IN THE SUPREME COURT OF NEW ZEALAND SC 58/2011

[2012] NZSC Trans 5

BETWEEN **BODY CORPORATE NO. 207624**

First Appellant

AND **THE SPENCER ON BYRON UNIT OWNERS**

Second Appellants

AND **NORTH SHORE CITY COUNCIL**

Respondent

Hearing:	20, 21 and 26 March 2012
Court:	Elias CJ Tipping J McGrath J William Young J Chambers J
Appearances:	J A Farmer QC, M C Josephson and G B Lewis for the Appellants D J Goddard QC, S B Mitchell and N K Caldwell for the Respondent

---

CIVIL APPEAL

MR FARMER QC:

Yes, if the Court pleases, I appear with my learned friends Mr Josephson and Mr Lewis for the appellants.

ELIAS CJ:

Thank you Mr Farmer, Mr Josephson, Mr Lewis.

MR GODDARD QC:

May it please the Court, I appear for the respondent counsel, with my learned friends Ms Mitchell and Ms Caldwell.

ELIAS CJ:

Thank you Mr Goddard, Ms Mitchell, Ms Caldwell. Yes, Mr Farmer.

MR FARMER QC:

If your Honours please, the issue in this case, as granted by leave, is whether the duty of care, as formulated by this Court in *North Shore City Council v Body Corporate 188529 [Sunset Terraces] Terraces* [2010] NZCA 64, [2010] 3 NZLR 486, extends to mixed-use building of the kind that exists in this case, namely hotel apartments and residential and penthouse, or penthouse apartments. Hotel apartments which, I might say, on the expiry of the current 10 year leases could easily revert to home use and in fact, in some cases have.

The Supreme Court, as your Honours know, left open in *Sunset* for future consideration the question of whether the duty applies beyond premises intended for residential use. So one possible outcome in this case, on the basis of *Sunset* as it presently stands, is that the duty applied to the penthouse apartments only. There being no dispute but that they were intended for and are in fact used for residential purposes.

Another possible outcome is that the Court thinks that the hotel apartments are sufficiently close in character to residential apartments, in particular for example, residential apartments of the kind that were considered in *Sunset* that are purchased and then rented out for investment reasons. So, it's sufficiently close for the hotel apartments to be regarded as being within the duty as so far articulated.

A third possible outcome is that the Court accepts the approach of the Council in its submission in the present case which is to say that the premises as a whole should be regarded as commercial in nature. If that is the view taken, then the issue will be whether the Court extends the duty to commercial premises and refuses to follow recent authorities that exclude such premises from the duty.

Your Honours, it is to be noted that the Council, in its written submissions, has elevated our case to one that is dependent on our establishing that the duty applies

to all commercial premises. Throughout the submissions they refer to commercial premises rather than to the mixed-use premises that, on the facts, exist in this case.

One assumes that when they pose the issue in that way, they presumably are referring to premises that are used for commercial activity, for a commercial return. And that must be the way that they put it because, of course in *Sunset* itself, the Court, this Court, did hold that the duty applies to premises that had been purchased by an investor seeking a commercial return in respect of premises where a tenant will reside.

So the distinction between *Sunset* on the one hand and Spencer on Byron on the other hand, on the facts, really comes down to whether the Court will draw a line, a firm line, between on the one hand, premises that are used for a home, for a residence, albeit that the premises have been purchased by an investor seeking a commercial return and then renting them out to a tenant for residential reasons, that on the one hand and on the other hand, the Spencer on Byron situation, where there are in effect short-term rentals by people staying at the hotel, where each individual unit has also been purchased by an investor subject to a lease to the hotel company which then, as I say, in effect sublets the premises to people sleeping at the hotel but staying only for short periods of time that might vary between one day, one week or perhaps, in some more limited cases, longer.

CHAMBERS J:

You're not shying away from the possibility though, are you that the duty of care might be owed in respect of purely commercial premises?

MR FARMER QC:

Oh no, no, I'm going to come to that because what I'm going to say, what I do say, is that on the facts of this case and particularly having regard to the leave that the Court gave, it would be sufficient for us to establish that drawing the line in the way that I've just suggested, is not an appropriate line to draw and that the Spencer on Byron premises with its mixed-use is sufficiently close to the kind of residential apartments that this Court in *Sunset* said did attract the duty, even in cases where the owner of the premises was an investor who then rented the property out to someone to live in.

ELIAS CJ:

On that basis, where would you draw the line, somewhere where people lay their heads, or –

MR FARMER QC:

Well, ah –

ELIAS CJ:

I know it's not for you but you are saying that this is your fallback position?

MR FARMER QC:

It is a fallback position and your Honour, it does become almost impossible to draw the line because if – I'll come to the case later but, thinking of the *Minister of Education v Econicorp Holdings Ltd (Glen Innes Primary)* [2011] NZCA 450 case, where the question was whether the duty applied in respect of a school that had been built and that was defective. If one takes the view that the policy of the Building Act is to protect the health and safety of those occupying a building, well does one say well, we can't extend the duty to the school because the children are not sleeping there but they are there of course during the day for quite long periods of time.

TIPPING J:

Well that would apply to most commercial buildings too, people don't sleep there.

MR FARMER QC:

Yes indeed, indeed, absolutely it does and so –

ELIAS CJ:

On that point –

TIPPING J:

Well some of them do, but it's not relevant.

MR FARMER QC:

Some?

TIPPING J:

Oh sorry Mr Farmer, no, that's an unhelpful observation.

MR FARMER QC:

Well, to me at any rate, perhaps I'm clear on observation, no doubt intended to be helpful but –

ELIAS CJ:

On that point, the respondent's submission is that the purpose of the Act is protection of the health of safety of occupants. What's your position on that?

MR FARMER QC:

Well, we certainly would agree with that but we also say that health and safety, in particular as discussed by Justice Richardson in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA), [1996] 1 NZLR 513 (PC), referring to a public report at the time, is a concept that must be interpreted expansively, so in –

CHAMBERS J:

Why isn't it just a duty of care to ensure that all buildings are erected in accordance with the Building Code?

MR FARMER QC:

Well that's what, at the end of the day, looking beyond the facts of this case, is the issue that the Court – whether this Court today, or a future Court, necessarily will have to confront and that's perhaps why my learned friends have chosen to try to elevate to this case that issue. So that's my point, that when one reads their submissions, throughout they put our case as being a case that is advocating a duty of care in respect of premises that are used for commercial purposes –

ELIAS CJ:

But why aren't you advocating that as a –

MR FARMER QC:

Well what I, that's exactly what I was going to go on to say your Honour, that I'm quite happy to have that debate here today.

TIPPING J:

Well that is your primary submission, your fallback is the more subtle, is that a fair way of looking at it?

MR FARMER QC:

Well, in terms of the leave that this Court granted, it was granted in terms of –

TIPPING J:

Well never mind precisely the leave Mr Farmer, is your primary argument that it applies across the board but if you're unsuccessful on that, you say you get home anyway on this more segmented or subtle –

MR FARMER QC:

Yes.

TIPPING J:

– if I may so describe it?

MR FARMER QC:

Yes, yes and –

ELIAS CJ:

Well you only want to win but we need –

MR FARMER QC:

Well that's not a bad ambition to have your Honour –

ELIAS CJ:

– to look at the whole picture –

MR FARMER QC:

Yes.

ELIAS CJ:

– and a lot of the argument against you is to do with the unworkability of drawing the line at any stage so that's really why Mr Goddard pushes you to also have to argue the benefit.

MR FARMER QC:

And that's what I'm here to do.

ELIAS CJ:

Yes.

MR FARMER QC:

So he would say you can't draw the line and therefore you should stay where you are in your residential box –

ELIAS CJ:

Yes.

MR FARMER QC:

– we say, yes, we agree the line is very difficult to draw, you can't draw it in The Spencer on Byron case in a sensible way. That's why the duty should extend, because the policy of the common law, the policy of the Building Act, et cetera, inevitably drives you to expand the duty not to restrict it, and I will deal with the case in that way.

ELIAS CJ:

Yes.

MR FARMER QC:

Now another feature of my learned friend's submissions is that they rely very heavily on what they say is a line of authority which denies the duty in respect of premises used for commercial purposes. And they say that because of this line of authority there can be no concept of community reliance on council responsibility of a kind which would give rise to the common law duty of care. Indeed, they say to the contrary that the line of authority constitutes, in effect, an acceptance of council immunity. When one examines though, and this is really the first substantive submission I want to make, I want to examine the line of authority and just see how solid it is.

My learned friend's put it, and I will just give you the references without taking you to them, in their written submissions at paragraph 8.10 that New Zealand Courts have, as they put it, over the last eight years or so held that there is no duty of care owed

by councils in respect of buildings other than dwellings. In fact, the first time that this was held at the level of the Court of Appeal, and I will come back to the High Court shortly, was only just over three years ago in *Te Mata Properties Ltd v Hastings District Council* HC Napier CIV-2004-441-151 Williams J, 17 August 2007 which is a case I will necessarily have to come back to as well. Subsequently the Court of Appeal followed that decision in *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] 3 NZLR 786 (CA) and in so doing reversed Justice Fogarty, who in the High Court was not prepared to strike out a claim in respect of a defective chimney in a lodge and then of course there is the Court of Appeal decision in this case. So, that's the line of authority over the last three years at Court of Appeal level.

Now I should say there are two previous High Court judgments prior to those decisions, relating to council duty and respect of commercial premises. The first of these is a case called *Otago Cheese Company Ltd v Nick Stoop Builders Ltd* HC Dunedin CP180/89, 18 May 1992, in which Justice Fraser ruled that a council did owe a duty of care to a factory owner but then held on the facts a duty had not been breached. I'm not going to take you to that. That case is referred to in the second and quite significant in terms of current debate, the second High Court decision that really preceded the Court of Appeal decisions that I have just referred to and that is the judgment of Justice Venning in *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 which features significantly in my learned friend's submissions. In that case Justice Venning refused to follow the earlier decision by Justice Fraser and refused to find a duty of care in respect of a motel which had a number of defects.

Now I do want to take you to that case for two reasons. One, it's an extremely useful case – perhaps three reasons - one, it's a useful case in terms of the decision policy, general policy considerations, which was how the Judge describes them. Secondly, it's important to see the actual basis on which the Judge in that case, on those facts, held there was no duty and, thirdly, it's because that case has featured, as I say, very strongly in the subsequent debate on this particular issue. It has been influential in the later Court of Appeal decisions. So if I could perhaps ask you to –

ELIAS CJ:

So you are taking us to it really for the ideas, for the arguments principally?

MR FARMER QC:

For the arguments and also to show that in that case His Honour did not say that there could never be a duty of care in respect of commercial premises. To the contrary he decided on some very particular facts that existed in that case.

CHAMBERS J:

I'm very happy to look at the cases, Mr Farmer, I may say it does seem to me though that where one should first look for the policy is the Building Act 1991 because the Building Act 1991 changed significantly the statutory framework that had previously existed.

MR FARMER QC:

Yes, and that's, your Honour, that's so. And that's material that, when issued, was very well traversed at the time in *Hamlin* and subsequently in this Court in *Sunset.* And perhaps that's why I haven't dwelt on it, and didn't really intend to dwell on it too much because I take it as a given that what that Act clearly does is to impose statutory responsibility on councils in respect of the construction of buildings of all kinds without distinction between residential, commercial or industrial and, secondly, it confers on the councils very wide powers to control construction to ensure that it is done properly and, for example, confers express power to issue notices to rectify defects before issuing a certificate of code of compliance.

CHAMBERS J:

Just to give one example from the Act which seems to me extremely important is section 76 because one change the Act made from what the law was prior to 1991 when councils were not under a duty to inspect. The 1991 Act provided that somebody had to, had to inspect –

MR FARMER QC:

Yes, yes.

CHAMBERS J:

– either a council or a certifier, and section 76 is actually a statutory duty of care.

MR FARMER QC:

Absolutely.

CHAMBERS J:

– you could sue on that breach of statutory duty and there is no suggestion in section 76, for example, that it is limited to residential dwellings.

MR FARMER QC:

No, absolutely, and it's conceded by my learned friend in this case, your Honour, that there are no distinctions drawn in the Act between residential, commercial or whatever and, Your Honour, with respect, is absolutely correct that there is that express obligation to inspect. There are issues around, there was provision at one time for certifiers –

CHAMBERS J:

Correct.

MR FARMER QC:

– private certifiers and there were issues around that but they don't concern us in this case. There is no doubt but the council here assumed the responsibility and the obligation to inspect and we would say, on our pleaded facts that they failed in that duty.

TIPPING J:

Mr Farmer, the more so, as my brother has pointed out something that I think is, I agree, very important because the duty to inspect is, or the concept of inspection, is defined as the taking of all reasonable steps to ensure that any building work is being done in accordance with the rules.

MR FARMER QC:

Yes, yes.

TIPPING J:

That is a duty that is not trammelled by the nature of the building.

MR FARMER QC:

No, absolutely, and –

ELIAS CJ:

Or health and safety.

MR FARMER QC:

No, and I, as I say, I hadn't intended it, it's very helpful but I hadn't intended to dwell on this because I assumed this was well traversed ground and not really disputed.

TIPPING J:

Well, it doesn't seem to have seen a great deal of light in the cases that have held to the contrary.

MR FARMER QC:

No, no, that's correct.

TIPPING J:

And I think we're going to have to grapple with that.

