings, is why that only happened in 2003 and that's something that will be explored through the discovery process and through cross-examination at trial and it's possible that it will be the result of deliberate high level policy choices made about expenditure but it's also possible that it's not and that no additional resources would have been needed to do the job properly in 1995, or that the change of events that led to the failure to identify those issues, or to alert the Council to them when they became actually

known to the BIA in 1998, was the sort of operational disorganisation and incompetence for which tort liability has always been imposed.

Even if there is an element of resource constraint, then the question would still have to be considered at trial whether that went beyond the sort of constraint that territorial authorities were subject to on a day-to-day basis but that does not exonerate them from liability.

So the pleaded claims and to look at these, perhaps what is most helpful is first of all my written submissions section 2 and also the pleading which is in volume 1 of the case on appeal, under tab 3.

The Council which was named as the first defendant, joined five third parties, the Attorney-General was the fifth of those, so the claim against the Attorney-General as successor to the BIA begins on page 29 of the stamped numbers in the right-hand corner. There are four causes of action.

The first alleges a duty of care that was owed to the Council in respect of the 1995 review. The functions of the BIA are pleaded at 57, part of that review at 58, 59, "At all material times the BIA had special expertise and experience in matters relating to building control, the Building Code, the administration and enforcement of the Building Code and the extent to which different methods of construction would or would not comply with the Building Code." The allegation of special expertise and an allegation at 60 that, "At all material times the territorial authorities relied on the BIA to inform, educate and assist them in connection with the performance of their duties, including through dissemination of the information, provision of education and conducting reviews. Reporting on issues identified at a general level and, where applicable, specific issues affecting particular TAs."

The 1995 review is then pleaded. The purpose set out at 61.2 and pleaded at 61.3 that the report was provided to the Council. At 61.4 that, "The purpose of providing this material included assisting the Council and other TAs in evaluating and strengthening the internal procedures of their departments and to assist with the achievement of national uniformity and increased efficiency." Now that really just tracks the language of the review but, in any event, it's a pleaded allegation that that was one of the purposes which is a question of fact.

The scope at 61.5 notes that, “Construction using monolithic style cladding has been ongoing since the early 90s and –

ELIAS CJ:

What does monolithic mean in this context? If it can be answered quickly.

MR GODDARD QC:

I think it means really big bits of cladding that get attached to framing, rather than lots of separate little boards.

ELIAS CJ:

I see.

MR GODDARD QC:

My learned junior, who actually understands building much better than I do, says I’ve got that roughly right.

ELIAS CJ:

Right, thank you.

TIPPING J:

Big slabs.

MR GODDARD QC:

Big slabs of cladding. So it’s nice and quick, I mean, it was a quick, relatively inexpensive method of construction because you could take a large part of wall, attach this cladding and you didn’t have to spend ages lining up your weatherboards.

BLANCHARD J:

It is very quick.

MR GODDARD QC:

I’m delighted to say I haven’t seen it done.

BLANCHARD J:

I have.

ELIAS CJ:

Yes, sorry, thank you though.

MR GODDARD QC:

I was at 62, I think, the pleading. So the 1995 review and report didn't identify any serious failures or defects. Sets out some particulars of that and then 63 pleads what the Council understood from the review and the report which is that, "Its consenting and inspection regime and procedures were in accordance with acceptable standards under the Act. That if the Council's building consent team continued to operate in accordance with its practices and procedures as reviewed it would be adequately fulfilling its obligations."

Third and importantly, "There were no material failures or defects in its processes for performing its functions in assessing compliance." In 64 it's alleged that, "In reaching that understanding the Council reasonably relied on the special expertise of the BIA. In 65, "A pleading of explicit reliance on the 1995 review and the 1995 report for two purposes. First, continuing to operate its inspection practices without any material changes," and the lulling into a sense of security point, "Did not commission other external reviews or seek other expert advice or assistance in respect of the performance by the building consent team of the Council's functions under the Act."

In 66, "If the 1995 review and report had been done property, the Council would have had an opportunity to improve its systems and would have taken that opportunity." In 67, alleges a duty of care to prepare, "To carry out the review and prepare the report with the skill and care that could reasonably be expected of the expert body responsible for the administration of the Act and to use reasonable skill and care to ensure that the review and report were consistent with the objectives of the Act." And it's alleged that that was breached in the respects set out in 68 including critically 68.8, "Not reviewing the need for the Council to have in place a system of inspections that would adequately identify breaches in the Building Code."

And there's then a claim at 69, that is the council is liable to the plaintiffs, which was at that time denied, such liability has arisen as a result of, or was contributed to by the BIA conducting the 1995 review and preparing the 1995 report in breach of duty of care the Council claims damages and/or an indemnity, and it should be damages really, what is sought here. The reference to an indemnity is a bit of a red herring.

The second claim is a negligent misstatement and the allegation at 71 is that the 1995 report conveyed, and was intended to convey, to the Council that the building consent team was doing its job properly and there were no material failures or defects. That's what's defined as the clean bill of health statements. The Crown complains that those things are not said in precisely those words anywhere in the report but the pleading is that that is what the Council took from it and that it was fairly implicit in the report and that is what the BIA should have expected the Council to take from it. And those are essentially issues of fact.

Those statements were incorrect. Breach of duty of care. Reasonable reliance, at 74, and a claim for liability. The third claim against the BIA, negligent failure to correct misstatement, this repeats the previous allegations and then points out that prior to the issue of building consent or code compliance certificates in respect of the Grange, the BIA was aware or should reasonably have been aware of the issues set out in paragraph 68 above, the various defects in the Council's system, and the correspondence from Prendos is then pleaded, beginning on 24 April 1998 and running right through to 27 July 2000. And the allegation at 77.2 is that as a result of those matters, and the BIA's own building knowledge, the BIA knew or ought to have known that construction of residential buildings in a manner the same as or similar to the Grange would result in water ingress and/or non-compliance with the Code.

Failure by the BIA to tell the Council that the clean bill of health statements were incorrect. 79, the Council reasonably continued to rely on those statements up to and including the time at which it issued a building consent and code compliance certificate in respect of the Grange. The BIA's submissions say, well that was three to five years later. How could they still reasonably have been relying on a 1995 report? Two comments on that. First, it's a question of fact, it's not something that can be determined at a strike out stage. And second, when in 2001 the BIA came to do its second review of the Council, it checked back to see whether the 1995 recommendations had been acted on. So it clearly still saw what it had done as having continuing relevance and checking compliance with that as being a live issue some six years later. And so again a claim for damages.

The fourth claim is the direct duty claim, direct duty owed to the plaintiffs and a claim for contribution under the Law Reform Act. Previous allegations are repeated and then 84, the BIA owed the plaintiffs, the plaintiffs this time, not the Council, a duty to perform its functions with the skill and care that could reasonably be expected of the

expert body responsible for the administration of the Act. In particular the BIA owed the plaintiffs the duty to use reasonable skill and care in advising the Minister. Approving documents for use in establishing compliance and of particular importance to this claim, disseminating information and providing educational programmes and conducting review of the operations of territorial authorities.

The BIA knew that if you were going to build a building you had to get a building consent from a TA and the TA would be checking compliance. The BIA knew that it was responsible for monitoring the performance of those TAs, making sure that the day-to-day administration was consistent with the Code, bearing in mind its particular expertise in those matters, as it outlined in its report.

85, the BIA are actually on notice of the Prendos material, Prendos concerns, so you ought to have known that construction of residential buildings, along the lines of the Grange, would result in non-compliance with the Code and so it breached its direct duty of care. It didn't tell the Minister that this risk existed. It didn't approve a document which had the effect of ensuring that untreated timber and monolithic cladding systems complied with the provisions of the Code. It didn't publish or disseminate information concerning untreated timber and monolithic cladding systems to parties in the building industry and TAs. It didn't take reasonable steps to achieve the purposes of the Act and the Code and it didn't properly review the practices and procedures of the Council as set out above.

So the BIA received the levy from the plaintiffs for performance of its functions but didn't, it's alleged, perform them with the reasonable care that the plaintiffs, and others who paid the BIA the levy, could reasonably have expected from it. And if the BIA had not breached this duty of care the systemic issue would have been known to the plaintiffs, the building industry and territorial authorities. The Council wouldn't have issued the consent and CCC in respect of the Grange and the plaintiffs would not have suffered the loss for which they now claim, hence the claim for contribution under section 17(1)(c).

So that's a lightning tour of the pleading and if the court has any helpful submissions for how it can be approved consistent with the generous approach in *Couch* then counsel, as ever, would be only to happy –

TIPPING J:

I think this is a slightly different kettle of fish from the pleadings in *Couch*.

MR GODDARD QC:

I hope so your Honour. From the comments that were made by way of introduction in relation to those pleadings. But nothing has yet been written that's not capable of improvement either.

TIPPING J:

The one thing that I'm slightly surprised your client hasn't emphasised, although it's there, is this concept of advice.

MR GODDARD QC:

Yes, I think that's one of the things that with the benefit of –

TIPPING J:

I'm not suggesting a view here but I would have thought that was-

MR GODDARD QC:

I think that's especially important and whatever might have been said in that paragraph, the BIC report, about the BIA not being an advisor to territorial authorities, clearly it considered that in the context of carrying out reviews, one of the purposes of the review was to enable it to advise and assist councils to perform their functions better.

TIPPING J:

Well 61.2 is a sufficient pleading of it, I dare say, for pleading purposes, but it's – that paragraph is, of course, I think incorporated into all the, in the second and third anyway.

MR GODDARD QC:

Yes, but it could be up more in lights, I absolutely agree with your Honour. Also I think, I mean there are a number of other things that will be done by way of refinement to the pleading if the appeal is successful.

TIPPING J:

And the pleading of the duty of care is rather exiguous.

MR GODDARD QC:

Yes.

TIPPING J:

But as I say we're only at strike out.

MR GODDARD QC:

I hope that the essence of it is there and I'm, it's not any sort of false modesty in saying that I have no doubt but that it can be significantly improved and what –

BLANCHARD J:

There are some who say that that's the main point of strike out applications, to improve the plaintiff's pleading.

MR GODDARD QC:

Yes anything I say about that is not going to help me now.

ELIAS CJ:

Not the purpose but the consequence.

MR GODDARD QC:

It can be a consequence, quite often, and indeed McGechan says as much by reference to one of my early unsuccessful attempts to strike out a pleading and suggests that it was futile and likely only to produce that result.

TIPPING J:

It wasn't *Marshall Futures*, was it?

MR GODDARD QC:

No your Honour it didn't go quite that far in that one and it did adopt the test, at least, that was the subject of discussion about the complete write off.

TIPPING J:

Repair job or complete write off.

MR GODDARD QC:

That's right your Honour. But no that was a decision of Master Williams, as he then was, and Adams –

TIPPING J:

It doesn't matter.

MR GODDARD QC:

It doesn't matter, which was much less successful. I think it's the same Mr Marshall who is the subject of the decision in relation to the Access Brokerage, your Honour, was the subject of that earlier litigation. Anyway which I'll come to later, that decision. I did notice that as I was preparing over the weekend.

So that's the pleading and it is capable of improvement, there's no doubt about that but I hope that it does, at least in outline, indicate the nature of the four complaints that are made and, as I say, if the appeal is allowed by this Court then it will of course be refined in the light of the closer attention that it's had the benefit of in three courts since that was written.

I don't think there's anything in section 2 of my submissions I need to go to and that means that I can begin again, bit of a, one hesitates to say cook's tour in the context of the law of negligence of some relevant authorities. I was going to begin by drawing a parallel with some of the issues discussed by this Court in *Couch* and I'll just go to a few particular paragraphs –

TIPPING J:

Could I just ask something, just to clear it out of the way Mr Goddard? I take it, and I don't think there's any question of this, from the way your submissions are written and structured, there is no suggestion of departing from the conventional – what has been called the conventional test, proximity and policy?

MR GODDARD QC:

No.

TIPPING J:

No.

MR GODDARD QC:

And indeed, every effort was made to bring the case –

TIPPING J:

That's all right, I don't want you –

MR GODDARD QC:

Yes, no –

TIPPING J:

– I just wanted to be absolutely clear that there's no suggestion that that general framework should not be followed?

MR GODDARD QC:

No, the general framework should be followed as summarised for example in *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) and reiterated in *Couch* and many other decisions of this Court.

TIPPING J:

That's all I wanted to know.

MR GODDARD QC:

Perfectly orthodox, plain vanilla and in particular in the context of the second cause of action, plain vanilla negligent misstatement. The other thing I should emphasise in that context as well is that, in respect of the first three causes of action, to the extent that reliance is a necessary ingredient, as it certainly is for the second but I think probably for all three, as a matter of causation at least, it is specific reliance, actual reliance, by the Council on the BIA that's alleged, not general reliance. That is what is pleaded and what the Council will set out to prove on the evidence.

In relation to the fourth cause of action, it's general reliance that's in issue and essentially the argument is that the general reliance on the building control system, that the courts found in *Hamlin* and the predecessor cases, extended to all the control authorities in respect of that system, in relation to the functions allocated to those control authorities and that when the responsibilities were re-parceled out in 1991, that didn't affect the scope of the general reliance of ordinary home owners. All it affected was who they would look to if particular bits of that system fell down.

TIPPING J:

When you're talking about shared responsibility, you're really talking about dual reliance, aren't you?

MR GODDARD QC:

Yes.

TIPPING J:

Which makes it rather different from *Hamlin*. I'm not saying it's necessarily materially different in the end but it's conceptually quite different.

MR GODDARD QC:

Yes, in the period to which *Hamlin* related, pre-1991.

BLANCHARD J:

Because you say – your whole thesis is that the BIA should be in this as well as the Council –

MR GODDARD QC:

Yes –

TIPPING J:

– you're not saying it's solely the BIA's –

MR GODDARD QC:

No, no your Honour –

TIPPING J:

– so you really have to suggest that the plaintiffs were relying on both?

MR GODDARD QC:

Yes. They were relying on the system, they were relying on what the BIC report refers to as "the control authorities". It's really inherent in general reliance that you don't necessarily know exactly who is doing it, or exactly what they're doing but that you trust the outcome of the system. There is a confidence in its effectiveness to protect you against certain risks and that's why the courts have repeatedly found that

the very effective cross-examinations by Mr Henney of plaintiffs in these cases to establish that they'd never heard of the territorial authority or its responsibilities for building control have so far not produced a single successful defence I think, on that ground, as opposed to other grounds.

The courts have said it just doesn't matter, you don't need to have heard of – know that the Council looks after this, there is general reliance by New Zealanders on the effectiveness of the system and the fact that the unknown monitor is, in some respects, or jointly the BIA, shouldn't affect the incidents of the existence of a duty of care, although it may affect who owes it.

TIPPING J:

It's a bit like saying there, it just seems to me to be getting rather – it would be better to leave this until you're addressing it directly, Mr Goddard perhaps?

MR GODDARD QC:

No, no, your Honour, if your Honour is troubled by something I'd like to know earlier rather than later.

TIPPING J:

Well no, I think I'll hold it, thank you because you may well assess it as you go along.

MR GODDARD QC:

We'll hope for that Sir, right. Otherwise, I'm sure it will be picked up.

TIPPING J:

Yes, it will be.

MR GODDARD QC:

Yes, thank you Sir. *Couch* then, very briefly because this Court decided it very recently and hardly needs to be reminded of its basic framework. It's in volume 3 of the authorities under tab 22. I just really wanted to pick up on a few themes. Paragraph 24 first of all, from the judgment of your Honour the Chief Justice and Justice Anderson, just making the point that at that stage the Probation Service, the defendant in that case, hadn't yet pleaded or given discovery and because of that, "Little is known of the basis upon which the Service and the probation officer acted or failed to act in the supervision of Bell," it was not known what consideration was

given to certain steps, what steps were taken. "The acceptance by counsel for the Attorney-General that the supervising probation officer was insufficiently experienced and the Mangere branch was not functioning properly may suggest some administrative or professional ineptitude rather than high policy explanations for the acknowledged deficiencies in Bell's supervision. The fact that these matters have not yet been explored suggests the need for caution in assuming that there are policy considerations which should negative the existence of a duty of care." Just so in this case as well.

Turning over to 35, to 36, point made again that, "Where liability for negligence is determined at trial, it should not much matter whether questions of policy are considered as going to duty of care or its breach. But on strike out… it may matter a great deal. The facts as eventually found may make it clear that the policy consideration was not engaged in what happened and is not a justification for denial of responsibility." That's really, I think, your Honour the Chief Justice's point to me earlier this morning, well it may not have been a problem of adequacy of resources or of any high policy decision that resulted in these inadequate reports.

Passage to similar effect from Lord Browne-Wilkinson in *Lonrho plc v Tebbit* [1991] 4 All ER 973, concluding over the page, "For all I know, the reason for the delay in releasing the undertaking [in that case] was a purely administrative blunder … involving no considerations of policy at all," and *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) again, making the point that we just don't know whether there are high issues of policy here that are unsuitable for consideration by the court, or whether the court is simply called on, in the last, quoting from Justice Mason, "To apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness," and those are engaged in the carrying out of a review of this kind sends, in my submission, something that is, if anything, rather lightly. The same point is made again in paragraph 36, by your Honour the Chief Justice, especially in the last couple of sentences.

Paragraph 58 makes the point that, "The Probation Service could not be a bystander," similarly obviously the BIA. And the last sentence, I think, has a resonance here. "It is not immediately apparent why a probation officer should have an immunity not possessed by solicitors, nurses, engineers or building inspectors, such as would be provided by denial of a duty of care," and again the same can be

said of a BIA review. Not obvious why there should be an immunity not possessed by, for example, the building inspectors.

Paragraph 68, one more passage from the first judgment of the Court, begins by saying, "On any view, knowledge of the risk posed by Bell will be critical to an ultimate conclusion of legal responsibility," so too here, knowledge of the risk of this building system. And, over the page, "On the basis of the undisputed information before the Court for the purposes of this preliminary application, it cannot confidently be concluded that Ms Couch will be unable to establish knowledge on the part of the Probation Service that should have alerted its officers to risk of a magnitude that made it a breach of duty to fail to exercise available powers of control of physical proximity between Ms Couch and Bell or to take other steps as would be reasonably available to eliminate or contain the risks. Such other steps might have included warning the RSA of risk, or providing Bell with the sort of support envisaged in his conditions of release." Similarly, once a level of knowledge was attained by the BIA here, it cannot confidently be concluded that the Council will be unable to establish that it was – so much was known about the risk that it was a breach of duty to fail to take available steps, including warning TAs of that risk. And then of course the note on which I end my submission 69, "In both *X* and *Barrett* members of the House of Lords expressed the view that in considering the liability of public authorities, 'the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied and that very potent counter-considerations are required to overrule that policy.'"

Turning to the majority decision, just a couple of paragraphs here. Paragraph 83, this, I think picks up the question of situational duties of care, which the plaintiff, well which the Council is accused of subscribing to here, and whether one has to examine duty of care independently of breach and as the court notes, or he notes, "In most cases that yields a satisfactory result but this approach should not be rigidly applied. Sometimes the nature of the brief can be relevant to the scope of the duty. For example, in circumstances of the present kind, it may be appropriate to hold that, in the case of a failure to warn, a duty is owed more widely than in the case of a failure to control. Indeed, it is possible to posit a case in which a duty to warn might be owed to a substantial number of people," say, all people currently holding a building consent, who have given you money, or even just all TAs, there's only 70 of them after all, it's not too hard to write a letter to them, "... and, perhaps, though it would be

rare, even to the public in general, albeit difficult causation issues might then arise." There's then a comment that's rather more relevant to the particular facts of the case.

Paragraph 126. 126 and 130 I rely on particularly in terms of the appropriate approach to an application of this kind. Having found that it's possible there may be proximity, the Court went on to say, "It is necessary to address the question of policy. The claim should be struck out on the ground that policy militates against a duty of care only if, at this stage of the proceedings, it can be said that this is undoubtedly so. Claims in tort relying on breach of a duty of care have of course been struck out in the past on this basis. But everything depends on the circumstances and, in particular, on whether it is necessary or desirable for the case to go to trial to enable a fair and fully informed policy determination to be made."

And at 130, "Although conclusions could be drawn on both sides of the policy equation, and an ultimate assessment made on the present rather abstract basis, we consider that in this case it is necessary and, if not necessary, desirable," and that tiering of reasoning in my submission is important, "... to make the ultimate determination when all relevant facts have been examined and conclusions can be reached upon them. Although policy determinations can finally be made on strike out applications in cases of this kind if the position is clear enough on the pleadings, we do not consider that this is an appropriate case to do so." And my submission the same is true of this case, it would be dangerous and unsafe to reach confident propositions of policy uninformed by the facts of what actually happened in this case and whether those policy considerations were engaged.

WILLIAM YOUNG J:

Help me with this please Mr Goddard. If a case goes to trial where policy is unresolved, how does going to trial assist? Does it assist because the facts are examined in full detail and then a policy judgment can be applied to them, as it were, with greater confidence as to what the true situation was? Or, is it anticipated that there would be evidence led as to policy, from economists saying it's a really good thing for a national regulator to be tough on territorial authorities and another economist saying, no it's a waste of money really, and it's best to leave it to the insurance market. Would you expect that sort of evidence to be given?

MR GODDARD QC:

I had not contemplated a great deal of evidence of the second kind. But there is an intermediate type of evidence that's relevant to assessing policy. First of all there will definitely be extensive evidence and argument at trial directed to that first question, to what extent are policy concerns about liability engaged on the facts of this case. Is this a case which involves the court straying into the assessment of policy choices of a kind which the court is not well equipped to second guess, or are these, Justice Mason's phrase, "Simply matters of applying judgments on technical administrative common sense issues that the court is well placed to do." In my submission it's just too early to know whether matters of high policy have any relevance to the facts of this case at all.

But second, it seems to me that additional evidence about how the regulatory regime operated in practice, and the day-to-day interactions between the territorial authorities and the BIA, will inform the assessment of where – it will inform the policy assessment, will inform an assessment of what the BIA's role was in practice, and what it should reasonably have expected –

WILLIAM YOUNG J:

So it's really a case of going to trial facilitates the policy decision against all the facts?

MR GODDARD QC:

Yes. A value – assists in understanding the environment within which the policy operated, and the extent, if any, to which policy decisions had a bearing on the outcome that is the subject of the claim.

TIPPING J:

The issue, if I could just follow, that for me I would find provisionally problematic it's quite difficult to say, does the duty, does the BIA have a duty to the Council in the abstract? It may do against certain facts or background, it may not do against other certain facts or background. That's where the roll up, if you like, of breached duty et cetera, can be helped –

MR GODDARD QC:

Yes –

TIPPING J:

– and as I think Lord Pearson it was who said it in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) the three actually can, a part of a single whole really, and although often it'll be possible. These are more complicated novel situations. One's striking a little bit in the dark, if one doesn't know exactly what happened, and whether in that particular situation, a duty should be imposed.

MR GODDARD QC:

Exactly your Honour. What was everyone actually doing here? And what was the set of accepted roles and responsibilities and interactions against the backdrop of which it was happening.

TIPPING J:

No, it may be that the other side will persuade me that there could never be a duty, never mind what the facts ultimately turn out to be, but I would say they'd have to go that far.

MR GODDARD QC:

Yes, because otherwise we just don't know enough at this stage, and the pleading, certainly in my submission, alleges matters such as the clean bill of health statements, which, if established at trial, if those were reasonable inferences from the report, which were in fact drawn, and which the BIA should expect to have been drawn, then essentially what you're saying to the TA is what you're doing is fine, keep going, you will be performing your role and there is not need to talk to anyone else about that because we're the experts and we've told you what you're doing's good. And if you'd said that in as many words, to suggest that there could be no duty of care associated with that, it seems to me is quite a stretch. And –

TIPPING J:

Well you'd have to be able from somewhere that it – such would be quite inconsistent with the statutory scheme.

MR GODDARD QC:

I was about – yes. You'd have to show that it would be actually counter to the statutory scheme for a duty to be owed. I don't need to lean on the statutory scheme to show it's necessary to have a duty of care to deliver against the scheme. What the BIA would have to show that, as in the case of a duty owed to parents where a social welfare organisation is conducting an investigation into the possible abuse of a

child, a duty would be positively inconsistent with the statutory responsibilities and this is not that case.

TIPPING J:

Well as the Chief Justice, I think, said in *Couch* and Justice Anderson, the fact that you don't strike out doesn't mean to say you're saying this is a shoe-in for the plaintiff?

MR GODDARD QC:

No. All the issues that are getting –

TIPPING J:

You didn't put it that way Chief Justice but –

ELIAS CJ:

Well you're absolutely correct.

MR GODDARD QC:

– and that's exactly right. I don't need to establish now that it's a shoe-in for the plaintiff. All I need to persuade the court of is that one cannot, with the high level of confidence that's appropriate in relation to a novel claim in tort, say that it is inconceivable that this claim could succeed and as the –

TIPPING J:

For myself I see this as a combination of the statutory scheme coupled with what the, they actually did –

MR GODDARD QC:

Yes.

TIPPING J:

– never mind whether they had to do it –

MR GODDARD QC:

Yes.

TIPPING J:

– coupled with what they actually did.

MR GODDARD QC:

And what they actually did is terribly important here. The Canadian Supreme Court case *R v Imperial Tobacco Canada Ltd* 2011 SCC 42 that I'll come to in a little bit or possibly tomorrow, realistically, explores exactly that, what are the possible sources of duty of care. It may be the statutory scheme, it may be the actual interactions between the public authority and the claimant or it may be some mix of the two and it's mix of the two but with a particular emphasis on the actual interactions which is in play here. And where the Supreme Court got to in that case was to say proximity is arguable and actually in that case it was so clear that the matter of high policy in relation to public health and smoking were engaged, that it was possible to strike out on grounds of policy but only after emphasising how rare such a conclusion would be in language very reminiscent of this Court in *Couch*, although there's no reference, perhaps disappointingly, to *Couch,* in the judgment.

TIPPING J:

How is, is this Canadian case in the supplementaries that you gave us?

MR GODDARD QC:

Yes your Honour. It was delivered on the 29th of July which is the day my submissions were filed but of course one day after them in New Zealand time and I only came across it more recently to be honest. But it's actually – if I may say so, a judgment of the Chief Justice for the Court which provides an extraordinarily elegant exposition of the challenges raised by tort claims against public authorities and the appropriate approach to applications to strike them out which seems to be very much on all fours with the approach adopted in *Couch*. With *Couch*, actually I am going to reach it today because I, all I wanted to do with *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL) was to look at the very famous passage, so authorities volume 2, tab 20 at page 368.

ELIAS CJ:

I don't have a 20, maybe I'm looking at the wrong thing.

MR GODDARD QC:

The page number is clearly absolutely wrong. It's page 638, I've transposed two digits.

BLANCHARD J:
It's 638 of the report?

MR GODDARD QC:
Of the report your Honour, I'm sorry of the stamped numbers 555. It's at the very well known passage of Lord Oliver's saying that "what can be deduced from the *Hedley Byrne* case ... is that the necessary relationship between the maker of a statement or giver of advice ('the adviser')," so though the term adviser is used it may just be the maker of a statement, "... and the recipient who acts in reliance upon it ('the advisee') may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser." And here we have the BIA setting out the purpose for which the review is required. "(2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee," and that's easy because it was sent to them. "(3) it is known either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry." Every reason to expect that in this case. And (4) "it is so acted upon," and that's pleaded. So if one just works through that check list, actually it's really easy, it's plain vanilla, *Caparo* and *Hedley Byrne* and it's not an accident that as it's pleaded it fits comfortably within that.

Imperial Tobacco, it's in the supplementary authorities I handed out this morning and as I said it was decided on the 29th of July this year, on appeal from the Court of Appeal for British Columbia, about the first 15 pages are head notes and lists of counsel appearing and other things like that. Two pages of counsel. and the judgment of the Court delivered by the Chief Justice begins with a table of contents which runs a couple of pages and then the nature of the claim is described in the first few paragraphs.

There was an attempt, an application by the Crown to strike out some claims by Imperial Tobacco which was a defendant in two cases before the courts in British Columbia. One was a claim by the Government to recover costs associated with healthcare for smokers and the second case, a class action, brought against Imperial by Mr Knight on behalf of classed members who purchased light or mild cigarettes. The tobacco companies issued third party notices to the Government of Canada alleging that if the tobacco companies are liable, they're entitled to compensation

from Canada for negligent misrepresentation, negligent design of the low-tar tobacco and failure to warn as well as an equity. Paragraph 3 Canada applied to strike out the third party notices. They were struck out at first instance but the British Columbia Court of Appeal allowed the appeals in part and in particular allowed the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies to proceed and a majority in the *Knight* case also allowed the negligent misrepresentation claim based on Canada's alleged duty to consumers to proceed, which was of course a claim for contribution and the negligent design claims. There was an appeal from more or less everyone about more or less everything and from paragraphs 6 and following the claims in the *Knight* case and the *British Columbia* case are set out. If we look at paragraph 9, Imperial made five allegations against Canada in the *Knight* case, that's the class action by smokers of light or mild cigarettes against Imperial and the second is relevant, "Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn" and failing to design with due care. A claim for contribution and indemnity. And third, "Canada breached its private law duties to Imperial by negligently misrepresenting," to Imperial, "the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to define its tobacco strain with due care." A claim for damages to the extent of any liability to class members.

ELIAS CJ:

It's quite striking, this reference to Canada, perhaps in terms of some recent litigation that the Solicitor-General has been involved in, I'm wondering whether we might start talking about New Zealand.

WILLIAM YOUNG J:

I think it's in contradistinction to the Government of British Columbia I think which was one of the plaintiffs.

ELIAS CJ:

Yes I suppose she's Her Majesty's, that's Her Majesty's as well I suppose but it's the The Queen in Right of Canada, I've just never seen it before, quite as startling.

MR GODDARD QC:

I think because the province was one of the parties of –

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

On the front page, it's Her Majesty In Right of British Columbia is one of the respondents.

MR GODDARD QC:

– their distinction was perhaps –

ELIAS CJ:

I see, she's wearing two hats.

MR GODDARD QC:

Yes Her Majesty –

ELIAS CJ:

Two crowns.

MR GODDARD QC:

Yes, I can never quite remember whether it's metonymy or synecdoche to but – when you talk about The Queen in Right of Canada, it simply is Canada. I get those figures of speech confused. Yes, it's certainly very striking the way it's dealt with throughout.

Then there's a description at 11 and following of the costs recovery case and at 12, "The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes." So the claims against Canada listed in 13, the relevant ones for our purposes, number 2, Canada breached private law duties to consumers for failure to warn, a negligent design and negligent misrepresentation, and three, "Canada breached private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes and claim for damages."

Issues before the court, paragraph 15, both cases discuss whether Canada could be liable at common law and negligent misrepresentation, negligent design and failure to

warn and inequitable indemnity to reduce duplication. Your Honour treats the issues common to both cases together. There are some specific issues that are then looked at.

Paragraph 17, over a couple of pages, "A. The Test for Striking Out Claims," puts the test very much in familiar terms, in particular at the top of the next page, "The claim has no reasonable prospect of success."

Paragraph – quite an interesting discussion about the policy rationale for the power to strike out claims at 19 and following. The fact that striking out claims with no reasonable prospect of success, a valuable housekeeping measure which, "Promotes two goods – efficiency in the conduct of the litigation and correct results." But over at 21, and I think this is a helpful reminder, "Valuable as it is, the motion to strike as a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v Stevenson* [1932] AC 562 (HL) ... few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions... Therefore, on a motion to strike, it is not determinative that the law has not yet recognised the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial." I think that's very much, on all fours, of what this Court has said and I refer to it really only because it's so, with respect, beautifully expressed.

Over a couple of pages to paragraph 27, Canada's alleged duties of care to smokers, and the *Costs Recovery* case, that's – I don't know why I took the court to that, sorry because my note beside that is not relevant to our case.

We can move on two more pages to paragraph 32, "The Claims for Negligent Misrepresentation." Two types of negligent misrepresentation claims remain at issue. Alleged misrepresentations about the health attributes of low-tar cigarettes to consumers and in both cases, the allegation that Canada made negligent

misrepresentations to the tobacco companies and Canada is liable for losses they incur to plaintiffs.

The facts that must be accepted as true, outlined in 34, that the representations were made and that consumers and tobacco companies relied on them and acted on them to their detriment. Discussion that – about *Hedley Byrne* and the argument made at 36, by Imperial and the other tobacco companies, that the facts pleaded bring their claims within the settled parameters of the tort and is therefore a prima facie duty of care is established.

Her Honour considers that argument and at 38 says, "The facts pleaded do not bring either claim within a settled category of negligent misrepresentation [because the law] thus far has not recognised liability in the kinds of relationships at issue in these cases."

About six lines further down, "It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry." So we need to consider whether the general requirements for liability in tort are met on the test set out in *Anns v Merton London Borough Council* [1978] AC 728 (HL) as reformulated in *Cooper v Hobart* 2001 SCC 79, [2001] 3 SCR 537. Proximity and policy being the two stages.