MR FARMER QC:

Yes, I mean in this case, your Honour, you will be aware of course that the hearing in the Court of Appeal took place before your Honour's judgment in *Sunset Terraces.* The judgments came out while this case had been reserved for judgment in the Court of Appeal and what actually happened was the Court of Appeal gave judgment with reference to the judgments in *Sunset* but did not call for further submissions before doing so. So it may well be, and I say this with respect of course, that it may well be that there wasn't a proper consideration or a full consideration and discussion, certainly no discussion.

CHAMBERS J:

Well, in fairness to the Court of Appeal, they had to decide this on the basis of previous binding authority of their own Court, namely *Te Mata* and *Charterhall* and I can say, as a Judge who sat in *Charterhall*, we felt ourselves bound by *Te Mata* so to some extent it was almost a given that you had to find a distinction between commercial and residential because that's what *Te Mata* said.

MR FARMER QC:

Well that's so and I'm going to deal with *Te Mata* of course and a critical point about *Te Mata*, which I'll say now and I'll come back to it, is that in that case the case was argued and considered solely on the basis of the way in which *Hamlin* had been formulated. Namely, that the duty there was to protect vulnerable homeowners from economic loss. Whereas the emphasis in this Court in *Sunset* was that the duty was there to protect occupiers of premises, but the way in which that duty was best given effect to, and the only way it could be given effect to, was by granting a cause of action to the owner, who rented the property out to an occupier, because it was the owner who could recover compensation to remedy the defects. So that's paragraph 53 of Your Honour Justice Tipping's judgment. So you see, there's quite an important shift from the way that matter was looked at in *Hamlin* and *Te Mata* and the way it was looked at in this case. And in *Te Mata* itself interestingly Justice Baragwanath, and indeed the other Judges, Justice Robertson –

CHAMBERS J:

Justice O'Regan.

MR FARMER QC:

Justice O'Regan and Justice Robertson, recognised that the case could well have been argued differently. The case could have been argued, or rather could have been pleaded and argued on the basis of the policy of the Act being to protect the health and safety of occupiers but that's now how it has been argued and pleaded. It had been argued on the basis of economic vulnerability of owners of residential buildings – of buildings and so the point there was, well, the commercial owner is really seeking economic loss, recovery of economic loss, and we're not going to allow that, but Justice Baragwanath did say, and I'll take you to this in due course, did say: well if it had been argued the other way then maybe the result would have been different. And indeed, we've since had *Sunset* in this Court where the emphasis is on the occupier. The policy of the Act being to protect the occupier that being, as it were, applied or implemented via the owner suing for compensation to enable the defects to be remedied.

CHAMBERS J:

I would have said the policy of the Act was to see that all buildings were erected in accordance with the Building Code.

MR FARMER QC:

That's true but for what reason and the reason is to ensure the health and safety –

CHAMBERS J:

Well I don't know about that.

MR FARMER QC:

In a broad sense, using that term in a broad sense.

CHAMBERS J:

Why not simply: not to cause economic loss?

MR FARMER QC:

Well I'm happy with that, let me say –

WILLIAM YOUNG J:

That's quite a big question, of course, and it's a much debated question but can I just ask you really to come back to the point Justice Chambers put to you. He said that section 76 imposes a duty to inspect. Now, I can't see that in there. I can see a definition of "inspection" and I can see a power through the building consent that permits councils to inspect and I can see section 43, which imposes an obligation on a council when issuing a code compliance certificate to do so if satisfied on reasonable grounds, but I don't see a duty spelled out in terms to inspect.

CHAMBERS J:

It doesn't come from section 76.

WILLIAM YOUNG J:

Well, where does it come from?

CHAMBERS J:

It comes from a reading of the sections requiring that the code compliance certificate must be given and if one then looks at the regulations, one sees that there have to be certain inspections carried out in order that one can give the certificate.

MR FARMER QC:

Well there's also the notice to rectify provision as well. That if, before issuing a certificate the council, as Your Honour says, has to – necessarily –

WILLIAM YOUNG J:

Or a certifier –

MR FARMER QC:

– necessarily has to inspect because, if there are defects, its duty is to issue a notice to rectify and –

WILLIAM YOUNG J:

I know, I suppose I'm going to have a semantic argument for the rest of my life, there's a power to issue a notice to rectify. The duty – do I take it, and I really, I suppose, am bouncing this question off you back to Justice Chambers, the idea that there's a duty is one that really flows from the scheme and purpose of the Act rather than from a particular provision that says the council shall inspect?

CHAMBERS J:

Well for instance regulation 7 sets out exactly when the owner must give notice to the territorial authority or various things, intended commencement of instructions for - and it was altered at one stage, but – and the various steps in the process.

TIPPING J:

At a rather higher level - that section 6 and 7, which set out the purposes and principles and the fundamental premise that all building work should comply with the Building Code. The only person given the relevant powers to bring this about is the council and the council therefore must have a duty to bring it about –

CHAMBERS J:

Or a certifier.

TIPPING J:

Or a certifier, well, forget the certifier, but the council must have a duty to bring it back otherwise the Act would be –

MR FARMER QC:

Absolutely and –

WILLIAM YOUNG J:

Or the building owner has got an obligation.

TIPPING J:

Well the council's given the task of controlling the building work. Section 6(1) says that one of the purposes is to provide for necessary controls relating to building work. That's – the council's given that power of control, as it seems to me.

ELIAS CJ:

And until there's a certificate of code compliance the council can intervene, can't it, to require compliance with the Code?

MR FARMER QC:

Yes it can and –

ELIAS CJ:

Anyway, I'm just wondering where we're heading here because it does seem to me that the sensible starting point may well be the Act but at least you may return to that. You wanted to make the submission that the cases relied upon in the Court of Appeal didn't revisit the *Hamlin* liability in the light of the changes to the legislation, is that the –

MR FARMER QC:

Well, the submission that I'm really making is that the – there has been this – *Hamlin* was, the focus in *Hamlin* was said to be a policy of protecting vulnerable homeowners from economic loss and you'll recall that in Justice Richardson's judgment, particularly in *Hamlin*, he went right back to really post World War setting and examined Government policy that was intended to encourage owner/occupiers, whole state housing developments, state advances 3% loans, all of that sort of thing so that the real emphasis was on – and on people building relatively modest homes after the war everyone was poor, building homes with 3% loans, and the builders themselves were small companies and therefore the role of the council was to ensure that the vulnerable home builder or homeowner did not suffer loss because of

negligent building and that was why – how the duty of care, as it were, in New Zealand conditions arose. That was Justice Richardson's particular analysis.

ELIAS CJ:

It proved a very effective argument in persuading the Privy Council to let New Zealand follow its own path.

MR FARMER QC:

Yes, that's right.

ELIAS CJ:

But I suppose there is a question as to whether that really is the rationale today.

MR FARMER QC:

Yes that's right, we've moved on, and –

ELIAS CJ:

Or indeed was the rationale for the other members of the Court.

MR FARMER QC:

Yes, that's probably so too. The - there's not quite that focus in Sir Robin Cooke's judgment, for example, in that case.

CHAMBERS J:

But the law definitely moved with the 1991 Act. When the Court of Appeal was writing in *Hamlin*, the statutory background was the Local Government Act and the fact that you didn't even have to have bylaws relating to building. And this was the whole issue in *Anns v Merton LBC* [1978] AC 728 (HL), how can you make a local authority liable when they're not under a duty? It's merely a power which they may choose not to exercise. But what the 1991 Act did, I would have thought, was make it crystal clear that first, you must get the local authorities consent to build anything and secondly, it must be inspected by someone.

MR FARMER QC:

Yes and the Privy Council –

WILLIAM YOUNG J:

Just pause there –

ELIAS CJ:

Just pause for a second. Can that –

WILLIAM YOUNG J:

Well, there is a premise there. I thought that at the time of *Hamlin* there was requirement to get a building consent for all works but the –

CHAMBERS J:

No.

WILLIAM YOUNG J:

– model bylaw was applied throughout New Zealand?

CHAMBERS J:

But it was discretionary under the Local Government Act whether you had a bylaw or not.

WILLIAM YOUNG J:

Okay, well I think –

MR FARMER QC:

There was a New Zealand standard for sure but in any event –

WILLIAM YOUNG J:

And I thought all local authorities had adopted it?

MR FARMER QC:

Well, I'm probably on your side on that one too but the important, this may be a – but in any event, the Privy Council knew about the Building Act which hadn't come into force as at the time of the facts of that case and they did, there was a discussion about it, there was an acceptance of it, there was an acceptance of the fact that it did impose, as your Honour already puts it, a higher responsibility on councils than previously existed.

So yes, of course, that's one of the steps that we've now moved on from but we've moved on in other ways and one of the ways we've moved on is that what emerged of course 10 or 12 years ago was a crisis, called a leaky building crisis, with Government reports, the Home report and the rest of it and so with the Building Act being reacted in 2004 but without necessarily changing the thrust of it so –

McGRATH J:

Hamlin in the Court of Appeal they tested - Justice Richardson tested his approach against the Building Act, did he not?

MR FARMER QC:

Yes, he did, he did but the –

McGRATH J:

And really for him, wasn't it, that the – in terms of vulnerability, he saw the importance of the assets in the way you've described, the home purchase asset for the ordinary New Zealander, that was a significant aspect in reliance on the council.

MR FARMER QC:

That's right and, in a sense, that was a – but there is that reference to economic vulnerability of such people and what I was going to say though is, just in this context - seeing as we're talking about his judgment we may as well deal with it now - was that he did also recognise and consider the health and safety aspect of this and you'll find that actually in volume 2 and the Court of Appeal is in tab 21. He considers the Building Act – well, I won't take you right through it but from page 524 on you'll find his analysis of the policy and the social context in which the issue had arisen.

Then you'll find the Building Act is considered on 526, where he says, "The Building Act introduced," this is line 5, "introduced a new perspective on building and planning controls. Section 6," which your Honour Justice Tipping referred to a moment ago, "states the governing purposes and principles and the statute contains provision for owners to engage approved certifiers. Central features of the legislation are that all building work must comply with the Code. Section 7, territorial authorities are charged with responsibility of enforcing the Act." So there's perhaps where the duty is. "Section 24, consents for building work can only be issued by territorial

authorities, 32 and 33 which are entitled to inspect work for compliance with the Act and that's section 76 which started this discussion."

Then the reference to the certificate of code compliance, et cetera. Now, he went on at line 21 to make the point that there was nothing in the Act to preclude private damages, a common law, claim and says, "On the contrary," line 24, "that may properly be regarded as part of the accountability at which the legislation is directed."

Now he also then refers, and this is what I wanted to take you to, further down the page he refers to a report by the Building Industry Commission to the Minister at the time and quotes from that at line 40, "People have certain expectations of the buildings they use, whether that use is public or private." So, no distinction there. "Because buildings may pose a threat to their safety, health or wellbeing, in social and economic terms". So, see how broadly stated it is, "people seek assurance through some form of control that all buildings must," that probably should be contained, I'm not – oh sorry, "that all buildings meet certain essential requirements to safeguard them from risk," and so forth.

Then if you see, at the bottom of 2.16 that's quoted and emphasised by His Honour, "The purpose of a building control system should be to ensure that essential provisions to protect people from likely injury and illness and to safeguard their welfare will be satisfied in the construction, alteration, maintenance and use and demolition of buildings."

McGRATH J:
So that's the Building Industry Commission?

MR FARMER QC:
Yes, which was the predecessor to the Act,

McGRATH J:
Which led to the Act?

MR FARMER QC:
Yes, that's right.

McGRATH J:

And seems to be pretty focused on safety?

MR FARMER QC:

Well, but in that rather broader sense of referring more so to their welfare and –

CHAMBERS J:

But also their wellbeing and social and economic terms.

MR FARMER QC:

Yes, that's right, that –

CHAMBERS J:

I mean, we have never limited damages to only so much as you need to make you safe.

MR FARMER QC:

No, no.

CHAMBERS J:

Residential owners are, within the appropriate scope of the duty, entitled to have their houses fixed up because of the economic loss they've suffered.

MR FARMER QC:

That's right and – I'm sorry, I thought there was another reference here too that I wanted. Oh yes, it's going back a page, 525, this is as part of his analysis. Here's he referring to the standard model building bylaw, at the top of page 525 and he referred to a report, "The bylaw that was published by the Standards Association and a report called the Review of Planning and Building Controls, published in 1983, noted that building inspectors filled a significant advisory and educative role spending 10% to 60% of their time in that way. The review also noted that while health and safety seemed to be the prime considerations, it was clear that health had included comfort or convenience and safety had moved into the area of good standards of workmanship or durability or sound construction," and then it continues, "Again, the Commission of Inquiry report noted the Building Research Association," et cetera and then at line 15, "The high social interest in standards and amenities was also reflected in terms of reference."

So really, as I say, to regard health and safety in some narrow way, it doesn't accord with what is being said here.

McGRATH J:

Thank you, that's very helpful to be reminded of that.

MR FARMER QC:

Now, I've been distracted from *Three Meade* –

ELIAS CJ:

Just in terms of a map, you indicated that the reasons to move on from a narrow view of *Hamlin* –

MR FARMER QC:

Yes.

ELIAS CJ:

– we've discussed legislative reasons, you said the leaky building crisis and, I suppose, the third is the advances in the common law in relation to tort in the context of statutory duties –

MR FARMER QC:

Yes, and I am going to, in that respect - for the map, here is my map. I wanted to deal with the cases that my learned friends rely on that supposedly say that there can be no duty of care in respect of commercial premises that are used for commercial purposes. I wanted to deal, in that respect, with *Three Meade* because it's useful for the reasons that I gave earlier. I wanted to deal with *Te Mata* to show that in fact the case, that case, is not as clear cut as my learned friends would put it.

Then, what I wanted to do was to move on to a general discussion, but relatively brief, on what the point your Honour has just raised which is the common law duty and how the Courts have developed that duty. And, in that respect, I'm intending to take you back to familiar territory in the form of the sort of landmark House of Lords decisions in particular, not to look at the facts of particular cases so much but more to

look at the judicial role in this area as it's been formulated by some of the great Judges.

TIPPING J:

And the key point there I think is the link between common law and statute.

MR FARMER QC:

Yes, and for example, my learned friends place a lot of emphasis on the *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) case, where there is no statutory context and so is a quite different sort of case.

After that what I wanted to do was to give you a quick summary of the main points in our submissions, which will be read so I can do that very quickly indeed, and then I wanted to do a summary of the main points in my learned friends submissions and on specific points give short comments or proper response so that's my road map.

ELIAS CJ:

Thank you.

CHAMBERS J:

And negligent misstatement at some point?

MR FARMER QC:

Well yes. I'll deal with that more or less as it were in passing. It's perhaps – it's main interest and importance is that this is a case, of course, where classical economic loss is not an issue because in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, that was economic loss and the duty of care was recognised in that context of negligent misstatement so that if, to the extent that my learned friends seek still to argue, as I see that they do, that somehow – and they rely very much on the Court of Appeal decision in *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) in that respect, - to argue that the purpose of the Building Act is not to enable owners of commercial buildings to recover economic loss and that there is still this spectre somehow that economic loss is something you can't recover in the law of torts then our response will be well that's a highly doubtful proposition and the negligent, *Hedley Byrne*

demonstrates it was – that is as it were the case that actually cracked the wall, the economic loss barrier and –

ELIAS CJ:

If economic loss is not a difficulty, however, the negligent misstatement claim is perhaps the fifth wheel of approach?

MR FARMER QC:

One could regard it that way. The facts that it's based on, that the contracts provided an obligation on the vendor to – or provide an interim certificate of code compliance and then later a final certificate of code compliance and also provided that that interim certificate would be provided on settlement - and so our case is that the importance of that was that the obligation to settle was not triggered until the interim certificate was received and when it was received that led to the settlement and that led, therefore, to the loss that was suffered. Now my learned friend's argument, I think, as he told me at two minutes to 10, is going to be that, based on your Honour's judgments in a case a couple of years ago that a breach of warranty does not preclude the obligation of a purchaser to settle. If you settle you're still obliged to settle and later you can sue for damages and –

WILLIAM YOUNG J:

But from your point of view the argument directly provides some support for your general duty claim because it suggests that, despite the ostensibly commercial nature of the units, the purchasers were still relying on the Council –

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

But, beyond that it is maybe a bit of smoke and mirrors. Because the Council doesn't owe a duty of care to these purchasers in relation to the code compliance certificate and the preliminary inspections, then it would be a bit odd if, as it were, a duty of care could be retrospectively stuck on them because the purchasers put in CCC clauses in the agreement.

MR FARMER QC:

Well there was - I think where the argument would centre was that there was, because of the provisions in the agreement, there was specific reliance by – express reliance - by the purchasers on those certificates.

WILLIAM YOUNG J:

Does the Council necessarily know that? I mean they'll know that, they'll presumably know that, lots of agreements for sale and purchase are subject to a CCC being issued.

MR FARMER QC:

Yes your Honour –

CHAMBERS J:

And that's all they need to know, isn't it?

MR FARMER QC:

Yes –

CHAMBERS J:

For the purposes of the cause of action.

WILLIAM YOUNG J:

Which cause of action?

CHAMBERS J:

The negligent misstatement.

WILLIAM YOUNG J:

Well –

CHAMBERS J:

Is within their –

WILLIAM YOUNG J:

But if they don't have a duty to purchasers when they do inspections and when they issue a CCC generally, then it maybe that this is, as a Chief Justice put it, a bit of a

fifth wheel. It's hard to see why actions between vendor and purchaser would impose a duty that wasn't there. The fact that purchasers normally do want this sort of clause may help the case in terms of the first claim.

ELIAS CJ:

Yes.

MR FARMER QC:

And the primary cause of action in the negligent misstatement cause of action, yes, to a large extent they tend to run together. But the value of the negligent misstatement cause of action is certainly to – it does provide an answer to any otherwise well founded argument that under the general duty economic loss is not recoverable. If that were the position the Court reached, and with respect I don't believe it will reach that point.

So perhaps if I can go to *Three Meade* which was a case, as I say, that did create a lot of excitement at the time and it was, with the greatest respect, a very careful and well reasoned judgment and it does have great value in terms of discussion on policy consideration. So you'll find it in volume 4, tab 41 and the first point, it related to the building of a motel in Rotorua and the first point to note, and it was really the critical point, was that Three Meade, which was the plaintiff suing the Council, was in fact the owner and developer of the motel and so that's not a very attractive start for a plaintiff because it clearly had the ability itself to ensure the building was built. It was not in the position of a subsequent purchaser who comes along and sees the building with all the defects hidden, buried, supposedly passed by council inspection. It was the developer and indeed the builder was a related company so – and it was indeed on that very point that we'll see that the Judge said that in this case, in this case the duty of care did not arise.

TIPPING J:

Was it logical to think that even if it had been a resident these reasons might have excluded the duty in the Judge's mind, so –

MR FARMER QC:

Well I think –

TIPPING J:

Do you follow what I'm getting at?

MR FARMER QC:

Yes, with respect, it does seem to me that that is exactly what he is saying because he in fact refers to Lord Wilberforce in *Anns* where Lord Wilberforce referred to situations where someone is effectively – is the cause of their own loss and –

WILLIAM YOUNG J:

Weren't there cases on this? I've got a feeling that there were – at the time that *Hamlin* was going through the Courts there were at least first instance decisions where home handymen would sue the council saying, you know, you didn't stop me.

TIPPING J:

You should have checked up on me better.

MR FARMER QC:

I have a vague recollection myself of someone building a terrace that fell down in exactly that category. In any event, let me just quickly take you through it. So if you go to paragraph 42, well first of all paragraph 30 perhaps, where there's a reference to, or go back to 29, there's a statement, a reference to the Court of Appeal's judgment in *Carter* where the Court of Appeal described the duty, the *Hamlin* duty, as sui generis and then 30 –

ELIAS CJ:

Is that a proposition – that's not a proposition you accept, presumably?

MR FARMER QC:

No, absolutely not. And then paragraph 30, "Given the basis for the conclusion reached in *Hamlin* there is a real issue where the duty of care owed by councils to homeowners extends to the owners of commercial property where the sue for economic loss." In *Hamlin's* case itself the learned president left the point open but observed that, in a case of commercial or industrial construction, the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded, which is a rather careful way that His Honour's obiter raised that particular issue.

CHAMBERS J:

Didn't this Court in *Sunset* say that that was all a bit of a red herring about the contractual network?

MR FARMER QC:

Yes and I –

CHAMBERS J:

I think something was said to that effect.

MR FARMER QC:

Yes, and I will come back to that. So 32, in the present case the first plaintiff, which was the company Three Meade, claims for pure economic loss for diminution in value of the motel, loss of rental, maintenance, et cetera. Then there is a discussion about case, overseas cases, which I won't take you to - and then go to 42. In the present case the building in issue is a motel developed for commercial investment purposes. *Hamlin* does not automatically apply rather the position is that if a duty of care is to be owed in these circumstances then the Court needs to be satisfied that the duty should extend to the owner of a commercial premises such as a motel and, more particularly, on the facts of this case that a duty should extend to the first plaintiff. So there's the important focus which he comes back to later.

Then at the end of 43 you will see the two broad fields of inquiry are the degree of proximity or relationship between the council and the plaintiff and whether there are policy considerations which tend to negative or restrict or strengthen the existence of the duty, and then he finds in 44 that there was sufficient proximity in the case, and then 45 onwards we have this very useful discussion of policy issues which he refers to later as general considerations and I –

CHAMBERS J:

But is it right, for instance - take the first sentence in paragraph 49.

MR FARMER QC:

Ah, okay.

CHAMBERS J:

To the extent that the council has a role under the Building Act in relation to the consent and inspection process the emphasis is on safety and sanitary issues.

MR FARMER QC:

Yes well I don't, with respect, accept that.

CHAMBERS J:

How one could say that –

MR FARMER QC:

I don't accept that that – I think that's too narrow.

WILLIAM YOUNG J:

I suspect Mr Goddard is going to say that actually. I mean, there is a legitimate argument that the Building Industry Commission's report was primarily focused on health and safety. I see that I have referred in the *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445 (CA), the *Sunset Terraces* case, to a paragraph that said that the protection of the economic interests of people is not a justification. Now, in the end that argument, while reasonably cogent, didn't carry the day but there is an argument there, isn't there -

MR FARMER QC:

Well, there's an argument but I think, with respect, that argument is precluded by –

WILLIAM YOUNG J:

Well it hasn't – it has been dismissed, effectively, by the Courts.

MR FARMER QC:

Well in effect what I've relied very heavily on is your Honour Justice Tipping's paragraph 53 in *Sunset* and I will – the last part of the paragraph. I'm going to go to it later, I will just read the sentence, or two sentences. "Protection of a non-owner occupant such as a tenant can be achieved only through a duty owed to the owner as it is only the owner whose pocket is damaged as a result of the negligence of the building inspector. It is only the owner who can undertake the necessary remedial action so the economic loss is in the owner.

WILLIAM YOUNG J:

Well that's the way it's panned out, through the decisions of the Court.

MR FARMER QC:

Yes, yes.

ELIAS CJ:

No, but the point that you're making is that this decision proceeds on that assumption and if that premise is wrong the –

MR FARMER QC:

Yes.

ELIAS CJ:

– the decision is, to that extent, suspect.

MR FARMER QC:

Right.

ELIAS CJ:

But we don't need to resolve this debate at the moment because it is one on which, as I understand it, the parties are engaged. Whether Mr Goddard faces a substantial impediment in our earlier decision remains to be seen.

MR FARMER QC:

Right, all right. Well I won't, the section on policy issues which begins at 45, I won't read it to you but I will just summarise it in this way and give you the paragraph references. So, at paragraph 45 his Honour makes the point that the fact that the claim is for economic loss may weigh against a duty although it is not decisive, so that is how he treats economic loss.

Paragraph 46. The floodgates argument had not caused difficulty with the application of *Hamlin* and should not in respect of commercial or industrial buildings. So, he doesn't see floodgates as being a barrier to extending the duty to commercial premises and of course in that respect we have the 10 year longstop and we had that discussion in *Sunset* as well.

Point 3, he said the analogy with – this is paragraph 47 – the analogy with council's duties in respect of residential buildings might be seen as a very close one, though the Court in *Hamlin* had expressed caution as to the extension of the building to commercial premises.

Paragraphs 48 and 49. That's the bit we've just referred to - Your Honour Justice Chambers referred me to it - The developer, he said, can protect itself, sorry. The emphasis in the Building Act is on safety and sanitary requirements rather than the protection of economic interests and, with respect, we wouldn't, and it all gets back to what the word "sanitary" is - his Honour's word - health and safety and interpreted broadly in the way that I just described a short while ago, we say requires a broader view to be taken. And then paragraphs 50 to 53, he said the developer who in this case before him was the first plaintiff can protect itself by contractual arrangements with the builders, engineers and architects involved in the project, and he was also the builder actually. In that case the first plaintiff had failed to do so.

Then perhaps the sixth point in paragraph 53, a subsequent purchaser could obtain pre-inspection reports and obtain warranties from the previous owner. Now that is a view that was discussed in *Sunset* and your Honour, the Chief Justice at paragraph 8 and Justice Tipping at paragraph 43, rejected or rather found that not a realistic view of the position of a subsequent purchaser and Justice Tipping referred to *Dutton v Bognor Regis UDC* [1972] 1 QB 373 (CA) where I think it was Lord Justice Sachs, and that's all very well but these development companies they tend to be single purpose companies, formed for the purpose of doing the development and then they dissolve. So, what use is your warranty or your assignment of this or that and, indeed, of course the whole point of *Sunset* at the end of the day was that there was separate duties owed by the council to, a separate duty owed by the council to the subsequent purchaser, and in that respect, as I say, this is a very different case from *Rolls-Royce v Carter Holt* because there you have a purely private commercial situation with three large companies, the owner, the builder, the contractor, the subcontractor all able, and in fact there existing in that case a matrix of quite complex contractual arrangements between those parties.

ELIAS CJ:

Were the relationships in that case wholly contractual?

MR FARMER QC:

Yes, yes they were. There was no statutory context and therefore there was public law context in which the common law could operate.

McGRATH J:

The subcontractor was the party not the contractor was the defendant?

MR FARMER QC:

There is a subcontractor and a contractor. The contractor was Genesis, the subcontractor was Rolls-Royce, the owner of the –

McGRATH J:

The subcontractor was claiming a duty of care, was –

TIPPING J:

Well they have no contractual right so –

MR FARMER QC:

The owner was –

TIPPING J:

– so they are trying sue in tort.

MR FARMER QC:

Yes, Carter Holt was suing the subcontractor. It was really a *Junior Books Limited v Veitchi Co Limited* [1983] 1 AC 520 –

McGRATH J:

Yes, yes.

MR FARMER QC:

– the House of Lords situation.

McGRATH J:

So the owner is suing the subcontractor?

MR FARMER QC:

Yes.

McGRATH J:

Without contractual privity?

MR FARMER QC:

Yes, that's right, yes. Now, just to finish off on *Three Meade*, if you go to paragraph 54 you will see really the basis on which His Honour decided in this case there was no duty. So he said – well, first of all in 53, he said that the initial developer in this case, second sentence, "The initial developer in this case, the first plaintiff, has the opportunity to protect itself by contractual arrangements. A subsequent purchaser will have the opportunity to obtain pre-inspection reports," I've already made that point.