"Stage 1: Proximity and Foreseeability... tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or 'proximate', relationship..." and that Canada could reasonably have foreseen reliance "on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care."

Over at 41, "Proximity and foreseeability are two aspects of one inquiry." Foreseeability is not enough. "Must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other." These are "heightened concerns in claims for economic loss, such as negligent misrepresentation... both those requirements... are established if there was a 'special relationship' between the

parties." And the requirements for that from a Canadian decision set out in terms that are also very familiar from *Caparo*.

At 43, "A complicating factor is the role that legislation should play when determining if a government actor owed a prima facie duty of care. Two situations may be distinguished." This is where he picks up your Honour, Justice Tipping's observation, where he says, "The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute. The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a prima facie duty of care." It may be difficult to make that finding and even more difficult, a few lines down, "if the recognition of a private law duty would conflict with the public authority's duty to the public." There's reference to *Syl Apps* which was a case about removing children from harmful environments.

Over the page, 45, second situation, "Where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and that claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity... In these cases, the governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises... However, the factor that gives rise to a duty of care... is the specific interactions."

Then 46, "It is possible to envision a claim where proximity is based on both," and one needs not to envision very hard here today because that is the claim that's brought before this Court.

Then 47, it's a strike out, so the question for the court is "simply whether, assuming the facts... there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole base is asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation."

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

At 48, Her Honour says, by way of summary that, "on the facts pleaded, Canada did not owe a prima facie duty of care to consumers but did owe a prima facie duty to the tobacco companies." The pleading doesn't establish a direct relationship between Canada and the consumers of light cigarettes. No specific interactions between Canada and class members, so any finding of proximity had to arise from the governing statutes and those established only general duties to the public and no private law duties to consumers. It's a bit like *Carter*, for example and that developed through that paragraph.

In the last couple of sentences of that paragraph, over the page, "At the same time, the governing statutes do not foreclose the possibility of recognising a duty of care to the tobacco companies. Recognising a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public." So too here.

"Turning to the relationship between Canada and the tobacco companies... the companies contend that a duty... arose from the transactions between them and Canada over the years... that Canada went beyond its role as regulator... entered into a relationship of advising and assisting the companies in reducing harm to the consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did."

How does that create a special relationship? The answer over the page, the last sentence of 52, yes, "The facts pleaded allege a history of interactions ... capable of fulfilling the," effectively *Hedley Byrne* requirements, the *Caparo* requirements. What is alleged is that Health Canada ventured into research into and design of tobacco and tobacco products, carried out a programme of co-operation with and support for tobacco growers and manufacturers, including advising them of the desirable content

of nicotine and tobacco to be used in the manufacture of tobacco products. And then particularly important, “It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them. Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into... based in part on the advice given.”

Paragraph 54, “What is alleged with respect to Canada’s interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large.” Specific interactions are alleged. “Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties. ... With respect to the issue of reasonable reliance, Canada’s regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable, in the pleaded circumstance.” Discussion of the usual indices of proximity. Note that the representations were made in the course of Health Canada’s regulatory and other activities, not casual interaction. “Made specifically to the manufacturers who were subject to Health Canada’s regulatory powers and by officials alleged to have special skill, judgment and knowledge.” So too here.

A couple of other arguments by Canada rejected, one very specific to the statutory framework, and at 58 an argument that reliance wasn’t reasonable, “Because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor.”

At 59, Her Honour says for the Court, “In my view, this argument misconceives the reliance necessary for negligent misrepresentation... When the jurisprudence refers to ‘reasonable reliance’ in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker’s statement as accurate, not

whether it was reasonable to believe that the speaker is guaranteeing the accuracy of the statement." In my submission that is consistent absolutely with *Caparo* and *Hedley Byrne*. "It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two," and that's the approach I'd urge the Court to adopt in this case as well. To ask in the proximity phase, was it reasonable for the Council to rely on the BIA in the sense of whether it was reasonable to rely on it as accurate, not whether it was reasonable to look to it, in terms of legal responsibility, that's an issue for the second phase.

And so Her Honour concludes at 60, "That the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis." Pleadings disclose a prima facie duty of care and negligent misrepresentation. Not so in relation to the relationship between Canada and consumers, which is struck out at that stage.

Then Conflicting Policy Considerations and at 62 Her Honour summarises the Court's conclusions, "I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognising a duty of care would expose Canada to indeterminate liability." And this is the point at which this decision starts to look sharply different from the case before this Court because the policy decisions that were plainly in issue here, were high level public health policy choices that were made by the government and given effect to through these statements and it was clear that it was that policy level when it was in play, and then I'll come to the indeterminate liability issue, but in short I say that that's just not a concern here because of the finite number of buildings erected and the equal irrelevance of that response to both the BIA and territorial authorities.

So government policy decisions are discussed. Importantly in terms of your Honour Justice Tipping's questions earlier this afternoon, at paragraph 67 there's a heading, "Conduct at Issue," and some precision about the nature of the conduct is sought and obtained and achieved. The Court then undertakes at paragraph 71 and following, an extremely helpful discussion about what constitutes a policy decision immune

from review by the courts, and the Her Honour identifies at 72 that this is a vexed issue upon which much judicial ink has been spilled. It records that there's general agreement in the common law world that government policy decisions are not distinguishable and cannot give rise to tort liability. Also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties, the problem is to devise a workable test to distinguish these situations.

I won't read it all out, but Her Honour surveys the themes that have been explored, the discretion test, the policy operational test, notes thaeswings that have occurred in the jurisprudence in England on whether the policy operational test is helpful, including at 79, noticing that it was adopted in a certain form in *X (minors) v Bedfordshire County Council* [1995] 3 All ER 353 and then within a year, the House abandoned it with a ringing declamation of the policy operational distinction is unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence, but then Her Honour goes on to notice in its most recent foray into the subject, the House of Lords have affirmed that the distinction as a valuable tool, so I think there may be an element of dialogue between the superior courts of the two jurisdictions reflected in that paragraph.

TIPPING J:
I think she's saying that Canada's steered a straight course and England's gone up and down.

ELIAS CJ:
Wobbled.

MR GODDARD QC:
Yes, a theme that has also occurred in some of this court's judgments I think.

ELIAS CJ:
Well you could always adhere to Lord Nicholls.

MR GODDARD QC:
And I think there's an accurate, but slightly sad conclusion at the end of paragraph 89, and thus at the end of the long judicial voyage, the traveller arrives at a test that essentially restates the question. When should the court hold that a government

decision is protected from negligent liability? When the court concludes that the matter is one for the government and not the courts. There's discussion –

TIPPING J:

Where were you reading from there?

MR GODDARD QC:

The last few lines of paragraph 79.

TIPPING J:

Oh 79.

MR GODDARD QC:

79. And then a discussion of the Australian cases. And then at 82 and following, a discussion of the United States case law, and a summary at 84 and following, a test based on the exercise of discretion is too broad, "Considerable support in all jurisdictions reviewed for the view that 'true' or 'core' policy decisions should be protected from negligence liability. The current Canadian approach holds that only 'true' policy decisions should be so protected, as opposed to operational decisions. ... The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to the central insight," even in the UK.

In 87 a reference to the US approach, which is essentially what Her Honour goes on to adopt, the last sentence, "The weighing of social, economic and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason decisions and conduct based on these considerations cannot ground an action in tort. Policy, used in this sense, is not the same thing as discretion... Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy considerations are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions."

And that's really Her Honour's conclusion, at 90 that core policy government decisions protected from suit, are decisions as to a course or principle of action based on public policy considerations such as economic, social and political factors, provided they're neither irrational nor taken in bad faith. It points out that the test is

not a litmus test but nevertheless last few lines, “most government decisions that represent a course or principle of action based on a balancing economic, social and political considerations will be readily identifiable.”

And what Her Honour goes onto conclude is that the decision’s about public health policy and smoking made by Canada which were reflected in these statements were issues of this, decisions of this high policy kind.

TIPPING J:

So this is where they were all told to, if they were going to smoke at all, to smoke low-tar?

MR GODDARD QC:

Yes.

TIPPING J:

Was it that ilk?

MR GODDARD QC:

Yes. And so that was a big policy choice engaging questions of the economic, social, political nature and statements made to give effect to that were protected by the protection for that policy choice.

TIPPING J:

Was it seriously being argued that that was sort of encouraging people to think that they wouldn’t get any harm from smoking?

MR GODDARD QC:

That they –

WILLIAM YOUNG J:

It was worse, because it was actually seen to be more dangerous.

MR GODDARD QC:

Yes, they were led to believe that it would be –

WILLIAM YOUNG J:

Safer when it was more dangerous.

MR GODDARD QC:

– better or at least no worse and in fact the evidence that, in the cases or the allegation of both plaintiffs was that it was actually worse because of compensatory smoking behaviour.

TIPPING J:

Low-tar was worse than –

MR GODDARD QC:

Yes.

TIPPING J:

– I see.

MR GODDARD QC:

That's the allegation.

BLANCHARD J:

At this point though isn't it that the tobacco companies were saying that they were misled?

MR GODDARD QC:

Yes. They were, they faced –

ELIAS CJ:

They were pushed into pushing low-tar?

MR GODDARD QC:

Yes that's exactly right. But one has to say that this is not on its face the most appealing of claims.

WILLIAM YOUNG J:

Although they did have to buy low-tar tobacco – because they bought tobacco that had been grown by the Canadian Government.

MR GODDARD QC:

By Agriculture Canada as part of this health policy, so there are a range of layers to this.

WILLIAM YOUNG J:

It wasn't quite as silly, that aspect of the claim didn't seem quite as problematic as the other.

ELIAS CJ:

It wasn't as vanilla as you're saying things are here, is that right? No, don't worry.

TIPPING J:

Well it's a bit murkier than it looked on the face of it was really what, I think, my brother's saying.

MR GODDARD QC:

And I think it would be very time consuming and not especially helpful for me to go through the policy arguments because they are very specific to this case although it is well worth reading, an enormously interesting decision. But what I think I can say about my much less ambitious claim is that we are not here in the territory of major public policy choices and certainly that cannot be said, cannot be said with confidence that we're in that territory at this stage of this proceeding. So if the court adopts the approach to proximity that is adopted by the Supreme Court of Canada there is plainly proximity as between the BIA and councils. If the court adopts the approach to what constitutes a policy decision immune from attack and negligence, adopted by the Supreme Court of Canada, then the answer can only be probably not but at any rate it's much too soon to tell.

TIPPING J:

Are you suggesting that the same approach that applies to a Federal Government like the Government of Canada should apply to a Government organisation like BIA but much more difficult, presumably, to suggest a high level policy at the lower level, is that the line of thought Mr Goddard?

MR GODDARD QC:

Exactly and that is the one other paragraph that I was going to take your Honour to actually, 95 of this judgment where the conclusion is that the representations were

part and parcel of a government policy to encourage people who needed to smoke to switch to low-tar. This was a true or core policy in the sense of a course or principle of action that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government and involved social and economic considerations. And I say that the further down layers of government you get, the less likely it is that policy considerations of that kind will be in play. It would be much more difficult to invoke this sort of protection in respect of a more modest beast, such as the BIA, than it is in respect of decisions made by central government by Ministers in relation to a course of action to be adopted and one shouldn't, of course, be misled by the fact that the Attorney-General has assumed the responsibilities of the BIA and to think that this is a claim against the Crown in anything other than form, it is as a substance, a claim against a separate standalone public authority which was a technical regulator.

TIPPING J:
It's a claim against a Crown entity, isn't it?

MR GODDARD QC:
Yes.

TIPPING J:
Yes but not against the Crown per se?

MR GODDARD QC:
Except that the Crown is the successor to the BIA – so that's why I say, in form it now is because the liabilities now reside with the Crown but in substance, it arose out of the conduct of a Crown entity, a corporation, a legal person, established under the Building Act 1991, of a fairly technical kind.

That – so the approach adopted by the court there which in my submission is on all fours with the New Zealand case law and very much with *Couch*, leads to the conclusions that there is proximity but that it would be premature to strike out on policy grounds.

Time, I think, for just one more quick reference to a case *Stringer v Peat Marwick Mitchell*, volume 6 of the authorities, tab 48. This was a claim by partners in a firm who had paid out over a million dollars to clients to reimburse advances by a former

partner from the mortgage nominee company, in breach of the Law Practitioners Act, a claim by those partners against the auditors of the firm. The auditors sought to strike out on the ground that they owed no duty of care to the firm that they were auditing but although the primary purpose of the audit is to protect clients, *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA), a decision of the Court of Appeal, it was held that it was consistent for that duty for the auditors to also owe a duty to innocent partners, it was a secondary purpose of audits under the Act and regulation to protect those innocent partners and although a defaulting partner could not sue, the innocent partners could.

After dealing with a possible statutory bar to the claim, His Honour addressed, at 457 of the report and following, whether a duty of care exists. Submission was that there was a prima facie duty of care because loss was foreseeable and there was a close relationship that was sufficient unless there were compelling policy reasons for declining to recognise a duty, there were no such considerations. The defendants opposed that in part, on the grounds that, this is at lines 18 and following, "For practitioners to contend that they rely on auditors to find fault is implicitly contending that they can discharge their duty to comply with regulations by leaving it to the auditors to find fault and, via the law society, impose discipline on them" which is nonsense, it was just that the duty was athwart to the statutory duties imposed by the Act and regulations, that solicitors shouldn't be able to abrogate their responsibilities or obtain indemnity or contribution from the third parties, arguments which have their parallel in the BIA's arguments in this case.

No authority directly in point. Discussion of the statutory framework. An issue that's discussed on page 460 of the report and following, is the argument that the duty is owned to the Law Society and no co-existing duty to the law firm but over the page, His Honour says at 5 and following, "For the purpose of obtaining information from banks", the auditors are the agent of the solicitor. "[T]he regulations recognise that the auditor has responsibilities to the solicitor who pays the audit fees. In many respects the relationship between the auditor and solicitor is much closer than between auditor and client. There does not appear to be any reason why a duty in favour of the solicitor would undermine or weaken a duty in favour of the law society and/or client. In my opinion, they could coexist perfectly satisfactorily," and that's what the Council says about the Court of Appeal's emphasis on responsibility to the BIA, to the Minister.

Yes, absolutely but that these duties can co-exist perfectly happily and that, duties of this kind, can co-exist with duties to another regulatory or a government agency is supported by the decision of the High Court of Australia in *Shire of Frankston and Hastings v Cohen* (1960) 102 CLR 607, where the High Court concluded that the auditor of a municipal authority appointed by the governor but remunerated by the municipal authority owed a duty of care to the municipal authority as well as to the Crown.

West Wiltshire District Council v Garland [1995] 2 All ER 17 (CA), a similar case in the United Kingdom context, no problem with owing a duty to the minister or governor and also a duty to the body that you are auditing and at line 30, responding to Mr Fogarty's argument that the *Frankston* decision was distinguishable, His Honour said, "It is not apparent to me why the audit of trust account cannot have a dual purpose in the same way as the audit of the accounts of a municipality. In both cases the purpose of the audit is to discover if there are any irregularities and the audit function performed by an independent person who is suitably qualified."

In both situations, line 38, "Important that the auditor has consented to appointment and has embarked upon the audit function thereby creating a relationship which should logically carry a duty of care in favour of the body whose accounts are being audited."

Then there's a reference to *West Wiltshire District Council v Garland*, essentially the same point, there was a duty to local government electors which could co-exist with a duty in favour of the Council but no duty of care to individual officers.

ELIAS CJ:

Sorry, could you summarise, what are you relying on this authority for?

MR GODDARD QC:

For the proposition that a person carrying out an audit inspection may owe responsibilities to two or more people in parallel, providing only that they are consistent. Nothing more excite –

ELIAS CJ:

Yes.

TIPPING J:

Yes, as long as there's no inconsistency in the purpose.

MR GODDARD QC:

Yes. So it's not an answer to an alleged duty to the Council to say but there's a responsibility to the Minister. The response is, so what, is a little bit inelegant but these can co-exist together, there is no inconsistency and that is not a reason to find that there is no duty to the Council arising out of the interactions which actually took place. I'm conscious of the time your Honour.

ELIAS CJ:

All right, we should take the adjournment now. How do you think we're going Mr Goddard, did you think you might be complete by the morning adjournment?

MR GODDARD QC:

That's what I'm aiming for your Honour. I think if I went longer, that would be –

ELIAS CJ:

Unfair, yes.

MR GODDARD QC:

– and unhelpful. So I will tailor my submissions to that. I think I've covered quite a lot in passing.

ELIAS CJ:

Yes, thank you, thank you counsel, we'll take the adjournment.

COURT ADJOURNS: 4.03 PM

COURT RESUMES ON WEDNESDAY 2 NOVEMBER 2011 AT 10.02 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Good morning your Honour. The plan, subject to any different plans the court may have, is that in the hour and a half that's remaining to me, I'll spend about half an hour on an overview of sections 7 and 8 of my written submissions and I'll spend about half an hour going through *Attorney-General v Body Corporate 200200 ("Sacramento")* and discussing the direct duty to the plaintiffs and about half an hour on the limitation issue.

So, beginning at page 17 of my written submissions, discussing proximity as between the BIA and the Council. So the focus here is on the duty of care owed to the Council, I'll come later to the direct duty to the plaintiff homeowners. I'd already gone through the reports and what the BIA did, including attending at the Council's offices, getting all its systems and process documents, looking at its checklists and going out to visit a sample of buildings and reviewing the adequacy of the Council's inspection processes and findings. The provision of a report, addressed to the Council and providing to – and as I say, at the bottom of my 7.2, the BIA expected the Council to take note of its findings and to act on them and in 2001 checked back to see whether its recommendations, as it described them, had been implemented.

If there were serious deficiencies in the Council's knowledge of weathertightness risks associated with monolithic cladding systems which by then were widespread and in its procedures for granting consents and carrying out inspections, in respect of buildings using this technology, then it was plainly foreseeable that if those deficiencies weren't identified in the 1995 review and report, first of all the owners of such buildings would suffer losses and second, that the Council would be sued by those buildings owners and would in turn suffer loss.

It was, of course, very well established by 1995 that Council is owed a duty of care to homeowners, where some four years after *Hamlin* – no sorry, about a year after *Hamlin* and the Privy Council. The '91 Act recognised the existence of this liability on the part of territorial authorities and the risk of Council liability if it didn't lift its game on weathertightness was expressly referred to by the BIA in its 2003 report.

The BIA argued below and argues before this court, that it's untenable to suggest that the BIA ought to have foreseen that the Council would be negligent in its enforcement procedures. That, I think, is an odd submission, in the content of a review which is, has as its central purpose, the identification of deficiencies in what the Council is doing.

The underlying assumption of a review of this kind is that there may be deficiencies in the Council's systems and procedures and that a more expert body, such as the BIA and its reviewers, is likely to be able to identify those, point out those deficiencies and assist and encourage the Council to remedy them. It's explicit, in the fact that one is doing a review of this kind, that deficiencies are foreseeable. If it was not foreseeable that the Council's systems would be defective, you just wouldn't bother to do reviews of this kind and it's also implicit that they could be identified by a reasonably careful review by an expert body.

I go then to *Caparo*, I've already taken the court to that decision and just work through, at 7.6, the way in which the three requirements for proximity identified by Their Lordships and particularly in Lord Oliver in that case were met, plainly met here. It seems to me, there really can't be any reasonable difference about that, certainly to suggest that it's not arguable is a stretch.

This is, among other things, a negligent misstatement case, the concept of assumption of responsibility is often invoked in that context and here, it seems to me again, that there's certainly an arguable case that the BIA either voluntarily assumed responsibility to carry out the review carefully, or should be deemed to have done so. Voluntarily because it said, we're here to help you and here is this and we hope that it will assist you and we hope that you will act on our recommendations. Should be deemed to have done so having regard to the three factors listed in 7.8, the BIA special expertise, its knowledge of the purpose for which the report was provided to the Council and the obvious likelihood that an independent expert report from this authoritative source confirming the appropriateness of the Council's systems and processes and not raising any concerns in relation to them, would reassure the Council and discourage it from making any substantial changes to its systems or, I should add, from seeking external advice from other experts in the field.

I refer to the discussion of actual and deemed, the assumption of responsibility in *Attorney-General v Carter* and say, at 7.10, that in this case the BIA either foresaw or ought to have foreseen that the Council would rely on its report for the purpose of making decisions about its internal processes. The BIA can hardly suggest it wasn't reasonable for the Council to do so when that was the very purpose for which it provided the report and when it subsequently review the extent to which the Council had implemented its recommendations. If it didn't expect the Council to that, it would be an odd thing to check to see whether it had.

Carter, a very different case of course because there the survey certificate was provided for the benefit of persons other than the plaintiffs and was provided for a purpose other than that for which they claim to have relied on it. Neither of those objections are applicable in the present case. The report was addressed to the Council and was provided to it for the very purpose for which it was in fact used. It wasn't the only purpose of the report but it was plainly one of them.

I touch on the range of functions performed by territorial authorities and the reasonableness of their senior executives and elected members relying on views expressed by an expert national regulator such as the BIA when making decisions about the Council's building control operations. I mention the passage of your Honour the Chief Justice's judgment in *Couch*, confirming that the statutory imposition or responsibility is relevant to proximity in existence of a duty of care. Although really, it's the direct interactions between the BIA and the Council that form the heart of the proximity argument in this case. Say at 7.14, that its difficult to suggest that proximity can confidently be excluded at this stage without the benefit of hearing all the evidence at trial.

The Court of Appeal disagreed. The court rested that finding largely on a view that territorial authorities weren't vulnerable and were well able to protect themselves from the risk of their own negligence in performing their statutory functions.

With respect, that overlooks the relative expertise of the BIA and of any given council, of any one of the 70 or more councils in this field, their respective statutory roles and the express purpose of the 1995 review and report which was for a more expert body to critically examine the systems of the Council to see if they were satisfactory or deficit.

McGRATH J:

So just wait, you've put a lot of emphasis on greater expertise. At the moment, I just simply see the BIA as a monitoring body. The greater expertise it has, I don't immediately see, as I indicated to you, in the makeup, the constitutional makeup of local authorities as the BIA. It's quite plain that the BIA was simply acting on the report, at one set of consultations in each case, so why is it that there is such greater expertise as would indicate a greater overarching responsibility for performance as simply, rather than monitoring performance and reporting to the Minister.

MR GODDARD QC:

The existence of greater expertise is, I think, implicit in the statutory scheme in a number of respects. First of all, its role as the body to which matters of doubt or dispute are referred. If the TA doesn't know, who do you ask? The BIA.

WILLIAM YOUNG J:

But the BIA – how many building people are within the BIA staff, there's what, four or five?

MR GODDARD QC:

Well may be half a dozen. Mr Porteous gives the numbers in his affidavit.

WILLIAM YOUNG J:

Yes, I mean, but it's pretty limited, it's about 13 people and some of those are answering the phone and doing the accounts.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

And their expertise is such that, as Justice McGrath says, when they do a report they have to go and get someone else to do it for them.

MR GODDARD QC:

They had a choice always about what skill sets to have in house and what to contract out and we've seen that balance shift over the period of those three reports. So first of all, it seems to me that that was something entirely within their control. Secondly, what they were required to have by the statutory scheme was that additional

expertise, whether they hired people, or whether they contract it in and it was their responsibility to ensure that they were bringing it to bear and territorial authorities were entitled to proceed on the basis that this was the central national body which resolved matters of doubt, in relation – which was responsible for formulated the Code which one would have thought might give it some special insights into how it was supposed to operate which resolved matters of doubt or dispute in relation to the code, resolved disagreements about waivers of the Code in particular cases which was alone able to give nationally effective accreditations to particular products or processes and issue documents to assist acceptable solutions in meeting the requirements of the Code and which was to have an information providing role.

Again, why do you provide information? Because you have knowledge and expertise. An educational role. Why an educational role? Because it was well placed to educate about the Code. The whole structure of the system, the way it sat at the pinnacle of a rather flat pyramid, with the BIA and then over 70 territorial authorities and then the industry beneath that, I think in itself –

TIPPING J:

Your argument Mr Goddard, has to be this, doesn't it, that never mind what they actually did which you claim to have been negligent anyway, what one has to focus on is what the statute contemplated –

MR GODDARD QC:

Yes.

TIPPING J:

– they would be responsible for –

MR GODDARD QC:

Exactly.

TIPPING J:

– or what role the statute contemplated they would perform.

MR GODDARD QC:

And what they held themselves out in their reports as performing. They described their statutory role very much in those terms in the reports and the whole flavour of –

TIPPING J:

Well I'm not sure that they – apart from the voluntary assumption which of course you've earlier touched on, I'm not sure that that's necessarily going to help us, if you're down to deemed assumption.

MR GODDARD QC:

No, the deemed assumption must be the statutory scheme and there absolutely, my argument is, as your Honour says –

TIPPING J:

The voluntary assumption is how they conducted themselves towards your client.

MR GODDARD QC:

Yes.

TIPPING J:

The deemed assumption is what one derives from the statutory scheme, not entirely but largely.

MR GODDARD QC:

Yes, absolutely and there your Honour was exactly right, it's not whether they manage to discharge their responsibilities, it's what those responsibilities were contemplated as being and then I say, that in this case, we can actually glue those two together and look –

TIPPING J:

Well you can't say that because they didn't do it very well they can't have owed a duty of care.

MR GODDARD QC:

No, that would be a very convenient argument for defendants in tort cases but one that's never got much traction and indeed, in the territorial authorities context, even the argument that everyone was doing it equally badly, it hasn't got much traction. The question is, what was the statutory role –

TIPPING J:

But what was the statute contemplated they would do and be responsible for.

MR GODDARD QC:

Yes. So –

WILLIAM YOUNG J:

Can I just come back to something we discussed yesterday but in this context? Let us assume that A has got a function to perform for the benefit of B and gets an agent to do it, then A chooses to perform the function by the agent and is probably going to be reliable to B for any negligence on the part of the agent. Okay.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Say that's what's happened but A, in an effort to be helpful to C, says look at the report we've obtain, you know, this may be of assistance to you. Is A necessarily liable to C for the negligence of the agent then? Wouldn't you say, have to look for some personal negligence on the part of A, some error because all A is really doing is passing on, for what it's worth, to C, a report it has commissioned?

MR GODDARD QC:

First – three points, I think, in response to that. First, that's not what is alleged in this case and to the extent that there's a factual dispute about the purpose for which the report was prepared, it seems to me that's a matter that has to go to trial. It's essentially a factual issue –

WILLIAM YOUNG J:

Yes, contextual though –

MR GODDARD QC:

– what was the BIA setting out to do –

WILLIAM YOUNG J:

– yes, contextual though. It is of some contextual moment, to me anyway.

MR GODDARD QC:

I think it's, yes – second, it's not as if the provision of the report to see was wholly incidental to the performance of a duty owed to B. The Minister, I think, is B in your example. Rather, it seems to me, that the purpose of reviews is twofold. It's both to the report, to the Minister and to monitor and assist councils and in that connection, one point that I didn't make as clearly as I ought to have, going through the legislation yesterday, was that section 79 of the Act which is in volume 1, under tab 1 which is the special powers of authority for monitoring performance of functions –

ELIAS CJ:

Sorry which volume was that in?

MR GODDARD QC:

Volume 1 your Honour, the white volume. Well, there are three white ones now unfortunately but tab 1, section 79 which is on page 61 of the stamped numbers in the top right-hand corner.

Section 79, I think it's not without importance that this power is not conferred for the purpose of carrying out reviews under section 15, it's broader and it seems to me that the section 79 monitoring power could be used independently of a section 15 review for the purpose of the 12(1)(h) function of taking all such steps as may be necessary or desirable to achieve the purposes of the Act. So –

TIPPING J:

Isn't this one of those cases where you can delegate performance but you can't delegate responsibility?

MR GODDARD QC:

Yes, that was my third –

TIPPING J:

Sorry Mr Goddard.

MR GODDARD QC:

No, no, your Honour, I'm –

TIPPING J:

I'm not sure that's the right answer but that is what is – that has to be the proposition.

WILLIAM YOUNG J:

Yes but the answer is – the trouble is, you're saying that, to the extent to which you're saying that the responsibility is assumed by the provision of the report, that may be a bit of a bootstraps argument because if you're saying we haven't got, we haven't got a clue about this, this is so far beyond our knowledge we have to get some other people to come in and do a report, this is the report we've got, here it is. Is that an assumption of responsibility?

MR GODDARD QC:

I think if it was put in those terms one would have to examine the way in which it was put but the BIA didn't express itself in that language here and say, we have no idea but here is what some consulting firm says.

WILLIAM YOUNG J:

All right. We haven't ourselves done an investigation but someone else has done an investigation and this is what they've come up with.

MR GODDARD QC:

I think it would be better to understand the BIA to be saying, we have a statutory responsibility to carry out investigations of this kind. We have selected appropriate people in whom we have confidence to perform that responsibility –

WILLIAM YOUNG J:

But does that throw it back –

MR GODDARD QC:

– on our behalf –

WILLIAM YOUNG J:

– into the statute –

MR GODDARD QC:

– and in our name –

WILLIAM YOUNG J:

– doesn't that throw it back to the statute then, as opposed to what actually happened on the ground? I mean, you see, if the BIA fairly can be said to have an other duty to local authorities to stop them getting it wrong, then that's fair enough. But if they're just there as a regulator, the fact that they choose to regulate in a particular way, doesn't seem to me to really sort of cut the mustard, actually.

MR GODDARD QC:

I think it's important to bear in mind the two categories of case referred to, example, in – by Chief Justice McLaughlin in the *Imperial Tobacco* case. The cases where proximity arises solely from the statutory framework and the cases where proximity arises from dealings. In the former category of case, I agree that it's necessary to find some positive obligation implicit in the statutory scheme and that's what HH said.

ELIAS CJ:

As we thought there was in *Couch*?

MR GODDARD QC:

No, I think, well, your Honour said, yes, that it needed to be enquired into further and that certainly there was nothing –

ELIAS CJ:

Yes.

MR GODDARD QC:

And that certainly there was nothing positively inconsistent with it, yes, exactly, your Honour.

McGRATH J:

And in the latter type of case, don't you have to make sure the statute doesn't exclude the duties?

MR GODDARD QC:

Yes, but all that needs to be –

McGRATH J:

But that's what Justice McLaughlin said?

MR GODDARD QC:

Yes, exactly, and so I don't think that one needs to go as far as your Honour, Justice Young was suggesting and saying in that second category of case that the statute positively points to the existence of a duty, it merely needs to be consistent with the statutory scheme for responsibility to be assumed.

ELIAS CJ:

Doesn't it have to be either, a statutory duty or the report has to be adopted by the agency?

MR GODDARD QC:

This is dealing with the question of to whom it's attributable.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes, provided that that adoption can obviously be implicit, saying it's our function to do this and here is the result of our performance of that function, by warranting people to go out in the name of the authority to exercise its inspection powers in order to produce that report. So, there will be a factual issue at trial, I suppose, if the Crown takes this point, about the extent to which the authority adopted this report as its own, but it's alleged that this was provided as and understood to be a report of the authority.

TIPPING J:

Well, there's no suggestion that I can see that they just disowned it. They positively sent it out.

MR GODDARD QC:

Yes, they sent it out and then they sent a different group of reviewers back to check in their name, whether the recommendations had been acted on and we again see the authority treating the report in 2003, very much as its own report and sending its chief executive to talk to the chief executive of the council about how to ensure compliance with those recommendations. Now, there's no suggestion –

McGRATH J:

But that presumably is because the chief executive wants to have some comfort from the council, otherwise the chief executive is going to the Minister with a rather nasty recommendation that the council's powers be taken away from it.

MR GODDARD QC:

The threat of the exercise of hard power always lurks behind offers of help from regulators. In my experiences as an advisor to regulated entities, but that doesn't mean that the offer of assistance is not itself within the functions and a contemplated part of the performance of the statutory role. Indeed, most regulatory regimes simply couldn't operate if only the hard powers were exercised, the bully pulpit, as I think the Americans call it, is also an important tool for regulators and facilitating compliance, we hear a lot of that from regulators these days and that is also something which is within these functions and if it's done carelessly then there may be a duty depending on the circumstances of the particular interactions and depending on the statutory scheme and whether it runs counter to that.

TIPPING J:

Well, the authority has power under 13E to engage consultants and also building referees but consultants is presumably what one would classify these people, for Opus and the other –

MR GODDARD QC:

Yes.

TIPPING J:

Thank you. Now, it would be odd, in my view, if having engaged them, won't – they can disown them.

MR GODDARD QC:

Yes.

ELIAS CJ:

Well, in this day of use of independent contractors, it would be an effective way to unload responsibility.

MR GODDARD QC:

Statutory responsibilities and that can't be right. And I think it's striking that in relation to building referees, also referred to in 13E, when it comes to section 17 determinations, there's some quite detailed provision for the way in which those will work, including in section 21 how a hearing by them will operate and subsection 5 says, "A building referee may, if so authorised by authority, give a decision, or if not so authorised forward to the authority a report," but then six, "Notice of any decision shall be sent to the authority by a building referee and the authority shall give effect to the decision as if it were a determination of the authority." So, if you push something out to a building referee, what the referee does in your name is the decision of the authority and again, if we look at provision in relation to delegations in section 22, what we see in subsection 5 is, "The delegation under the section does not affect the performance or exercise any function, power, right of duty.

WILLIAM YOUNG J:

But that's to an employee, isn't it?

MR GODDARD QC:

It's to a committee or to an employee, yes, but the – committee, I think, is also in there. The basic thrust of this part of the Act in relation to the authority is that as expected by the Commissioner, it's likely to be small, it has a range of ways in which it can perform its functions including through consultants, but that doesn't affect the ownership by the authority of responsibility for the performance of those.

TIPPING J:

The cases on non-delegable duties or you know what I'm talking about?

MR GODDARD QC:

Yes, I do.

TIPPING J:

It's a long time since I've had to think about this, but my recollection is that if you have a statutory function you can delegate performance but you can't delegate responsibility if you like –

MR GODDARD QC:

Yes.

TIPPING J:

You can't simply say, "Well, we're going to get rid of this, we're going to send it over to someone else and it doesn't matter to us whether they do it well or bad."

MR GODDARD QC:

So we have two layers of argument in response to the concern which His Honour Justice Young has raised yesterday and again today.

WILLIAM YOUNG J:

Still, I confess with –

MR GODDARD QC:

And, your Honour, the best I can do is to say there are two layers of response, the first is the legal response averted to by His Honour Justice Tipping that you just can't shuffle off responsibility for the performance of your statutory function in this way and even if you tried it would be ineffective. But second and perhaps this will give your Honour more comfort, as a matter of fact, it plainly must be open to the statutory body to adopt what its consultant has done and forward it as if it were its own.

WILLIAM YOUNG J:

This is sort of de-negligence.

MR GODDARD QC:

And at that point it takes responsibility for any misstatements that have been carelessly made in it. One can't –

WILLIAM YOUNG J:

So if I get an engineering report on something and refer it on to say, an insurer, am I liable for – because I'm adopting it for negligent mistakes made by the engineer?

MR GODDARD QC:

That's a factual question which depends on whether you can, in the context of that communication, be understood to be adopting it as your own. Now, it's inherently unlikely –

WILLIAM YOUNG J:

But why, sorry –

MR GODDARD QC:

I know, but you –

WILLIAM YOUNG J:

But how could I adopt it as my own without being an engineer –

MR GODDARD QC:

I was about to say, your Honour, coming from you –

WILLIAM YOUNG J:

Please just let me finish.

ELIAS CJ:

Well, *Hedley Byrne* is about, I mean, expertise gets factored in.

WILLIAM YOUNG J:

Yes. Yes, but how could the BIA be saying, "We are warranting your inspection processes," when everyone knows that they hadn't been there and hadn't looked at it themselves.

MR GODDARD QC:

They had sent people they considered to be competent to do it in their name. The difference with your Honour sending on an engineer's report is that few insurers would think that your Honour expertise extended to taking an independent view on

engineering. Your Honour may be an amateur engineer, I don't know, but the assumption, the working assumption of an insurer, I think, would be that you were a mere conduit, to use the language of the Fair Trading Act cases, whereas when the national expert body, which has received a draft report approves it and sends it out and there's quite a lot of discussion about process in the reports. It seems to me that a recipient can reasonably say, "This is the BIA that is telling us this," the Act provides for the BIA to do a review and it's sending us this document saying, "Here is our review, which these people we warranted have carried out in our name."

ELIAS CJ:

Mr Goddard, I may be a little bit behind on this but you've had a number of questions relating to a regulator. I'm not sure what perhaps you're driving at but I wondered whether there's anything that you want to say in answer to the view that there's a contradistinction between a regulator and someone who's under a statutory duty to perform? I'm just thinking about, for example, *Stovin v Wise* [1996] AC 923 (HL) where I suppose the Council could have been said to have been a regulator but it also – but that didn't preclude it arguably owing a duty of care, although it was excluded by the –

MR GODDARD QC:

According the minority, yes.

ELIAS CJ:

Yes, well no, although it was excluded –

MR GODDARD QC:

In respect of that issue –

ELIAS CJ:

Yes.

MR GODDARD QC:

I think that's really –

ELIAS CJ:

I just, I'm a little concerned about the label and if there's anything more to be unpicked there?

MR GODDARD QC:

I don't think there's any special magic in the label. I think –

TIPPING J:

Isn't it simply a factor which can, in certain contexts, carry the day, but in other contexts it won't necessarily, particularly if it's conjoined with other functions?

MR GODDARD QC:

It tends to point – there are aspects of being a regulator that can point in both directions. It does rather tend to point towards expertise, which can be relevant to reliance, but on the other hand if you're regulating for the public benefit and not for the benefit of any particular person or any particular section of society, then that has, in a number of cases, been held to point against the existence of a duty of care in *Fleming v Securities Commission* [1995] 2 NZLR 514, *Yuen Ken Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC), and *Cooper v Hobart* [2001] 3 SCR 537 in Canada, are all examples of that. But what that really illustrates is what His Honour said, that you've still got to say, what actually were the functions of this body and what was the purpose for which those functions were being conferred. In the first category of case, does that lead us to a positive conclusion that a duty was owed to these plaintiffs. In the second category of case, is there anything in the statutory scheme that is positively inconsistent with such a duty. But I don't think that there's any qualitative difference in the analysis that stems from the magic word "regulator" and if anything I said suggested that, then that's wrong.

ELIAS CJ:

No, no, it was, a question had been put to you about there being a distinction but I think you've sufficient answered it.

MR GODDARD QC:

I was, in 7.15 and part of the argument in response to vulnerability, referring to a bit of expertise but I was also making the point that in the negligent misstatement context if the *Caparo* criteria are met than that is sufficient to establish reasonable reliance on the statement for the purpose for which it was provided and a corresponding vulnerability. Vulnerability in relation to misstatements arises out of the non-reliance on the statement and the common sense point, I think, which one just can't overlook, that even if the person to whom the statement was made could

have made other enquiries, and was well placed to do so, the law reflects the common sense proposition, that they are less likely to do so if they are reasonably relying on the statement and it's maker.

The court put some emphasis on the principle purpose of the reviews being to enable the BIA to oversee the operation of the Act and provide appropriate advice to the Minister, but as I say, and I touched on this yesterday, a review or report may have more than one purpose and more than one addressee. Here the Council was a direct addressee and one of the purposes of the report, not an incidental one, or an afterthought, but identified in lights up front, in increasingly explicit language over time, but the purpose of the reviews, in my submission, was the same, was to provide assistance to the Council and provided that was one of the purposes of the report, and the BIA knew this, it's irrelevant that there were other purposes and other addressees.

The Court of Appeal said at paragraph 50 of its judgment that the Council wasn't entitled to treat the outcomes of the review as, in effect, a quality assurance certificate in respect of its processes. I don't think the concept of a quality assurance certificate is very helpful, with respect. Obviously this was not an exhaustive audit of everything the Council had done but it was an inspection and one of the points that *BNZ v Deloitte Touche Tohmatsu* [2008] NZCA 25; [2009] 1 NZLR 53 (CA), BNZX case illustrates is that something short of an audit and inspection can give rise to duties of this kind. It's reasonably arguable that the Council could and did reasonably rely on the report as confirmation that its systems and processes were appropriate. Once the BIA had expressed that view the likely consequence was the Council would address specific concerns raised or otherwise continue with business as usual. And I talk about shared responsibility and the issue of remoteness raised by the Court of Appeal and I suggest that that's really a downstream issue for trial, remoteness of damage not a duty of care issue.

The court seemed to be saying that losses involved are potentially very large and certainly the BIA argues that before this court, but that can't be a reason to deny liability on the part of the BIA any more than on the part of the Council.

I've dealt with analogous cases and I don't think I'll go through those in more detail. At 7.25 I touch on the BIA argument that the claim relates to the Council's negligence and it's not easy to understand why this should be a barrier to the existence of a duty

of care. If it's an argument about relative fault then that's a matter for trial, obviously not for determination at this stage, and the duty of territorial authorities to inform themselves of certain matters under section 26 certainly may be relevant to an assessment of relative fault but not to the question of duty of care. And in particular, and I think this is important, the section 26 duty on the part of territorial authorities is, in my submission, a correlative of the BIA's responsibility to educate and inform, they work in tandem, and the BIA is logically a primary source of such information and assistance for TAs. If, on the other hand, and I think I've mentioned this argument already this morning, my 7.26, if the BIA is arguing that a defendant can't be liable to a plaintiff for failing to identify deficiencies in the plaintiff's systems and processes, when the defendant was responsible for conducting a review or audit of the plaintiff concerning those matters then it seems to that is contrary to both principle and common sense and it lacks any authoritative support.

Policy issues I have mostly covered in the context of reference to *Couch* and to *Imperial Tobacco* but I should just deal with the inconsistency point in this case, 8.2. This isn't a case where the suggested duty of care is inconsistent with the statutory responsibilities of the BIA. Rather, it is closely aligned with them. If it is a function of tort liability to incentivise performance by a public body of its functions, as has been suggested in respective territorial authorities, for example in *Dicks v Hobson Swan*, then the argument applies with equal force to the BIA.

I've discussed whether this is a policy decision and the relevance of resource constraints and suggested that that is a matter which requires investigation at trial were any high policy matters engaged in the – were they the cause of the deficiencies in the review and I also raise at 8.5 a concern that this argument be applied symmetrically, consistently to both the BIA and territorial authorities. That's also, I think, the answer to the complaints about indeterminate economic liability. There's not the sort of qualitative difference in exposure between territorial authorities and the BIA that would justify drawing a distinction for duty of care purposes. Also, of course, it's hardly indeterminate when the BIA knew exactly how many consents had been issued in each month. What the value of the work was and had been paid a levy in respect of that work.

The legislation expressly contemplates claims against the BIA and in that context it seems to me that the Court of Appeal's analysis really proves too much. As I say at 8.9, the suggestion of the Court of Appeal that the policy considerations in favour of

not imposing a duty of care were even more powerful than those relating to the duty discussed in *Sacramento* and the review function – sorry the power to discipline certifiers because it might create an impediment to the free flow advice to the Minister by making the BIA too cautious in its assessments or rending it unwilling to carry out reviews of its own motion.

It overlooks the eight factors listed in that paragraph. First of all, the expectation in the Building Industry Commission report and the 1991 Act that the BIA would be liable in tort for the negligent performance of certain of its functions. The prospect of negligence wasn't seen as a barrier or disincentive to the effective performance of those functions, but rather is the necessary consequence of community reliance on the BIA to perform them carefully. Second, the expectation that the BIA would ensure, in respect of negligence liability, which significantly alters the direct exposure to the pocket that underpinned the concerns expressed by the court. Third, it's a bit difficult to understand the risk of making the BIA too cautious in its assessments, because there's no risk of liability to a territorial authority if a report accurately identifies or overstates defects in its systems. It's not a case whether risk of liability might deter a regulator from making a hard hitting report to the contrary, the risk of liability would only arise if the report was unduly benign.

There's the incentive point at D, which I've touched on earlier and in particular, as I say at E, there's no inconsistency with the statutory scheme in incentivising the BIA to carry out carefully those reviews that it actually decides to carry out. Any more then it will be inconsistent with the scheme to incentivise the BIA to consider carefully those building products and processes that it decides to accredit under part 8 or to incentivise territorial authorities to carry out carefully those inspections of particular buildings that they decide to carry out. The flood gates argument and the dual addressee part I've already touched on.

That brings me then to *Attorney-General v Body Corporate 200200 ("Sacramento")* and I should go through this with a little care, I think, it's in volume 2 of the authorities, the green volume under tab 12. No, it's not tab 12, that's Carter, sorry, under tab 11. It's a decision of the full court of the High Court judgment of the court delivered by your Honour Justice Young and it related to a leaky residential development. The claim was brought against a range of defendants including the BIA. This was a building that had been inspected by certifiers, not by the authority, by approved building certifiers who have featured in other litigation before this court

and other courts and the, after outlining in the first few paragraphs, the nature of the claim, the Act is described in paragraphs 537, extracts from the Building Industry Commission, set out on the next few pages, beginning at paragraph 11, the court sets out some key provisions in the 1991 Act and that runs through the next couple of pages, paragraph 21 refers to the funding which came from building levies. It doesn't note and in my submission it is an important part of context who paid those, namely each person who sought and obtained a building consent, the plaintiff group, and then the review of the Act concludes at paragraph 25 with a reference to part 7.

Council don't appear to have taken the court to some other provisions, which in my submission are relevant and helpful for understanding the role and expected liabilities of the BIA, section 49 in relation to acceptable solutions, part 8 in relation to accreditations. The section 79 review power which extended both to territorial authorities and to certifiers, there's a great deal of reference to the ability to approve certifiers in the first place and then to dismiss them, but no discussion of reviews, perhaps because there was no evidence of a review that had come across those issues or it didn't occur to the plaintiffs to plead it. So, no reference to the section 79 power to monitor and section 12(1)H. So, there is a slightly broader statutory framework, which is relevant in our case and which might've been relevant to this one.

There's then a discussion of leaky building syndrome and your Honour, Justice Young recalled yesterday, reference to particular proportions in moisture and timber and that was in the New Zealand standard referred to in paragraph 28, which was incorporated by reference in the acceptable solution. The other defendants listed at 33 and then the allegations against the BIA set out in 34, the face fixed monolithic cladding claim, certain duties associated with the use of face fixed monolithic cladding systems to timber, negligent and supervision of ABC, ABC approval claim and negligent and approval of insurance cover arrangements for ABC, the insurance cover claim.

So, discussion of the general approach, the imposition of a duty of care, the point made at 41 that statutory functions that involved quasi-judicial legislative power is not appropriately the subject of duties and care. In itself, no issue taken with that proposition, but two riders that I think are important, first, that the fact that a body has such powers, it doesn't mean that other powers are immune from negligence, liability

from duties of care and we saw that most strikingly with territorial authorities which had the full range of functions, legislative, quasi-judicial and inspection pre-1991 and which were nonetheless firmly held to be liable and taught in respect of the inspection function.

And the second rider, that we need to be a little bit careful about reasoning from the fact that a power appears to be quasi-judicial to the absence of tort liability in relation to the BIA, because it's quiet clear that the statutory scheme contemplated that it could be liable in tort, for example, for determinations under sections 17 and 20, even though those have a quasi-judicial flavour to them, but the BIA was seen rather as standing in the shoes of the lower control authority, as itself performing the function of a control authority, harking back to the language of the Commission report.

And there's a discussion of – at 43 and following a reasoning backwards from the alleged negligence, situational duties and some words of caution about that which were responded to in part by this court. In *Couch*, suggesting actually that it's a fairly common and helpful approach to –

WILLIAM YOUNG J:

Quite helpful for plaintiffs, for reasons given in *Sacramento*.

MR GODDARD QC:

For the reasons given in *Sacramento* but not inappropriate for the reasons given by this court and *Couch*, in *Sacramento* the court flags two reasons for caution, to cautions in 46, really, I mean to be fair, the Sacramento court, your Honour, didn't say, "This is never permissible," but rather just raised two points to bear in mind and again, no issue is taken with those. It is important to ask those questions, but the fact that one starts from a particular context in which a defendant has allegedly been negligent and the harm that has caused and asks whether there was a duty that extended to that system is not illegitimate, provided that one pauses to ask whether logically one would have to recognise such a broad duty to make sense of that, that that would itself be a problem. Overlap with public law principles, discussed and dismissed by the court, the idea that one might look to public law principles and again that's not an issue in this appeal.

Then a discussion of strike out principles, a condensed version, really, of the discussion that we saw at greater length in the Supreme Court of Canada's

yesterday and then the three claims are tackled, first the face fixed monolithic cladding claim, the pleading of it, that once the BIA, the BIA had a duty to exercise reasonable care and connection responsibilities and in particular to collect information and it became of serious problems overseas to carefully consider the consequences for New Zealand and set and train processes to ameliorate them. Likewise where it became aware of such problems in New Zealand. "Exercising reasonable care in preparing and approving documents for establishing compliance with the Building Code, a legislative function which is not in those terms in issue here, and warning the Minster that people within the building industry including TAs and certifiers in the public concerning potential serious and severe implications for the health and safety of occupants and the enjoyment of their homes."

And (e) is perhaps the limb that is most similar to the duty that the BIA is alleged to have owed direct to the plaintiffs in this case. There are other aspects, perhaps worth bearing in mind as we go through this, of the duty owed direct to the plaintiffs in this case including the duty to carry out reviews carefully. The analogy effectively with the auditors of solicitor's trust accounts. They know that the reason they're auditing the solicitor's trust accounts is because that will affect the interests of clients. Similarly here it's alleged the BIA owed a duty direct to homeowners to take reasonable care in reviewing territorial authorities because of the obvious implications of that process for the interests of the homeowners who had paid through that territorial authority a levy to the BIA. So that chain reflects the flow of funds and the flow of responsibility.

The three aspects of the duty are then discussed. The broad and overarching duty in (e). Preparation of documents relating to the Code and a situational duty to respond to what is said to be mounting evidence of the problems associated with the use of face fixed monolithic cladding systems.

McGRATH J:

Sorry, what paragraph are you on sorry?

MR GODDARD QC:

Paragraph 54 sorry your Honour. The High Court approach is discussed and then the court turns, at 58, to the alleged overarching duty. The court notes, "In the late 1990s the BIA could have foreseen that adoption… of defective building systems had the potential to cause substantial economic loss… it would have been open to the

BIA (in the sense of being within its functions…) to investigate practices… and to take steps which would have been effectively to put at end to (or at least limit) practices which were producing outcomes which did not conform to the Building Code. It could have achieved this in various ways, either by use of its specific statutory powers… (… an amendment to the Building Code, under its s 17 jurisdiction to determine disputes or perhaps by way of review of the operation of building certifiers) …" certainly by way of providing that information in the context of its regular reviews of territorial authorities, that would perhaps have been the most effective. "Alternatively by disseminating information under its genera s 12(g) power."

Just pausing there, your Honour Justice Tipping asked me about control yesterday. It seems to me that this paragraph really goes a long way to answering that. Control in the sense in which that term is used as the foundation for the *Hamlin* duty is that the territorial authority could have procured compliance with the Code. And similarly there is no doubt there but that the BIA had effective means at its disposal to ensure that territorial authorities were alive to the risks associated with the monolithic face fixed cladding and carried out inspections in a way which substantially reduced, if not eliminated, the prospect of those risks occurring.

TIPPING J:

The control – I'm not suggesting necessarily this defeats the point but the control is at one stage removed from the operational control of the TAs, isn't it?

MR GODDARD QC:

Yes it's not as hands on and direct as being on the site and saying, "I don't like what you're doing, do it differently." But it is no less effective for all that. The relevance of control is that it is within the power of the body to procure a different outcome and –

BLANCHARD J:

And how does the BIA do that?

MR GODDARD QC:

The BIA could have done that in a number of different ways here. It could – all it would have needed to do, probably, is provide information and education about the risk to territorial authorities.

BLANCHARD J:

Is that control?

MR GODDARD QC:

If it's coupled with – it comes back to the comment I made earlier in answer to a question from His Honour Justice McGrath about help from regulators backed by the implicit threat that if you don't get your act together, less pleasant consequences may follow.

BLANCHARD J:

Well yes but all it could do really is to say well we'll go to the headmaster. It can't inflict punishment or direction itself in any legally binding way.

MR GODDARD QC:

But that's not necessary, in my submission, for there to be control in the only sense that's relevant in this context. It can inspect, it has that coercive power under section 79 so it can both demand to see the records of the territorial authority.

BLANCHARD J:

It can certainly advise and cajole but it doesn't have any power to give a direction. All it can do, as I understand it, is to go to the Minister and say, "We think you should do something here."

MR GODDARD QC:

Yes but as with so many regulatory regimes in New Zealand, it's the whole light handed regulatory philosophy which was prevalent, I was about to say rampant but prevalent I think is a more neutral term, in the 1990s where the idea was that there was not a highly detailed set of coercive powers but rather an oversight, hence all the information disclosure and here the inspection powers, coupled with a nuclear option if things went seriously wrong, and the threat of exercise of the nuclear option, made softer forms of authority effective.

BLANCHARD J:

Can you just remind me where the Minister's powers are in here?

MR GODDARD QC:

Yes, I think it's section 29 from memory.

BLANCHARD J:

Yes. Yes well that certainly is the nuclear option.

MR GODDARD QC:

And if your Honour thinks back, for example, to how we regulated telecommunications or any other monopoly providers of services in those days, the technique was basically to say you're going to disclose lots of information about what you're doing so it's transparent and if we're really unhappy there's a nuclear option in that case, part 4 price control, and this is very consistent with that and the idea is that transparency through reviews and monitoring, coupled with cajoling, would be effective to produce different behaviours from territorial authorities because ultimately there was this sanction of simply taking the task away.

TIPPING J:

But in *Hamlin*, that line - the point was that the councils could directly control the builders. Here, it seems to me that the control by the BIA of the builder is, at best, very indirect. The builder is the person who is actually right up front doing it all wrong, shall we say, or using the wrong materials, or a combination.

MR GODDARD QC:

It's not necessarily all that indirect because all the BIA had to say to a territorial authority, for example, was we are unhappy with the way you are consenting buildings of this kind and the territorial authority would, next time one came along, refer the matter as one of doubt to the BIA and the BIA then could have stepped right into the shoes and made the decision that the TA was otherwise making. So it was always open to the BIA to express displeasure –

TIPPING J:

Indirectly control –

MR GODDARD QC:

– and provoke – well no, and step into, effectively provoke a situation where it would be able to step into the shoes of making the decision on the building consent and the CCC.

BLANCHARD J:

But that's assuming that the territorial authority did refer the matter to the BIA.

MR GODDARD QC:

I'm not taking on the task of showing that the BIA had the same level of hands on control of what was built on any particular building site as the Council. That's plainly not the case. But rather when it comes to reliance and control I'm looking back to the reasoning in *Hamlin* which underpinned the imposition of a duty of care, identifying the general expectation on the part of homeowners in New Zealand that –

ELIAS CJ:

You may need to take us to that reasoning Mr Goddard.

MR GODDARD QC:

I hadn't been intending to actually go back to the case –

ELIAS CJ:

That far.

MR GODDARD QC:

And the court, I think sets it out very helpfully again in *Sunset*.

TIPPING J:

Yes, wasn't the whole point of *Hamlin* that – the twin, I think, as Justice Cooke called it, the twin concepts, or pillars of control in reliance but the council had control of the building. The home owner relied on the council to exert that control in a careful manner –

MR GODDARD QC:

And then –

TIPPING J:

– and I see that as being material, and this really affects only your fourth cause of action.

MR GODDARD QC:

Yes absolutely.

TIPPING J:

And I see your fourth cause of action frankly as being decidedly more wobbly.

MR GODDARD QC:

Yes, there's an – I think that's – I wouldn't use the language "decidedly more wobbly" your Honour in my submission but –

TIPPING J:

No I'm sure you wouldn't Mr Goddard but in the interest of clarity and frankness.

MR GODDARD QC:

– the strength of the first three – but I think it's fair to say they are in very different categories, the first three claims and the fourth claim.

To put that in context, in his very careful review of the history of building control in New Zealand and common practices, Justice Richardson in *Hamlin* refers to the extensive practice of building inspectors providing advice and assistance to builders, and that was also seen as an important part of the control regime and I would say that what the BIA does is very closely analogous to that.

TIPPING J:

Well it's far more removed. The average home owner wouldn't recognise a BIA chap if he fell over it.

MR GODDARD QC:

Well the average home owner would immediately have said, "Oh, you're the chap who turned up on my invoice at $1 for every thousand of my building. I know who you are, and what was that money for?"

BLANCHARD J:

Yes but the thing about building inspectors was that if you didn't do what they suggested you should do, they had coercive powers directly.

MR GODDARD QC:

Yes. I'm not sure though that that is in any way essential to the analysis than *Hamlin*.

BLANCHARD J:

Can you point to any cases where a body which does not actually have a power of direction itself has been held to owe a duty of care?

MR GODDARD QC:

In the sense obviously of a public authority because –

BLANCHARD J:

Yes.

MR GODDARD QC:

– because in the private context it's perfectly normal of course.

I just haven't really worked through the cases I've looked at applying exactly that test, so I might need to come back to that in reply I think, rather than hazard an answer now, but I'll give that some more thought overnight. I – no I need to think about that, but -

TIPPING J:

I think you'll be having a very difficult job in finding one, Mr Goddard.

MR GODDARD QC:

I think that's partly because cases founded on general reliance are also very scarce and it can only be in the context of general reliance that that issue really becomes acute, because as soon as you have specific reliance, obviously there's no need for control. There just needs to be a reliance on the care with which something is done -

TIPPING J:

I can understand that.

MR GODDARD QC:

– or on the carefulness of a statement.

BLANCHARD J:

Well the reliance is to an extent, because of the existence of a power of control. We wouldn't rely on somebody if they had no such power.

MR GODDARD QC:

That's where I think the history of the evolution of the BIA is important. Your Honour will remember that the Commission report began by identifying 10 control tasks and then parcelled out those 10 control tasks to control authorities, and the BIA is one of those control authorities, and it seems to me that the right way to think about this is that the control over what's done on the site, that was previously exercised by the territorial authority alone, is now shared by the BIA and the TAs. So, yes in the case of the BIA, that control is exercised through the TAs, but it's part of a single control system that is deliberately designed to operate in that way and each of those authorities plays its part in together exercising control over what happens on site. I think that's the best answer I can give to your Honour's question. So, shared responsibility for the control tasks by two control authorities, together they have control, and it's wrong in principle, irrelevant to the inquiry, contemplated by the law of Tort to try to stick a firm label, does have hands on control, does not have direct hands on control on either one.

And I think I am going to have difficulty coming up with examples for your Honour because of the problem that the superset of general reliance gases is actually quite small. So trying to find a subset where there's no hands on control may, itself, be a little difficult, but I'll come back to that.

Anyway, turning back to *Sacramento*, I was at 58, where the various ways in which the BIA could have, as the court said, "Taken steps which would have been effective to put an end to, or limit, those practices where described," and there are more. Those are not the only options and, as the court says, at 59, "If there was a duty of care, it's at least arguable the BIA was negligent," but at 60 the court was satisfied that there was no such duty, dealt first with proximity, the relationship between the BIA and building owners extremely limited. The only direct link was that the BIA approved ABC as a building certifier and the systems involved the use of untreated pinus radiata contemplated by B2AS1. Obviously so far as the council's claims are concerned, that's not true. In this case there were very direct links and, in terms of links between the BIA and the building owner here, I would add into the mix, the payment of the levy, which, it seems to me, is not without importance in narrowing the relevant class, and the fact that the BIA was carrying out regular reviews of the

way in which territorial authorities with day-to-day administration roles performed their functions.

The second proximity point, the responsibility for durability of the complex might thought to rest far more directly on the developers, designers and builders, yes certainly, and code compliance certifiers that on the BIA. Well that, I think, can be said it will be a reclaim against a territorial authority as well, that the duty rests far more directly on the developers, designers and builders but, as this court emphasised in *Sunset*, the fact that you may be able to look to architects and other designers, and that they may owe a duty, does not of itself, exclude the liability of a regulatory that you have to carry out a separate inquiry into the relationship with each. That's not a good answer to an allegation of a duty to say that there are others –

TIPPING J:

It's a bit wrong to talk about regulators in the *Hamlin* context because they're not a regulator, they're an inspector of the premises.

MR GODDARD QC:

That –

TIPPING J:

This word "regulator" gets thrown around with some degree of abandon and with respect, Mr Goddard, I think it's – the *Hamlin* relates to the inspection function –

MR GODDARD QC:

Yes it does. I think -

TIPPING J:

Not the regulatory function in any conventional sense.

MR GODDARD QC:

I think what that illustrates mainly is the looseness of the term "regulator". Building regulation is, in a sense, what we're concerned with here. The Building Act and The Building Code are building regulation and those who administer it are, therefore, regulators.

WILLIAM YOUNG J:

Isn't a function? Isn't it really a function? Local authorities, pre 1991, were regulators because they were the legislators. They enacted the building by laws in each district. So obviously they were, in a sense, regulators or legislators but the function that was material in the *Hamlin* case was the assessment of building plans and the on the ground inspections.

MR GODDARD QC:

I think this really goes to, Her Honour, the Chief Justice's point earlier that you have to look at the whole range of functions and which ones are engaged in a particular case.

ELIAS CJ:

Well that's really what Justice Young is saying.

WILLIAM YOUNG J:

Well that's what I'm saying actually.

MR GODDARD QC:

Because we do use regulator, for example, to refer to bodies like the Commerce Commission that don't make any rules at all.

TIPPING J:

Well that's – all I'm signalling is, for me it's a slippery word and one has to – just because the word "regulator" is in play, doesn't mean there's no duty of care, but you have to focus, if my brother has said, very sharply, and the Chief Justice, on what particular function the person is said to have mis-done it.

MR GODDARD QC:

Yes, and the functions are different, although there is an overlap, in the two classes of case before this court. The claims by the Council and the direct claims by the plaintiffs. So far as the Council is concerned it is very much the review function and the –

ELIAS CJ:

Well it's an inspection of the methodology of the Council in carrying out its obligations. That's where you're at?

MR GODDARD QC:

Yes, exactly your Honour.

ELIAS CJ:

It is an inspection function but it's a bit more –

TIPPING J:

Higher level.

ELIAS CJ:

I didn't want to say remote but…

TIPPING J:

It's higher level inspection. It's inspecting the inspector.

MR GODDARD QC:

Yes, quis custodiet.

ELIAS CJ:

Yes.

MR GODDARD QC:

But I think the reason that someone watches the watchers is ultimately for the benefit of those who are most watched. It's the –

WILLIAM YOUNG J:

Well the interesting thing was how many cases are watchers of the watchers held liable. Are –

MR GODDARD QC:

I can't think of any offhand your Honour.

WILLIAM YOUNG J:

No. So this would be the first –

MR GODDARD QC:

I'll think about it overnight.

ELIAS CJ:

But this is a cutting edge area.

MR GODDARD QC:

Yes and that takes us back to Chief Justice McLaughlin's point that what seems impossible on one day may become orthodox after a leading case some time later and that that sort of evolution takes place best against the backdrop of the full facts, the full context, as found at a trial. Which is, I think, probably my best response to the questions about the watchers of the watchers that the court has put to me.

Certainly it seems to me that there is a level of relationship between the BIA and those who are undertaking building work that goes far beyond the relationship discussed in *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540 described as the closest analogous case in –

ELIAS CJ:

Sorry, where are we now?

MR GODDARD QC:

Sorry, 61D. It was described as perhaps the closest of the analogous cases of high authorities, *Graham Barclay Oysters*, but that was a case relating to Hepatitis A contracted from eating oysters and the complaint was that neither the state nor the council had done anything to prevent faecal contamination of Wallis Lake and it could be anticipated that the public at large buying oysters might be adversely affected if nothing was done. The relationship between the BIA and those carrying out building work is much closer here and the –

ELIAS CJ:

Do you need – is that so?

MR GODDARD QC:

Neither the state nor the council were receiving a payment per oyster consumed.

ELIAS CJ:

Yes but leaving that aside, because you have to put a lot of emphasis on this levy, what else is there that's – it does seem analogous. I have to say I've never particularly liked the case.

MR GODDARD QC:

I think the other difference that is worth stressing is that those were, that was a pure inaction case whereas here the BIA was out there rolling up its sleeves –

ELIAS CJ:

Yes.

MR GODDARD QC:

– looking at what the territorial authorities were doing knowing, and actually going out to sites, it was going to actual building sites to look at what the TA was doing on the ground, literally as well as metaphorically, as well as going through its office systems and checking its staff resources. So it knew that there was hands on regulation by people who had the ability to say, don't do it like that and it was looking at what they were doing. So it was reviewing whether they were doing that job properly. There were some people who were directly on the ground and it was monitoring how they did that task. So it could expect the carefulness with which it performed that task, which it was actually performing, to influence outcomes on the ground. So that –

TIPPING J:

Well that is a perfectly valid point of distinction, I would have thought, between the oyster case and this one.

MR GODDARD QC:

Yes.

TIPPING J:

Oysters, they did nothing. Here they got involved, they undertook to do something and then allegedly did it negligently.

MR GODDARD QC:

Exactly.

McGRATH J:

When you say they did nothing, are you talking about the council or the state in –

MR GODDARD QC:

Both.

McGRATH J:

Both, was it. Their position was the same?

MR GODDARD QC:

Yes, a pure inaction case, described in those words by the Chief Justice and to the same effect, but with rather more words, in the other judgments. It's not meant unkindly but it's a characteristically long judgment of the High Court of Australia.

BLANCHARD J:

I thought you were saying it was a characteristically long judgment of the Chief Justice.