Then 54, "Apart from these more general considerations, a particular consideration is directly applicable to the position of the first plaintiff in the present case. The first plaintiff, at a time it was controlled by Mr Coervers, was a developer of the motel complex. It bought the land; it engaged the builder Limburg Construction, another company controlled by Mr Coervers. The motel complex was physically built by Mr Coervers. In *Anns*, Lord Wilberforce observed that the Council's duty was owed to owners or occupiers who might suffer injury to health and not to a negligent builder owner who was the source of his own loss."

His Honour went on to refer to a similar judgment by Justice Tompkins in *Bell v Hughes* HC Hamilton A110/80, 10 October 1984. If you then go to 57, having considered the facts of the plaintiffs' position, at 57 his Honour said, "When these issues are weighed, in balance I am driven to conclude that on the facts of this particular case a council does not owe a duty of care to the first plaintiff."

Then later he also excluded the second plaintiff, who was a person who became a shareholder of the first plaintiff and therefore provided funds for the development and who in fact was never herself an owner of the building. You'll see that at 71 and 73. Now –

ELIAS CJ:

It's Justice Chambers doing two finger typing.

CHAMBERS J:

Oh, I am so sorry.

MR FARMER QC:

I understood he was very much better than two fingers –

ELIAS CJ:

I think that sound can be put off and we should do it at some stage, thank you.

CHAMBERS J:

Oh, I am sorry.

ELIAS CJ:

No, that's all right, it was just Mr Goddard was looking mystified.

MR FARMER QC:

No, I recall it well in the Court of Appeal. I don't think it's two fingers either.

ELIAS CJ:

It is two fingers, they're fast though.

CHAMBERS J:

The family is very critical of my style.

ELIAS CJ:

I was just making a mental note to get some typing training.

MR FARMER QC:

All right, so *Three Meade* we say was a case decided on its own facts. At no point did Justice Venning rule that a council can never be under a duty of care in respect of commercial premises.

So, we then turn to what is the next case and the most important case which is *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (CA) in the Court of Appeal and you'll find that also in volume 4 and it's at tab 38 which, as I say, three

years ago this case was decided, just over three years ago. So, this is the established authority - line of authority - the beginning of the established line of authority, at the level of Court of Appeal, that my learned friends rely on.

Now, the principal judgment was that of Justice Baragwanath and he – it's another motel case, leaky building and if you go to paragraph, towards the end of the judgment, I wanted to take you to paragraph –

TIPPING J:

Just before you – I'm sorry Mr Goddard [*sic*], am I right in thinking that Justice Venning in *Three Meade* didn't refer at all, or not relevantly, to this duty to inspect issue?

MR FARMER QC:

No, not that –

MR GODDARD QC:

He did.

MR FARMER QC:

He did? Well I don't recall it but I'm grateful to my friend if he points me to it –

TIPPING J:

Just before we sort of leave that, it might be helpful if he did, to see what he said about it.

MR GODDARD QC:

Paragraph 65.

MR FARMER QC:

Oh, he referred to section 76.

TIPPING J:

Mhm.

CHAMBERS J:

Where is that?

MR FARMER QC:

It's paragraph 65 but it's expressed in terms of a power rather –

CHAMBERS J:

Well that is just not right, is it? I mean, it all depends whether the owner has chosen a private certifier or the council but if the council is the one, that is what the council duty is.

MR FARMER QC:

Right, well, I mean, what comes to mind, Your Honour Justice Young, said well maybe we shouldn't get too bound up with debates about words like duty and so on but – because of course, you'll remember, admittedly a different kind of case but the House of Lords in *Padfield v Minister of Agriculture, Fisheries, and Food* [1960] AC 997, was considering a statutory power to do something and said that in the particular case there was a duty to exercise the power. It couldn't just say we've got a power and we're not going to exercise it.

WILLIAM YOUNG J:

Well there would be no rational basis for not exercising it.

MR FARMER QC:

No, that's right, yes.

ELIAS CJ:

And that was the argument between Lord Hoffmann and Lord Nicholls in *Stovin v Wise* [1996] AC 923 (HL) but that's a mile away from this sort of –

MR FARMER QC:

Oh and I –

ELIAS CJ:

– case and clearly on the - one would have thought, that the reasoning of Lord Hoffmann, if applied to this sort of case, might well have been to say yes, there is a duty.

MR FARMER QC:

A duty, yes, yes.

TIPPING J:

I think the learned Judges' concluding sentence in 65 is capable of some serious debate too.

ELIAS CJ:

Sorry, which tab is it again, I've lost it?

CHAMBERS J:

Tab 41.

CHAMBERS J:

No, well that's right because that can't stand against your Honour's paragraph 53.

TIPPING J:

Well it's not immediately easy to see but I'm just keeping my mind open –

MR FARMER QC:

No, I understand.

TIPPING J:

– to all this at the moment Mr Farmer, it's all quite tricky.

MR FARMER QC:

Yes, all right. Perhaps then if we can go back to *Te Mata* –

CHAMBERS J:

In one sense, Justice Baragwanath's judgment is the main one but the other two didn't agree with it –

MR FARMER QC:

On the –

CHAMBERS J:

– but the problem is the other two didn't actually say why they didn't think it extended to commercial premises.

MR FARMER QC:

No, no but okay, can I come to that because I'm going to try and deal with that as best I can. So paragraph 62, at about line 25, His Honour referring to an academic work said, "I am satisfied that the public health issue aside, *Hamlin* claims can be justified only as an exceptional response to the claims of residents in domestic accommodation. They provide no basis for extrapolation to non-residential properties. Outside such a context a claim for a purely economic loss encounters the obstacle that damages for such loss are generally irrecoverable in negligence.

There was, until *Dutton v Bognor*, no relevant exception. The exception created in that case and endorsed in *Hamlin* cannot be generalised beyond the case of the public interest in secure habitation without demolishing the rule to which it is an exception. That was the ultimate conclusion of the Australian and English Courts. Liability to an investor in a commercial building, such as a motel or hotel, cannot be justified on a *Hamlin* basis as protecting a mere economic interest."

So that's probably the real central part of His Honour's reason and he reinforces that at paragraph 73, a couple of pages over –

TIPPING J:

Mr Farmer, just before you do. What does the learned Judge mean by, are you able to help, "damages for such loss", that's pure – this is where people are getting tied up with economic loss and –

MR FARMER QC:

Yes, indeed.

TIPPING J:

– pure economic loss which I deprecate frankly but –

MR FARMER QC:

Yes, yes.

TIPPING J:

Sorry, I've lost the page, "have such a context", that's residential property presumably?

MR FARMER QC:

Yes, he –

TIPPING J:

"A claim for purely economic loss encounters the obstacle that damages for such loss are generally irrecoverable in negligence." I'm not sure that's a sound proposition?

MR FARMER QC:

No, it's not.

CHAMBERS J:

It is certainly not sound because there are a number of people who contribute to the erection of any building. There is the builder, there may be an architect, there may be an engineer and there may be someone who is effectively doing architect-type duties, either a building certifier or a council. Now those first three can certainly be liable if by their acts they cause loss through the building not being built properly. So what has to be asked is well, why is the certifier or the council in a different position from the other three, it being just another player in the construction of a building?

MR FARMER QC:

With respect, I agree. I suspect that what my learned friend would say is that the other people that you – well he might try to say that the other people are all under contractual obligations but of course they're only under contractual obligations to the original developer and *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) recognises that a subsequent purchaser can sue the negligent –

CHAMBERS J:

Well, in any event if you choose a private certifier it's under a contract in the same way as the others and in any event with the council, councils aren't doing this work free, they charge and are permitted to charge a reasonable fee for the work that –

MR FARMER QC:

And they can also charge an extra fee if extra work is required by them in the way of further inspections and that kind of thing. In any event, I think his Honour there recognises that *Dutton* was a case that broke down the – that was where their Lordships were not prepared to accept the concept of economic loss as a barrier and it was *Dutton* that led to *Hamlin* and indeed Your Honour Justice Tipping's judgment in *Sunset* refers fairly extensively to *Dutton*. But be that as it may his Honour at paragraph 73, after considering the Building Act and the building report that led to the Act, the Building Industry Commission report that is, said at 73, "I'm satisfied at this stage there is no justification for extending the *Hamlin* cause of action based as it is on economic loss" - again we're back to that - "beyond the specific limits of private dwellings."

Now then he goes on to – there is this point about *Te Mata* which we say is very important. First of all I can just say something further about economic loss. Also in your Honour Justice Tipping's judgment in *Sunset* there is this statement –

ELIAS CJ:

Where do you find *Sunset* by the way?

MR FARMER QC:

It's volume 3, tab 30, so it may be easier to have that open because I am going to refer to it from time to time. So if you go to paragraph 30, your Honour had at 28 referred to *Bowen*, *Hamlin* and *Dutton* and we'll see in a little while that *Bowen* was a case that was very – referred to by the House of Lords subsequently and then paragraph 30 Your Honour said, "This is an early example," that is to say *Bowen* was, "of the general approach of the New Zealand Courts to a question which has vexed some jurisdictions. That is the difference between physical damage and economic loss. Our jurisprudence has never treated this distinction as critical in determining whether a duty of care is owed. The nature of the damage or loss in suit is relevant to whether a duty is owed to take reasonable care to prevent it but classification per se does not determine the issue." And then your Honour referred to *Bowen* and *Dutton* and so forth. So that we, with respect, we say that that is the correct approach –

TIPPING J:

Well that's what made me rather startled to read that there's apparently a rule that economic loss is off limits.

MR FARMER QC:

Yes, quite, quite. Now what is to be noted about *Te Mata* is the way it was argued and this is referred to both by Justice Baragwanath and by Justice Robertson delivering a judgment for himself and Justice O'Regan and in this case the plaintiff elected to base its case solely on *Hamlin* where the, in particular, the articulated policy was the need to protect vulnerable homeowners from economic loss - that's the *Hamlin* statement.

The Court of Appeal here recognised that a claim could have been based, or could be based, on a policy to protect the health and safety of the occupants, not the owner, albeit that the duty of care then, as per your Honour's paragraph 53, becomes one owed to the owner who sues compensation that enables him to remedy the defects for the benefit of the occupiers. So, the Court of Appeal said a claim could be based on policy to protect the health and safety of the occupants and that this would – and we say that would encompass premises other than a home, such as a motel, for example in *Te Mata* itself. So, if we can just look at where this is dealt with.

First of all, Justice Baragwanath at the end of his judgment, paragraph 75 – sorry 74. "There remains in my view a further point on which I respectfully differ from the other members of the Court. They are of the view that since the risk to health and safety has now been identified it can be met for the future by council powers of control of dangerous or insanitary buildings as under section 124 of the Building Act. So there could be no purpose in giving the appellant further opportunity to re-plead." And that was what was at issue here: a question of whether a plaintiff should be allowed to re-plead its case, not on the *Hamlin* basis but on a health and safety basis arising out of the provisions and policy of the Building Act.

His Honour then went on to say, "in respect of a potential claim pleaded distinctly as of failure to ensure that our building stock provides safe conditions for those who occupy it, I would have adopted the cautionary approach of Justice Kirby in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515." Then His Honour said, "despite its written submissions, the oral arguments of the appellant did not, in the end, as I understood them, disclaim such a contention. I do not accept that the

earlier decisions bind this Court to a different conclusion. At the least, it should be open to [a plaintiff] to argue its case in such a way."

His Honour continued: "that is because of the considerations stated in *Dicks v Hobson Swan Construction Ltd (In Liquidation)* (2006) 7 NZCPR 881 (HC). Parliament and the Governor-General in council adopted under the Building Act and Code the concept that the building should have a 50 year life and be given a certificate of compliance. The advantage of that course was to provide an assurance of reasonable quality which is actionable in tort by a later purchaser without the need to perform structural examination of portions inevitably covered up in the course of construction."

Justice Baragwanath continued: "it is in my opinion arguable that the public interest in ensuring that the building stock meets the 50 year lifespan warrants a cause of action founded squarely on the statutory health and safety considerations. It might indeed be that a judicial response, aimed at ensuring that those responsible for creating leaky buildings which place public health at risk are held liable for the cost of making them good, could be supplemented by a legislative requirement that net funds received be applied to restring the building so that later occupants are not exposed to hazard. I would therefore have given the appellant leave to consider re-pleading. But the majority opinion that amendment could make no difference requires that the claim be struck out."

So, what the majority, the other two Judges, basically said is you'll find at paragraph 84: "the appellants' case, as presented by Mr Weston QC, was rooted entirely in the proper interpretation of *Hamlin* and its limits. That was not a matter of oversight but a calculated decision based on an appreciation that this Court's decision in *Carter* stood in the way of such a cause of action succeeding. Mr Weston urged us to view the appellants' arguments through a *Hamlin* lens. He asked us to evaluate the sui generis *Hamlin* duty and determine whether it was appropriate to extend it to cover the present case. His difficulty was that the underpinning logic of the *Hamlin* decision is the need to protect vulnerable homeowners from economic loss rather than the need to protect the health and safety of the occupants of the home. The court is united in determining that it is not appropriate to extend the *Hamlin* duty in this way."

Well what do we make of that? With respect, Justice Baragwanath appears to be saying if this case had been pleaded correctly - that is to say if it had been pleaded

on the basis of the policy of the Act, the policy of the Act being that building stock should meet a 50 year lifespan and that that's founded squarely, as he puts it, on statutory health and safety considerations - if that's how it had been pleaded we may well have had a different result. But I'm not going to allow a re-pleading because my fellow Judges, by brother Judges have taken the view that – disagree with that view of the matter. So *Te Mata*, with respect, is not as clear cut and simple a case as perhaps my learned friends would have it.