MR GODDARD QC:

No, no, of the High Court of Australia.

ELIAS CJ:

We're talking Gleeson CJ. Never a wasted word.

MR GODDARD QC:

It was, I think it's one of the shorter judgments in that case. The case as a whole occupies a rather large part of one of the bundles. But anyway I don't think I'm prepared to go further than attacking the whole court on a transcript that was posted on the web. To go any further would be invidious.

The policy considerations I've really, I think, worked my way through.

TIPPING J:

Well you've got the same point in C.

MR GODDARD QC:

Yes, that this is not a lack of action case. It's about getting out there. Actively watching the watchers, seeing what they were doing and saying it was fine. So that, I think, is a key distinction. Also, I think B doesn't really translate directly to territorial authorities. It's not the case that making the BIA liable in cases such as this could have incentivised the BIA to adopt such a vigilant approach to territorial authorities that they would have stopped operating, they had no choice. They were the certificate granters and inspectors, to avoid the regulator word, of last resort under this scheme and they had a public responsibility to continue to provide that service.

So I don't think that that particular inconsistency with the statutory scheme is in play at all when it comes to reviews of territorial authorities. And as your Honour said C is quite different here because I am emphasising different functions.

We don't need to worry about the documents establishing compliance with the Building Code. There's no challenge to the acceptable solution here and the court was exactly right to say that even repealing it wouldn't have prevented the use of this technique, this method of building.

A situational duty is –

TIPPING J:

Is this a phrase that was coined in *Sacramento*, "situational duty"?

MR GODDARD QC:

I haven't –

ELIAS CJ:

Is that a special facts duty of care?

MR GODDARD QC:

I think there may be other people better placed to answer that.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

You can't remember.

MR GODDARD QC:

I'm not sure either but I can't think of any other cases in which –

TIPPING J:

Well it was new to me, I have to confess, on reading for this case.

MR GODDARD QC:

It's very evocative but I don't know that it's an established conceptual tool for thinking about cases of this kind. The idea is that one starts from a particular thing that's gone wrong and works out, or crafts a duty that just focuses on that rather than describing it more generically, and it seems to me that apart from the fact that that's a natural pleading technique which tends to be adopted by plaintiffs as your Honour said, for understandable reasons, as long as one asks, can you sensibly identify a duty of that scope, there's no more concern really –

ELIAS CJ:

It doesn't matter where you start from.

MR GODDARD QC:

It doesn't matter where you start and your Honour made that point in *Couch* in responding directly to this analysis.

ELIAS CJ:

I see that there was a point made by Justice Cooke also in *Fleming*.

MR GODDARD QC:

Yes.

ELIAS CJ:

Well I'll just have a quick look at *Fleming*.

MR GODDARD QC:

Justice Cooke didn't see any difficulty in thinking about all the phases of the enquiry together referred to other cases of high authority where that had been done.

ELIAS CJ:

And Justice Gault in one of those other cases too.

MR GODDARD QC:

Yes. And for that reason, I think, Justice Cooke in *Fleming* considered that there probably was a duty of care about that. The case failed at the causation stage.

I think the main answer to all of this is that the case presented before this court on the fourth cause of action, like the others, is not a mere omissions case. It's a getting out there and doing something carelessly which led to these outcomes case and I don't think I need to go through the certifier approval and insurance cover discussion.

The arguments for dismissing the insurance cover argument in 1993 towards the end of the judgment, again really just served to highlight the difference between - *Sacramento* and this case, approval of insurance arrangements being part of a quasi-judicial process like approving certifiers and the existence of a duty of care would have had the tendency to produce this sort of official over vigilance the '91 Act was intended to avoid and that couldn't be said of the careful conduct of review the territorial authorities.

So just summing up the response to *Sacramento,* that was an attempt to establish a duty to homeowners based on the statutory scheme where the complaint was one of pure omission. There was nothing that the BIA had done that was said to have been done negligently, the complaint was that it had the power to act and negligently failed to – or it sat on its hands, to use your Honour Justice Young's phrase at 68 if the BIA was on notice but just sat on its hands and this case is a million miles away from that, especially obviously when it comes to the claim by the Council because there the BIA was right out there doing reviews and writing reports and sending reports and providing information but also in relation to plaintiff homeowners, the owners of the Grange units because central of the claim that they would have, in this case, is the negligent conduct of the review of the territorial authority that was inspecting their building work as part of a joint system of building control, a co-operative control

regime. And the BIA had all the powers that it needed in the context of that conduct which it actually undertook to produce a different outcome but carelessly failed to do so. That I think is the distinction from *Sacramento* in a nutshell. Very clear in relation to the claims by the Council, the first three courses of action but also in my submission, significant distinction in relation to the direct claim, the fourth cause of action.

That brings me finally and of necessity, briefly, to the limitation issue. I think what I'll do is highlight that and then since it's really the Crown's argument, the BIA's argument, deal with it perhaps in a little more fully in reply. But the argument here which is dealt with in my supplementary submissions is that the Crown says the BIA says that the Council's first, second and third causes of action are barred by the long-stop provision in the Building Act. Leave's been granted to argue that on appeal by consent. The reason that the Council's claims are not barred by the long-stop is set out in paragraph 4 of those submissions, my submissions. The better view is that the claims are not civil proceedings relating to building work, they relate to the review and the report, not to building work. The BIA didn't do any building work and the claims don't relate to building work.

WILLIAM YOUNG J:

Isn't your, I mean I'm reasonably sympathetic to position on limitation but isn't your claim to be compensated for damages you have to pay associated with building work and you no more carried out the building work than the BIA did, yet you're liable –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– and can invoke the limitations so at that point why isn't the Crown argument a good one, I think there might be other problems with it?

MR GODDARD QC:

Because it's at – too many removes and as the courts have confirmed in the context of claims for warranties as to the quality of building work or its compliance with the code, a claim for a warranty that a building complies with the code is not a claim relating to building work based on the act or omission of the building work itself being done.

TIPPING J:

It's a breach of promise.

MR GODDARD QC:

It's a breach of promise. This came before – the issue the question came before this court on a application for leave, which was rejected, in *Gedye v South* [2010] NZCA 207, [2010] NZLR 271. In the *Gedye* case in the Court of Appeal – I'll deal with this because I think it is important. It might be helpful just to have the structure of the provision that was an issue in that case, section 91 I think it was, in front of us. That's under tab 2 of my supplementary bundle in the form it was in force at the time.

So subsection (1) says that, "Except to the extent in subsection (2) –

ELIAS CJ:

Sorry, which section?

MR GODDARD QC:

Sorry, under tab 2 of my supplementary bundle and it's section 91 of the 1991 Act. Had I had more time I would have started with the original version of the section because the structure's actually quite helpful.

BLANCHARD J:

Is this what was in issue in *Gedye*?

MR GODDARD QC:

Yes your Honour.

BLANCHARD J:

That's why we're looking at it?

MR GODDARD QC:

Yes, and also because it contained some clues about time of accrual which don't appear in 393 because of changes to the regulatory system where the BIA didn't feature. So it's quite helpful, I think, to look at this one.

So subsection (1) said that, "Except to the extent provided in subsection (2), the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from any building work associated with design, construction, the omission or removal or the exercise of any function under this Act or any previous enactment, relating to the construction, alteration, demolition or removal of that building."

So it's focused very much on work on a particular building and the definition of –

WILLIAM YOUNG J:
What about all the exercise of functions?

MR GODDARD QC:
Yes, the exercise of a function relating to the construction, alteration, demolition or removal of that building.

WILLIAM YOUNG J:
All right, sorry, yes.

MR GODDARD QC:
So that's the key I think sir. So subsection (1) is very clearly focused on work on a building or exercise of functions in relation to a particular building, and subsection (2) is clearly intended to be co-extensive with subsection (1). That's obvious I think from its structure. It was particularly obvious when the words in square brackets weren't in there, otherwise it would have been all civil proceedings, which plainly was not what this Act was intended to achieve.

And we have a civil proceedings relating to any building work and that I think is shorthand for proceedings of the kind described in subsection (1), "May not be brought against any person 10 years or more after the date of the Act or omission on which the proceedings are based."

Now, in *Gedye* it was conceded that the claim on the warranty was a civil proceeding relating to building work. In my submission that concession was wrongly made and the court then went on to consider what act or omission the claim was based on and found that it was the giving of the warranty and its breach, not the performance of the building work.

This court, in its leave judgment, actually, it seems to me, with respect, captured the issue rather more neatly and *Gedye* is in volume 3 of the authorities, the orange volume, under tab 26. There's both the Court of Appeal and the Supreme Court decision, and the Court of Appeal said at paragraph 12 that the issue before it was - depended on how "The act or omission on which the proceedings are based," is defined, and went on to say it was the giving and breach or the warranty, but the reason for that was the concession at paragraph 26, it's recorded at paragraph 26. Mr Ben, the counsel for the plaintiffs, accepts that the present proceeding does arise from building work undertaken by the Gedye's on the properties. So the requirements of 91(1)(a) are met.

In my submission that concession should not have been made because it wasn't a claim relating to building work, it was a claim relating to the warranty and that is actually that insight reflected in the leave judgment of this court. Right at the end of this report, after setting out in three that summary judgment had been refused because, "The act or omission on which the proceedings are based is not the carrying out of the building work but breach of the warranty. This court said, 'We consider that view is undoubtedly correct. The act or omission is the breach of contract. The claim against the Gedye's as framed, could not succeed simply, and only, if the building works were non-compliant and the contractual warranty had not been given." It was in respect of the latter event that the claim arose and that sentence is my argument in a nutshell. What was the claim in respect of? Not the building work at all. It was in respect of the warranty and its breach. Similarly here, the claim is –

WILLIAM YOUNG J:

There's a difference between a representation said to be given negligently and a warranty that's breached. I mean that's elementary, one is expectation damages, the other is detriment damages and the detriment, in this case, is the damage associated with the building that was badly constructed.

MR GODDARD QC:

The loss claimed in the –

WILLIAM YOUNG J:

You are seeking to be compensated for damages you've had to pay in relation to a badly constructed building?

MR GODDARD QC:

Yes, and the same is true of the counterclaim here. It was a claim for – in a warranty where the amount recoverable would reflect the cost of making good the defect or the devaluation in value, resulting from the defect of the property, so it's exactly the same, your Honour.

WILLIAM YOUNG J:

Well, I don't think it's the same. I mean I guess part of it is the same because they're different measures of damages.

MR GODDARD QC:

The – I'm conscious of the time –

WILLIAM YOUNG J:

Right. Can I just ask you one question?

MR GODDARD QC:

Yes, your Honour.

WILLIAM YOUNG J:

And it's going back. If the – assume that the BIA or its agents had gone in and said, "The North Shore Council is absolutely terrible and should have its certifying function removed," and they were just too tough on the Council. Could the Council just sue them for negligence?

MR GODDARD QC:

They could certainly have brought public law proceedings –

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

– to seek a judicial review of any decision that, well, probably of the BIA's recommendation and certainly of any decision that the minister sought to make in reliance on it, but could they have sued in –

WILLIAM YOUNG J:

Negligence.

MR GODDARD QC:

– negligence, not in negligent misstatement because they wouldn't have done anything in reliance on it.

WILLIAM YOUNG J:

Negligent performance of statutory function.

MR GODDARD QC:

Well, that's a very different case from the one I'm putting forward here.

WILLIAM YOUNG J:

Yes, but if they couldn't do that, then, which I doubt if – I would think they couldn't do that.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Then the duty of care is asymmetrical.

MR GODDARD QC:

And I think that's right, I think they couldn't and I think it is asymmetrical and that's partly why I say that the policy concerns are asymmetrical and that we shouldn't be concerned that imposing liability here would produce outcomes inconsistent with the statutory scheme.

WILLIAM YOUNG J:

Thank you.

MR GODDARD QC:

It would be okay to be too tough.

ELIAS CJ:

Mr Goddard, we will take the adjournment now, but do you want – is there more that you want, more points that you want to make in elaboration of your supplementary submission, because I think we would like to hear you if you do want to. So we won't hold you to the 11.30 stop.

MR GODDARD QC:

It's an invitation that it's impossible for any counsel to spurn, your Honour. I'll take five minutes to just explain the two-pronged nature of that submission, but I do think that otherwise, what I have to say in more depth will be more assistance to the court once the court has heard the Crown's arguments, which in effect I'm responding to.

ELIAS CJ:

Yes, well, you'll have five more minutes after the adjournment, thank you.

COURT ADJOURNS: 11.34 AM
COURT RESUMES: 11.43 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour, five minutes starting from now, on limitation, time bounded limitation argument. I was at paragraph 7 of my supplementary submissions on this point and I'd just noted that the focus in 91 is on, one, is clearly on building work on a particular building and the exercise of a regulatory function in relation to a particular building and subsection (2) where it refers to civil proceedings relating to any building work is clearly intended to be co-extensive with subsection (1) and to refer to work on a particular building or the exercise of a regulatory function in relation to building work on a particular building. The two are intended to dovetail together and there's link to a specific building project, is also confirmed by the way in which, and they're subsections (3) and (4), provide for identifying the date of the relevant Act or omission where the proceedings arise from performance of a regulatory function where it's work on a particular building, obviously that's easy, well, at least not too hard, you look at what was done on the building and count from there.

In the context of regulatory steps, subsection (3) deals with regulatory steps that relate to a particular building and says that the relevant date is the date of issue of the consent or certificate or determination. So, a consent or a certificate issued by a local authority or a certifier, a co-compliance certificate which could be issued by either or a determination issue by the authority, all of those building specific. But, when we come to subsection (4) which deals with accreditation certificates issued by the authority, what we see is that the date of the act of omission is the date at which the accreditation certificate was relied on. So, again, we're looking at building work in relation to a particular building and we're looking at the date on which in the context of that building project, a particular accreditation certificate saying, for example, that corrugated iron is fine as a roofing material was relied on in the execution of that building project. So, that tells us both, I think, that the focuses on particular projects and also very importantly that where a generic regulatory function, such as issue over an accreditation certificate is an issue, this section will bit, only if it's relied on in the context of a particular building project and what you count from, in terms of the long-stop, is the date of reliance in the context of that project, not the original date on which the accreditation certificate was issued.

So, a claim can plainly be brought more than 10 years after the authority issues and accreditation certificate, because five years after it has been issued, someone may put up a building using the product or process its been accredited, rely on it then and that's the date of the relevant act or omission. That, I think, explains and perhaps again it's just worth noting, because that reliance, of course, is not an act of the defendant, not an act of the authorities, so the discussion by the Court of Appeal in *Gedye* which suggests that you always count from the date on which the defendant did something, with respect, is not always right, this is an example of a situation where the legislation provided for a different type of act, a different date to count from.

So turning over to my paragraph 12, *Klinac v* Lehmann (2002) 4 NZ ConvC 193,549 (HC) which is another building warranty case, a decision of Justice Glazebrook at first instance, was certainly right to say the legislative policy was to provide certainty to those involved in building work, so they could rest easy after 10 years, but two things, first of all it was only addressed to those involved in a hands on way with particular building projects or whose work was directly invoked, directly relied on for a building project. Second, it wasn't, plainly wasn't the policy that the BIA could rest

easy 10 years after making a decision or engaging conduct of a kind that had implications for multiple building projects, 91 falls inconsistent with that. And indeed, in *Klinac* dealing with the same issue that was discussed in *Gedye* I just note that Her Honour, Justice Glazebrook did say at paragraph 48 that Her Honour had doubts about whether the claim based on the warranty was a claim relating to building work, but was content to go on and deal with the case on the basis that it might and Her Honour found that in that case certainly the act or omission was the giving of the warranty and its breach and therefore no long-stop issue arose, but in my submission, Her Honour was right to say that in that case the claim was not a claim relating to building work, the same point that was made by this court in its leave decision on *Gedye* and in this case, likewise, the better view is that the conduct of the BIA that is complained of, is not building work and did not relate to building work wasn't concerned with any particular construction project.

TIPPING J:

Would your argument manifest itself if within the bracketed part of subsection (2) of 91 where it says, "Relating to any building work," one simply inserted implicitly, "Any particular building work."

MR GODDARD QC:

Yes, it's the same.

TIPPING J:

That would be the fact of your submission?

MR GODDARD QC:

Yes.

TIPPING J:

Which is to read in the word "particular" before building work?

MR GODDARD QC:

Yes, and which I say is the proper reading given the relationship with subsection (1) and given the definition of –

TIPPING J:

I was just trying to bring it –

MR GODDARD QC:

Yes, your Honour is exactly right, and I think that's funnily enough even clearer in the original form of the provision as inactive without the words in the square brackets. If one just covers those up, I have to look into a different document, what subsection (2) used to say is, "Civil proceedings may not be brought against any person 10 or more years after the date of the act or omission on which the proceedings are based. Now, plainly that didn't apply to all civil proceedings. The only limit was one from context and the context was clearly a reference back to subsection (1) which is –

TIPPING J:

That building?

MR GODDARD QC:

Yes, exactly.

TIPPING J:

Do we know why the Building Amendment Act 1993 made those changes?

MR GODDARD QC:

The history is discussed in some detail in Justice Glazebrook's decision in *Klinac* and Her Honour describes it as a much needed restriction, must need a limitation, but –

TIPPING J:

Well, it wasn't clearly, it was clearly implicit already, wasn't it? Otherwise it would make no sense at all.

MR GODDARD QC:

That's exactly right.

BLANCHARD J:

But is there any legislative history that helps us?

MR GODDARD QC:

Not that I'm aware of. There is in relation to other aspects of the 1993 Act but not, I think, the specific change. I understood it to be simply making explicit what already was implicit in the structure of the two subsections and implicit also in the policy of this long-stop which was addressed to participants in the building industry and those who regulated the performance of their work. So my primary submission is that this is not one of the civil proceedings that is referred to in subsection (2) of the 1991 Act or the identically worded subsection (2) of the 2004 Act, but alternatively and this would be good enough for this case although the difference would have implications for other cases.

If this is a claim relating to building work, then one still has to ask, "What is the Act or omission on which the claim is based and the Act or omission must be consistent with the approach in 91(4), the Act or omission of relying on the BIA's advice in the context of the TA's, activities, the council's activities concerning the Grange." But the very fact that that's rather tenuous again, tends to take one back to the first limb of the argument that this is insensibly described as a claim relating to building work. I don't think I need to labour that two-pronged argument anymore, it's in the written submissions and I can come back to it in reply, unless the court has any specific questions in relation to that. I'll slightly belatedly, your Honour, the assurances I gave my learned friend about when I would stop.

ELIAS CJ:

Thank you, Mr Goddard. Yes, Mr Solicitor.

SOLICITOR-GENERAL:

Thank you very much, your Honour. The reasons why the Court of Appeal were correct in concluding that there was no reasonable prospect of the defendant's third party claim succeeding, can in my respectful submission, be distilled to four very basic propositions. The first is that the Council had the sole responsibility to approve the construction of the Grange, to inspect the Grange when it was being constructed and to certify that the Grange complied with the building code when the construction was concluded. The second very basic reason is that the Council had every ability to ensure that it performed its statutory functions without negligently causing the harm suffered by the plaintiffs in this case. And the third basic reason is that the BIA had no control over the approval inspection and certification of the Grange and the fourth basic reason is that the Council could not realistically regard the 1995 review as an

assurance that in 1999 the Council properly carried out its statutory approval, inspection and certification functions under the Act.

Your Honours, having given you that very brief introduction, can I provide you with a one-page list of the topics which I wish to address in the time that I will be on my third? Your Honours, you will see that I propose to address nine matters which constitute proximity and policy factors which I urge this court to take into account in determining whether or not a duty of care existed in this case and it is, of course, my submission that the combination of these proximity and policy factors leads to the conclusion that no duty of care existed from the BIA to the Council.

TIPPING J:

Is there any significance in the fact that policy is at the bottom, proximity at the top and we have two arrows, Mr Solicitor? You haven't sort of subdivided them discretely and I'm not being critical about that –

SOLICITOR-GENERAL:

And deliberately not, Sir.

TIPPING J:

No.

SOLICITOR-GENERAL:

Because there is a point where the two merge.

TIPPING J:

Right.

SOLICITOR-GENERAL:

And sometimes it's not possible to have a bright line differentiating them. I'm quite attracted to Professor Stapleton's analysis where she abandons the terminology of proximity and policy and says, "Let's just look at matters." And –

ELIAS CJ:

The matter of matter.

TIPPING J:

But you're not asking us to depart from the traditional methodology?

SOLICITOR-GENERAL:

No, I'm not. The first point which I wish to focus upon, of course, is the legislation and the underlying policies and as this court well appreciates it, of course, is not quite conventional to regard the broad purposes of the relevant legislation as being a highly material factor in determining whether and to what extent a duty of care would be owed at common law and I need not take the court through the –

TIPPING J:

The word "buy" in the first line of that –

SOLICITOR-GENERAL:

– authorities.

TIPPING J:

– is two, I think, is it?

SOLICITOR-GENERAL:

I'm sorry, your Honour, could you – I misheard what you said.

TIPPING J:

That the legislation did not intend that a duty of care would be owed by the Council, to the Council?

SOLICITOR-GENERAL:

To the Council, you're correct, Sir, you're absolutely correct. Now, as we fully appreciate, the 1991 Act in its underlying policies were very well analysed by the Court of Appeal in *Sacramento* and in the judgment of the Court of Appeal, Justice Arnold's judgment in the court below. As emphasised by Justice Young in *Sacramento*, the Act largely implements the reforms of the Building Commission's report of 1990 and that report strongly advocated, light-handed regulation with only essential safeguards and relied upon market forces to produce innovative building solutions and greater efficiencies in the building industry, and I won't take the court to the various provisions in the building Commissioner's report which illustrate those driving philosophies because I think that they are widely accepted as being the

underpinning philosophy behind the 1991 Act. But what I do want to do is spend quite some time focusing upon the statutory duties of the Council and what the Commissioner's thought the statutory duties of the Council should be. The statutory duties of the BIA and what the Commissioner's thought the statutory duties of the BIA should be. How non-compliant territorial authorities are to be managed and the issue of how proceedings and in what circumstances proceedings could be brought against the BIA.

To assist your Honours would probably be of advantage if we have volume 6 of the case on appeal and volume 1 of the bundle of authorities. What I will do is focus firstly on what the Commissioner's were wanting the legislature to do in relation to those four areas that I have identified and then we will go and look at the legislation. So focusing first upon –

ELIAS CJ:

Just looking at your first point in your outline. It is a matter of controversy and, of course, there are different views on this but could it perhaps be expressed in a way that I certainly would prefer as the legislative purpose of the statute is inconsistent with a duty of care?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Because I don't think our enquiry is really as to what the legislature intended.

SOLICITOR-GENERAL:

Yes, I'd agree with that your Honour.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

So focusing first upon the statutory duties of the Council. The Commissioners, and their report as we know is in volume 6 of the case on appeal, the Commissioners recommended that Council should be charged and charged solely with the responsibility of enforcing the Building Code. So if your Honours would be kind

enough to go first to page 899 to the fourth bullet point on that summary page, territorial authorities will be charged with the administration of the Code and an extended co-ordinating role between all regulatory bodies. They will continue to be the office for building records and will issue consents for construction and occupancy signifying that the building owner has provided sufficient assurance of compliance with the Code provisions.

If we just move on to page –

ELIAS CJ:
Sorry, I'm lost. I've got the bundle of authorities, volume 1, and the common –

SOLICITOR-GENERAL:
Case on appeal your Honour.

ELIAS CJ:
Oh case on appeal, I'm sorry, I've got volume 6 of the bundle.

SOLICITOR-GENERAL:
It's the pink one.

ELIAS CJ:
Yes, thank you.

SOLICITOR-GENERAL:
And the bullet point that I just read from your Honour is at page 899 and it's the fourth of the bullet points.

If we could just move through to page 964 where we're dealing specifically with the Commissioner's expectations of the duties of councillors – sorry, of councils. And in particular paragraph 4.40 and the second sentence, "These procedures – " that's the operating procedures which the Council are to follow, "– are to be administered to individual territorial authorities. They involve the checking of many matters to provide that assurance – " that is the assurance of compliance with the Code, "– and obtain consent from TA to proceed with the construction in use of all the buildings."

Page 966, paragraph 4.45, and again the second sentence is quite pertinent. That again emphasises the Council's responsibility for administering and enforcing the mandatory Code requirements and for the owner to obtain consent to comply with the Code.

Similarly if we move through to page 967, at 4.47, we have at 4.47 a summary of the powers and duties that the Commissioners were recommending be imposed upon territorial authorities and at paragraph 4.48, in summary form, a list of all the duties which territorial authorities, councils, were to undertake.

If we move through to page 972, we see at 4.72 the responsibility on territorial authorities to ensure that they, the territorial authorities, have sufficient information to ensure that each building does comply with the Code. So there was a huge emphasis being placed upon the territorial authorities acquiring information to ensure compliance with the Code in each individual case.

TIPPING J:

I suppose the Council would respond to that, Mr Solicitor, well we got the information from the BIA and it put us on the wrong track.

SOLICITOR-GENERAL:

With respect, your Honour, that misses the essential point and the essential point is that the territorial authority, the Council, they were charged with the sole responsibility of acquiring the information to ensure that in each particular case the Code was going to be complied with and I will be elaborating in quite a lot more detail later in my submissions, what actually happened in this particular case by reference to the plaintiff's allegations against the Council and comparing that with what the Council claims from the BIA.

TIPPING J:

Well it may be that it was a more specific level. There's a good answer, that at the more general level – I just don't see these issues as directly intersecting. There's no doubt they have these responsibilities but they say that they looked to the BIA to help them discharge it.

SOLICITOR-GENERAL:

And my response is that that doesn't absolve them from their responsibility to perform their statutory function your Honour.

TIPPING J:

No I'm sure it doesn't. The question is whether your client should have to contribute.

SOLICITOR-GENERAL:

Absolutely and I accept that that's the essential issue. But I won't traverse all of the features of the Commissioner's report in great detail. Can I just simply take the court, finally in this tranche of my submissions, to page 979 and paragraph 4.10, at the foot of that page and over to the top of page 980, where there is again the emphasis being placed upon the Council to be satisfied that building work is proceeding without defects in compliance with the Code.

McGRATH J:

What paragraph number?

SOLICITOR-GENERAL:

That was 4.107 at page 979. Now all of these responsibilities on the territorial authority were faithfully transposed into the legislation or adopted by the legislature. The territorial authorities have under section 24, a section my friend didn't take the court to, the sole responsibility for administering and ensuring compliance with the Building Code.

ELIAS CJ:

Section?

SOLICITOR-GENERAL:

Section 24(a) to (g).

TIPPING J:

You used the word "sole". Does that appear in the legislation?

SOLICITOR-GENERAL:

No other body is charged your Honour. That is the simple answer to your question. The territorial authorities are the only bodies that are charged with the duties of ensuring – or of issuing consents, inspecting and certifying and I can take

your Honours very quickly and I don't invite you to take a note of this because I know it will be recorded, but under section 36, "All building work is required, a building consent issued by a council under section 34(3) consent is required to be given if the local authority is satisfied on reasonable grounds that the provisions of the code would be met if the building work was properly completed in accordance with the plans and specifications that were submitted," and under section 43, "Councils are responsible for issuing code compliance certificates in respect of completed work." These legislative reforms reflect the recommendations of the Commissioners which are summarised in the Commissioner's report at page 967, paragraph 4.47 that the councils would be a single "on the stop" control authority, charged by Parliament with the responsibility to co-ordinate the building control and ensure compliance is achieved by the regulatory control system." It very, very specifically identifies the councils as being at the epicentre of ensuring that the Code is complied with.

I now want to move on to the statutory duties and the responsibilities of the authority. The Commissioners in 1990 recommended the creation of the BIA to be an advisory body to the Minister. With no direct power or control over the way in which the building code was to be implemented. So, again, if I can invite your Honours to go to the Commissioner's report at page 963, paragraph 4.3, "The BIA would not be an advisory body except to the Minister. It would be inconsistent with its powers of decision making in matters of interpretation, approval and monitoring of the control system, for BIA also to have the lesser status of an advisory body to territorial authorities or any organisation in the building industry. Any person would nevertheless have rights of access to its records, but BIA would not express opinions as opposed to announcing decisions on matters referred to for rule." The Commissioners recommended that the BIA would be responsible for monitoring the control system administered by councils and if councils were found to be acting in a manner that was open to severe criticism then the BIA would report to the Minister and if the Minister thought that the role of the council would, by ordering council, be transferred to a Commissioner, and that's contained in the Commissioner's report at paragraph 4.51 at page 968 and 4.52.

Can I invite your Honours just to pause at paragraph 4.51, at page 968, you will recall yesterday, your Honours, my friend placed considerable emphasis upon this provision of the Commissioner's report. He referred to it as being the section in his report which was heavily underlined and he took your Honours through each sentence of paragraph 4.51 emphasising how it was critical to the council's case.

There is a part of this which I do wish to emphasise but not for the reasons which my friend emphasised and that is in the middle of that paragraph there is a reference and to require correction if it was not. What the Commissioners envisaged was that the BIA would have a power to ensure that councils would comply with their obligations under Act. That was a very specific recommendation contained in the Commissioner's report but it was not translated into the legislation.

BLANCHARD J:

Was it in the draft legislation that I understand accompanied this report?

SOLICITOR-GENERAL:

Can I just have somebody check that Sir? I have to confess that I didn't trawl through the draft legislation but I'll have somebody check that.

ELIAS CJ:

And is there a section of this report which indicates that? That you haven't taken us too? You say the Commissioners envisaged the BIA would have power to direct compliance?

SOLICITOR-GENERAL:

And to – the words are "and to require correction" if it was not –

ELIAS CJ:

There's nothing else?

SOLICITOR-GENERAL:

No there is nothing else.

ELIAS CJ:

Thank you.

TIPPING J:

The key word is "require"?

SOLICITOR-GENERAL:

Yes. That connotes control and Parliament deliberately did not accept that particular recommendation.

ELIAS CJ:

Well that may, in fact, turn on what's in the draft legislation, whether it was as specific as that.

SOLICITOR-GENERAL:

I'm just having somebody check that.

ELIAS CJ:

Because this is a little bit ambiguous or a little bit obscure here because the requirement could be through the reporting to the Minister that's envisaged. One would think if there is a power of direct direction, it would either have been developed in a further paragraph of this report or it will be in the draft legislation.

SOLICITOR-GENERAL:

Right, well I'm having the second point examined at the moment your Honour.

ELIAS CJ:

Yes, that's right.

SOLICITOR-GENERAL:

What I can say is that this is not in the legislation. The ability to require correction of the Code.

ELIAS CJ:

Yes, I see.

SOLICITOR-GENERAL:

As we noted yesterday the primary functions of the Authority are set out in section 12 of the Act. these are high level responsibilities, similar, but not identical, to what your Honour the Chief Justice in *Couch* described as target duties. That is the sort of duties in respect of which there may be reluctance to impose on public bodies liability for failure to use general powers to prevent harm, and I'm quoting there from your Honour in *Couch*. And there are clearly four powers or duties that are pertinent to the matters before this court and your Honours were taken to those yesterday and I will not reiterate them and take up the court's time.

What I can say is that when fulfilling some of its functions the BIA acted in a quasi-legislative way. For example the Building Code was promulgated by regulations on advice initially from the BIA to the Minister and obviously through to the executive council. The regulations were made in that respect relying upon the BIA to conduct itself in a quasi-legislative way. The BIA acted in a similar role when approving documents for use in establishing compliance with the provisions of the Building Code. By contrast when exercising its power to determine disputes between territorial authorities the building certifiers and property owners and others, the BIA performed a judicial function and as noted, and I take this no further than to say as a general proposition, when a statutory body is vested with quasi-judicial roles and quasi-legislative roles, these are functions which do not readily lend themselves to impositions of duties of care.

I was now going to come on and deal with non-compliant territorial authorities but before I do I'll just find out if the provisions of the draft bill assist on the point that your Honours asked me about. Answer, no.

ELIAS CJ:

Has the enquiry been complete or there is nothing?

SOLICITOR-GENERAL:

There is nothing.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

So what happened to non-compliant territorial authorities in the eyes of both the Commissioner and the Act? We know that ultimately they could be the subject of ministerial control and oversight through the appointment of a Commissioner and the powers for such an appointment are set out in section 29 of the Act. But importantly, and contrary to the recommendation in paragraph 4.51 of the Commissioner's report, the BIA was not given the power to direct councils on how they should perform their statutory functions. The BIA did not have the power and ability to exercise necessary control over the immediate wrong-doer and that is in stark contrast to the position in *Couch* where it was envisaged that it would be necessary in order for a duty to be

imposed for a – to any ultimate plaintiff that the wrong-doer had the ability to impose, have power and ability to exercise control over the immediate wrong-doer.

The Act's philosophy of non-prescription meant that the Code dealt in outcomes not the means to achieve those outcomes and that is why the BIA could not, and did not, other than through the quasi-legislative mechanisms like approving documents, engage in directing councils as to how the Code's objectives were to be achieved and nor was the BIA given power to direct the design of individual buildings or to assess the quality of workmanship or to inspect individual buildings for code compliant purposes in the way that the Council had to do. Those operational matters vested solely with the councils and private certifiers and significantly, and I reinforce, the BIA had no power to take any enforcement action against non-compliant building owners or against non-performing councils.

Now suing the BIA. The BIA was subject to both statutory appeal processes and judicial review. It's clearly spelt out in section 52(9) and 86 of the Act. The Commissioner's and Parliament clearly contemplated that the BIA would be subject to review by a product manufacturer aggrieved at the way the BIA dealt with a product application. Similiarly the BIA might be sued by a certifier aggrieved at the way in which an application to become a certifier was dealt with by the BIA and both of these instances are referred to by the Commissioners in their report. However, there is no provision that can be clearly pointed to in the Act that says that the BIA would share the liability of councils for individual building failures. Plainly the Commissioners envisaged that the BIA would take out limited insurance to protect itself against the types of claims which I've just identified but that type of insurance plainly related to the way in which – did not relate to the way in which the Council exercised its functions and it was not envisaged by the Commissioners or in the legislation that the BIA would be sharing liability with the councils when the councils failed in their statutory duty to either properly inspect, certify or approve the construction of a defective building. The Act reflects the recommendations of the Commissioner that councils would bear responsibility for ensuring compliance with the Code and be accountable if they failed to do so.

Your Honours that finished my first piece under proximity and I was going to move on now to what I've called the lack of relationship between the plaintiff's loss and the BIA's alleged duty to the Council. Unless I can assist your Honours any further in relation to the structure of the legislation, the Commissioner's report.

ELIAS CJ:

No thank you.

SOLICITOR-GENERAL:

And the various statutory responsibilities. One of the striking features of this particular claim is what I would describe as a significant disconnection between what the plaintiffs have claimed was the cause of their loss and now what the Council claims in relation to its action against the BIA as fifth, third party, I will demonstrate that quite significant difference in a few moments, but before doing so, it's important to emphasise that in this context, the points which I'm making go well beyond questions of causation.

This part of my submissions focuses upon the scope of the duty by pointing out the lack of nexus between any alleged breach by the BIA of its duties and the Council's actual alleged loss. This point was made very well by Lord Bridge in *Caparo*. If I can take your Honours to the bundle of authorities, volume 2, tab 20, page 600, sorry, I have the case page number, 627, it's 544 of the paginated number system.

ELIAS CJ:

Sorry, can you give me the page number again?

SOLICITOR-GENERAL:

Yes, paginated page number 544, your Honour and the particular part of the judgment which I emphasise is at line, anyway, between C and D, commencing, "It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless. The question is always whether the defendant was under a duty to avoid or prevent that damage, but the actual nature of the damage just suffered is relevant to the existence and extent of any duty to avoid or prevent it and a –

TIPPING J:

This is effectively what we said in *Carter* although not in quite such elegant terms.

SOLICITOR-GENERAL:

And you also, I think, hinted at it fairly directly in *Couch* as well, at paragraphs 83 and 85 of your judgment, your Honour. The same point was made just as forcibly in the *Bank of New Zealand v New Zealand Guardian Trust Co Limited* case which is under tab 17 of the same volume and again at page 683 of the case, I'll give you the paginated number in a moment. This is the judgment of Justice Gault and it's at page 449 of the tabulated version. And it's at line 20, "The scope of a duty to inform or inform correctly has not commonly been found to extend to protect against losses arising from some independent cause where breach of the duty merely creates or preserves the circumstances in which that loss can be incurred.

Now, we've heard a lot in the last day and a half about what the Council claims against the BIA. What hasn't been examined is what the Council is actually liable for, namely, what was the damage that the plaintiff say that they suffered as a result of the Council's failure to either properly certify, inspect or approve the construction of the Grange. Rather than taking your Honours rather laboriously through many pages of the statement of claim, what I have done is I had prepared a table which highlights the claims by the plaintiffs against the Council and then compares that with the claims which the Council makes against the BIA.

Now, the box in blue is the plaintiff's claim against the Council and we're extracted, very methodically from their statement of claim what it is they say was their loss as a result of the Council's negligence and it's very instructive to go through each of those alleged losses which the Council has now settled with the plaintiffs over. Because one could be left with the impression that this case was all about the BIA failing in 1995 to tell the Council that there was a problem with monolithic cladding being placed over untreated timbers, frames. In fact, when one actually examines the loss that the Council is liable for, and that can be the only loss that Council can claim against the BIA, one sees that the actual loss relates specifically to shortcomings on the Council's part in failing to properly approve but more realistically, properly inspect the Grange and to identify a whole range of defects that have got absolutely nothing to do with monolithic cladding. The defects include roofs with defects, including cap flashings that lack any adequate fall, incorrect lapping of roof cap flashings, glued joints between the metal cap flashings and Butanol that have failed and roofs lacking any adequate support fixing, causing them to fold inward and allow wood –

YOUNG J:

This is all in the context of a building that was constructed of monolithic cladding face fixed on untreated timber?

SOLICITOR-GENERAL:

That is so Sir, but the specific defects are not cladding on untreated timber, the specific defects are failing to detect –

YOUNG J:

Well, some of the references are to cladding –

SOLICITOR-GENERAL:

Some are to the cladding yes.

YOUNG J:

And some of them are pretty familiar.

TIPPING J:

But you're saying there's been a settlement for an indiscriminate amount of which we have no idea of how much relates to what, is that the –

YOUNG J:

No, I think what the solicitor is saying is that this is basically a series of botched inspections, not really excusably particular to monolithic cladding, but it's at a level of detail that's disconnected from the high level review in 1995, correct? Is that right?

SOLICITOR-GENERAL:

Correct.

TIPPING J:

Well, some of it might be, some of it may not be. Are you able to demonstrate, for example, if they were put off guard, what about the fourth in number 1? "Failed to adequately detail the waterproof membrane," et cetera. Now that could easily be related to – I just picked that one up at large and I dare say they're some of your kind and there are probably some that Mr Goddard will say, well, they're within and how on earth are we going to determine that?

ELIAS CJ:

Cladding, there doesn't have to be exact coincidence, though?

SOLICITOR-GENERAL:

No, there doesn't have to be exact coincidence but clearly there has to be a nexus and the BIA cannot be held accountable for loss –

YOUNG J:

You say this is a series of operational botch ups that are very particular and there's a sort of, to the extent to which there's a nexus, it's a rather shadowy one between what happened in 2000 and the 1995 report.

SOLICITOR-GENERAL:

Absolutely.

TIPPING J:

Well I agree with you in principle Mr Solicitor. They have to show that your negligence, assuming there's a duty et cetera, has led to at least some of the defects, put them off guard so that they missed some of these things.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Well why is it a causation issue?

SOLICITOR-GENERAL:

Well it can be both a causation and a scope of duty issue your Honour. Like so many aspects of the law of torts there are overlaps and that's why I took your Honour to Lord Bridge's statement in *Caparo* and to what Justice Gault said in the New Zealand case where they recognised –

ELIAS CJ:

Those were general statements about the need to have – to be able to demonstrate the damage followed from the alleged breach.

SOLICITOR-GENERAL:

As part of identifying the duty of care.

ELIAS CJ:

The scope, because you have to establish the scope of the duty of care.

SOLICITOR-GENERAL:

Correct, yes.

ELIAS CJ:

But if there is – if some of these matters come within the allegation against the BIA, the extent of it will depend on the facts, won't it? I mean what was it attributable too? What was, what were the leaks attributable to?

SOLICITOR-GENERAL:

Entirely due to the council either not understanding what it was doing when it issued the approval to construct the particular building, but more particularly in not inspecting properly so as to be able to detect these deficiencies in the construction.

ELIAS CJ:

The right of the claim against the BIA is that it didn't understand because it wasn't warned by the expert supervisory body. That's the case.

SOLICITOR-GENERAL:

Yes but this was all done independently of the BIA by a body exercising its statutory duties and powers.

ELIAS CJ:

I understand that argument, yes.

SOLICITOR-GENERAL:

And in my respectful submission if the case was BIA had a duty to warn us in 1995 of the dangers of applying monolithic cladding to untreated timber frames, and that was what the plaintiffs were saying the Council had failed to do, I could see the nexus. But when goes through the detailed list of complaints which the plaintiffs have against he Council, one doesn't get into that area of concern. One gets into areas of

concern which relate specifically to the way in which many aspects of this building were botched to use Justice Young's –

TIPPING J:

When I did a similar exercise, Mr Solicitor, before we sat I thought there was a degree of dissonance but there was a degree of nexus if you like and how one is going to sort that out, it's very helpful to have this chart, but I think in the end one might have to go through the statement of claim to see exactly how it's been pleaded, if this point is a live one. That was my impression, that there was a degree of dissonance, that you couldn't pass on, but there were some things that were pleaded in such a way that you could see them as deriving from the putting off guard aspect.

SOLICITOR-GENERAL:

Well they're not obvious from the plaintiff's claim your Honour.

TIPPING J:

All right.

ELIAS CJ:

But one wouldn't expect them to be obvious from the plaintiff's claim but it's for the defendant to make out, as a matter of fact, that it was misled by the BIA into the defective performance.

TIPPING J:

And that whatever of this can reasonably be referable to that can be passed on –

ELIAS CJ:

Yes, in part.

TIPPING J:

In part, yes.

ELIAS CJ:

Maybe not in whole.

TIPPING J:

Well, may be, exactly. There'll be an apportionment of liability but there will also have to be an examination as to how much of this can reasonably be related to your client's alleged negligence.

SOLICITOR-GENERAL:

Yes. your Honour, one must not lose sight of the fact that this is a third party claim. This isn't an allegation directly of negligence so therefore as a third party claim there is either a seeking of contribution or there is a seeking of damages that are highly – that co-relate highly to the damage which the plaintiff claims from the defendant. One can't just have two parallel claims in the one proceeding under the guise of a third party claim.

ELIAS CJ:

Well the Council's loss is the damages it has to pay to the plaintiff so there has to be that connection.

SOLICITOR-GENERAL:

Yes, but I'm concerned your Honour that you and I aren't quite on the same wavelength at this particular moment and can I just make the point, perhaps in a slightly different way, plainly the Council can only claim from the BIA that which the Council is liable for. To ascertain what the Council is liable for, one has to understand what they did wrong.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

To understand that one goes to what the claim is against the Council and that's the only documentation we have which spells out what the plan is and in my respectful submission there is quite a disconnection between what the plaintiffs alleged the Council failed to do and what it is that the Council is planning from the BIA.

ELIAS CJ:

But there is some overlap and as long as there's some overlap, where does this argument go? Except why is it more than a causation argument?

SOLICITOR-GENERAL:

Because it goes to scope of duty, your Honour.

TIPPING J:

Well, whether it goes to scope of duty or causation, to get it struck out, don't you have to show that beyond a shadow of a doubt, none of these things can possibly relate to your negligence, assumed negligence for the moment.

SOLICITOR-GENERAL:

Assumed negligence, thank you. And I'm not so sure I have to go so far as beyond a shadow of a doubt –

TIPPING J:

Well, all right, yes, but that's the others perhaps, Mr Solicitor, but that sort of thing. Now, what about SU3, for example, home owners, this is right at the very bottom of that page, now, what are we to make of that, weathertightness?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

I mean this is a classic factual issue, isn't it?

SOLICITOR-GENERAL:

Well, obviously I don't want to engage in a factual exchange with the court, but what I can do is point out that there is a lack of symmetry between what the plaintiffs claim from the council and what the Council plans from the BIA?

BLANCHARD J:

Well, the plaintiff's claim may be a bit wider, but it seems to me that there's an awful lot of commonality. The more I look at this there seems to be commonality. Clearly the plaintiffs are making some complaint about weather proofing and cladding and that's what the third party claim is all about. If you look at the right-hand side of the page, so I'm like the Chief Justice, I'm not on the same wavelength.

SOLICITOR-GENERAL:

Well, I'll get off the wave then. In the time that's available I will start the third item that I wanted to deal with in terms of proximity and policy, no reasonable reliance on

the 1995 report by the Council and as your Honour Justice Tipping mentioned in *Carter*, whether it is reasonable for the plaintiff to place reliance on what the defendant says will depend on the purpose for which the plaintiff relies on it. If a statement is made for a particular purpose it will not usually be reasonable for the plaintiff to rely on it for another purpose and I think that that proposition would be regarded as completely acceptable and it echoes what we said in *Caparo*, the section which my friends took your Honours to yesterday, the four point proposition from Lord Oliver in *Caparo* points 2 and 3 emphasise that the advisor knows either actually or inferentially that his advice will be communicated to the advisee either specifically or as a member of an ascertainable class. In order that it should be used by the advisee for that purpose, for that particular purpose and the third proposition is that it is known either actually or inferentially that the advise so communicated is likely to be acted upon by the advisee for that purpose without independent enquiry and I emphasise the words without independent inquiry. The purpose of the 1995 report, the 1995 report was prepared for the Minister but made available to the Council and –

BLANCHARD J:

Do I take it that it did go to the Minister or a report in some form went to the Minister?

SOLICITOR-GENERAL:

Your Honour I have always assumed that it has gone to the Minister, I have not made that enquiry. I will make that enquiry but I have always worked on the assumption that it went to the Minister. But I will make that enquiry. It was primarily prepared for the purposes of a report for the Minister.

WILLIAM YOUNG J:

A report for the Minister was only necessary if the BIA thought that there was a problem, is that right?

SOLICITOR-GENERAL:

That's correct, under section 29.

WILLIAM YOUNG J:

So it may be a report for determining whether there should be a report to the Minister?

SOLICITOR-GENERAL:

Yes, that's probably, and thank you your Honour. That, I think, is probably a more accurate way of expressing it because as there was no major earth shattering defects found in 1995, there were defects found but they weren't of the nuclear type that we've been referring to earlier.

ELIAS CJ:

Or that eventuated.

SOLICITOR-GENERAL:

Yes but I will make some enquiry your Honour. I just had assumed that it was a report –

TIPPING J:

If it wasn't a report for the Minister in terms of the section that required it to go to the Minister if –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– then was it a gratuitous report to the Council?

BLANCHARD J:

Isn't it a record of the authority's review, rather than actually being a report as such? Unless, of course, as my brother says, it became a report to the Council?

SOLICITOR-GENERAL:

Well can I invite your Honours to go to the case on appeal, that's the purple volume, volume 3, at page 341, paragraph 1.02. I can't do any better than – or go beyond what is stated there. I interpret the first sentence to mean that the first purpose of this review was to enable the BIA to discharge its responsibilities to the Minister. To be able to advise the Minister on operating methods and consider any legislative changes that might be helpful.

TIPPING J:

Sorry, I was making a note on something else Mr Solicitor. We're in purple volume, tab?

SOLICITOR-GENERAL:

Tab 18 and page 341, paragraph 1.02. So the first half of that paragraph, in my respectful submission, is indicating that the purpose of the review is to help the BIA in deciding what, if any, information it needs to give to the Minister about legislative changes or other changes that might be helpful. The second part shows that it was to be made available to the seven territorial authorities, I think there were seven that were involved, to assist –

ELIAS CJ:

So the next page?

SOLICITOR-GENERAL:

Yes, territorial authorities to assist them in evaluating their own internal procedures and to assist with achieving the national uniformity and increased efficiency envisaged by the control reform.

TIPPING J:

On page 338 it's described as a report for the North Shore City Council.

SOLICITOR-GENERAL:

Yes I have highlighted the word "for" your Honour. All I can say is it's obviously been prepared by NZS.

ELIAS CJ:

It may in fact be of some moment.

SOLICITOR-GENERAL:

The word "for" your Honour?

ELIAS CJ:

Well the, whatever this report was because on one view it's a record of a clean-ish bill of health that is provided to the territorial authorities to assist them in determining whether their own internal processes are adequate.

SOLICITOR-GENERAL:

Yes, well I know it's been described as a clean bill of health –

ELIAS CJ:

Is that where it popped into my mind from. Mr Goddard's submissions.

SOLICITOR-GENERAL:

That's a matter for submission and I will have a contrary submission to make –

ELIAS CJ:

Yes, I understand that.

SOLICITOR-GENERAL:

– as your Honours will appreciate but I accept, your Honour, and perhaps now that it's 1 o'clock I can just make some further enquiries because I'm sorry I had made some assumptions –

ELIAS CJ:

Yes, I had too, I must say Mr Solicitor but it does seem to me that it probably is the stage before that and that it is a record that the BIA has conducted a review and has decided that no report is necessary to the Minister and that it serves also the purpose of assisting the territorial authorities in terms of their internal processes.

BLANCHARD J:

Judging by 1.02 it must have all along been the intention to provide a copy of this to each of the territorial authorities. It says, it was also proposed.

SOLICITOR-GENERAL:

Yes proposed by –

BLANCHARD J:

In other words it's not being proposed now, some time in the past it was proposed. The work we do, "we" being Joyce Group, will be provided to the – will be made available to the territorial authorities.

SOLICITOR-GENERAL:

All I can say Sir is possibly.

TIPPING J:

It's clearly not a subsection (3) report.

SOLICITOR-GENERAL:

No.

ELIAS CJ:

Which does perhaps raise some of the issues that Justice Young has been speaking about. if it isn't the report envisaged under the legislation. What is section 15(1)? I see the report is commissioned under that. Is that simply the power to commission reports?

SOLICITOR-GENERAL:

No that's the power to conduct reviews your Honour.

ELIAS CJ:

I see. Thank you.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.13 PM

ELIAS CJ:

Yes, Mr Solicitor.

SOLICITOR-GENERAL:

Thank you very much, your Honours. Can I just give the court an indication as to how much longer I propose to be and how long I think the hearing will take?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

My best estimate is I'm likely to conclude around about 4 o'clock this afternoon and I would think that the fixture would be over by midday tomorrow, at the latest.

ELIAS CJ:

Excellent, thank you.

SOLICITOR-GENERAL:

Now, just prior to lunch, His Honour Justice Blanchard was asking me what was the purpose of the review, was it one, was one ever sent to the Minister and I'm very grateful to both Ms Scholtens and Mr Goddard who remind me that there is an explanation in the case on appeal and can I invite your Honours to go to volume 2 which is the smallest volume that you have, the red one, to tab 12 and in particular to pages 294 and 295, this is an affidavit in support of the application to strike out from Mr Porteous, the former chief executive of the BIA.

TIPPING J:

So, just the page here?

SOLICITOR-GENERAL:

Yes, page 294, your Honour, under tab 12. Now, I accept that there are probably a couple of paragraphs in here which are more aptly described as submission rather than statement of fact and there are probably some that are statements of law. However, I invite the court to turn a slightly blind eye to that –

WILLIAM YOUNG J:

So the report is actually that of the reviewer sent to the authority and provided to the TA?

SOLICITOR-GENERAL:

Yes, according to this. But can I answer very specifically, Justice Blanchard, no report appears to have ever been sent to any minister. Whilst the report is called a report of the North Shore City Council, one could reasonably conclude that as there were seven reports, each with common sections and each with separate sections, it would be at a – it would be understandable to describe each section as being for an individual territorial authority, but that doesn't mean to say it was prepared specifically for that territorial authority, it was prepared in relation to and it does appear that the reports were prepared as part of the high regulative function to assist the BIA in its priorities under section 12 of the Act. I do recall actually reading that affidavit at the time we were preparing our submissions and I'm sorry to you,

Justice Blanchard, I had completely forgotten when you asked me the question. If I can just return to the skeleton of my argument, we were up to three bullet point three and I was then going to move on to the recommendations in the 1995 report. The recommendations are in volume 3, tab 18 at page 353.

ELIAS CJ:

Sorry, volume 3, was it?

SOLICITOR-GENERAL:

Yes, that's the purple volume, your Honour, case on appeal, volume 3, tab 18 at page 252.

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

Now, my friend made reference to a couple of the recommendations but I invite the court to look very, very carefully at what in fact the BIA was saying to the council on this occasion. Firstly that the council had an internal reviewing system implemented to monitor its performance with respect to compliance with the building code. That there be monitoring of both the vetting and field inspection processes by the Council during the implementation of the new scheme to establish if the staffing structures are adequate to provide effective code of compliance and field inspection service delivery. If performance is not considered to be satisfactory, additional resources may be required. The field inspection group appears to be short of resource. During on site inspection, more careful attention should be paid to installation details of material to the manufacturer's recommendations with particular reference to durability. Field inspectors must ensure that the as built construction on site is as per the approved documents. Builders must be encouraged to keep approved documents on site and I'll skip over to recommendation 9. Monitoring of construction review producer statements should be implemented. That, in my respectful submission, is not a clean bill of health. Those are recommendations which if followed on the Council's analysis may very well have avoided the problems which the Council found itself – I'll go no further –

TIPPING J:

They're pretty general. They don't focus on the sort of issues that the Council puts forward, if you like, as matters that put it off guard.

SOLICITOR-GENERAL:

Well even if they are general, if they had been complied with then the Council would have been in a very solid position to mitigate the loss which subsequently occurred some three to four years later.

ELIAS CJ:

Which recommendations do you say would have equipped the Council to deal with the matters in issue here?

SOLICITOR-GENERAL:

The improving of field inspections in particular your Honour. To assess building construction in compliance with the durability elements of the Code.

ELIAS CJ:

Sorry is that number 2?

SOLICITOR-GENERAL:

Yes it's 2, 3, 4 and an element of 1 as well your Honour.

ELIAS CJ:

What about monitoring, is that what – do you take by that inspection?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Well it's monitoring of inspection that's being talked about here, isn't it?

SOLICITOR-GENERAL:

Yes it is your Honour. I take it to mean to enhance the quality of the inspections through a system which will ensure that the inspectors are doing their job properly.

TIPPING J:

There's nothing specific here as to what they should be on their guard against that I think is the nub of the complaint against you.

WILLIAM YOUNG J:

There wasn't a leaky building syndrome problem then. As at 1995?

SOLICITOR-GENERAL:

As at 1995.

TIPPING J:

Well that's a matter of –

WILLIAM YOUNG J:

The 1994 untreated timber approved solution had just – acceptable solution had just come in, hadn't it?

SOLICITOR-GENERAL:

Yes. your Honour Justice Tipping, the Council's case is that in 1998 the BIA was put on notice by a company called Prendos.

TIPPING J:

Prendos, yes I appreciate that.

SOLICITOR-GENERAL:

1998.

TIPPING J:

But they were specifically put on notice –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– but I didn't understand them to accept that there was, no one could possibly have had any knowledge of these issues as at 1995. That seemed to me, with respect, to

be the gravamen of their complaint. Whether it's a valid complaint is quite another matter, it's a matter of fact.

SOLICITOR-GENERAL:

All I can say Sir is that there was – this could not be construed as a clean bill of health.

TIPPING J:

I accept, yes, that's a valid point.

SOLICITOR-GENERAL:

And that's the very point that I'm trying to make.

TIPPING J:

That's a valid point, yes.

BLANCHARD J:

As of 1995 the change to the standard which allowed the use of untreated timber had only just come in.

SOLICITOR-GENERAL:

In 1994 if I understand it correctly Sir.

BLANCHARD J:

In 1995 according to what I've read.

WILLIAM YOUNG J:

It's got a date 1994 but when was its operative date?

SOLICITOR-GENERAL:

Well –

BLANCHARD J:

In one of the judgments, an earlier judgment in an earlier case, 1995 is referred to. But in any event the report was very soon after that.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

But they wouldn't be alleging negligence against you if – well I suppose they theoretically could, but we have to assume, don't we, that this was a negligent report. The issue is – because that's what they plead. Now the issue is whether they owed you any duty at that time or at any time.

SOLICITOR-GENERAL:

Whether we owed them a duty Sir.

TIPPING J:

Sorry, yes.

SOLICITOR-GENERAL:

That is the, that is true Sir.

TIPPING J:

Right well I just have some hesitation about accepting the premise that you put as to what their case is. No doubt Mr Goddard will clarify this in his reply.

SOLICITOR-GENERAL:

Thank you Sir. Interestingly enough the one building which is said to have been similar to the Grange is specifically referred to at pages 362 and 363 of the paginated volume.

BLANCHARD J:

Yes it's *Sacramento* paragraph 28, 1995.

SOLICITOR-GENERAL:

Thank you very much Sir. I accept that.

TIPPING J:

So 6 City View Terrace, Birkenhead is *Sacramento*?

ELIAS CJ:

No.

SOLICITOR-GENERAL:

No.

ELIAS CJ:

He could simply be repeating an error in the judgment.

BLANCHARD J:

Surely not. No I have actually seen the reference to 1995 elsewhere.

SOLICITOR-GENERAL:

It is true, of course, that none of the recommendations dealt specifically with this monolithic cladding or watertightness issues. However, in my respectful submission, the key recommendations were that the Council needed to take more care in carrying out its statutory functions. What the Council is really trying to say is that by the BIA not being more explicit about the Council's shortcomings in 1995, the BIA was by implication approving the Council's practices in 1995. And this could be construed as an allegation that the Council omitted to perform its discretionary function to disseminate information to the Council, pursuant to the power to do so under section 12(g) of the Act.

In that respect it's worth reconsidering the key principles from *Stovin v Wise* in which it was held that the minimum pre-conditions for holding its statutory powers give rise to a duty of care would be that it would be irrational in a public law sense not to have exercised that power unless there were exceptional grounds for holding that the policy of the statute required compensation to persons who suffered loss because the power was not exercised. And in my respectful submission the allegations fall well short of that threshold set in *Stovin v Wise*.

Now those were the submissions I was proposing to make under the heading –

ELIAS CJ:

Do you want to elaborate on that submission because I'm not sure, for myself, I would accept it without more discussion.

SOLICITOR-GENERAL:

I'm quite happy to go to *Stovin v Wise*. It's in the bundle of authorities 6 –

ELIAS CJ:

No I understand that it's authority for that but why should we accept that position? That public law irrationality enters into this?

SOLICITOR-GENERAL:

Because what is being invoked, if it focuses upon the alleged failure to disseminate information under section 12(g), is the alleged failure to exercise a discretion of a statutory nature and the – because it is discretionary and because it is statutory in nature, *Stovin v Wise* and other authorities would hold that before you could find an intention to hold the authority liable for failing to fulfil that statutory duty, there would be an extremely high threshold required and Lord Hoffmann for the majority there referred to that in terms of public law irrationality.

ELIAS CJ:

I'm not sure that it's useful to muddle those concepts myself but I do understand that that's the way he addressed it.

SOLICITOR-GENERAL:

Yes.

WILLIAM YOUNG J:

It's not really an omission to exercise a public law function. The BIA had a public law function under section 15(1) of reviewing territorial authorities. It carried out that public law function in a particular way and the complaint is that it owed a duty of care – or the allegation is it owed a duty of care to the local authority in the exercise of that function, perhaps triggered by its decision to share the report with the authority. So it's not quite *Stovin v Wise* but it's similar because there's still an issue. You've got essentially a public law function being performed. Does the public authority performing the public law function have a duty of care to those who authority performing a public law function have a duty of care to those who might be adversely affected. Does the Maritime Safety Authority, whatever, Maritime New Zealand have a duty of care to the people of the Bay of Plenty in relation to the way in which they deal with maritime disasters. Perhaps they do because they're more closely involved with the actual dealing with it than someone who is more removed but it's still that same sort of issue, isn't it?

SOLICITOR-GENERAL:
Yes I don't take any issue with what your Honour has just said.

WILLIAM YOUNG J:
And there aren't many cases where a public law function exercise has been held to be subject to a duty of care where it's at a policy level or where it's removed from the nitty gritty of what causes the problem.

SOLICITOR-GENERAL:
Yes and –

TIPPING J:
There's a major difference, in my understanding, between failing to act at all and choosing to act but acting negligently.

SOLICITOR-GENERAL:
Yes and the second and third causes of action, and in particular the third cause of action, is really an allegation of a breach of a duty arising through an omission to fail to correct an earlier omission. So it's an omission on top of an omission allegation but I want to deal specifically with the third cause of action quite separately later because it raises some quite unique problems of its own. I'm not certain if I can assist your Honour Justice Young any further at this moment.

I was now going to move on to the absence of an assumption of responsibility by the BIA and in *Couch* this court placed considerable emphasis on power and control. At paragraph 82 the question is posed, "Did the defendant have sufficient power and ability to exercise the necessary control over the immediate wrong-doer. Unless that is so it would be inappropriate to impose a duty of care on the defendant in favour of the plaintiff fulfillment of which necessarily requires that power and ability." I'm quite happy to take the court to the passage of the judgment but it's one that I'm sure will be well known to you.

Here the BIA is even further removed from asserting control over the immediate wrong-doer than the probation officer in Ms Couch's case. Ultimate control here lay

with the Minister pursuant to section 29 of the Act. But this is not the sort of control that was to be exercised in respect of the specific building such as the Grange. Like the Commissioner in *Yuen Ken Yeu*, the Privy Council case which I will be taking your Honours to later, the BIA had no power to control the day-to-day activities of those who caused the loss and damage. Just for current purposes *Yuen Ken Yeu* is at volume 6 of the bundle of authorities at tab 53. And on this same point I refer to the court to *Sacramento* at paragraph 42 where your Honour Justice Young observed that the further removed the public body is from day-to-day physical control over the activity which directly causes the loss, the less likely the courts are to impose a duty of care. And your Honour was citing *Yuen Ken Yeu* there.

It's axiomatic that statutory bodies such as the BIA are bound by their statute and can only assume – should only assume responsibility for what is expressly imposed on them by statute. The BIA could not assume a power or authority to undertake the statutory powers conferred upon the Council when the Council was issuing the building permit for the Grange, inspecting the Grange or consenting – or issuing the certificate of compliance once the Grange was completed. As the Court of Appeal recognised in *Sacramento* responsibility for ensuring individual buildings complied with the Building Code, logically rests with those with the day-to-day control and with those specific powers of inspection and certification.

In *Sunset Terraces* this court emphasised that these were matters that involved a great deal of control, those were the words used by this court at paragraphs 1 and 32 of *Sunset Terraces*, a great deal of control over building work by councils.

TIPPING J:

But here we have what I understand to be a statement case. That a statement made by the defendant to the plaintiff, for our present purposes, by the BIA to the Council. I don't understand how matters of power and control come into the question of assuming responsibility for the accuracy of one's statement, either voluntary or deemed.

SOLICITOR-GENERAL:

I accept that Sir. It doesn't come into that part of the equation but it does come into the equation in determining whether or not there is a duty of care for the ultimate damage which is caused by the intermediary.

TIPPING J:

Well one technique is to say, and not all agree with this, that if there is either a voluntary or a deemed assumption of responsibility, then that ex hypothesi leads to a duty of care. Now assuming that to be so for the moment I still don't understand how power and control – power and control arise where it is the – it's not a statement, it's a physical. It arises in physical cases where you've got the ability to control someone but if a statement is made directly from A to B, and A says they reasonably relied on it, et cetera, et cetera, et cetera, then I don't understand how these issues fall under this rubric of assumption of responsibility. I'm sorry, it's probably my fault.

SOLICITOR-GENERAL:

Well, no it's not your Honour's fault, and in many respects we're dealing with the opposite side of the same coin when we're talking about unreasonable reliance and assumption of responsibility. The two do dovetail together and it is quite conceivable to think of it more in terms of an absence of reliance, reasonable reliance, when one has a specific statutory duty to do certain functions. To say that because of representations made by another party, that other party ought to be responsible for all of our negligent failure to fulfill our statutory responsibilities, and that fairly and squarely is a question of absence of reasonable reliance.

TIPPING J:

I can understand the concept of the absence of reasonable reliance but where I – but I don't want to prolong this – I just thought I'd signal that I'm having difficulty.

SOLICITOR-GENERAL:

Yes, yes, I apologise Sir and can I invite you to think of it in terms of being the hand and glove of the same general issue of unreasonable reliance and no assumption of responsibility. Because the two are hand and glove.

TIPPING J:

All right, I'll do my best.

SOLICITOR-GENERAL:

Thank you Sir. And I have emphasised that the power of the Council contrasts quite markedly from that of the BIA in relation to individual buildings. The BIA's powers were essentially limited to advising the Minister under section 15 and 29. The BIA's powers did not extend to assuming any responsibility for directing Council employees

on how Council employees should discharge their statutory responsibilities relating to the building consent process.

As noted by the Court of Appeal in two very important paragraphs in the judgment from the court below, 50 and 53, in the context of the Act the principal scope of review, such as the 1995 review, was to enable the BIA to oversee the operation of the Act and to provide appropriate advice to the Minister. Any external enforcement was to be channeled through the Minister rather than the BIA. The review process did not confer upon the BIA any powers over the councils and the BIA did not assume any responsibility for the acts and omissions of the Council. So although the two concepts of no reasonable reliance and no assumption of responsibility have been dealt with, as I say, in tandem, I think they do need to be considered together.