Now, supporting what Justice Baragwanath says can I perhaps - I've already referred many times now to Justice Tipping's paragraph 53 which, with respect, is in the same vein but can I also refer in *Sunset*, it's volume 3, tab 30, to paragraph 7 –

ELIAS CJ:

Sorry, I'm just thinking about that rationale - it seems spurred by the leaky building crises based on health and safety.

MR FARMER QC:

Yes.

ELIAS CJ:

In some respects I suppose it is, it might be thought to be fortuitous that the building crises is in relation to something which does have a health and safety aspect because of mould and spores and all of those sort of things. Justice Baragwanath, however, would only find a duty of care if that sort of provision of the code was engaged.

MR FARMER QC:

Well no, with respect, because he refers to the policy of the stock having a 50 year durability –

ELIAS CJ:

Yes but –

MR FARMER QC:

– so the foundations –

CHAMBERS J:

But he does clearly see it as health and safety.

ELIAS CJ:

Yes, yes.

MR FARMER QC:

Yes.

CHAMBERS J:

And it would seem to me that it was in your interest to say firmly he is wrong in that regard.

MR FARMER QC:

Well, depending on how one defines health and safety - because I've previously said by reference to that earlier building report that Justice Richardson refers to, that health and safety extends beyond that and I think we had that discussion so I wouldn't adopt what may have been a rather narrow view of health and safety that his Honour's taking, I'm not sure whether he is taking a narrow view.

ELIAS CJ:

But his position in this is that *Hamlin* is confined to residential vulnerable people in respect of economic loss.

MR FARMER QC:

Yes, yes.

ELIAS CJ:

But that a course of action could be successfully pleaded which was based on the 50 year life and health and safety concerns, a new basis –

MR FARMER QC:

Yes.

ELIAS CJ:

– not an economic loss basis and the majority say it's only economic loss that can be covered.

MR FARMER QC:

Well yes.

ELIAS CJ:

And confined to the *Hamlin* basis.

MR FARMER QC:

Yes that's right but the way it works - and I take this from Justice Tipping's paragraph 53 but also from Your Honour's paragraph 7 of *Sunset* - the way it works is that the policy of the legislation is concerned to protect occupants of buildings, call it health and safety if you like and leaving aside how broadly we define that, that's the policy of the Act. The common law says, paragraph 53, that the way to ensure that that policy is met is to allow or to impose a duty of care to the owner of the building by the council and the owner of the building can then - he is the only one in a position to remedy the defects and if he recovers compensation he can remedy the defects. Now, of course there is always an issue as to whether he will in fact remedy the defects but if he doesn't then at least the loss is then recognised in respect of a subsequent owner by the loss of value - diminution of value of the building.

TIPPING J:

What I was trying to do in 53 and it maybe that it could have been done better is to suggest, perhaps a little too gently, that people shouldn't get hung up on this classification of the loss –

MR FARMER QC:

Yes.

TIPPING J:

– because what for an occupant is health and safety for an owner is economic –

MR FARMER QC:

Yes.

TIPPING J:

– but it's the same problem.

MR FARMER QC:

Same problem, and if I can perhaps follow that with your Honour the Chief Justice's paragraph 7, halfway down, two-thirds of the way down there is a reference to *Bowen* and *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) and then your Honour said, "a limitation of liability to owner/occupiers moreover is contrary to the policy of the legislation which is concerned with protecting all users of buildings." All users of buildings.

ELIAS CJ:

Yes, I'm just raising really whether that pausing point which was understandable in the context of the argument addressed to us in this case in the *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) case is in fact the right resting point, given the arguable policy of the Act, and this is more for Mr Goddard to respond to perhaps than to you. The arguable policy of the Act in ensuring compliance with the building code, end of story.

MR FARMER QC:

Mhm.

ELIAS CJ:

So whether or not there is a health and safety dimension as you're concerned about occupiers or whether you're concerned about the structural integrity of buildings –

MR FARMER QC:

Mmm.

ELIAS CJ:

– may not in the end matter. I mean, it maybe that you are concerned with the structural integrity of buildings and, therefore, with economic loss.

MR FARMER QC:

Yes, okay.

CHAMBERS J:

Well I think you are. I'm with Justice Tipping that I do not think we should get hung up about language but just as the Chief Justice said at 7 and as Justice Tipping said at paragraph 53, to test what this Court really meant ask oneself what if the premises

were leased, residential premises but leased. Now the only person who's suffering harm to health and safety potentially is the tenant but who can sue, it's the owner who sues and –

MR FARMER QC:

It's the owner.

CHAMBERS J:

– what does the owner sue for? To remedy the defects to the structure of the building, so I think both those paragraphs are consistent in saying that in truth one is remedying the loss the owner has suffered and it's the owner who can sue.

MR FARMER QC:

That's right, and the owner in that example is a commercial investor.

CHAMBERS J:

Correct, may well be.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.52 AM

ELIAS CJ:

Yes, thank you Mr Farmer.

MR FARMER QC:

Your Honours, I just wanted to give you one reference from the discussion this morning. In relation to code compliance certificates, I mentioned that there is an obligation on the council to issue notice to rectify if it is of the view that the building doesn't comply with the Building Code and you'll find that in the Building Act at section 43, that's the bundle of cases, volume 4, tab 46.

Section 43 provides, in general terms, that the notice has to be given by the owner when the building is completed. Section 43(3) says that, "the territorial authority shall issue to the applicant in the prescribed form on payment of the charge a code compliance certificate if it is satisfied on reasonable grounds that (a) the building work to which the certificate relates complies with the Building Code" and then in subsection (6) you'll find this provision: "where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular work because the building work does not comply with the Building Code, then the territorial authority shall issue a notice rectify in accordance with section 42 of the Act," and then there are various procedural provisions about that.

Now what I wanted to do next was to look at the question of policy in relation to the development of the common law duty. Our basic submission is that the correct approach here is not to say well, here are some precedents, *Three Meade*, *Te Mata*, *Charterhall*, that's the end of it, our submission is that even if there are such precedents, albeit of course they're in the lower Courts anyway, then that is no impediment to the Court examining, from a policy point of view, how the duty, the common law duty, as so far recognised, whether it should be applied further and if the policy considerations seem to favour that course, then this Court should not feel constrained in so doing.

Of course we have statements such as that of Lord Cooke, or Sir Robin Cooke as he was, in *South Pacific Manufacturing Co Limited v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) which indicate that in considering that issue, then the statutory framework, the statutory policy is highly relevant to the

decision as to what the – or how far the common law duty should be imposed and the primary quote from his Honour's judgment you'll find in our submissions at page 26, paragraph 115 and without taking you to the case, I'll just quickly read what he said there.

His Honour said "clearly enough however, such provisions show that the statute is not intended to inhibit the Courts in developing the common law. I think they can be a real help in deciding whether there is a common law duty. For example, they may encourage the Court to hold that certain interests warrant protection. The analogy of a statute may properly influence the development of the common law."

I wanted to go back, if I could and your Honours will be familiar with this material but it's, with respect, extremely helpful as a reminder as to the approach that this Court should take and I wanted to refer to two famous House of Lords decisions in particular. The first of them being the *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, [1970] 2 WLR 1140, [1970] 2 All ER 294 (HL) case and the second being *Anns*.

Now the *Dorset Yacht* appeal cases, we gave to the Court separately, I think yesterday, your Honours have that. That Court, that the Lords on that occasion sat with, of course, two of the greatest of Law Lords of the 20th century, Lord Reid and Lord Diplock and it was their judgments that I wanted to refer to. You'll remember the facts of the case well enough, the borstal boys who escaped, who were not kept under proper supervision on an island where they were but the prison officers all went to bed and just left them to their devices and they swam out to a yacht called *The Silver Mist* that was moored nearby, got on it and did terrible things to it –

ELIAS CJ:

Where did you get that detail, *The Silver Mist*? I don't remember that in the judgments.

MR FARMER QC:

Well, I didn't remember it either but it's actually on page 1007 at letter (e), they cast her adrift and cause considerable damage to her and her contents.

TIPPING J:

The Silver Mist, there it is.

MR FARMER QC:

Yes, it's at letter (c) as well, an appalling crime but –

CHAMBERS J:

Lucky it wasn't *Georgia*.

MR FARMER QC:

No, exactly, exactly, my blood ran cold when I read this, the facts of this again. Here, what was considered novel at this time of course, was the notion that here was the damage done by certain parties but it was the Home Office who had their care who were being sued in tort by the owners of the yacht. I'd like to go, Lord Reid's judgment, if we can go to that at page 1026 at letter (e). I'll read a few paragraphs here.

"The case for the Home Office," his Lordship said, "is that under no circumstances can borstal officers owe any duty to any member of the public to take care to prevent trainees under their control or supervision from injuring him or his property. If that is the law, then inquiry into the facts of this case would be a waste of time and money because whatever the facts may be the respondents must lose. The case is based on three main arguments. First, it is said there is virtually no authority for imposing a duty of this kind. Secondly, it is said that no person can be liable for a wrong done by another who is of full age and capacity," et cetera and, "Thirdly, it is said the public policy, or the policy of the relevant legislation, requires that these officers should be immune from any such liability. The first would at one time have been a strong argument," that is to say no authority.

"About the beginning of this century, most eminent lawyers thought that there were a number of separate torts involving negligence, each with its own rules and they were most unwilling to add more. They were of course aware, from a number of leading cases, that in the past the Courts had from time to time recognised new duties and new grounds of action but the heroic age was over. It was time to cultivate certainty and security in the law. The categories of negligence were virtually closed. The Attorney-General invited us to return to those halcyon days but, attractive though it may be, I cannot accede to his invitation. In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that when a new point emerges one should not ask whether it is covered by authority but

whether recognised principles apply to it. *Donoghue v Stevenson* [1932] AC 562, 1932 SC 31, [1932] WN 139 (HL), may be regarded as a milestone and the well known passage in Lord Atkin's speech should, I think, be regarded as a statement of principle. It is not to be treated as if it were a statutory definition, it will require qualification and new circumstances but I think the time has come when we can and should say that it ought to apply, unless there is some justification or valid explanation for its exclusion. For example, causing economic loss is a different matter. For one thing it is often caused by deliberate action, competition involves trading being involved entitled to damage their rival's interest by promoting their own and there is a long chapter of the law determining in what circumstances owners of land can and in what circumstances they may not use their proprietary rights so as to injure their neighbours, but when negligence is involved the tendency has been to apply principles analogous to those stated by Lord Atkin," and he refers then to *Hedley Byrne.*

So there's the answer to the economic loss point that we're not dealing with competition we're dealing with negligence and then we see the House of Lords and *Hedley Byrne* coming along and breaking down the economic loss barrier, and then his Lordship went on to say: "when a person has done nothing to put himself in any relationship with another person in distress or his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, that's not practicable to make it a legal duty." Then there are cases with regard to landlord and tenant, for example, where the law was set a long time ago, neither Parliament nor this Court sitting judicially has made any move to alter it but I can see nothing to prevent our approaching the present case with Lord Atkin's principles in mind.

Then if you – this is a little bit of a digression, if you will indulge me, but if you go to 1032 it does go to the point perhaps that somehow we shouldn't impose liability on councils because that may cause them great harm even though the breach of a duty of care would also be a breach of their statutory responsibilities. Anyway, let me read this letter (f). "Finally I must deal with public policy. It is argued that it would be contrary to public policy to hold the Home Office or its officers liable to a member of the public for this careless or, indeed, any failure of duty on their part. The basic question is: who shall bear the loss caused by the carelessness, the innocent respondents or the Home Office who are veraciously liable for the conduct of their careless officers? I do not think that the argument for the Home Office can be put

better than it was put by the Court of Appeal in *Williams v State of New York,* 337 U.S. 241 (1949)," and then he refers to the judgment in that case:

"Public policy also requires that the state be held, be not held liable. To hold otherwise would impose a heavy responsibility upon the state or dissuade the wardens and principle keepers of our prison system from continued experimentation with minimum security work details which provides a means for encouraging better risk prisoners to exercise their sense of responsibility and honour and so prepare themselves for their eventual return to society. Since 1970 the legislature has expressly provided for out of prison work and its intention should be respected without fostering a reluctance of prison officials to assign eligible men to minimum security work less they thereby give rise to costly claims against the state or indeed inducing the state itself to terminate this saltatory procedure looking towards a rehabilitation."

Then his Lordship said, "It may be that public servants of the State of New York are so apprehensive, easily dissuaded from doing their duty and intent on preserving public funds from costly claims that they could be influenced in this way but my experience leads me to believe that her Majesty's servants are made of sterner stuff so I have no hesitation in rejecting this argument. I can see no good ground in public policy for giving this immunity to a Government department."

What we are talking about here, of course, is a council having statutory responsibilities which is must carry out and the fact that there are also common law responsibilities or duties which may lead, and will lead in appropriate cases, to perhaps relatively large sums of money having to be paid out is not a reason for the Court, this Court, granting them an immunity in respect of a particular category of premises.

CHAMBERS J:

Well just like the builder, the architect, the engineer, the private certifier, they can build into the charge that they do for the service –

MR FARMER QC:

Yes.

CHAMBERS J:

– either such sum as will meet insurance premiums or such other sums as might be necessary to put aside for careless, for claims when they are careless.