I was now going to come on and deal with the absence of analogous cases and can I just say that subject to the court's indications to the contrary, I might be a little longer with this section than I have been with individual sections so far. I start again with the basic principle that whether or not a duty of care exists in analogous situations is a material factor in determining whether or not a duty should be imposed in the situation in issue. *Sacramento* at paragraph 37 and Lord Bingham in a case which is not before you but I'll read the citation *Customs and Excise v Barclays Bank Plc* [2007] 1 AC 181 at paragraph 20.

It is particularly telling in the present case that the Council cannot draw the court's attention to any genuinely analogous case in New Zealand or from cogent jurisdictions in which it has been held that a duty of care exists in circumstances similar to the present case, and I will be taking your Honours to two Canadian cases which also support that proposition. The Council does endeavour to garner support from, in its written submissions, from those cases in which auditors have been found to owe a duty of care when retained to carry out audits and in doing so have failed to detect fraud on the part of employees or failed to detect significant defects in systems. But that line of authority is really distinguishable because in those cases a duty of care was quite properly held to exist because the auditors in those cases had been retained to carry out a relevant audit and/or had direct oversight of the work in respect of which there had been negligence or fraud. So if we go to *BNZ v Deloitte*, which is volume 2 of the bundle of authorities at tab 16, it is clear that very little comparison can be drawn between the functions of the BIA in the present case and

the duty of care that the Stock Exchange had in that case in the way in which it expected its member brokers.

The Court of Appeal in the present case, at paragraph 51, readily distinguished *BNZ v Deloitte* for four reasons and I'll just go through those four reasons. The New Zealand Exchange had a specific duty to inspect its members. Secondly, it was an important purpose of the rules and inspection regime of the New Zealand Exchange to protect the clients of the member brokers. Thirdly, the Exchange was a commercial entity with some regulatory functions and more amenably to owing private law duties of care. And fourthly, the BIA in this case exercised its regulatory powers in the public good without asserting any oversight over the wrongdoing said to have occurred in relation to the construction of the Grange. So those are the four key factors which distinguish the conduct of the BIA in this case and Deloittes in the BNZ case which in the written submissions my friend placed so much reliance on.

In my respectful submission, when one goes through a large number of cases, the following principles can be deduced. Those cases which are similar in principle to the case before the court show that the courts and jurisdictions we like to compare ourselves with, have rejected claims which endeavour to create a private law duty of care on the part of public bodies which exercise general supervisory or regulatory powers, act in the public good, exercise a discretion, do not involve direct oversight of the alleged wrongdoing at issue, and involve allegations of omission as opposed to the negligent performance of a positive action. And these principles were well summarised in *Couch*, at paragraph 80 of *Couch* where it was said, "The law has traditionally been cautious about imposing a duty of care in cases of omission as opposed to

commission; in cases where a public authority is performing a role for the benefit of the community as a whole; and in cases where it is the actions of a third party rather than those of the defendant that are the immediate cause of the loss or harm suffered by the plaintiff."

The role of the BIA in the present case can be more accurately equated with the roles of a number of other public bodies which have been held not to owe a duty of care of the kind advocated by the Council in the present case. I will briefly go though just some of the key ones. *Fleming v Securities Commission*, which is in volume 3 at tab 25. I'm sorry the court will be reasonably familiar with most of these cases and I

apologise if I just very briefly summarise them in a few sentences. If there is any issue or concern please do not hesitate to raise it.

There the plaintiff had lost money in an investment regime which had been illegitimately marketed. The Commission was aware of the scheme and took limited, and what was described as ineffectual steps against the promoters of the scheme. The plaintiff sued in negligence alleging a duty of care based on the proposition that the Commission had been on notice of the illegitimate scheme but had not acted appropriately. His Honour Justice Richardson was most influenced by the concern that the Commission was a public body vested with a discretion as to how it went about its numerous functions and to place a duty of care on the Commission would constitute interference with that discretion. So from that judgment I take two of the five principles I articulated earlier. Acting in the public good and exercising a discretion.

The next case I refer the court to is *Carter*, the well known –

ELIAS CJ:

Was there a difference in approach in that case? *Fleming*, you've just cited from one judgment. Are the other judgments consistent with that?

SOLICITOR-GENERAL:

From my memory yes your Honour I think they were consistent but if –

ELIAS CJ:

No it's all right.

McGRATH J:

I think Justice Cooke was more concerned with causation.

SOLICITOR-GENERAL:

Right, yes, I'm sorry your Honour, yes it's coming back to me now. Yes, however Justice Richardson was the – wrote for the majority in that particular judgment, I think.

ELIAS CJ:

I think two of the other Judges concurred as well as writing separately.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Yes, I think that's right.

SOLICITOR-GENERAL:

Yes. Very helpful. The next case I was going to refer to is *Carter* which is in tab 12 of volume 2 of the bundle of authorities. I'm sorry to be repeating this particular case which is extremely well known to members of the court. For completeness the plaintiff had purchased a vessel which had been the subject of a survey certificate issued by agents of the Ministry of Transport. The vessel was seized by the Auckland Harbour Master and sold for scrap and the issue before the court was whether the issuer of the certificate owed a duty of care to purchasers of the vessel to protect their economic interests. The court held that the issuer of the certificate owed no duty of care to the purchasers of the vessel because the purpose of the certificate was protection of public safety not protection of economic interests. And I place the emphasis on this, the public regulatory body should be free to perform their public safety role without fear of collateral attack from those who wish to protect their economic interests.

Cooper v Hobart, which is –

ELIAS CJ:

Do you say that that's the same in this present case?

SOLICITOR-GENERAL:

From these cases, your Honour, I draw the five principles which I articulated at the beginning of this section.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

So not all five principles are going to be found in one case. *Cooper v Hobart*, a Supreme Court of Canada case which has been referred to in passing. The plaintiff

sued the registrar of mortgage brokers for losses suffered as a result of the registrar allegedly not responding quickly enough to suspend a particular mortgage broker. The Supreme Court held the lower courts decision striking out the proceedings – upheld that decision and in doing so noted that the regulatory regime required the registrar to balance a myriad of competing interests in order to protect the public as a whole and their decision to suspend a broker involved quasi-judicial elements inconsistent with private law duty of care being owed to the plaintiff.

Yuen Ken Yeu v Attorney-General, which is at volume 6, tab 53. There the plaintiffs lost money which had been deposited with a company registered by the Commissioner of Deposit-taking Companies in Hong Kong and they sued the Crown alleging reliance on the company's registration and the Privy Council upheld the decision striking out the proceedings. The commission had no statutory power to control the power. There was no sufficient proximity between the plaintiffs and the commission to create a duty of care. The emphasis there being on the regulatory body's lack of control.

I have already mentioned *Stovin v Wise* and I will probably come back to *Stovin v Wise* a little later so I won't detain the court longer than necessary on that.

But I do want to take the court to two Canadian cases. One is *Holtslag* which is in my friend's supplementary bundle of authorities under tab 4. This is a judgment of the Alberta Court of Appeal. The facts are as close to this case as we have seen. The plaintiffs owned homes with roofs built from untreated pine referred to as shakes in the judgment, we'd call them shingles, which decayed prematurely and the plaintiffs sued the provincial director of building standards alleging that he had breached a duty of care to owners, to them when issuing product listings authorizing the use of shingles. And there was also a claim that he had failed to warn them and disclose information which he possessed. However, the Alberta Court of Appeal agreed with the trial Judge that there was no duty of care because, and there are about 10 reasons which I'll just very quickly go through, there were no analogous –

ELIAS CJ:

What page are you at?

SOLICITOR-GENERAL:

At paragraph 20, there were no analogous cases imposing a duty. Secondly, at paragraph 21, there was no direct relationship and therefore no proximate relationship between the director and the consumers of various listed building products. Thirdly, at paragraph 23, the circumstances were more akin to a statutory regulation of mortgage brokers which the court had found had no duty of care owed to members of the investing public, in the case I have just referred to. At paragraph 27 the appellant's attempt to draw comparisons to cases dealing with building inspection was rejected on the basis that the proximate relationship between the appellants and the respondent is not similar or analogous to that of a building inspector and a property owner. A building inspector has a direct relationship based on direct contact with an individual house owner or purchaser who suffers an ultimate loss. The inspector's duties, which are mechanical or supervisory could result in liability but on a case by case basis. These are not analogous to the acts of the director in issuing a product listing. The director is not performing a mechanical or supervisory task.

At paragraph 31, the director's decision to issue a product listing is a policy legislative power. I'm not saying that that's comparable to the present case. At 35, there is nothing in the statute that could be said to give rise to a private duty as opposed to a general public duty. At 38, the director's duty is to the public as a whole and at 42 and 44, recognition that the duty pleaded would create the specter of an unlimited liability to an unlimited class. It's a matter which I'll refer to later when dealing with the nature of the risk in the present case.

TIPPING J:

A closer analogy would be if this case had involved a letter written by the director to the homeowner saying, "Go ahead and use these shakes, they're fine."

SOLICITOR-GENERAL:

Possibly.

TIPPING J:

I'm not sure what Their Honours would have made of that, this is quite a long way from what arguably is the case you're facing.

SOLICITOR-GENERAL:

Well I accept that there are differences but it is probably about as close as we've got to. Now can I just simply say that *Holtslag*, there was an application to leave to the Supreme Court. That application was declined. The Supreme Court of Canada is not in the habit of giving extensive reasons for dismissing applications for leave to appeal. It's very summary in its dismissal of the application.

Can I just draw the court's attention to another case which followed *Holtslag*. *McMillan v Canada Mortgage and Housing Corporation*, 2008 BCCA 543. I'll make this case available to the court but it is another example of an Appellate Court, this time the British Columbia Court of Appeal, following the reasoning in *Holtslag*.

These cases, in my respectful view, all illustrate that the courts have consistently rejected claims which would create a private law duty of care on the part of public bodies which are, as I said earlier, exercising general supervisory or regulatory powers. Acting in the public good to quote Justice Richardson. Exercising a discretion and don't involve, and I place particular emphasis on this point, do not involve direct oversight of the alleged wrong-doer at issue and involved in an allegation of an omission as opposed to the negligent performance of an action, and that's from *Stovin v Wise* that particular point.

To that can I also emphasise that in response to the question which Justice Blanchard asked my learned friend this morning when he asked for a case which was as close as he could find to the present, another qualification, and that is not only do we not find any case along the lines that your Honour asked about but we also don't find any case in which the wrong-doing has been committed by a body with a statutory duty to perform the functions which were the direct cause of the damage in question. And that is very pertinent to the present circumstances.

I emphasise that point because that is the clear point of distinction between *Imperial Tobacco v Canada* that my friend placed so much reliance upon yesterday afternoon and the present case. Here it was the Council, as I have said probably too often, that had the specific statutory duties to do things which weren't done and which caused the homeowners loss. In *Imperial Tobacco v Canada* there was no statutory duty on the part of Imperial tobacco, BAT or any other of the tobacco manufacturing companies. They weren't charged with a statutory duty to do or not to do the things which caused the damage to the consumers in that particular case and I respectfully submit that that is a very important distinction, even though ultimately

Imperial Tobacco v Canada can be cited as supporting our overall proposition because the proceeding was struck out anyway.

I want now to move on to the nature of the risk and can I say that I'll be relatively quick with these points. I have mentioned *Stovin v Wise* on more than one occasion but there is an aspect to *Stovin v Wise* which is quite important in relation, at least to the third cause of action, and probably also to the second but more specifically to the third which is an allegation of an omission not to remedy an earlier omission. And *Stovin v Wise* is at volume 6 of the bundle of authorities at tab 47 and in relation to the third cause of action which I will come back to, can I just invite the court to give consideration to the issues relating to omission, which His Lordship dealt with under that heading at page 1453 of the, sorry, 1452 of the paginated volume of authorities and I'm bringing this particular matter to the court for two purposes, one to lay the foundation to a point which I'll be making when I come onto the third cause of action, but also to just point out in explaining why alleged omissions have been traditionally treated differently from positive actions, in the common law, His Lordship identified three factors that he said helped explain why omissions were treated differently. He put it as matters of politic, moral or economic terms and in terms of the economic terms.

There is some resonance with the present case where His Lordship emphasised and this is at the top of page 143 between lines A and B about five lines in, "In economic terms, the effectual allocation of resources usually requires an activity, should bear its own costs if it benefits from being able to impose some of those costs on other people," what economists call externalities. The market is distorted because the activity appears cheaper than it really is, so liability to pay compensation for lost cause by negligent conduct acts as a deterrent against increasing the cost for the activity to the consumer and reduces externality, but there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. In the present case the council does seek to shift the cost of its failure to perform its statutory functions to the BIA, thereby decreasing the council's externalities and that distorts the true costs of the council performing its functions and in economic law theory terms that's an undesirable outcome.

The second point I wish to make about the nature of the risk is that it is an action involving economic, as opposed to personal injury loss and this was a point that resonated with your Honour, the Chief Justice in *Couch* at paragraph 69 of *Couch*

where your Honour correctly noted that the floodgate considerations are less potent in the case of physical injury. It logically follows, in my respectful submission, that the nature of the risk is a legitimate factor that can be taken into account in determining whether or not a duty of care exists and the final point I make about the nature of the risk is the indeterminate nature of the liability, at this point it was well made by Her Honour, the Chief Justice of Canada *Imperial Tobacco v Canada* at paragraphs 99 and 100 of the judgment, the BIA is in no position to control the activities of the council to hold that a duty of care exists in these circumstances exposes the BIA to indeterminate liability for the actions of the council, and the same analogy is drawn between holding Canada liable for the damage caused by smoking companies to consumers of smoking products.

I will now move on to the seventh point. Council is not vulnerable and can I simply say that I will be very brief with this, unlike *Couch*, the council can not, under any circumstances, be considered to be a vulnerable entity. In *Couch*, your Honour, the Chief Justice and Justice Anderson at paragraph 65, recognised that in some cases, particularly those where individuals cannot reasonably protect themselves from risk, which a statutory body has a duty to abate or manage, you considered that sufficient proximity may well follow from that statutory obligation. So, there was an emphasis there on managing a risk through having the ability to be able to do so. By contrast, the council is not a vulnerable entity. The Council's position was metrically opposed to that of Mrs Couch. The Council was well able to protect itself from the risk of its own negligence in performing its statutory functions. The Council was a large corporate entity with operational responsibilities in all aspects of its business. It had resources with well skilled employees trained to analyse building consent applications to inspect buildings and to evaluate whether or not buildings complied with the code, it had the ability to conduct its own internal audits and to engage external advice to help litigate the risks of its own negligence and it was the council which had the day to day operational responsibility for the implementation of the code, so this is not a situation in which it could be possibly said that the council, plaintiff for the present purposes is in a vis-á-vis the BIA.

I make the point and I will make it very briefly that Mr Porteous' affidavit which I had previously taken you to but to earlier paragraphs, explains that at all relevant times the BIA had a total staff of just 13 persons. It was financed by a levy that was kept at approximately $3 million during the period in question. It was therefore not an entity with a huge degree of resource. I will simply leave that submission at that juncture.

And the final point I wish to make in relation to the proximity issues concerns the recent legislative response to the leaky building issue. It is not unusual for Judges to urge the legislative to provide a comprehensive solution to what are complex legal and social issues and I did actually ask a member of my staff to go through and find out the number of occasions when members of this court during their judicial careers had made such a plea, I won't –

TIPPING J:

What's the storm?

ELIAS CJ:

We could run a sweep on it, I think then, couldn't we? Justice Blanchard for statute fee correction and –

SOLICITOR-GENERAL:

It's quite a number of instances, can I put it that way? And I won't isolate individual Judges.

BLANCHARD J:

Yes, but how many of them have actually led to them?

SOLICITOR-GENERAL:

Well, it's funny that you should ask that because in this particular case the executive has heeded the calls from the judiciary and the legislature has passed a statute which does provide a very finely balanced, I have said in my written submissions, a finely calibrated solution to what is clearly a very complex problem. There is a limit to how far I can push this particular point, I accept that. But I do submit that it is a legitimate factor for this or any other court to take into account as a policy consideration in determining whether or not, in any particular case, a duty of care should be held to exist and I won't take the matter any further than that.

Can I now move on to the third cause of action, which alleges that three to four years after completing the 1995 review, the BIA continued to have a duty of care to warn the council about alleged omissions in the 1995 review and the council says this duty arose when the BIA is said to have received information from Prendos which they say raised issues about the use of monolithic cladding over untreated timber frames.

The following points need to be appreciated to understand why the third cause of action is, in my respectful submission, doomed to fail. I re-emphasise that the BIA statutory duty to advise the Minister, no statutory duty to advise or control councils. There was absolutely no contractual relationship between the BIA and the Council. The BIA did not undertake to review its 1995 report, nor did it otherwise assume any responsibility to undertake a review of its 1995 report. The Council's third cause of action is based on an allegation that in 1998/1999 the BIA omitted to remedy its earlier omissions by not informed the Council of information which it says the Council should have been informing it of.

Now, it is not surprising that the Council has failed to direct the court to any case that is even remotely analogous to that third cause of action. There are, however, a number of cases which can be cited for the proposition that a professional person may, as part of their undertaking to provide to professional services, have an ongoing duty not to cause harm to their clients. Thus, in *Midland Bank v Hett, Stubbs & Kemp* [1978] 3 All ER 571 a firm of solicitors, which is in the respondent's supplementary bundle of authorities at tab 2, solicitors who failed to protect their client's interests when they failed to register his interest in a piece of land had an ongoing duty to remedy their mistake and were liable for failing to do so." However –

TIPPING J:

The damage wouldn't be any more or less as a result of the failure to do it, as opposed to the failure then to remedy their failure to do it, would it?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

The circumstances of this case could have a material difference in that respect.

SOLICITOR-GENERAL:

Well, Sir, what the authorities demonstrate is that – I have not found a single case in which it has been held that there is an ongoing duty of care in tort –

TIPPING J:

Oh, no, I provisionally understand –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

I understand that, but I don't think the –

SOLICITOR-GENERAL:

Midland Bank?

TIPPING J:

– *Stubbs* case really – because the one is just simply a continuation of the other. Here, there is said to be a –

SOLICITOR-GENERAL:

A separate duty.

TIPPING J:

Yes.

SOLICITOR-GENERAL:

Yes, yes, a separate stand-alone duty.

TIPPING J:

Yes.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

As a result of –

SOLICITOR-GENERAL:

The earlier alleged omission.

TIPPING J:

Yes.

SOLICITOR-GENERAL:

Yes. And the point that I make is that there are – and I have asked for some very extensive research to be done on this point – but we have not found any case which suggests that a body with a, like the BIA, with a statutory responsibility to advise a Minister, with no statutory responsibility to take care of the actions of a council, is somehow under a continuing duty to remedy alleged omissions in a report on how the Council was discharging its statutory responsibilities. The nearest analogies, as I say, are professional cases, and even there the cases hold quite clearly that where the contract for service has come to an end there is no ongoing duty, there is no indeterminate continuous duty of care in tort, even though there may be a coterminous duty in contract and tort at the time of the contract of service.

TIPPING J:

And of course what makes this duty different from the earlier one is that this seemingly is a pure omission –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– not an omission coupled with a commission, if you like, or however one likes to put it.

SOLICITOR-GENERAL:

Although in that –

TIPPING J:

I mean, the argument in this one I understood to be that you should have spontaneously, if you like, alerted us –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– as a result of Prendos and other things, which they simply didn't do.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Did nothing.

SOLICITOR-GENERAL:

Yes, well, that's their allegation.

TIPPING J:

That's the allegation, yes.

WILLIAM YOUNG J:

It's very like the alleged *Sacramento* duty.

SOLICITOR-GENERAL:

Yes, there are strong similarities, yes, Sir.

WILLIAM YOUNG J:

Different, different recipient.

SOLICITOR-GENERAL:

But different entities to whom the duty is owed.

WILLIAM YOUNG J:

Yes.

SOLICITOR-GENERAL:

But, other than that, changing the entity, and you've got the same allegation.

I will now move on to the limitation defence, and Ms Scholtens will deal with the fourth cause of action that's specifically the *Sacramento* argument.

The limitation defence relates only to the three causes of action which are said to emanate from the 1995 report. The 10-year long-stop provision was original set out in section 91(2) of the 1991 Act, and is now carried over into section 393 of the 2004 Act, which is the operative provision for the limitation purposes, and it will be noted

that section 91(4), which my friend placed reliance on, was not carried over into the 2004 Act. So section 393 does not have that provision in section 91(4) of the 1991 Act relating to when it was that accreditation certificates were said to trigger the limitation period.

Now, the policy reasons for the 10-year long-stop provision are well set out in *Gedye v South*, volume 3 tab 26, and I won't take the court through the policy reasons behind the introduction of the long-stop provision. In my respectful submission, two questions arise in relation to this issue: does the third party claim relate to the building work and, secondly, what is the act or omission upon which the Council's claim is based? And there are two ways in which one can reach the conclusion that the third party claim relates to building work. The first is that the plaintiff's proceeding against the Council plainly relates to building word as defined in section 2 of the 1991 Act and section 7 of the 2004 Act, in that it focuses upon alleged omissions in relation to the issuing of building consent to the Grange, inspection, and the issuing of the certificate of completion.

Now, the Council's claim pleads by way of relief contribution. I still am uncertain as to whether or not that claim for contribution is confined to just the fourth cause of action or is to all causes of action, my friend was a little uncertain on that. Only the fourth one.

If the claim by the Council against the BIA is not a claim for contribution or indemnity then the claim must nevertheless fall within one of the four categories of case under rule 4.41, which I've made available to your Honours in that sheet, we can put the claim for indemnity or contribution to one side, we can go to the second, that the Council is entitled to a remedy or relief from the BIA, and that claim is connected with the plaintiffs' claim against the Council, and that the relief or remedy which the Council seeks against the BIA is substantially the same as that which the plaintiffs claim from the Council. Thirdly, that the question or issue – and these are all alternatives – that the question or issue in the proceedings between the plaintiff and the Council ought also be determined between the Council and the BIA. Or, fourthly, that there was an issue between the Council and the BIA which is substantially the same as the issues between the plaintiff and Council.

So, putting aside contribution and indemnity, it's either got to be a claim for common relief, as between plaintiff and defendant, a claim raising common issues, as

between plaintiff and defendant, or a claim raising substantially the same matters as between plaintiff and defendant. There is no question that the plaintiff's claim against Council relates to building work, and the Council's claim against the BIA must similarly relate to the building of the Grange if it is properly to be brought as a third party proceeding. The plaintiff's claim against the BIA are necessarily dependent on the plaintiff succeeding against the Council. The Council could have no claim against the BIA, absent of filing of liability by the Council to the plaintiffs for the construction of the Grange, and the damage sought in both sets of claims is the same. Thus, in my respectful submission, any proceeding brought by the Council against the BIA are necessarily proceedings relating to the Grange. Otherwise, the Council's claim against the BIA simply does not satisfy the criteria for a third party proceeding.

TIPPING J:

Would the position – on this basis it might turn on whether you issue third party proceedings or commence separate action, and then seek to consolidate.

SOLICITOR-GENERAL:

Possibly.

TIPPING J:

That seems a rather unsatisfactory distinction.

SOLICITOR-GENERAL:

Well, it's the choice that the Council has made, your Honour. But, in any event, there would still need to be a high degree of correlation, because the Council could only claim by way of damages for which it was liable.

TIPPING J:

It depends, I suppose, ultimately on how elastic we should regard the word "relating" or the concept of relating to, as being.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Because strictly speaking this claim doesn't – it has, in the background, the – but it relates to the allegedly negligent report.

SOLICITOR-GENERAL:

Well perhaps the best example that I can come upon where I think that the third party rules have been accurately applied is *Re Securitibank Ltd* [1986] 2 NZLR at 280 and there the former directors of Securitibank were sued in negligence by the liquidator and the former directors applied to issue third party notices joining Securitibank auditors as third party and they alleged two causes of action, namely a right of contribution against the auditors as joint tortfeasors and an independent duty of care owed by the auditors to the former directors. Justice Barker allowed the third party notice to be issued in respect of the former cause of action, that is the joint tortfeasor action, but not the latter. He said it was an independent claim and didn't fit the objective of third party proceedings.

So I accept, Sir, that there is an issue as to whether or not this third party proceeding relates to building work but the fundamental proposition is it must because absent building work that went wrong, there could be no liability for the Council and the Council could have no claim against the BIA.

Now what is the act or omission upon which the Council's claim is based? I ask that question rhetorically, of course, I'm not expecting any of your Honours to answer. I will endeavour to do that. The Council's claim against the BIA are that in 1995 the Council negligently conducted its review, negligently misrepresented its review and then in the third cause of action at a later time, 1998/1999, failed to remedy the 1995 review. Those first two causes of action clearly relate to events said to have occurred in 1995. It's just inarguable, not arguable that it was anything other than that. So therefore if that submission is accepted in relation to those first two causes of action, the 10 year long-stop period must apply. The cause of action starts in 1995, even though the building work to which the cause of action relates, doesn't actually occur for another three to four years. And that is just the clear, in my respectful view, clear and unavoidable conclusion from applying the –

TIPPING J:

That suggest a bit of an anomaly in holding that it relates to because if it relates to then it, time starts to run before the building work to which it relates.

SOLICITOR-GENERAL:

Yes, yes, it does. I know – I don't resile from that, that is the reality.

TIPPING J:

It seems pretty peculiar.

BLANCHARD J:

Time would start to run before there was a tort.

SOLICITOR-GENERAL:

Before there was a building, yes. Well, no, not before there was a tort, if you're saying that the 1995 report was done negligently Sir.

BLANCHARD J:

Well where's the loss?

SOLICITOR-GENERAL:

I agree, there is no loss, yes.

ELIAS CJ:

Well you need loss to complete the cause of action.

SOLICITOR-GENERAL:

I accept that, I'm sorry your Honour.

TIPPING J:

Well there might be a loss but not relating to this particular property.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

I mean this gets very, very –

SOLICITOR-GENERAL:

Well I'm just putting before the court the –

TIPPING J:

Yes, I know –

SOLICITOR-GENERAL:

What I would submit is the very plain language –

TIPPING J:

Yes but what I'm suggesting is that that puts under a heavy spotlight the validity of the proposition that this relates to, it's going to have that consequence.

SOLICITOR-GENERAL:

Well your Honour it can't relate to anything other than that. It can't relate to building work carried out, the act or omission can't relate to the building work carried out in 1995 which the BIA was not responsible for.

TIPPING J:

But what – I think we'll add it in Mr Solicitor but what – if you jump the first hurdle and it does relate to, the second hurdle, when you jump the second hurdle that suggests that time starts to run four years before the building work to which the claim relates.

SOLICITOR-GENERAL:

Yes I accept that Sir.

TIPPING J:

And that's Alice in Wonderland.

SOLICITOR-GENERAL:

Well it's what Parliament has written your Honour.

ELIAS CJ:

Well it probably pushes you –

WILLIAM YOUNG J:

Well there are limitation periods that are elapsed before a loss crystallises or before people know about it.

TIPPING J:

Well that's the *Pirelli.*

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
But it, it may push you to a different interpretation of relates.

SOLICITOR-GENERAL:
I'm simply putting the argument as fairly and as squarely as I can.

ELIAS CJ:
Yes, yes we appreciate that.

SOLICITOR-GENERAL:
I'm getting a message here which I can't read or understand so I won't attempt to. Your Honours, Ms Scholtens was now going to deal with the final cause of action, what I've called the *Sacramento* cause of action. It's most appropriate she should do so. She was counsel in the Court of Appeal in *Sacramento* and so I'll invite her to address the court on that point.

ELIAS CJ:
Thank you Mr Solicitor.

MS SCHOLTENS QC:
Thank you your Honours. Unsurprisingly it's the submission for the Crown that *Sacramento* was correctly decided and there's no proper basis for distinguishing it in relation to the fourth cause of action. Can I ask your Honours just to turn to *Sacramento* in volume 2, tab 11? There are a number of matters that we haven't yet looked at which are of some relevance.

Now my learned friend addresses the fourth cause of action in his submissions under paragraph heading 10 and much of his submission appears to have been that *Sacramento* is distinguishable here. That this case is a million miles from *Sacramento*. Of course, he has indicated in his submissions and in the courts below the argument was that *Sacramento* bound the courts as to the fourth cause of action and so there's been no discussion of that until this court.

Today he has emphasised in particular the fact that, refers to *Sacramento* as an omission case and insofar as this overarching duty point is concerned, yes, it's a question about whether the BIA sat on its hands or whether a duty of care can arise in those circumstances. But of course the Court of Appeal also considered the somewhat analogous position of whether the BIA owed a duty arising out of its role in approving and reviewing the building certifier who was involved in the *Sacramento* damage. Of course, other actions of the Building Industry Authority were in issue, such as its approval of the approved solution and, in respect of approving the insurance, the approval of the building certifier together with the insurance scheme that went with certifiers. But, in particular, the cause of action relating to the building certifiers, in the judgment of the court His Honour Justice Young reviews the Act and the Building Industry Commission report with some emphasis on the way the Commission looked at this new role of building certifiers, and you can see that at page 343 of the authorities, paragraph 8, His Honour notes the Building Industry Commission, looking at the corollary of implementing this recommendation about certifiers, would be that they'd have liability in tort in relation to building defects, which corresponded to that of local authorities, but of course would not have corresponding financial resources to meet resulting claims.

So, of course, this was a matter that the Commission gave some careful thought to. And at the foot of that page – that's page 343 of the bundle of authorities – para 4.92 of the Commission report, there's a reference to where a building producer is at fault the owner has a right of action for damages or for breach of contract. "If the fault lies with the builder in common with the territorial local authority and/or the approved certifier, there is no reason why liability should not fall upon any one or more of them where it belongs, in accordance with the general law.

Now, in all this discussion about tort liability, there's never any suggestion that the Building Industry Authority itself would have any liability. Over the page, 6.27, reference to insurance, and the fact that, "Insurance would have to cover defects discovered some time after the negligent act, and the Commission has considered the level required for approved certifiers in relation to the open-ended cover afforded by territorial local authorities," and, at 6.28, comparing the, that owners have a choice of going with what might be a more riskier option with an approved certifier, given their insurance position, than with the territorial authority.

TIPPING J:

Ms Scholtens, this may or may not help, but I would have thought that for them to get home on their fourth cause action they have to show that the Court of Appeal was wrong in *Sacramento*, in its first holding, which is the one on the first page of the report, held, "(1) the BIA owed no duty of care to owners," et cetera. Because if they can't show that's wrong – it's not a matter of distinguishing it, it's either right or wrong. If it's right, it shuts out the fourth cause of action; if it's wrong, it doesn't. I mean, I don't know whether that helps.

MS SCHOLTENS QC:

That focuses, thank you, Sir, yes.

TIPPING J:

Well, that's just my perspective anyway.

MS SCHOLTENS QC:

Yes.

TIPPING J:

I don't know whether Mr Goddard really did actually place all his emphasis on trying to distinguish it, because I would have thought we're bang on the same point.

MS SCHOLTENS QC:

I certainly understood my learned friend as suggesting that this case was a million miles from –

TIPPING J:

But if you think I'm wrong and you need to guard yourself against a more subtle approach –

MS SCHOLTENS QC:

Yes, yes.

TIPPING J:

– on the part of your opposition, then of course you must proceed.

MS SCHOLTENS QC:

Yes, no, I hear my learned friend suggesting subtlety's not in his –

SOLICITOR-GENERAL:

Distinguishing the first three causes of action –

TIPPING J:

Yes.

SOLICITOR-GENERAL:

– but attacking it head on, on the fourth.

MS SCHOLTENS QC:

Right, thank you.

TIPPING J:

He was trying to make distinctions for causes of action, one, two and three, which were arguably valid. But this one, he's right up against it.

MS SCHOLTENS QC:

Right, yes. Well, be that as it may – and I'll move off this now – I think it is still nevertheless relevant to see that the Court of Appeal has considered the liability to homeowners in the context of circumstances where the BIA has in fact carried out reviews very recently of the people who did the actual inspection, much closer than a review of the territorial authority itself.

I think, the relevant cases, I think my learned senior, Mr Solicitor, has referred your Honours to the various cases, and I really need to focus on how the fourth cause of action is different. And I think –

TIPPING J:

Well, Mr Goddard's trying to equate the fourth cause of action with *Hamlin* –

MS SCHOLTENS QC:

Yes.

TIPPING J:

– essentially, as I understood him, and you have to show why, in your submission, that isn't appropriate.

MS SCHOLTENS QC:

Yes. There are two things that, as I understand, he emphasises. One is that, he says, there is shared control after the '91 Act, so that I think the court's, that it's plain that what *Hamlin* is referring to is the inspection power, and so for the BIA we simply say, "Well, the BIA hasn't taken from the TA any of those powers," it's perfectly clear that the powers that the BIA have are quite different from the *Hamlin* powers.

TIPPING J:

Isn't the key point that the power of control in *Hamlin* is direct? Here, at the very best, it's very indirect.

MS SCHOLTENS QC:

Yes, well, absolutely, control and reliance are the two themes from *Sunset Terraces*, they sit with the territorial authority. The BIA is your classic small, high-level regulator, with multiple functions, limited resources, significant degree of discretion as to how those resources are applied, and subject to some reasonably firm political control over those resources.