MR FARMER QC:

Yes and there is an argument in my learned friend's submission that says that if the duty extends to commercial premises then the cost of construction will go up because councils will charge more for fees. They will do more inspection rather than less inspection. I think that's what the purport of the argument is. Now –

ELIAS CJ:

That might of course be exactly the sort of information that would legitimately come in at trial because of course this is simply strike-out –

MR FARMER QC:

Yes.

ELIAS CJ:

– and it may be that, instead of basing that sort of determination on speculation or assertion, it's a reason to let the matter go through to trial to have that sort of thing tested.

MR FARMER QC:

Yes, I think that's the attitude that this Court took in refusing leave in the *Glen Innes Primary School* case in fact, that it should go to trial for that very reason. Just still in *Dorset Yacht* case, Lord Diplock, who gave the final judgment –

ELIAS CJ:

I should say that, although it's not in the context of buildings, this case was heavily relied upon by this Court in *Couch v Attorney-General* [2008] NZSC45 –

MR FARMER QC:

Yes, yes.

ELIAS CJ:

– so we are pretty well familiar with it but it does make a point that I would like to make which is that it may be that in this area of litigation we are confining our sights a

little bit too narrowly in only looking at the building cases because these, as you're saying really by taking us to this case –

MR FARMER QC:

Yes.

ELIAS CJ:

– our points are more general principle.

MR FARMER QC:

Absolutely, yes. Well I won't, I will just give you the references in Lord Diplock's judgment which are to the same effect. Beginning at 1058 at letter (a), first paragraph, where he says that because this was the first time that a case of this kind had come before the House of Lords, the way he put it was that their Lordships would be performing a judicial function similar to that performed in *Donoghue v Stevenson* and more recently in *Hedley Byrne* and His Honour, His Lordship said at letter (c): "This function which Judges hesitate to acknowledge as law making plays, at most, a minor role in the decision of the great majority of cases but there are the exceptions," this is what he called the outstanding exceptions of *Donoghue,* of *Hedley Byrne* and then he went on to say at letter (d): "It would be apparent I agree with the master of the roles what we are concerned with in this appeal is that at bottom a matter of public policy which we, as judges, must resolve," and reference there to *Hedley Byrne* the statement that the duty of – how wide the sphere of the duty of care and negligence was ultimately depends upon the Court's assessment of the demands of society for protection from the carelessness of others. Then the judgment continues in like vein for a number of the pages, in fact, and –

CHAMBERS J:

I suppose one argument here is that it is not a matter of judicial policy but that Parliament chose the policy in the 1991 Act and drew no distinction between the types of building with which –

MR FARMER QC:

That's right.

CHAMBERS J:

– it was concerned.

MR FARMER QC:

That's right, that's exactly right, and that is a critical element in this particular case. So that's the *Dorset Yacht* case now. The other case I said I'd like to quickly refer to is *Anns* because you are very familiar with that. It's quite interesting really that the New Zealand Courts - whereas *Anns*, the English Courts and the Australian Courts have gone down a different track and have in effect abandoned *Anns*. That has not been the approach here and the Privy Council was observed –

ELIAS CJ:

Well they've said they've abandoned it but –

MR FARMER QC:

Well, they've said they've abandoned it, yes, that's right. They've said they've abandoned it but the Privy Council, as we know in *Hamlin*, gave leave as it were to – not to this Court because this Court didn't exist then but to our lower courts, the Court of Appeal in particular, to follow their own lead.

Now, *Anns* is in volume 1, tab 1 and if you go to Lord Wilberforce's judgment at page 751 at letter (g), he refers to the trilogy of cases of *Donoghue v Stevenson*, *Hedley Byrne* and *Dorset Yacht Company* and he said there that: "Through that trilogy of cases, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather, the question has to be approached in two stages," and that's the proximity Your Honours, the first of them and then the second one of course is "The policy question as to whether there are considerations which ought to negative or to reduce or limit the scope of the duty once proximity is established, or the class of persons to whom it is owed, or the damages to which a breach of it may give rise."

Then he said helpfully at letter (c): "The factual relationship between the Council and owners and occupiers of new dwellings constructed in their area must be considered in the relevant statutory setting under which the Council acts." Then further references I can give you. He makes the observation at 754, at letter (d), he refers to public authorities that are not so much laying down policy but are operational, carrying out operational activities, such as here of course, inspecting buildings, issuing code compliance certificates.

CHAMBERS J:

That was the whole point of *Anns* that caused so much difficulty. Councils did not have to inspect and that's what led to this whole problem of well, is it fair to make councils liable in negligence in circumstances where they do not have to exercise the power to inspect in the first place? Now that's a problem, it seems to me, we no longer need to face.

MR FARMER QC:

That's right, yes, that's right. So at 754 at letter (d), the last sentence of that paragraph: "It can safely be said that the more operational a power or a duty, or duty may be, the easier it is to superimpose upon it a common law duty of care." Then if you go across, the opposite page 755 at letter (d): "Passing then to the duty as regards inspection if made – "

Well actually, just looking above that, that's interesting on this very point your Honour has just raised again, at letter (c): "If they do not exercise their discretion in this way, they can be challenged in the Courts." So that's a situation where they've been exercised with powers but they don't – they've been invested with powers but they don't exercise them. His Lordship says, "If they do not exercise their discretion in this way, they can be challenged in the courts. Thus, to say that councils are under no duty to inspect is not a sufficient statement of the position. They are under a duty to give proper consideration to the question of whether they should inspect or not. Their immunity from attack in the event of failure to inspect, in other words, though great, is not absolute and because it is not –

ELIAS CJ:

Well would that be a reasonableness test in those sort of circumstances –

MR FARMER QC:

Yes, I'm sure, it would be.

ELIAS CJ:

– whether a council could only reasonably have inspected?

CHAMBERS J:

Correct. It's a public law challenge he has in mind at (c).

MR FARMER QC:

Yes, yes and I referred earlier to *Padfield v Minister of Agriculture* which was a public law power. Then, in the next paragraph, his Lordship says: "Passing then to the duty as regards inspection if made, on principle there must surely be a duty to exercise reasonable care. The standard of care must be related to the duty to be performed, namely to ensure compliance with the bylaws. It must be related to the fact that the person responsible for construction in accordance with the bylaws is the builder and that the inspector's function is supervisory. It must be related to the fact that once the inspector has passed the foundations they will be covered up, with no subsequent opportunity for inspection but this duty, heavily operational though it may be, is still a duty arising under the Statute."

So that it's statutory duty but it attracts the common law duty in these circumstances and note there the emphasis on the fact that the defect is covered up if it's not properly supervised, if it's not properly inspected and that is the vice of course of this whole leaky building syndrome, as it's called, that these defects are covered up and if they're not properly supervised and inspected on the way through and at the end, then the innocent subsequent purchase who comes along is not able, easily at any rate, to discover that there is anything wrong.

I think the only other point I was going to just make in passing really, was that on page 760, at the top of the page, his Lordship referred specifically to the New Zealand Court of Appeal judgment in *Bowen* and said how helpful he had found it. Apparently the judgment was furnished by courtesy of the Court of Appeal in New Zealand.

TIPPING J:

How times have changed.

MR FARMER QC:

Yes, indeed. Then he concludes, halfway down that page, his conclusions are that: "*Dutton* was rightly decided and that the question whether defendant counsel by itself or its officers came under a duty of care towards the plaintiffs must be considered in relation to the powers, duties and discretions arising under the Public Health Act," and ultimately, that was so found.

Just one other broad statement of right approach, as it were, in *Hamlin* and the Court of Appeal. I'll just give you the reference, won't take you to it but at page 524, lines 18 to 19, Sir Ivor Richardson said, "Legislation must be seen in its social setting and the common law of New Zealand should reflect the kind of society we are and meet the needs of our society." I'm sure nobody would disagree with that.

So your Honours, I'd like to go on next to just summarise the main points in our submissions and then, as I say, I'll then go and look at the Council's main points and some responses to them. So I've extracted from our written submissions and I'll give you the references without going to the written submissions, what is actually 10 short propositions or submissions.

The first is that a logical – and this is paragraph 16 of our written submissions: "A logical application of the principles of liability and policy, recognised by this Court in *Sunset*, gives rise to the same duty of care that was found in that case to exist in respect of the Council carrying out its statutory duties and responsibilities."

Secondly, at paragraph 17 of our submissions, we submit that: "councils have statutory control and responsibility over building developments, including powers to require defect work to be rectified and the power to levy the cost of their inspection work in particular cases." As we've seen, they can in fact refuse to issue a certificate of code compliance if not satisfied that the building complies with the Building Code and can instead, and indeed must in that case, issue a notice to rectify.

The third proposition, which is an important one, we would submit - this is in paragraph 17 also of our written submission - that the Building Act does not draw any distinction between different forms of development and that point is conceded in my learned friend's written submissions at paragraph 8.30.

The fourth proposition is that the rationale for the duty as stated by this Court in *Sunset* is based on the Council's statutory control of building projects and on the general reliance which purchasers of buildings place in councils exercising those powers of control and inspection with reasonable care and skill, and that's paragraph 18 of our submissions.

Paragraph 19 of our submissions we submit that the Council control and responsibility is the same for residential purchasers as it is for the hotel apartment

purchasers at Spencer on Byron. In both instances purchaser's vulnerability and risk is the same. These are individual investors coming along buying either an apartment which they are going to rent out themselves to a tenant or it's buying an apartment which is located in a hotel which is going to be rented out, which is subject to a lease for 10 years to the hotel company which will rent the property, apartment out for people to stay in.

Six is that the policy, and I've covered this point earlier, the policy of the Building Act was to protect all users of buildings –

ELIAS CJ:
Sorry, you said six?

MR FARMER QC:
This is my sixth proposition.

ELIAS CJ:
I see, sorry, yes.

MR FARMER QC:
The policy of the Act was to protect all users of buildings. That's the points made in - by your Honour, the Chief Justice, in paragraph 7 and by Justice Tipping in paragraph 53. The common law protects such users by imposing a duty of care on the Council to the owner as the party whose pocket is affected and who can undertake the necessary remedial work and that's, we also make the point in paragraph 117 of our submissions.

The seventh point is the duty is required for the maintenance of standards which is a point I think made by one of their Lordships in *Dutton* as well, it may have been Lord Justice Sachs, that this is a good thing to have a duty of this kind because it will maintain standards and ensure that public bodies carry out their duties correctly or properly. That's paragraph 21 of our submissions.

Paragraph 21 of our submissions, we also say that in response to a submission that this will impose an unreasonable burden on councils to have such a duty. We say that the burden on councils merely reinforces existing statutory obligations and therefore the burden is no more onerous, albeit that it may have to look at insurance

or other means of meeting claims if it does not act and carry out its both statutory and common law duties correctly.

Ninth is that at the latent defect point: they're hidden. You can't see them once they are covered up and hence the responsibility of the council in that area to ensure that these defects are not covered up and that's submission is paragraph 22.

Then finally addresses the question of whether or not a plaintiff maybe at fault but not engaging their own expert advice or assistance. Now, leaving aside the rather exceptional case of *Te Mata* where the plaintiff was actually the person who was the developer and the builder, leaving that kind of exceptional case aside, our submission would be the issue of whether particular plaintiffs in any case are at fault. For example, a subsequent purchaser who it might be said should have obtained an inspection report that would have revealed a defect, that kind of example which will not certainly be one that will readily arise in the case of hidden defects. In any event, we would say that that kind of issue is best dealt with by applying principles of contributory negligence and, perhaps in some cases, causation. But simply to deny a duty in respect of non-residential property because there might have been ways and means of avoiding the loss - in our submission, to deny a duty for that reason is just simply too blunt an instrument, as we put it in paragraph 77 of our submissions.

TIPPING J:

That was similar to something said to that effect in *Sunset* wasn't it?

MR FARMER QC:

Yes, yes, that's right. Now the Council's submissions, their main points, I've counted 17, and they lead off and this is one that they do emphasise very greatly and I've already dealt with it. They say there is no precedent, either in New Zealand or in Australia or England that establishes a duty of care by local authorities in respect of commercial buildings, the precedent, and we've examined them this morning, are to the contrary. That's paragraph 1.16 and I've already made submissions in response to that. I don't need to say anything further.

The second submission that I've identified which is in 1.17(a) of their written submissions. They say there is no legal basis in the building legislation or in the case law justifying reasonable reliance by commercial building owners on councils to protect them from financial or economic loss. So once again, here they are, as far as

the legislation is concerned, they are distinguishing the commercial building owner from the residential owner, the Building Act, the very Act we're talking about, does not distinguish between one type of building and another. The concept of reliance, we say, has been developed by case law from the statutory responsibilities and control given by the Act to councils and all are entitled to rely on the councils carrying out their statutory responsibilities pursuant to the control that they have –

TIPPING J:

The foreseeable and reasonable reliance doctrine is primarily one to do with negligent statements, I would have thought, not one that deals with negligent acts or omissions.

MR FARMER QC:

Yes, that's so, your Honour.

TIPPING J:

I will just flag, I don't know that you necessarily need, unless you wish to, develop that, I just flag that for Mr Goddard's attention.

MR FARMER QC:

No I was – yes, I was thinking here of this concept of general reliance or the community reliance on, based on councils having the powers and the control and therefore relying on them doing their job, that's what I was referring to and what I –

TIPPING J:

Yes, it maybe that the reliance is a slippery word in this field in a sense –

MR FARMER QC:

Yes.

TIPPING J:

– they claim to be dependant on, I suppose which maybe the same thing essentially.

ELIAS CJ:

But if you have a duty why do you need to go to reliance?

MR FARMER QC:

Well it's just that it's –

ELIAS CJ:

A lot of the reasoning in some of these cases has been concerned with the arguments for getting to a particular point. They may not ultimately be essential to the principles being applied.

CHAMBERS J:

After all, a subsequent purchaser could sue an architect who had negligently supervised even though the subsequent purchaser may not have known there was an architect, isn't that the case?

MR FARMER QC:

So there would be no –

CHAMBERS J:

Or am I wrong on that?

MR FARMER QC:

There would be no reliance, you would say, there?

CHAMBERS J:

Yes but the architect is liable because the architect did not fulfil his or her part of the building process carefully.

MR FARMER QC:

Yes, well in *Bowen* - I mean, obviously the plaintiff would have known there was a builder but might not have known who the builder was, probably wouldn't have known who the builder was and so would not have relied on the reputation of that builder –

CHAMBERS J:

No.

MR FARMER QC:

–for example, but would have relied, well, would perhaps have relied, on the fact that the building would have been properly constructed by –

TIPPING J:

I think it may be helpful to introduce the concept that you rely or depend, never mind the word, on the process being properly undertaken –

MR FARMER QC:

Yes.

TIPPING J:

– rather than on any specific individual player in the process which is more theoretical.

MR FARMER QC:

Yes.

McGRATH J:

I'd understood that what Mr Goddard's submissions were getting at here was perhaps more in relation to the basis of reliance developed in *Hamlin* by reference –

MR FARMER QC:

That's what I think he is referring to, yes.

McGRATH J:

Yes and I think that that's –

MR FARMER QC:

General reliance, I think Sir.

McGRATH J:

– that is, I think, a key issue in the case, as to whether the *Hamlin* social context of home ownership in New Zealand provided a particular form of reliance that may not apply when investors decide. I mean, I think that's an argument that's centred around reliance.

MR FARMER QC:

Well except of course, this Court has said that investors who buy an apartment or house –

McGRATH J:

For residential use.

MR FARMER QC:

– that they're going to get a commercial return on by renting it out –

McGRATH J:

Yes.

MR FARMER QC:

– they have the same entitlement to rely on the council having done its job and my submission would be that because the Building Act doesn't draw any distinction between different kinds of building development –

McGRATH J:

Yes, that's a powerful argument too –

MR FARMER QC:

– then –

McGRATH J:

– that does sort of support the context, I think Professor Todd says that, you know, once you start down this route it's very hard to sort out when, if ever –

MR FARMER QC:

Yes, you can't get off it.

McGRATH J:

– in principle, in sound principle, you can stop.

MR FARMER QC:

Yes, you're on the train and you go to the end of the station.

TIPPING J:

Yes and you hit the buffer.

McGRATH J:

Yes.

MR FARMER QC:

My learned friend refers to case law as to commercial buildings. I think what he's trying to say, he'll say it himself in due course but not doubt differently from what I'm now saying, is that the case law that's out there, as it were, would lead people to the contrary view, that they couldn't rely on councils because the Courts had said there was no duty of care in respect of commercial premises but, as I've said, what we're talking about here is the Court of Appeal three years ago, making the first landmark decision and if they read that judgment carefully they might not have slept that well at night, thinking there could never be a duty of care. The Council –

TIPPING J:

But in *Sunset*, without saying so directly, perhaps we were too polite. We disavowed a limitation on account of the habitation interest –

MR FARMER QC:

Yes.

TIPPING J:

– because if we had stuck with that, we couldn't have allowed a commercial owner of a –

MR FARMER QC:

No.

TIPPING J:

– residential premises who had no habitation interest in those premises, he had an economic interest in those premises.

MR FARMER QC:

But the habitation interest was relegated to a one footnote in his Honour's judgment.

TIPPING J:

That's exactly right Mr Farmer, and deliberately so.

MR FARMER QC:

Yes, oh well, I didn't know that but –

McGRATH J:

But we, to some extent, we did reserve the position in relation to whether *Hamlin* should be extended generally –

MR FARMER QC:

Oh, exactly and –

McGRATH J:

– but perhaps we were inconsistent in that but I don't know if we closed off this issue.

TIPPING J:

It's one more – I'm not forecasting a view here but it's one more step that has to be reconciled with closing it off at residential buildings only.

MR FARMER QC:

Yes, yes.

TIPPING J:

Because it is arguable that there would then be an anomaly because you are allowing some degree of commerciality, albeit referable to a residential premises, but you're not actually protecting solely the habitation interest and nor did *Hamlin* I don't think, frankly.

MR FARMER QC:

No, no, it didn't and then what is meant by habitation here? Is it, as I think I said earlier, is it the fact that someone sleeps in the building overnight and if that's what it is, why draw a distinction between someone who sleeps in the same building night after night, as opposed to someone who stays in a hotel. There is always someone in the hotel room but it will be a different person from time to time. Actually, my hotel room last night was terrible, it was very, very cold and I couldn't find the temperature gauge, if anyone was affected it's probably me. So it is that issue, then there's the

Glen Innes Primary School issue, the children at school, only there during the day but does that mean to say that because it's habitation only, if we restrict it that way, that there's no duty to protect them? That can't be right, with respect.

TIPPING J:

Well all we had to decide in *Sunset* happened to be residential premises and it was –

MR FARMER QC:

Yes.

TIPPING J:

– rightly I'm sure, decided that we wouldn't attempt to forecast where it might lead but the law has to be coherent would be my –

ELIAS CJ:

I think we also knew that we were having a – we had a case queued up which was concerned, perhaps this case, concerned with commercial premises.

MR FARMER QC:

Yes, yes and that's probably why you left it open; expressly reserved the point.

TIPPING J:

But it may be that it can be demonstrated that there is coherence in drawing the line here but that, I would have thought, prima facie, has to be demonstrated.

MR FARMER QC:

Yes and that's what my learned friend's task is.

TIPPING J:

That's what Mr Goddard is going to do.

MR FARMER QC:

The third proposition and one finds this scattered throughout –

ELIAS CJ:

Sorry, where are you at, are you back on –

MR FARMER QC:

I'm going through my learned friend's propositions.

CHAMBERS J:

Mr Goddard's 17 points, we're up to number three of 17.

ELIAS CJ:

Oh, I'm sorry, I was looking at –

McGRATH J:

17(1)(a), is it?

TIPPING J:

This is three out of 17.

ELIAS CJ:

This is the respondent's references you're giving.

MR FARMER QC:

Yes, yes, that's right –

ELIAS CJ:

I'm sorry, no wonder I couldn't match them.

MR FARMER QC:

So, I'm trying to make some comments on their submission. So the last one was to be found in (1) 17(a), the next one is to be found, it's actually to be found in (1) 17(b) but then it's found all through their submissions in a variety of places and I'll just quickly read them out, 8.11(c), 8.16, 8.22, 8.24, 8.49, 8.50, 8.56 and the proposition, or the submission they make is that: "The purpose for which regulatory powers were conferred on councils was not the protection of the financial interests of commercial building owners," and emphasise the word owners, "but was the protection of the health and safety of building users," and they cite the *Attorney-General v Carter* case in support of that proposition.

Now there's nothing wrong with the broad proposition that *Carter* itself states, it wasn't a building case. Your Honour Justice Tipping referred to *Carter* in fact at paragraph 40 and the case itself is referred to in footnote 63. "It referred to *Carter* for the broad proposition that the purposes of the relevant legislation were a highly material factor in determining whether and to what extent a duty of care should be owed at common law."

Now that's fine but *Carter*, as I say, was not a building case so therefore it does more than state that broad principle and our submission has been that it's too narrow a view to say that the Building Act is only concerned with health and safety in the sense of sanitation, that rather narrow view of health and safety, of building users but even assuming that that's correct, even if you take that view, then the critical point is that the common law has imposed a duty on councils to the current owner of the premises as a mechanism by which the owner will be compensated for the cost of remedying the defect that causes potential harm to users of the building. Sorry, again, paragraph 53.

Further, then there's the discussion in *Te Mata* which I took you through, about health and safety and I also referred you to Justice Richardson in *Hamlin*, where he referred to the Government report that took a broad view of what is meant by health in safety in the context of building works.

Now, the fourth submission that my learned friends make and this is 1.17(d) and also at 8.11(d) is that: "The owners of commercial buildings can reasonably expected to manage financial risks for themselves." Now, with respect, that's not supported by *Sunset* and that's the point which your Honour Justice Tipping said a moment ago. It was dealt with there at paragraph 8 of your Honour the Chief Justice's judgment - was this, I'll read it quickly: "It was suggested in argument in this appeal that in larger developments it may be expected that architects, engineers and other consultants are likely to be engaged and that purchasers are more likely to rely on such experts than on the inspection and controls under the Building Act," and your Honour said: "That there may be overlapping duties of care owed by different potential defendants, including architects and engineers, is however no answer to the Council's liability for its own negligence. Apportionment of responsibility may be sought where available and in some questions of reliance may bear on whether any breach was causative of loss in fact," and I made that point I think myself earlier, relying on what your Honour had said and similarly, of course, is in your Honour Justice Tipping's judgment at

paragraph 72. Your Honour said: "The matter should be addressed against the background that the Council owes separate duties of care to original and subsequent owners. The duty owed to a first owner is not transferred to the second owner on sale nor is the loss. The duty is owed independently to the second owner and the second owner independently incurs loss. In principle, that owner should be able to recover loss suffered by him as a result of a breach in the duty owed by him quite independently of the first owner's position."

So, if it is going to be said, well, you know, you went into this with your eyes wide open, you should have got an engineer or an architect and so on, that argument in its extreme form would apply, say, in *Te Mata* where the plaintiff was in fact the developer and the builder and if he failed to get an engineer to help properly well then that's his problem but the subsequent purchaser is in quite a different position and you might say, well you should have got a pre-purchase inspection report but if we are dealing with latent defects which we nearly always are that pre-inspection report is unlikely to tell you very much.

TIPPING J:

That the main judgment also made a similar point to the Chief Justice's where at paragraph 50 we said: "That the part played by other professionals should not absolve councils from liability."

MR FARMER QC:

Ah, yes, yes. Thank you for that, yes, I'd overlooked that.

CHAMBERS J:

There is also a slight irony in that proposition you've just been putting from the Council's perspective because they seem to suggest that people should get their own inspections beforehand and of course the principle document that prospective purchasers now look for is the LIM which will refer to the code of compliance certificate but, ah ha, you find in another part of the Council's submissions, nobody but the actual original developer is apparently able to rely on the code of compliance –

MR FARMER QC:

Yes.

CHAMBERS J:

– certificate so it is a bit of a catch 22 –

MR FARMER QC:

Yes.

CHAMBERS J:

– for prospective purchasers.

MR FARMER QC:

Yes it is. Now I think the next proposition is, this is number 5, is that the submission by my learned friends is that the – and this is paragraph 1.19 and, again, even 9.6, 9.12 and 13.2, a submission is made by my learned friends that the relevant determinative council liability is the stated intended use of a building as disclosed in the building consent application, and the line is drawn, they say, in respect of buildings that are identified as residential dwellings in the consent application they say this is a workable and predictable test and they refer to Justice Heath at the first instance in *Sunset*, I think he used the term "bright line test".

Now it's true that in *Sunset Terraces* the, what was said was that – I will find exactly what was said. It's paragraph –

ELIAS CJ:

The use, the notions of use, are they Building Act notions or are they Resource Management Act notions?

MR FARMER QC:

I'm not sure. Could I come back to you on that?

ELIAS CJ:

I can ask Mr Goddard that because I wasn't, I didn't quite follow his submissions.

CHAMBERS J:

They are certainly not Building Act but I suspect they are –

ELIAS CJ:

They are the sort of information that goes in with a PIM, for a PIM to enable the Council –

CHAMBERS J:

You may need it for –

ELIAS CJ:

– to check –

CHAMBERS J:

– commercial buildings require warrants of fitness and have a different regime in that regard, don't they?

ELIAS CJ:

Yes.

MR FARMER QC:

Mmm, there is such a thing as a warrant of fitness for commercial buildings, that's right.

ELIAS CJ:

Yes, what's that under, what Act is that under?

MR FARMER QC:

Mmm –

ELIAS CJ:

This Act, the Building Act?

MR FARMER QC:

Yes. Now, yes, all right, so what my learned friend is referring to in this respect in *Sunset* is paragraph 51 of the majority judgment which says: "For these reasons we agree with the Court of Appeal that a building's intended use in accordance with the plans lodged with the Council is the most appropriate determinant of the scope of the *Hamlin* duty. Councils owe a duty of care in their inspection role to owners, both original and subsequent, of premises designed to be used as homes." But then the

Court went on to say: “This is as far as the Court needs to go for the purpose of deciding the present appeals whether and, if so, to what extent a Council may owe the same duties of care in relation to other premises should be left to a case in which the issue directly arises.” So, for the purposes of *Sunset* it was enough to say, well let's have a look at the - if we are concerned, if we want to know what was the intended use, what is the use of the building - if we want to bring it within *Hamlin* then let's look at the plans, let's look at the application for building consent. If we see it's residential then that brings you within *Hamlin* but whether that’s the right approach with something beyond residential is something we will leave for another day. So there’s, with respect, one can't read too much into paragraph 51.

We did actually also, by the way, file a supplementary case on appeal or volume of case on appeal which, by consent, which put in the plans that were provided or some of the plans that were provided in the case of Spencer on Byron which show the residential nature of the penthouse apartments, not that that necessarily takes the debate much further.

TIPPING J:

The use as per plans was simply there on the hypothesis that this was the extent of the duty. It doesn't tell you anything about whether the duty should be extended.

MR FARMER QC:

No, no, that's right I agree, with respect, I absolutely agree.