The suggestion – I'm just trying to remember where I put things –

ELIAS CJ:

Sorry, we didn't help you by not taking a convenient adjournment to allow you to move your papers, so take your time.

MS SCHOLTENS QC:

No, I should have – I'm sorry, your Honour, I should have been ready for that, it did come as a bit of a surprise.

TIPPING J:

Was your leader quicker than you were expecting?

MS SCHOLTENS QC:

He was, yes, much quicker.

BLANCHARD J:

Well, he got a message.

MS SCHOLTENS QC:

It was, it was a mean trick. The – I'm just thinking in terms of the proximity issues discussed in the *Couch* case, because I think this is certainly the – sorry, just, if I could have a moment –

ELIAS CJ:

Yes, of course.

MS SCHOLTENS QC:

– I'll just sort of work out where I'm going. My learned friend has referred, my learned senior Mr Solicitor has referred the court to the comments of this court in *Couch* relating to proximity where damage has been caused by a third person and how difficult that – the high threshold that there is there to meet and it's submitted that the, I think my learned friend's, Mr Goddard's two points with relation to proximity here were what you call the shared control and which is just rejected on the basis that the Council doesn't have any of the *Hamlin* functions. Secondly, the talked about the levy itself and while it's submitted that there's no basis for seeing a fee such as a levy to homeowners as giving rise to some sort of duty of care. In the statute it talks about building users for a start. You're really not bringing the duty down in any proximate way, not even as I think your Honours, Chief Justice in *Couch* referred to the proximity, the locality that one can at least bring the building inspector work down to. We weren't – there's not even that level of proximity in this case. But the levy itself, perhaps just to –

ELIAS CJ:

Well it may be, I suppose, significant that this is described as a levy rather than a fee, is it?

MS SCHOLTENS QC:

It is described as a levy.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

Is it significant?

ELIAS CJ:

Yes, I'm just thinking out loud on that. A point not adverse to the one that you're making really.

MS SCHOLTENS QC:

Yes. The fact that a person pays a levy to a regulator is, I would submit, neither here nor there. It's not unusual.

ELIAS CJ:

A form of funding perhaps.

MS SCHOLTENS QC:

Yes. And just to – I thought it would be useful to be clear about how –

TIPPING J:

It's not a payment –

MS SCHOLTENS QC:

– the levy works.

TIPPING J:

It's not a payment for a service or anything like that, is it?

MS SCHOLTENS QC:

No.

TIPPING J:

Where you can have different considerations applying?

MS SCHOLTENS QC:

No, that's right, it's just a fee per $100,000.

TIPPING J:

It's an ad valorem fee.

ELIAS CJ:

An impost.

MS SCHOLTENS QC:

Yes and the – Mr Porteous in his affidavit just does explain how the levy has worked over the relevant period and if I could ask you to have a look at that which is in volume 2 of the case on appeal and I'll also just refer to the provisions in the Act which are contained in the supplementary volume.

ELIAS CJ:

It may be that you don't need to take us to this. What is the counter that you make to Mr Goddard's reliance on the fee because –

MS SCHOLTENS QC:

It's really simply to make it clear how the fee works because it is relevant to the discretionary nature of the functions of the Building Industry Authority and the amount of resources they have and their level of control. There is political control. Mr Goddard says they didn't get enough money because they didn't put up a good enough case. Well that, the legislation puts all the say so on the Ministers and –

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

So –

ELIAS CJ:

I think for myself I think that submission can be accepted. Do you wish to go to this provision?

BLANCHARD J:

Not particularly, no. If somebody applied for a building consent, do I take it that there was a separate component within the amount that they paid that was the building levy that was identified as such?

MS SCHOLTENS QC:

I believe that's how it worked because the authority collected the money as part of whatever funds it collected for the consent and then it was forwarded to the Building Industry Authority.

BLANCHARD J:

Right.

ELIAS CJ:

But Mr Goddard took us to those provisions, I think, every three months was it, or something like that?

MS SCHOLTENS QC:

Yes, monthly I think.

ELIAS CJ:

Yes or monthly.

MS SCHOLTENS QC:

Monthly and the ability to audit it, yes

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

What he didn't take you to, I think, was section 23K which together with the provision just above it, J.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

So you'll see that under J, 23J, it's the bit that didn't get into the legislation so it's in the appellant's supplementary bundle at tab 1. So it is quite an unusual levy provision under I, the Minister reviews the levy annually and Parliament has indicated, you know, what the Minister must have regard to and that includes the terms of, under 2(b), the terms of any financial parameters notified by the Minister. The Minister notifies financial parameters to the Building Industry Authority under

23J(1) after consultation with the Minister of Finance. And then the authority has to have regard to those when preparing its estimate of expenditure. So the – what the Building Industry Authority can spend has nothing to do with the amount of the levy. They can only spend what the Minister says they can spend and it's a lot less than the levy.

ELIAS CJ:

It's a bit like court fees.

MS SCHOLTENS QC:

No doubt.

COURT ADJOURNS:3.48 PM

COURT RESUMES ON THURSDAY 3 NOVEMBER 2011 AT 10.01 AM

ELIAS CJ:

Yes, Ms Scholtens.

MS SCHOLTENS QC:

Your Honours, I won't be long. Part of my problem yesterday was just trying to work out what had been covered and what hadn't been. It feels like a while since I've been a junior, and –

ELIAS CJ:

It's a very irritating position.

MS SCHOLTENS QC:

Not always. It seems to me it may be useful to focus on really the nature of the relationship between the BIA and homeowners, because this is the primary cause of – primary basis for distinction of the fourth cause of action, and in particular I want to refer briefly to the two links that the Court of Appeal in *Sacramento* identified in terms of that relationship, which it described as very insubstantial, and then the two points emphasised by my learned friend. Much of this has been covered and I won't be long, but there are also the two analogous Canadian cases, one of which my learned friend, the Solicitor-General has taken you to, but I just want to focus on the duty to warn aspect of it and the way in which it, the legislation reflects the legislation we're dealing with here, or has some analogies. I don't anticipate I'll take more than 30 minutes covering that ground, at the most.

So, obviously, the fact that this is an omission cause of action raises particular difficulties, which were recognised by this court in *Couch*, and in particular paragraph 80 of the judgment of the plurality. And also, another useful discussion, brief discussion, was in the *Imperial Tobacco* case of the Supreme Court of Canada, that my learned friend Mr Goddard took the court to, in tab 3 of the supplementary volume. There's just, briefly, at paragraphs 106 to 109, the Chief Justice deals with Canada's alleged duty to warn about the health hazards of its strain of tobacco, and she notes for the court that the, the tort of failure to warn requires evidence of a positive duty. And, plainly, in a case such as this, one would expect to find that duty in the statute itself.

The links identified by the Court of Appeal in the *Sacramento* case, as paragraph 62 of that judgment, were two. First, the Authority's role in approving the building certifier in that case, and reviewing that building certifier, ABC Limited, and I've touched on the fact that that's plainly, we're not dealing with that sort of situation here but there is the similar power of review of the Authority that exists, which we've looked at closely. So that was the first link that was seen.

And the second link was the approval by the Authority of certain building systems through its approved documents, it's approved solution. And this the Court described as a red herring, at paragraph 63, and essentially that was because, as it found, the Authority didn't in fact approve, didn't take a positive action, didn't approve the use of face fixed monolithic cladding over untreated timber, the system that was failing in *Sacramento*. That system was, under the Act, an alternative solution, not an approved solution, that compliance with which would constitute compliance with the Code, but an alternative solution, which was something that the authorities or building certifiers had to take special care to ensure would comply with the Code, was up to them to determine whether it was sufficient to comply. And their responsibilities, the Authority's in particular, in relation to code compliance can be seen in section 43 subsection (3), that requires them to have reasonable ground.

ELIAS CJ:

So you're saying that approved solutions might be different, but *Sacramento* was not in that category?

MS SCHOLTENS QC:

It was not –

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

– in that category, yes, Ma'am. And so, just so that you know where the information is, the Court of Appeal records that the Authority had approved the conditional use of untreated timber in 1998, that for full framing. So we've got the Standards New Zealand approval in 1995, and that just sits by itself, nothing to do with the BIA, and that standard is found on the case on appeal in volume 3 at tab 20. And the particular reference to untreated timber to be used in this circumstances, it's a

conditional use, that's at page 409. The Court of Appeal does quote the standard itself, but under the standard is also some warnings about using untreated timber, one of which relates to the possibility of it getting wet in certain circumstances and how important it is to ensure that it's used appropriately. And Mr Porteous in his affidavit, his second affidavit, just refers briefly – that's in the case on appeal too, at tab 14 – refers briefly to the process of consultation that resulted in the BIA in 1998 adopting that standard as part of its agreed solution. He said by February 1998, when the Authority adopted it, "After a long process, no one had mentioned that there were any concerns with its use at that stage." And the solution itself, B2/AS1 is at, in the case on appeal, volume 3, and quoted at paragraph 29 of the *Sacramento* decision.

TIPPING J:

Are you simply saying that all this applies to the present case, or are you trying to distinguish this case from this? I'm not quite with you, I'm afraid, Ms Scholtens.

MS SCHOLTENS QC:

It does all apply to this case, your Honour.

TIPPING J:

So you're just reinforcing this for the purposes of this case, are you?

MS SCHOLTENS QC:

Well, I'm wanting to – yes, yes, I'm doing that, also to clarify where you'll find these provisions.

TIPPING J:

Oh, I see, thank you.

MS SCHOLTENS QC:

In 1995 it wasn't, it didn't –

ELIAS CJ:

Sorry, could I just ask – I've forgotten now, was breach of this standard, is that alleged in this case?

MS SCHOLTENS QC:

No.

WILLIAM YOUNG J:

Well, it was breached.

MS SCHOLTENS QC:

Yes, but by the –

WILLIAM YOUNG J:

It was breached by the builder.

MS SCHOLTENS QC:

– builders and the homeowners, yes.

WILLIAM YOUNG J:

They didn't conform, the builder –

MS SCHOLTENS QC:

They didn't conform.

WILLIAM YOUNG J:

Yes.

MS SCHOLTENS QC:

But the standard set by the Building Industry Authority was conditional.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

The conditions were not complied with.

ELIAS CJ:

Yes, that's right, okay. But there's no issue as to the setting of the standard, there's –

MS SCHOLTENS QC:

No.

ELIAS CJ:

– no liability suggested in terms of –

MS SCHOLTENS QC:

No, no.

ELIAS CJ:

– setting the standard.

MS SCHOLTENS QC:

The argument in *Sacramento* was that, in the end, the Building Industry Authority should have done something to strengthen the standard or to make it plain that untreated timber, which was approved, should not be used with, or should be, there should be particular caution in using it with face fixed monolithic cladding.

ELIAS CJ:

Yes.

TIPPING J:

But we're not, as the Chief Justice has just said, concerned with anything to do with this fixing of that standard –

MS SCHOLTENS QC:

No.

TIPPING J:

– by anybody.

MS SCHOLTENS QC:

No, but it's important that you know that this is what, I suppose, the focus of *Sacramento* was on, the fact that the Building Industry Authority had approved the used of untreated timber and, as the Court said, well, it's a bit of a red herring, because it approved it's use in a conditional way and those conditions were never met.

ELIAS CJ:

I've forgotten – it's my fault – but what's the allegation? This is the fourth cause of action –

MS SCHOLTENS QC:

Fourth cause of action.

ELIAS CJ:

– you're talking about. What is the allegation made in the pleadings?

MS SCHOLTENS QC:

It's at paragraph 87…

ELIAS CJ:

Of your submissions?

MS SCHOLTENS QC:

No, no, the pleadings are in tab 10.

BLANCHARD J:

Tab 3.

MS SCHOLTENS QC:

Sorry.

ELIAS CJ:

The green volume.

MS SCHOLTENS QC:

Yes, yes. Case 1 tab 10 – oh, not tab 10, tab – sorry.

ELIAS CJ:

You might have been right with that number 80 something.

BLANCHARD J:

Yes, 87.

MS SCHOLTENS QC:

87, yes.

McGRATH J:

This is tab 3, is it?

MS SCHOLTENS QC:

Yes, I'm sorry, your Honours, tab 3. So the duties are at 84 and the breach at 87. And 84 does refer to approving documents for the use in establishing compliance with the Code.

ELIAS CJ:

Sorry, is this the plaintiff's statement of claim?

MS SCHOLTENS QC:

No, your Honour, this is the –

ELIAS CJ:

Yes, the third party notice.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Oh, I'm looking at the wrong thing, sorry. Tab 3, is it?

MS SCHOLTENS QC:

Yes, your Honour.

ELIAS CJ:

And page…

MS SCHOLTENS QC:

Page 40.

ELIAS CJ:

Oh, paragraph – oh, I see.

MS SCHOLTENS QC:

So, yes, 84 the duties and 87 the breaches.

ELIAS CJ:

So, it's an omission?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

So, it's –

TIPPING J:

It's all failing to.

ELIAS CJ:

It's all failing to do something.

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

So it's not really comparable to *Sacramento* at all, is it?

MS SCHOLTENS QC:

It's essentially the same, the same allegations, your Honour, as you'll see from the judgment itself, 87 compared to –

ELIAS CJ:

Right. The failure to warn?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Yes. I'm sorry, I'm with you now, thank you.

MS SCHOLTENS QC:

Although – yes, and the failure to do anything really, given it had –

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

– a number of things it could have done.

ELIAS CJ:

Yes. And that's particularly after receipt of the Prendos report?

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

Yes, thank you.

MS SCHOLTENS QC:

So, in *Sacramento*, at 61(a), the Court found that the standards that had been approved were relevant to the insubstantiality of the link between the actions of the BIA and the losses suffered.

Now, your Honours, the Council relies, as I understand it, on two further matters. The first, which were discussed yesterday, the levy, and I just give your Honours the reference to Mr Porteous's discussion about the political control over that levy and the negotiation of the priorities that the Authority had with Ministers each year, and the need to focus on specific projects – that's at his first affidavit at volume 2, tab 12, and they are, his two affidavits are very short. It's worth perhaps noting that –

McGRATH J:

What page are you at?

MS SCHOLTENS QC:

Tab 12, your Honour.

McGRATH J:

Yes, that's the affidavit, isn't it?

MS SCHOLTENS QC:

Yes, and it's only a brief affidavit. He talks about the nature and functions of the BIA, and on page 290, which also talks about the annual statement of intent, "Negotiated with Ministers," and then at 291, the funding of the BIA by way of the levy, and how the Ministers dealt with the BIA, on 292, and limited funding from other sources is also covered. Worth perhaps noting, at para 17, that the levy rate was a dollar per thousand dollars of estimated value 1991, when the Act came into force, but it was lowered to 80c from 1994 and 65c in 1995. So, if homeowners were getting any message at all from building levies, which I submit is not very likely, then perhaps the message was that they might not expect so much from the high level regulator.

TIPPING J:

Is a point this, that whereas the Act contemplates some dealings between the BIA and the councils, the Act contemplates no dealing whatever between the BIA and individual homeowners?

MS SCHOLTENS QC:

There are some –

TIPPING J:

As a point of distinction.

MS SCHOLTENS QC:

Yes.

TIPPING J:

Maybe I've overstated it, "None whatsoever."

MS SCHOLTENS QC:

In relation to inspections and –

TIPPING J:

Well, as an incident, if you like, of their dealing with the Council.

MS SCHOLTENS QC:

Yes, that's correct, unless a council and a homeowner comes to the BIA to resolve a dispute.

TIPPING J:

Well, yes, that's a quite different context.

MS SCHOLTENS QC:

Yes, that's right.

TIPPING J:

But its role vis-à-vis the homeowners is extremely indirect –

MS SCHOLTENS QC:

Yes.

TIPPING J:

– whereas its role vis-à-vis councils is more direct. Whether it's direct enough is the other issue.

MS SCHOLTENS QC:

Yes.

BLANCHARD J:

Well, the dealings with the owners would be only if they happened to have the homes that were selected to be looked at. And they're not being selected to be looked at with a view to reporting on the particular home, it's a much more generalised review that's being done. They're looking for problems that might be symptomatic of a general –

MS SCHOLTENS QC:

Yes.

BLANCHARD J:

– problem.

MS SCHOLTENS QC:

Yes, or issues that might warrant the BIA doing something in the exercise of its many functions, not just –

BLANCHARD J:

Yes, it would be simply a fluke if your home happened to be one of the ones selected.

MS SCHOLTENS QC:

Yes, and of course –

TIPPING J:

As the target is the Council, the individual homeowners might be incidentally involved.

MS SCHOLTENS QC:

Yes, that's right. It's a sample of the councils that is the target the BIA is looking at, in terms of its review functions that we've seen here, a number of, by way of sampling, if you like.

So, that's the first of the two matters that my learned friend relies on, in terms of the relationship, and the second is what he refers to as the sharing of the control functions between the BIA and the TA, the territorial authority council. I'm not sure that, I think this ground's probably been covered. I think this Court's judgment in *Sunset Terraces* makes it plain that, in terms of the *Hamlin* duty of care to homeowners over building matters, the twin pillars of control and reliance relate to that inspection process, and that is not something that the Building Industry Authority is involved in at all, and I just refer to paragraph – of that judgment, *Sunset Terraces*, paragraph 24, talking about the change in the legislation not affecting the *Hamlin* duty, and 48 to 50, focusing on the rationale, independence of that inspection role and the need for a reasonably clear and consistent administration of that duty, which of course is a sui generis, a one of a kind type of duty of care. So submitted, there's no basis for drawing any parallel there between homeowners and the BIA.

Finally, can we look at the two Canadian cases? First is the *Holtslag* case that Mr Solicitor took you to yesterday. That's at supplementary volume at tab 4, and this is the case when it was argued that the provincial director of building standards, who'd issued a product listing authorising the use of untreated pine shakes for roofs, was

doing a comparable act to building inspectors. That was one argument and there was one argument that he should have warned homeowners when his employees learnt of the dangers involved in these shakes or shingles.

So note at paragraph 2, page 521, this was a class action, approximately 2600 claimants. Paragraph 4 refers to the building code and that's spelt out over the page but basically it permits the director appointed under the Act to issue product listings authorising the use of materials that, in his opinion, satisfy the requirements of the code, so it's possibly analogous to our accreditation function. And paragraph 6 the Court notes that the untreated shakes used were manufactured, sold and installed by private companies. The appellants received information from manufacturers, contractors, installers and realtors regarding the suitability and life span of the untreated pine shakes. They did not receive information on these issues from the respondent. And at 7, the claim of representation and warranties is noted.

At the foot of the next page, 523, there's a reference to the code, that being essentially, a code of minimum regulations for public health, fire safety and structural sufficiency with respect to the public interest. It establishes a standard of safety for the constructions of buildings, requirements unrelated to health and safety are kept to a minimum, and although requirements for quality and durability that affect health and safety are appropriate. And that's analogous to the code under the 1991 Building Act.

And then the code is set out in its two forms at the relevant time. Perhaps the primary target of the duty is 1.5.4.2, so at paragraph 9, "The director may issue lists of materials that, in his opinion, satisfy the requirement of this code and after listing, may be used to fulfil the requirements of this code." Then, over the page, 526, paragraph 16, the court refers to the *Cooper* case and notes that, "The fact is giving rise to proximity if they exist, must arise from the statute under which the Registrar's appointed. The statute is the only source of his duties, private or public," and –

ELIAS CJ:

Sorry, where is that?

MS SCHOLTENS QC:

That's at para 16 at the foot of page 526 your Honour, quoting from *Cooper*.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

Then discusses analogous cases, 528 at E, there's the argument that once the director circulated the new product listing to the industry, his relationship to consumers became similar to that between representor and representee. And then F, product defect failure to warn cases, this argument is that after the director issued product listings, employees of the respondent knew that consumers were using untreated pine shakes for the purpose approved by the director and learned of the danger arising from such use that is resulting in decay and potential health and safety concerns.

And then at paragraph 24 at the foot of 529, there's the argument that the analogy can be drawn to the cases dealing with building inspection, and reference to the recognition of the duty of care, similar to our *Hamlin* duty. And then over the page is, at 193, at the last half of that paragraph, it sets out the argument that the director must determine what, effectively, is equivalency, and that that determination is said to be comparable to the actions and duties of building inspectors, so that the analogy between the present case and a recognised category of proximity has been established.

And then the court refers to *Kamloops v Nielsen* [1984] 2 SCR 2, which related to policy decision to require inspectors –

TIPPING J:

Well *Kamloops* was similar to the *Dutton* case in England.

MS SCHOLTENS QC:

Yes, so the duty of care established, yes. And then the proposed analogy is noted, and at – so 26, the appellants argue there's no difference between the act of an inspector fulfilling his inspection duties and then a director making product determinations on a project.

And at 27, "We do not agree the proximate relationship between the appellants and the respondents is not similar or analogous to that of a building inspector and a property owner. A building inspector has a direct relationship based on the direct

contact with an individual house owner or purchaser who suffers an ultimate loss. The inspectors' duties, which are mechanical or supervisory, could result in liability but on a case by case basis. This is not analogous to the acts of the director in issuing a product listing. The director is not performing a mechanical or supervisory task." So your Honour, this reasoning is just essentially the same as the Court's in *Sacramento*.

Then – and I think as your Honours note, leave was not granted to appeal that to the Supreme Court, that judgment. Following on that judgment, the judgment of the Court of Appeal of British Columbia, this is *McMillan v Canada Mortgage and Housing Corporation*, 2008 BCCA 543, case which the Solicitor-General handed up yesterday. If your Honours don't have it, we have some more copies. This is a failure to warn case relating to leaky condominiums. It was again a dismissal of a class action which is seen as the same as a test for a strike out. If your Honours look at page 5 where Justice Saunders' judgment begins. Paragraphs, paragraph 4, the action concerns what are commonly called "leaky condos" refers to the plaintiffs and the damage. At 5, the respondent Canada Mortgage and Housing Corporation is a Crown corporation and at 6, the contention is that the Corporation conducted extensive research into building science and wall assembly and construction and in the early '80s and '90s it focused its research on wall assembly construction and water ingress related to envelope failures. They say, "by that research the Corporation gained knowledge of envelope design problems on the West Coast of Canada and owed to them a common law duty of care to disseminate this information to them". They plead negligence and failing to disseminate the knowledge it possessed and in failing to warn them about the potential failure of the envelope design and possible resulting threats to their safety. It's very similar to the claim here.

ELIAS CJ:

They don't say what the duties were of this corporation. Because on one view, may be later on it's referred to but on one view it's simply someone who's carrying out research –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– without any duties, supervisory or otherwise in relation to anyone carrying out this work so it does seem pretty remote.

MS SCHOLTENS QC:

The, yes, the duties themselves or the responsibilities of the body are set out at paragraph 24, your Honour, which is the bottom of page 8 and yes they are, "responsibility of the Corporation to cause investigations to be made into housing conditions and the adequacy of existing housing accommodation...and to cause steps to be taken for the distribution of information leading to the construction or provision of more adequate and improved housing accommodation and the understanding and adoption of community plans in Canada," and then, "74 for the purpose the Corporation may cause," and then it's got the listed, the listed steps.

ELIAS CJ:

It looks like a policy development – it looks further –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– even further away than the BIA is?

MS SCHOLTENS QC:

Perhaps it has one of the functions of the BIA, your Honour. While BIA was not a research body and there was, there were other research bodies, it nevertheless was there to educate and move forward.

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

And set the Code.

ELIAS CJ:

But as part of this scheme –

MS SCHOLTENS QC:

Yes, yes.

ELIAS CJ:

– under the Act, it has functions in –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– in a much wider supervision of the building industry.

MS SCHOLTENS QC:

Yes, the BIA does have much broader functions, yes.

ELIAS CJ:

So one can understand why they felt confident enough to give an oral judgment in this matter.

TIPPING J:

Well, you're probably coming to it but there's a key paragraph of 28 here where the Judge sights and adopts the statement of Madam Justice Sulyma in *Holtslag* about duties to the public as a whole –

MS SCHOLTENS QC:

Yes.

TIPPING J:

– a sort of – which you might call a wholly generic duty as opposed to an individualised duty.

MS SCHOLTENS QC:

Yes.

TIPPING J:

So – but we're not really in that territory here necessarily when it comes to the question of BIA and a council, not necessarily.

MS SCHOLTENS QC:

Yes, yes. I guess that will depend on your Honour's reading of the legislation in terms of its functions in relation to the council.

TIPPING J:

Yes. But it would seem as the Chief Justice is suggesting that this is distinctly further away, if you like, than what arguably we have here.

MS SCHOLTENS QC:

Yes.

TIPPING J:

Is there any particular aspect of this that you suggest should be, would be helpful because it's –

MS SCHOLTENS:

Well, I think accepting that the duties, or that the scope of this body's functions are more limited, nevertheless this is a function that is comparable because the allegation is that they had information and that they had a responsibility to pass it on and of course that falls squarely within their statutory functions.

TIPPING J:

You see para G in 74, this is on page 9, is really just a summary of what this is all about, what they were all about –

MS SCHOLTENS QC:

Yes.

TIPPING J:

– generally, "To take such steps as it may deem necessary or advisable to encourage the development of better housing and sound community planning and to

promote construction of housing accommodation that it is sound and economical." Well that's hugely generic.

MS SCHOLTENS QC:

Yes. Yes and I think your Honour's quite right about why they felt confident to give an oral judgment. The key principles are hit on though in terms of that oral judgment and the concern about the lack of a direct – that the legislation defines the relationship and there's a lack of a direct relationship here is emphasised and in paragraph 26 the court reads the legislation as not including responsibility or duty, it's much broader than that.

TIPPING J:

I think your key problem in this case, and it may not directly impact on your part of the argument is this, the direct communications, the direct engagement if you like, between the BIA and this particular council and what it said and what it represented and so forth –

MS SCHOLTENS QC:

Yes.

TIPPING J:

– which is miles away from anything like this.

MS SCHOLTENS QC:

Yes.

TIPPING J:

There'd be nothing remotely like that, vis-à-vis individual homeowners –

MS SCHOLTENS QC:

No.

TIPPING J:

– so it's good in part and it's not so good in another part for you.

MS SCHOLTENS QC:

Yes, well of course, yes and *Sacramento* isn't about that issue so –

TIPPING J:

No.

MS SCHOLTENS QC:

– the, but your Honour is – usefully he does point to the paragraph, the reference back to the *Holtslag* case and it is my final submission that this is, this is precisely the sort of body with the sort of powers that we're dealing with here with the BIA, as with *Cooper,* the duty is to the public as a whole and private duties would come at the expense of other important public interests.

ELIAS CJ:

They're not identified though are they, this conflict?

MS SCHOLTENS QC:

Here, in our case?

ELIAS CJ:

Well it's not in this, in the excerpt from the judgment there –

MS SCHOLTENS QC:

No.

ELIAS CJ:

– but what do you say the conflict is here?

MS SCHOLTENS QC:

In terms, if you're imposing a duty?

ELIAS CJ:

Yes, why would it pull against the responsibilities of the BIA?

WILLIAM YOUNG J:

Or discourage the BIA interacting with local authorities.

MS SCHOLTENS QC:

In relation to the first three – yes.

WILLIAM YOUNG J:

Because other functions of the BIA, the BIA could otherwise function with substantial immunity from suit, it – by allowing one aspect of its regulatory function to subject to civil litigation, the court – well not warning the BIA off that course would be, as it were, discouraging the BIA from going, from exercising that particular option?

MS SCHOLTENS QC:

Yes.

WILLIAM YOUNG J:

And that may be the best option because we only see the cases that go wrong, we don't know how many building catastrophes were avoided by the sort of interaction that was engaged in in this case.

MS SCHOLTENS QC:

Indeed.

TIPPING J:

Not a bad answer, Ms Scholtens.

ELIAS CJ:

But we're talking about the fourth, the fourth cause of action here.

WILLIAM YOUNG J:

I thought we are, I thought that the first three keep on intruding.

McGRATH J:

I'm not sure Justice Tipping was.

ELIAS CJ:

Okay.

MS SCHOLTENS QC:

The fourth cause of action though, your Honour, is just the duty, if any, that the BIA owes to homeowners, is the duty that they owe to the public and, under the Act of course, it's to occupiers of buildings. And because they've got such a range of

discretionary functions, once obligations of care are imposed on one as opposed to another or on an action rather than an omission, what they call the "chilling effect" is very real –

ELIAS CJ:

What I don't understand in respect of the fourth cause of action what potential there is for chilling. Why it's inconsistent with –

MS SCHOLTENS QC:

You mean if there's a duty owed to homeowners?

ELIAS CJ:

If there's a duty owed to homeowners – I mean there may well be very powerful arguments against –

MS SCHOLTENS QC:

Yes.

ELIAS CJ:

– proximity but I'm just picking up on this –

MS SCHOLTENS QC:

As a matter of policy?

ELIAS CJ:

Yes.

MS SCHOLTENS QC:

Well, then I guess that's where the Building Industry Authority would focus all its effort and what might be left to one side. I mean, one of its priorities at this time, when this was going on –

ELIAS CJ:

You mean it would be distracting?

MS SCHOLTENS QC:

Yes, well not just distracting but incentivising the authority to focus in one area to the detriment of all its other functions. I've been given the nod so unless I can assist further.

ELIAS CJ:

No, thank you very much, Ms Scholtens. Yes, Mr Goddard.

MR GODDARD QC:

With a view to maximising the prospects of finishing before the morning adjournment I have reduced my reply notes to a few pages of typescript if I may hand those up through Madam Registrar. I wanted to begin by referring to the table of, comparative table of pleadings handed up by my learned friend, the Solicitor-General, yesterday and to make four short points about that multi-coloured work of art. The first, my 1.1, is the relationship between the claims against the Council and the Council's claims against the BIA, very much a matter of evidence for trial. But second, as I think the Court observed in the course of my learned friend's submissions, the defects alleged by the plaintiffs are typical of buildings employing monolithic face fixed cladding.

If one runs down the homeowners' claims against the Council, in blue on the far left, the first problem, approving and issuing a building consent in respect of plans that were not sufficient to allow the Council to be satisfied on reasonable grounds that the building work would comply with the Building Code. This is very much a theme of the BIA's 2003 report that the Council wasn't requiring enough detail in order to form a view, a reasonable view on weathertightness. And then when one looks at the complaints about what the plans didn't show and did show, cladding laid hard down to the ground; hand rail fixings penetrating the deck membrane; failing to provide control joints and details; failing to adequately detail waterproof deck membrane; appropriate falls to the top; failing to provide flashing details required to provide weathertightness; and so on. So those are very much weathertightness issues and then when one gets to the inspections, fail to carry out sufficient inspections. Well, again that's exactly one of the problems the BIA identified in the weathertightness context in its 2003 report. Or to inspect with sufficient thoroughness and when one looks at what wasn't inspected with sufficient thoroughness, these are all classic weathertightness issues of a kind that need particular attention when you're building with monolithic cladding, but that were not a big issue with other styles of construction.

So, we have roofs with defects including parapet capped flashings that lack adequate fall; incorrectly lapped roof cap flashings; glued joints that have failed and the word butanol, which tends to turn up in a lot of these weathertightness claims, turns up there; complaints about the apron flashings which were incorrectly installed causing water to be directed into the parapet wall; and so on. Then down a few to cladding with defects that include problems with jointing and installation and inadequate design and construction. Joinery flashings, typical complaints about head flashings not being turned up so as to divert water away from the walls –

BLANCHARD J:

Mr Goddard –

MR GODDARD QC:

I don't need to go through this –

BLANCHARD J:

– didn't we really accept the argument you're now making yesterday?

MR GODDARD QC:

I'd hoped that's what I heard and, yes, in which case there's no need for me to attempt to –

ELIAS CJ:

Labour it.

MR GODDARD QC:

Or to labour it at all so I'll move on from that point. The second one, the purpose of the 1995 review again, in my submission, is to a significant extent a question of fact for trial and the allegation will be that the 1995 review and report, like the subsequent ones, that they all had the same purpose, it was just that it was more explicitly described as one went on, which was to provide it to the Council in order to inform and assist the Council to evaluate its systems and processes and perform its responsibilities. It wasn't solely for the purpose of deciding whether or not to report to the Minister. But again what it was for, what it was reasonably understood to be intended to achieve are matters of fact for trial.

My learned friend argued yesterday that the recommendations in the 1995 report would, if implemented, have avoided the failures by the Council in respect of the Grange, and presumably leaky building issues generally. Again, this is very much a question of fact for trial. Second, as your Honour Justice Tipping observed, these were very general recommendations, an internal peer review system would be a good thing, not recommendations focused on weathertightness. But critically here at trial the evidence will be that the Council did act on the 1995 recommendations as the BIA noted with approval in 2001 but that didn't resolve the deficiencies in the Council's systems and processes that were the subject of such vigorous criticism in 2003. So doing what was recommended in 1995 to a standard the BIA was happy with, didn't fix the problem. So it's a factual issue but the evidence on that, I think, can be anticipated without too much difficulty.

Fourth, I just wanted to clarify these timing issues that cropped up in the course of questions from the court yesterday and I think my learned friend, Ms Scholtens, went some way towards that. But I thought it was just worth noting that what is pleaded in relation to use of monolithic face fixed cladding is that this technique was widespread from the early 1990s. So that's a factual allegation which the Council makes. At that stage, it was mostly associated with timber that was to some extent treated. The level of treatment changed at different points over the years. But leaky building syndrome is not confined to buildings with untreated timber. Untreated timber makes the problems worse than if the timber is treated.

WILLIAM YOUNG J:

It also accelerates their surfacing.

MR GODDARD QC:

Yes, exactly your Honour. But it's by no means peculiar to that. So the point is that these problems were problems associated with use of monolithic cladding and the rate and extent of the problem, as your Honour points out, were the things that were driven by the timber being completely untreated as opposed to the different degrees of boron treatment that we used over the years, and I won't bore on about that. But it's interesting. It's the second case about wood chemicals that's come before this court I think if one includes Pointer and his competition issues.

So as I say in 4.2, the use of monolithic cladding was in widespread use before publication of the standard concerning use of untreated timber for framing in 1995

and before publication of the acceptable solution B2AS1 in 1998. What happened in 1995 after the standard came out is that the use of completely untreated pine became more common underneath the monolithic cladding that was already in widespread use and that, as I say, aggravated and, as your Honour points out, accelerated the consequences of defective installation of monolithic cladding. And what is striking, I think, in relation to any suggestion that this was hardly something that might have been expected to be detected in 1995 in a careful review in 1995, is that in a small sample of houses inspected at North Shore in 1995, there were three that used a form of monolithic, including one that used exactly the same form as the Grange, the Harditex, but three of the half dozen used this sort of technique.

So I didn't quite follow the relevance of the submission that the standard didn't come out until 1995 and the approved, the acceptable solution in 1998 to the application to strike out before this court, but to the extent that the chronology is relevant here it is, and certainly the allegations at trial will be, that the building technique was already widespread by the mid-1990s and that a reasonably competent BIA should have been alive to the issues associated with it and the particular risks associated with it.

My learned friend referred to paragraph 4.51 of the Building Industry Commission report – the reference to the authority carrying out check to ascertain whether a territorial authority was administering the Code in accordance with the Act and proper practices and to require correction if it was not. And suggested that might have been a specific recommendation that was not carried through to the 1991 Act. It's quite clear, I think, from the report and from the accompanying draft legislation, that what the Commission understood to be a power to require correction was a power that was implicit in the Authority's power to carry out checks of what territorial authorities are doing and to report, backed by the ultimate threat of a report to the Minister. It's quite wrong to suggest that there was a recommendation of a separate direction power that wasn't implemented in the 1991 Act, there's no suggestion of that anywhere in the Commission's report. What the draft –

WILLIAM YOUNG J:

Well, there was a suggestion of it in the Commission's report, but not apparently carried though into the draft legislation.

MR GODDARD QC:

I don't – there's no other discussion of it apart from –

WILLIAM YOUNG J:

No, yes.

MR GODDARD QC:

– one sentence, and I don't understand that to be a suggestion of a specific power to require correction, I understand that to be a reference to the implicit power to require correction, lest an unfavourable report be made to the Minister, that's all I'm suggesting, your Honour.

WILLIAM YOUNG J:

Right, okay.

MR GODDARD QC:

And I think –

TIPPING J:

So it's not a question of abandonment of the idea, it was already inherent?

MR GODDARD QC:

Yes, and it remained inherent in the statutory scheme. That's why the submission is important for me. The power to require correction was contemplated by the Commission as provided through the review and reporting function, backed up with the threat, ultimately, of going to the Minister, and it was, in my submission, carried through into the 1991 legislation using those techniques. The Commission could credibly say to a territorial authority, "You must get your act together, you must address these issues, or otherwise we will exercise our powers," and when one looks at the letter that was written by the Chief Executive of the Commission in 2003, that's essentially what one sees, "You need to get your act together, we are going to come in to help you do that. But, if you don't, it's always helpful to bear in mind the whole of the statutory scheme, including our fall-back powers."

So that – I refer, I won't take the court to it, to clause 10.2 of the draft legislation. That expressly contemplated providing reports to the Minister and to territorial authorities and to any other person that the Commission thought fit. But it seems to

me that the, when the draft reached Parliamentary counsel, they considered quite rightly that you don't need express statutory authority to provide a report to someone if it falls within your broader functions, and so that surplusage was removed.

Turning then to what I understood to be a submission that there were no indications in the Commission's report or the 1991 Act that the Authority would share liability for individual building failures, that was the note I took. That isn't quite right. First of all, liability for negligent determinations under section 17 is expressly contemplated by section 91, the limitation provision, which extends the protection of the long-stop to such decisions. There's express provision for the time from which one counts the long-stop for authority determinations, and that can only relate to individual building failures. And, second, when it comes to negligent accreditations, liability for individual building failures resulting from a "negligent type decision", I think is the phrase used in the report, is expressly discussed, positively identified as the intended consequence in the paragraphs I have referred to of the Commission's report, and again is the subject of explicit provision for calculation of the long-stop from the time of reliance, the court will remember, on the accreditation in section 91.

So there are explicit indications in both the Commission's report and in the legislation that it was anticipated that individual building owners would, in respect of some matters at least, be able to sue the Commission, and that – sorry, sue the Commission – sue the Authority – and that, I think, is important when one asks whether it's alien to the statutory scheme to find proximity as between individual homeowners and the Authority. It was clearly accepted that both building-specific decisions, determinations, and generic decisions by the Authority, product accreditations, without any particular house in mind, would found a claim in negligence if the BIA made its decision carelessly. It would be unfortunate to reach a conclusion founded on a lack of sufficient relationship between the BIA and homeowners to found a claim of negligence when such claims were squarely contemplated in the legislative history and in the Act itself.

ELIAS CJ:

But the issue is in respect of what functions.

MR GODDARD QC:

Yes, exactly. But, with respect, much of the reasoning of the court in *Sacramento* seemed to me to be directed to an argument that the BIA was just too far away from

homeowners, with whom it didn't deal directly, to ever be sued. Now, determinations, I think, one could say, "Yes, but that's where they did get close to an individual building," so that's a little bit different, but the accreditations I think are a striking example of a generic New Zealand wide decision that was expected to result in liability, and one I think should be careful that reasoning about proximity in the context of this claim doesn't produce answers that would be inconsistent with what the statutory scheme envisaged in respect of accreditations, the scheme as a whole must make sense.

I turn next, item 7, to the question raised by your Honour Justice Young at various points throughout this hearing, about whether the BIA is responsible for statements in the 1995 report, and I've just tried to capture here the answers I've given on various occasions to that question.

The first, which I haven't given but should have given, is that there is no application to strike out by the BIA on the grounds that these weren't its statements so it can't be liable, so that's not an issue which has been the subject of argument or consideration below or in this court. But, second – and this I did try to say but I'm not sure I said it very coherently so I thought I'd have another go – the responsibility of the BIA for the statements in the report is, at least in part, a question of fact for trial: did the BIA provide the report as its own, did it adopt it and was it reasonably understood to be doing so, or did it just pass it on as a mere conduit? And that's an issue which the courts have had to grapple with on a factual basis in many Fair Trading Act cases, for example. Does someone, by passing on a report from an expert, simply say, "Here is this expert's report, for what it's worth," or are they saying, "This has our imprimatur, we adopt it," and that's arisen many times in relation to real estate agents and, on occasion, in relation to solicitors. It's a question of fact, and so it's for trial, not for determination as a preliminary issue on strike out.

And, third, the argument at trial will also be that, as a matter of law, the review function was a function conferred by the Act on the Authority, and that although it could delegate performance of the function, as a matter of law it couldn't part with responsibility for the manner in which the function was performed.

WILLIAM YOUNG J:

Can you see anything wrong, in public law terms, with what the BIA did in 1995?

MR GODDARD QC:

No, I don't think there's any criticism in public law terms of what it did. What it did was it carried out a review through persons it selected to do that. A statutory corporation, of course, can only act by persons, and it chose to act through persons who were not employees but –

WILLIAM YOUNG J:

Well, just not confined to that point. They've got a function of monitoring local authorities, they, presumably for human resource reasons, commission a report, the report comes to them and to the local authorities, as was always obviously intended. Was there anything, just looking at it in public law terms, wrong with that?

MR GODDARD QC:

No, provided that they then turn their minds to whether it was an adequate review and an adequate discharge of their obligation, under the statute to carry out reviews, and, in the light of that, form a –

WILLIAM YOUNG J:

Well, just pause there. They don't have an obligation to carry out reviews.

MR GODDARD QC:

No, they have a power which they decided to exercise. So they were –

WILLIAM YOUNG J:

Well, let us assume for a moment that this is unexceptionable as an exercise of a public law power.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

How do you say we should reconcile the possible conflict between on the one hand an unexceptionable exercise of a public law power with what you say, on the other hand, was breach of a private law duty? So you don't go much on *Stovin v Wise*?

MR GODDARD QC:

Not at all, I rest myself wholeheartedly on your Honour's explanation of the unhelpfulness of public law concepts –

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

– in this area in *Sacramento*, which I think is now orthodox in English law as well, the *Stovin* approach.

WILLIAM YOUNG J:

It's, the House of Lords squared up to the problem, but the solution they came up with doesn't seem to have been very durable.

MR GODDARD QC:

With respect to their Lordships, it doesn't make sense and it doesn't work. It's an attempt to meld two different, it's an attempt to meld two quite unrelated conceptual frameworks and they simply don't mesh together in the ways suggested or at all and they don't really, the public law tests don't shed any, they don't have any real explanatory power in relation to the cases that have been decided and they don't have any normative power in relation to the question of whether there should be a private or duty of care.

WILLIAM YOUNG J:

We'll say it is the case that the BIA or any similarly placed regulator is far more exposed to private law claims and it interacts with market participants. Say it is the case that such interaction is perfectly proper in public law principles. What do you say to the contention that, to allow a private law claim introduces an extraneous component into the exercise of public law functions, thus discouraging the regulator from carrying out what may well be a very useful and helpful way of promoting the purpose of the statute?

MR GODDARD QC:

I say three things. First, that such an argument is inconsistent with the scheme of this legislation which contemplated that the exercise, perfectly properly in terms of public law of powers by the BIA, perfectly properly in public law terms by a council, would nonetheless result in private law liability where the actor was negligent. So to

say there is a problem with imposing private law liability in respect of such interactions is to adopt an argument which plainly has been rejected by the framers of this statute. It's –

ELIAS CJ:

Well, that's a submission that the two obligations march together is, I think Sir Antony Mason said in one of the cases.

MR GODDARD QC:

Yes, and that in fact in this case, rather unusually, both the policy designers and the legislatures have turned their minds to –

ELIAS CJ:

Yes.

MR GODDARD QC:

– whether those can co-exist and have said yes, subject to appropriate safeguards in terms of limitation periods and things like that and otherwise yes, your public law responsibilities and your private law liability can march together.

ELIAS CJ:

Subject to the question of whether that's so in respect of particular functions?

MR GODDARD QC:

Always, your Honour.

ELIAS CJ:

Yes.

MR GODDARD QC:

Second, my second answer is that the problem created by liability does not normally, either for private firms or public bodies, actually manifest itself in a reluctance to perform an activity. Rather it normally manifests itself by the purchase of insurance, the premium for which will in part reflect your claims history and the precautions you take to manage that risk. And that is exactly what was contemplated here. So it's wrong to say, oh dear the Commission if it interacted would, the Authority – I keep doing that, I'm so sorry. The Authority if it interacted with people would expose itself

to one-off catastrophic amounts of liability which would be completely unsupportable within its budget. With respect, that just makes no sense. It would do what the report suggests it should do, which is ensure it would have an ongoing –

WILLIAM YOUNG J:

Sorry – that's simply a liability smoothing exercise that over time the insurance premiums will reflect the risk behaviour of the regulator?

MR GODDARD QC:

But importantly it is a smoothing exercise that avoids the exposure of a limited budget to catastrophic spikes and enables what, if one was going to get into economic analysis of tort, one would describe as the internalisation over time of the risk created by both activity and care levels of the body but I don't think it's helpful here.

TIPPING J:

Isn't it more the first step rather than the second that may be important here? That although it may have a smoothing effect over time, as you say, the key point is will it have a chilling effect on co-operative – and your submission is no if you're insured you won't be chilled?

MR GODDARD QC:

You won't be chilled.

TIPPING J:

Your insurer might be chilled but –

MR GODDARD QC:

Yes. You won't be chilled and if you have a bad run of claims, your insurer will have conversations with you about what you need to do in terms of your systems to reduce that exposure and also about premiums and that will all be factored into annual budgeting and things like that but that was absolutely part of the scheme.

WILLIAM YOUNG J:

Isn't that just a long run, isn't that just a long run extortion rather than short-term extortion?

MR GODDARD QC:

No, your Honour, because it means that you're not chilled from engaging in that activity, it's just that the cost of engaging in it less than carefully becomes transparent and can be factored into your budgeting and decision-making.

WILLIAM YOUNG J:

Isn't it a cost-spreading exercise?

MR GODDARD QC:

Yes. And the third point, and here I am I think invoking *Stovin v Wise* on I say another point, is – as Lord Nicholls said and I don't think the court needs to go through it. I'll just read out a short paragraph, at page 941 of the judgment. The Council in that case argued that a common law duty would achieve little or nothing. Highway authorities would qualify their decisions to act lest they exposed themselves more readily to damages claims. His Lordship said, "This is not an impressive argument. Public authorities are responsible bodies which normally discharge their duties conscientiously and carefully. There is no reason for thinking they would indulge in artifice to conceal their true decisions," or here, no reason for thinking that they would fail to perform conscientiously their responsibilities simply because that involved the incurring of a cost which was a necessary consequence of the performance of that responsibility.

ELIAS CJ:

Well, it would be contrary to their public law functions.

MR GODDARD QC:

Yes.

ELIAS CJ:

And the whole thing can't be taken too far or else we'll have public authorities that are like the Japanese monkeys. They'd not want to hear or see or anything because – so they'd want to shut themselves away rather than performing their function, lest it lead to their incurring liability.

BLANCHARD J:

The real problem though would be not so much that they wouldn't perform their public functions, but that they would perform them with excessive cautiousness, which was not what the statutory scheme was wanting. It was wanting to encourage innovation.

ELIAS CJ:

Risk, yes.

MR GODDARD QC:

The usual theory in relation to the incentives created by tort liability is, of course, it encourages an efficient level of precaution and no more. The problem with applying that framework, one of the many problems of applying that framework to public authorities is that they don't bear the full costs, I think is your Honour's point of the precaution they take because they can insist that other people be more careful in their – some of that cost. But that perverse incentive is largely removed by insurance in respect of the function, because you're paying a predictable premium provi – at which is not subject to sharp fluctuation as result of particular instances of bad outcomes. It smoothes the issue over time.

WILLIAM YOUNG J:

Of course it didn't really work here did it because Europe claim policies meant the insurers just went off risk.

MR GODDARD QC:

We don't know what insurance the BIA had in any event but –

WILLIAM YOUNG J:

No, but it generally within the building – within the leaky building home cases, once the first sort of whiff of gun smoke, all the certifiers insurers retreated.

MR GODDARD QC:

The problem was that the policies that were obtainable in the market were claims made policies, not claims arising policies.

WILLIAM YOUNG J:

But that's pretty – it's not that easy, claims arising from policies is it?

MR GODDARD QC:

This is one of the problems with, in analysing this legislation is that it was developed, as your Honour knows –

WILLIAM YOUNG J:

And from *Sacramento*.

MR GODDARD QC:

– very well.

WILLIAM YOUNG J:

In ignorance of the market.

MR GODDARD QC:

After enquiries from the market according to the record, which – and for example the reduction of the 15 year period to 10 was because of the advice received that you could get insurance on a claims arising basis for a 10 year period but not for 15 and yet neither was correct as it transpired. But the whole structure was built on the assumption that one could do this and that that would work and it would be rather odd now, retrospectively, to identify the legal consequences of the conferral of the powers by reference to events that played out afterwards.

TIPPING J:

Now I think this quite important, Mr Goddard, this premise that the whole structure was based, as I understood you to be saying, although not directly, that because of what was in the report, everything was set out and this 15 year down to 10 tends to support that on the premise that they would be in – the risk would be underwritten.

MR GODDARD QC:

Yes. Now that, let me be very clear on that. The long-stop isn't dealt with in the Commission's report –

TIPPING J:

No, no.

MR GODDARD QC:

– that before this court, there were subsequent reports and subsequent steps were taken, and these are detailed very helpfully in the *Sacramento* –

TIPPING J:

Yes.

MR GODDARD QC:

– judgment. But it's quite clear that the whole of it was premised on the assumption, the whole certifier regime was premised on the assumption that one could create a level of liability and accountability broadly comparable to that of local authorities, with their ability to rate, by requiring insurance to be taken out that would be responsible for the life of the exposure provided for in the Act, and the decisions that the BIA took about the insurance it would require after the regime came into force showed the tension between a beautiful theory and what Justice Hammond has put to me as an ugly gang, a gang of ugly facts, in another case.

BLANCHARD J:

What do we know about this, about the insurance?

ELIAS CJ:

Yes, I was going to say, how can we use any of this on a strike-out application?

MR GODDARD QC:

Absolutely, and that really helps me, I think, because what it say is, these are all questions of fact –

ELIAS CJ:

For investigation?

MR GODDARD QC:

Yes, for investigation.

TIPPING J:

What at least we know is that the report contemplated that that the BIA would take out some insurance.

MR GODDARD QC:

Yes, that's expressly referred to in the report.

TIPPING J:

That's expressly referred to. No, there's nothing in the Act directly about it, but the power to acquire property and so on, the personality, must include the power to insure.

MR GODDARD QC:

Yes, the powers conferred clearly do –

TIPPING J:

Yes.

MR GODDARD QC:

– extend to the power to insure and to enter into contracts and so forth. So no doubt but that the BIA had the power to insure, no doubt that the report contemplated that it would have direct liability to home owners in some circumstances and could be expected to insure in respect of those, and that, it seems to me, coupled with appropriate evidence if necessary about the operation of insurance markets and expectations at the time, will enable a framework to be laid which shows that to skew the law with confidence proposition about policy, to echo your Honour's judgment in *Couch*, your Honour the Chief Justice's judgment, without knowing that, would be a mistake.

BLANCHARD J:

Did the Building Industry Commission say anything about how the BIA would be funded?

MR GODDARD QC:

Yes, there's a whole section in the report on funding, which contemplated a mix of charges for services like determinations. I think there was a contemplation of some levying power and also that some public good functions would be funded by appropriations. Then what appears to have happened – and I'm not familiar with the history of this in detail, your Honour – is that a charging power was included in the Act as enacted, I took the court to that yesterday, and the, no specific provision was required, of course, in order to appropriate money to this public authority for its

functions, but the initial legislation didn't include a levy power, and that's what was introduced in 1993 in part 3A, so there seems to have been a recommendation of a mix of all those funding types, I think, in the report on day one, initial non-adoption of the levy idea but then a move to it. I, what I say about the report, I just have to check. It's in, the report's in volume 6 of the case on appeal, and my learned friend, the Solicitor-General has been, helpfully referred to the part I had in mind, part 6, "Funding the control system," which begins at 996, and –

BLANCHARD J:

Sorry, which volume?

MR GODDARD QC:

Volume 6 of the case on appeal, your Honour, not the authorities but the case on appeal. Ah, in fact what happened was – if one looks at, "Sources of revenue," on page 1006, there's perhaps the most helpful discussion of this, "The overall costs of the national control body, offset by charges, could be met from funds from a combination of sources, consolidated fund, that is appropriations from territorial authorities as a local tax or from building owners as a levy on buildings, collected through the consent process," and the recommendation at 6.48 was against levy funding, and thus the recommendation at 6.52 was that, "Controlled tasks assigned to BIA which are not funded by fee or sales revenue should be funded by direct vote from Parliament by appropriation," and that was the form, as I said, that the 1991 Act too when first enacted, but it can only have been in force for less than a year, I think, given that it came into force in 1992, before the 1993 amendments provided for levies as a further option of funding.

WILLIAM YOUNG J:

Can I get back to your point about the reaction of public bodies to risk? My understanding is that the, in the United Kingdom, the retreat from AMS was very much associated with the sense that building inspectors were requiring far too much concrete to be poured into the ground, and I've got a feeling that that sort of, that the same concern is expressed in Building Industry Commission report, that a risk-averse building inspector with nothing to lose by being over-prescriptive, would avoid risk by saying, "Here, do it twice," or put –

MR GODDARD QC:

Yes, that's the point I was trying to make earlier, your Honour, about how a regulator, unlike a private firm, can to some extent externalise the cost of that precaution, make someone else do more, and that's one of the reasons why it's necessary to be a bit cautious about the crude argument that imposing liability on a public authority always makes them do things more carefully. It doesn't mean that it's not a useful insight, but it's only part of the analysis, and one needs to go on to ask, "Is there a risk of over-shooting here?" and the answer here is that a number of aspects of the scheme were designed to prevent over-shooting, not least section 7 subsection (2) of the Act, which expressly prohibited requiring anything more than was necessary to meet the requirements of the Code, and the ability, which was expressly contemplated as being used by owners where councils were too demanding, to go to the BIA, the national expert body, which would hold the balance, hold the fort on that issue. So, yes, it is something one has to think about when carrying out policy design, but there are a whole range of techniques for managing it and, in my submission, this regime, with the mix of both positive provision for intervention but also prohibition on further interventions, decision-making structures, ability to insure, removed that risk to the point that it shouldn't be a material concern that influences the Court in assigning private duties.

WILLIAM YOUNG J:

Well, just – the fallacious view of the Commission was that the insurance arrangements would mean that certifying functions would be covered by insurance?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

So that was the view and it was fallacious?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

But let's, factoring in that assumption, there wouldn't be much cause for the regulator to ever have, to step into the breach?

MR GODDARD QC:

In terms of…

WILLIAM YOUNG J:

Well, I mean –

MR GODDARD QC:

Paying, do you mean?

WILLIAM YOUNG J:

Yes. I mean, it's unlikely perhaps that the Commission would have thought that an insurer for a local authority would be suing the BIA – might of, I suppose – but it's not at that level of sophistication.

MR GODDARD QC:

What – the level of sophistication that was reached, and it's not the level of sophistication that one ends up with many years afterwards with hindsight like this.

WILLIAM YOUNG J:

Yes, with hindsight.

MR GODDARD QC:

But the level of sophistication that was reached actually is rather better than in many policy processes, because what we do see in the report is an express consideration of how the allocation of responsibility to different players in the system will affect the allocation of liability, so, I think it was that round 4.78 paragraph that said, "On the other hand, if a certifier does it, they'll be liable and the local authority won't be." If the BIA issues a determination, the territorial authority will have to act consistently with that, but its liability will be taken away and it will be passed to the BIA instead.

WILLIAM YOUNG J:

But I mean the *Sacramento* case was because the ABCs insurance arrangements failed.

MR GODDARD QC:

Yep, and a few other cases that have before the courts.

WILLIAM YOUNG J:

Yes. All right, okay, thank you.

MR GODDARD QC:

But –

WILLIAM YOUNG J:

But anyway, those are the three answers to the propositions.

MR GODDARD QC:

Those were the three answers and they link into my last number 12, which I think I've covered as well, although I need to fill in the gaps obviously, on economic tort. There I just wanted to sound a note of caution about trying to apply this in crude ways to public authorities and first of all to say the that externality analysis in *Stovin v Wise* is just, isn't helpful at all in relation to a conduct of a public authority. It's not providing services in a market, at a market price with the result that if you internalise liability to it, it will charge more, and less of the service will be provided. That's usually not the objective of the statute either. So that, although it's perfectly sensible in the context in which I understood His Lordship to be describing, which was general – you know, tort law, including private actors, really isn't helpful in relation to public authorities.

But secondly, the other point that's often made, that was made by the High Court in *Dicks v Hobson Swan*, the suggestion that tort liability incentivises the careful performance of public functions also needs to be deployed with caution because of the point your Honour Justice Young made, that is, you can push that cost of precaution out to other people, it doesn't necessarily follow that you'll end up with the efficient level of precaution because, of course, one, and one more thing about this and then I'll leave this subject.

From an economic perspective, one is just as worried about spending too much on precaution as too little, and it's only where both the cost of taking precaution and the liability for failure to take sufficient precaution are all internalised to the same player that you get the magic results that the pure Chicago school theorists suggest are magically delivered by tort, law of tort. With public bodies it's much more complicated and it's wrong to succumb to the lure of simple answers from economic analysis. One has to get into all sorts of issues about agency theory as well and who's making the decisions. Is it the public body or is it individuals who are

exposed? It's really messy, it's interesting, but it's messy and I don't think the court can get into it in the context of an application like this.

ELIAS CJ:

Well, I hope we don't have to get into it.

MR GODDARD QC:

But, of course, at trial it is perhaps something that might usefully be canvassed through a mix of argument and expert evidence, the kind of evidence that Sir Richardson called for in a number of decisions in the Court of Appeal, again illustrating that even policy issues, perhaps especially policy issues are not well –

ELIAS CJ:

Turn on fact.

MR GODDARD QC:

Turn on facts, turn on context and are not well suited to determination in a preliminary application of this kind.

Let me come back then to item 8 of my note. *Holtslag* I felt, having been unearthed by the exceptional research skill of my learned junior, Ms Cauldwell, ought to be drawn to the attention of the court, but it is distinguishable. It's very different. I adopt with gratitude your Honour Justice Tipping's phrase "miles away" from the first three clauses –

TIPPING J:

A bit of hyperbole perhaps, Mr Goddard.

MR GODDARD QC:

There's no harm in that on occasion, your Honour, and I'm prepared to go every inch of that mile with your Honour. It's a million miles away, I'll go further, from the first three causes of action involving direct dealings, but it's also distinguishable from the fourth cause of action because it was dealt with as a pure omission case, as my learned friend, Ms Scholtens said, whereas in the present case, the conduct to which the claim relates includes actual conduct in reviewing the Council, which the Council says was carried out negligently and which perpetuated the deficiencies in the inspection regime. This isn't a failure to warn someone about a cliff, it's a case of

encouraging them to go for a walk on a particular track and then failing to tell them about the cliff at the end of that track.

The other respect in which some caution is required in respect of *Holtslag* is that a key ground for that decision was characterisation of the decision. The particular function that was being attacked, product listing, is a policy decision. My learned friend took the court to that, whereas the argument here is that the functions in issue were not policy functions, they were much lower level operational calls and that is a matter for evidence at trial. *McMillan*, even further away because the Canada Mortgage and Housing Corporation isn't a controlled authority at all, with a sort of talking and policy shop.

The third cause of action, the argument here is that the duty to warn in 1998 to 2000 stems from prior conduct in the form of advice to the council in 1995 that the systems and processes were satisfactory. So this isn't a pure omission claim as my learned friend sought to describe. It's based on the combination of earlier positive conduct and the subsequent failure to correct the advice conveyed in circumstances where the BIA knew, or ought to have known, that the Council was likely to be continuing to rely on that advice.

Another way of looking at it, I suppose, is to say that if the prior review and report don't, themselves, fall on liability, which is what we argue in the first two causes of action, then they give rise to the proximity that justifies later, imposing a duty to warn, and –

ELIAS CJ:

A special facts duty of care.

MR GODDARD QC:

Yes, and the Court in *Couch* was perfectly willing to contemplate the possibility of a special facts duty of care, including a duty to take care to warn. I refer to paragraph 83 from your Honour Justice Tipping's judgment in *Couch* and in cases where the defendant knows of a significant risk to a limited class of persons, although your Honour was willing to contemplate a duty to warn that might extend to a wider group, perhaps even to the public as a whole, and *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4th) 697 (Ontario Court of Justice, General Division), the balcony rapist case in Canada which is very helpfully

summarised in *Couch* at 95 to 96, is a good example of a situation where the police have no control over the rapist but, because they knew a particular group of persons was particularly at risk, they had a duty to take reasonable steps to warn.

Here, the risk was known from the 1995 review. The BIA knew what systems the Council had and it had told them, essentially, box on but tweak these things here. So the risk was known, encouragement to keep on going had been provided. So as soon as information suggesting that this way of doing things was likely to end in tears came into the possession of the BIA it should have said, "Oh, we know some people who are doing just the thing that this is warning about. We saw them doing it just a few years ago. We expect they're probably still doing it. We'd better get out and tell them." So that's that argument. It's not an omission case.

TIPPING J:

Well, it's not solely an omission.

MR GODDARD QC:

Yes, that's better. But the aridity of trying to draw a sharp distinction on that dimension, rather than simply treating it as an insight that informs the analysis I think is helpfully discussed in *Stovin v Wise*. The whole point about how you frame an act and how broad the context is, affecting whether you end up describing it as an activity in the course of which you failed to take sufficient precaution, or a failure to take a small step, and this, I think, is something which, seen properly in context, is not a pure omission case.

The fourth cause of action. This, I accept, faces more difficulties than the first three because of the absence of direct dealings. I would prefer to put it in that way rather than your Honour's "more wobbly" I think, faces more difficulties I do accept, as opposed to *McMillan* for example, which is not just wobbly, but prone because there were no relevant control functions at all. And even here, and this is my attempt to answer your Honour Justice Blanchard's question of the other day, "Are there cases where a person's liable for harm where they don't have a direct power of control?" and it's in the duty to warn situation I think, your Honour, that that can arise, and I've provided two examples. There aren't many, but the *Jane Doe* case certainly one. That's not a case where the police were exercising a power of control over the risk, the rapist hadn't been identified, hadn't been taken into custody. This is not a *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; [1970] 2 WLR 1140; [1970] 2 All

ER 294; [1970] 1 Lloyd's Rep 453; (1970) 114 SJ 375, or *Couch* type situation, but the police were alive to the risk and because of the analysis they'd done, they knew the area in which the person was operating, they knew the sort of target they operated and they could narrow down to a finite number of women living in the second floor, I think it was, apartments in a particular area in Toronto, the people who were particularly at risk and so it was held there was duty of care to warn.

TIPPING J:

I subsequently inspected the area, Mr Goddard but it didn't illuminate anything.

MR GODDARD QC:

I was about to ask your Honour exactly that. So, we have to be a little careful about inspecting areas like that, your Honour, in the light of the prowling round looking at balconies in that area.

TIPPING J:

Well, I think he'd – I think that risk had passed.

MR GODDARD QC:

Right, I was delighted to hear that.

The other example I would give in response to your Honour's question is the auditor cases. It's not exactly on all fours, I accept that but your Honour said, "Has anyone been held liable in circumstances where they did not have a power to tell the person to stop the conduct in question?" and *Edwards v Law Society of Upper Canada* [2001] 3 SCR 562, or the lawyer's trust account auditor cases are such cases. The auditors have no power to intervene in any way in relation to the conduct of the practice and the operation of the trust account, but they can tell someone else who has a power to intervene, and that's a little bit like the BIA and the Minister, a little bit, and I can't get closer than that.

I've probably got about two more minutes. Does your Honour want to take –

ELIAS CJ:

No we'll carry on if that's all right.

MR GODDARD QC:

10.2, the argument in *Sacramento*. I did, I think to be fair to my learned friend, Ms Scholtens, suggest that, I suppose one could read it as a very narrow decision confined to the specific duties pleaded, but I'm not suggesting that that's the better reading of it. I think it is intended to stand for a broader proposition that the BIA did not have duties to the public, and that's, it's on that basis that it's tackled head on as wrong, essentially for three reasons listed there, that the court didn't take into account all the links between building owners and the BIA, levies, the possibility of direct dealings via determinations, the possibility of reliance on accreditations.

Second that the Court didn't take into account the full range of powers open to the BIA to effectively prevent harm of the kind suffered by the plaintiffs, including powers that are neither legislative nor quasi judicial and I particularly emphasise there, the review power and the ability to require correction by urging it with the backstop of reference to the Minister, and that the Court's attention wasn't drawn to the actual conduct, the positive conduct of the BIA in the context of TA reviews. It didn't sit purely at a second level all the time. Every few years it descended to the level of the territorial authorities. It went out and looked at what they were doing and contributed to the way in which they did it, in a manner that perpetuated the inadequate inspection regimes that contributed to the plaintiff's losses. And those are factors which I say enable the court to say at the least that the issue merits further investigation at trial to see whether those factors are enough to tip the balance.

And last, my learned friend referred, although very briefly, to the financial assistance package and it cannot be right as a matter of principle that there's 2011 legislation that retrospectively affects analysis whether a duty of care existed in 1995.

Unless there's anything I can assist the court with, those are my reply submissions.

ELIAS CJ:

No, thank you, Mr Goddard. Thank you counsel for your considerable assistance with this case. We'll reserve our decision.

COURT ADJOURNS: 11.33 AM