TIPPING J:

I will be interested to see whether Mr Goddard develops this –

MR FARMER QC:

Well that’s what they – they do rely on it.

TIPPING J:

I know they do, but I'm looking forward with keen anticipation to how it's developed.

MR FARMER QC:

Yes, and well that’s still to come as it were. Now the sixth proposition from my learned friends which you will find at paragraphs 1.20 and 4.1(h) and (i) and 11.2 and 11.3 is, they simply say the negligent misstatement claim also fails for all the same

reasons that the duty of care claim fails. They say the purpose for which a code of compliance certificate is issued to the original owner is not to protect subsequent owners from financial loss.

Now what we would say in response to that is, well, that seems to be inconsistent with the ruling of this Court in *Sunset* that the Council owes separate duties to original and subsequent owners. That's in your Honour's judgment at paragraph 72 and 73. So that if there is a prospect of a subsequent owner - sorry, there is also the point that – no I don't think I can really take that point any further but on this code of compliance certificate question, this recent judgment of this Court in *Marlborough District Council v Altimarloch Joint Venture Ltd* [2010] NZCA 104 may have some bearing on the matter because what happened there is you will remember of course very readily, is that there was a LIM report issued which misstated the extent of the water rights and it was held that the Council was liable to the purchaser in respect of that negligent misstatement.

A couple of points to note about that, although a different case from this one, they were commercial premises, there was no policy reason based on the fact that they were commercial premises that would exclude negligent misstatement liability. In that case it was a vineyard. The second point to note is of course, it was on pure economic loss, so it was the value of the property that was –

TIPPING J:

But if a LIM says there is a code compliance certificate, that's not incorrect.

MR FARMER QC:

No it's not, no that's not, if the LIM –

TIPPING J:

It may be negligently given but it's not a misstatement.

MR FARMER QC:

No, it's not a misstatement but our case here is not to do with a LIM, our case is to do with –

TIPPING J:

No, I understand what you're doing Mr –

CHAMBERS J:

But where it is relevant however is one of the documents you would want to see most often when you ask for a LIM, is whether there is a code compliance certificate but on the Council's argument, it ought to come with a warning: "under no circumstances rely on this code compliance certificate because it hasn't been given for anyone's benefit except the original owner". That, on the Council's argument, is the sort of warning that you should get when you get a LIM.

MR FARMER QC:

Yes, well –

CHAMBERS J:

And that seems odd that that should be so. Why does the Council keep code compliance certificates on property files, if they're of no use to anyone except the original person?

MR FARMER QC:

I can't answer that.

CHAMBERS J:

I'm really just flagging –

TIPPING J:

You wouldn't really want to.

MR FARMER QC:

No, no but what I should tell you about the relevance of the code compliance certificate in this case is that the contracts of sale of the hotel units contained a provision that a warranty, called a warranty and undertaking, that was the phrase used, warranty and undertaking, that on settlement there would be provided an interim code compliance certificate by the vendor and there is provision in the Building Act for interim certificates and final certificates and that a final certificate would be provided thereafter.

So, our case is that the code compliance certificate was relied on to trigger the settlement. It was relied on by the purchasers having received it: they then said "fine,

we can now settle". They did settle and the code compliance certificate was negligently issued by the Council.

My learned friend, as I said earlier, is going to argue, I think, that we would have been obliged to settle anyway, irrespective of whether the warranty – as he calls it "the warranty", I would say it's described as "a warranty and undertaking" and whether, these days, one can draw fine distinctions between warranties and conditions, I don't know - but the clear point is that we would say that we were under no obligation to settle until the certificate was received. We received it and, relying on it, we settled and it was negligently issued. So that's –

TIPPING J:

But that doesn't really trench on the extent of the Council's duty, vis-à-vis the CCC, does it, the Council either owes a duty only to the original person or it owes a duty generally and that's the key issue, isn't it?

MR FARMER QC:

Yes but I did – sorry, this is in the context of the negligent misstatement –

TIPPING J:

I understand that but it's more a causation problem, isn't it, rather than a duty problem, that Mr Goddard is raising against you? I mean, if you can show that you were owed a duty and you relied on it, then clearly you suffered loss –

MR FARMER QC:

Yes, yes.

TIPPING J:

– in terms of that reliance. I just don't –

MR FARMER QC:

I think it is perhaps a causation argument. He is saying you had to settle anyway, even though you got this –

TIPPING J:

Well I don't – I'm not inviting you to elaborate, I'm just forecasting that I don't quite see where it fits into this duty question.

MR FARMER QC:

No, right. Now the seventh point that's made by my learned friend which is found in paragraph 1.21 and 5.1, they say it's really just on the other side of the coin of the stated use was residential. They say the Spencer on Byron building was described in the building consent application as, quote, "new commercial/industrial" and they therefore rely on that as excluding the duty and I've already dealt with that point.

Their eighth point is that the distinctive New Zealand – they go back to what they call: "The distinctive New Zealand features emphasised in *Hamlin* are confined to residential buildings," that's 8.11(e). We've dealt with that point earlier really, we've moved on since *Hamlin* and the question for this Court today is whether the duty should apply –

TIPPING J:

And the movement on, in your submission is two-fold, is it? One, it is statutory and perhaps the more important point, is that the moving on is statutory?

MR FARMER QC:

Yes.

TIPPING J:

And just remind me, what's the second aspect of the moving on?

MR FARMER QC:

Well the second aspect would embrace society has moved on, we have leaky buildings on a large scale which they didn't have at the time of *Hamlin* and –

TIPPING J:

Well, we've got to be careful that the tail doesn't wag the dog.

MR FARMER QC:

No, no, that's true but we also have a whole body of subsequent case law, including this Court's decision in *Sunset*, that we have that movement from the emphasis in *Hamlin*, of a duty was needed to protect the economic – protect homeowners from economic loss, to what we have in *Sunset*, we have the need to have a duty owed to homeowners to protect the interest of occupiers and that's clearly feeding in very

much to the policy of the Building Act. Whereas the English Courts have gone the other way, they've stayed on that –

CHAMBERS J:

But that's presumably, at least in part because the statutory framework under which councils are working in the UK is different.

MR FARMER QC:

That's right, that's absolutely right. The next proposition is really the *Carter* arguments and I've sort of dealt with this already. There, their simple point is that there shouldn't be a statutory responsibility for a task they say does not imply a common law liability in damages to any person who suffers economic or financial loss as a result of the careless performance of that task and I think, one way and another, we've probably traversed that earlier.

TIPPING J:

Is the key enquiry in relation to the *Carter*, what interests are being protected?

MR FARMER QC:

Yes, yes.

TIPPING J:

You say it's not just health and safety, sanitation, et cetera –

MR FARMER QC:

Well, yes –

TIPPING J:

– it's wider? I just want to make sure I've got the key –

MR FARMER QC:

I'm saying that what's being protected are health and safety in the broader sense of occupiers of buildings.

TIPPING J:

Well I don't, at the moment, see that economic interests are not per se, intended to be protected –

MR FARMER QC:

And the second level is the economic interests of the owner and if we protect those that will also protect the other, the health and safety issues of the occupiers.

I'll deal with number 10 perhaps. "The imposition of liability," they say, this is paragraph 8.28, "would require councils to increase fees. This would increase commercial construction costs and result in an inefficient allocation of risks." Well, I've already dealt with that. We've got the 10 year longstop limitation period which significantly limits the scope, or the amount of claims against –

CHAMBERS J:

It would be interesting to know and this is really a sort of point the Chief Justice was making earlier, about knowing about the facts. Do councils at the moment charge less for commercial dwellings and I will be pretty surprised if that is in fact the case but that –

TIPPING J:

Commercial?

WILLIAM YOUNG J:

Buildings.

TIPPING J:

Commercial buildings.

CHAMBERS J:

For commercial builders, yes.

TIPPING J:

Yes.

MR FARMER QC:

Well because they –

CHAMBERS J:

Because they're not going –

MR FARMER QC:

– *Te Mata* is –

CHAMBERS J:

– to be liable –

MR FARMER QC:

– because they think *Te Mata* is there –

CHAMBERS J:

– I'll be very surprised if that is the case but –

MR FARMER QC:

Yes, it depends how good the legal advice they've received is.

ELIAS CJ:

How risky the legal advice is.

MR FARMER QC:

Risky, yes and maybe that's what is meant by the inefficient allocation of risks because I was going to say, I wasn't sure what my learned friend meant by that.

TIPPING J:

Well, just put on the table, if one's talking about inefficiency, one could well say that it's better to incentivise to do it right the first time than it is to mop up the problem at much greater expense the second time.

MR FARMER QC:

Yes, yes that's right.

TIPPING J:

Efficiency can cut both ways in this dilemma.

MR FARMER QC:

And, I mean, the reality is that the leaky building crisis emerged 10 - 12 years ago. The 10 year limitation period was already in the Building Act at that time. One would hope and assume, but again this will be a matter for empirical evidence, that councils

would have lifted their game since the scale of the problem emerged and the scale of their potential liability emerged, so that there will be a tailing off of these claims.

CHAMBERS J:

Can I just – your reference to empirical evidence and the Chief Justice's earlier remarks does lead me just to enquire one thing of you before we break for lunch, and it's this, that there are two possible responses to this appeal potentially in your favour. One is to say, well, as a matter of law, looking at the structure of the Building Act, et cetera, a duty of care was owed in this case. Another is to say, well, we just don't know whether there's a duty of care here. We do need empirical evidence as to what would be the consequences of finding a duty and that should be one of the issues at trial.

MR FARMER QC:

And no strike out, yes.

CHAMBERS J:

And not strike out.

MR FARMER QC:

Yes.

CHAMBERS J:

Of those two responses, presumably you would say, "I want both," but in what order would you put those responses.

MR FARMER QC:

I'd like the first one –

ELIAS CJ:

Well, I'm not sure that you can say because it seems to me that we are faced with the strike out application and so, at the best for you, all we could decide is the case wasn't suitable for strike out.

WILLIAM YOUNG J:

We couldn't decide what was suitable for strike out because it's unanswerably good.

ELIAS CJ:

Well…

MR FARMER QC:

Well, really, for my learned friend to defend the strike out, he needs to say under no circumstances, under no factual situations, can a commercial building attract the duty.

WILLIAM YOUNG J:

Just after lunch, could you answer me this, are there any cases, and if so could we have some references, where trials of negligence have involved a sort of commission of inquiry type exercise where empirical evidence is heard as to whether the duty of care postulated is a good thing or a bad thing?

MR FARMER QC:

Well, that's –

WILLIAM YOUNG J:

No, no, don't –

MR FARMER QC:

It's a pretty broad question, your Honour.

WILLIAM YOUNG J:

Well, just after lunch.

McGRATH J:

But there's a whole academic discussion on this in the work of Kenneth Culp Davis as to legislative fact and the general view seems to be that this material is better admitted on appeal, in a policy way, and it can be answered not by cross-examination but by contrary material being submitted. It's the Brandeis brief, if you like, notion.

MR FARMER QC:

Yes, I am familiar with all that too. I quite favour –

WILLIAM YOUNG J:

Well, you're familiar with –

MR FARMER QC:

– the idea of cross-examining actually myself on some of this.

WILLIAM YOUNG J:

Mr Farmer, you are – you've never been involved in a case where this sort of, what Justice McGrath says, legislative fact evidence has actually been led.

ELIAS CJ:

Wasn't *Hamlin* one of those cases, because didn't Justice Richardson actually look at a lot of material?

WILLIAM YOUNG J:

Yes, but I don't think he – I think he –

McGRATH J:

He did it himself.

ELIAS CJ:

He may have, but the point is that it was part of the base, the reasoning in that case.

MR FARMER QC:

Well, he referred to those reports –

ELIAS CJ:

Yes.

MR FARMER QC:

– Government reports and the like, and he referred obviously to – I suppose he took judicial notice of a lot of things too, but –

TIPPING J:

Well, one of them had been written by Sir Robin Cooke.

MR FARMER QC:

Pardon?

TIPPING J:

One of the reports that was referred to –

MR FARMER QC:

Yes, it was. The Housing Commission –

TIPPING J:

– has been written by Sir Robin Cooke.

MR FARMER QC:

The Housing Commission report. All of that is true, and I can certainly recall cases, not of this kind, where Sir Ivor would, at the hearing, say: "Well, have you not read – have you read this report or that report," and in fact I had one case where after judgment had been delivered, reserved, when judgment was delivered, he referred to a report that he himself wrote after he'd reserved judgment. That was a little difficult. It was a tax case.

WILLIAM YOUNG J:

But these are things that can be done as easily at this stage –

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

– as at trial or after trial.

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

That sort of exercise of going away and doing a degree in –

ELIAS CJ:

Sometimes, if a duty of care is based on, in part on specific circumstances - that might not be so. But legislative fact material is normally incontrovertible. It's not finely balanced stuff. So it can come in at this stage, I suppose.

McGRATH J:

But it's arguable. I mean, I don't see how that this is really an issue because I think in *Hansen* we said we will admit this sort of material in an appropriate case at the Supreme Court level, but it's got to be tested and it could be tested by other material. I think that, you know, arguable legislative fact material can certainly come in, and if the Court isn't satisfied with its reliability it won't place any reliance on it.

MR FARMER QC:

Yes.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.18 PM

MR FARMER QC:

So I think I was up to the eleventh submission that my learned friends make in their written submissions, which you will find at paragraphs 8.31 and 8.43, and this is that the *Hamlin* duty they say does not turn solely on control rather, they say, it rests on two pillars: control and reasonable reliance and they say there is no history in New Zealand of reliance in respect of non-residential buildings.

Now that reference to reliance it is dealt with in the judgment of your Honour Justice Tipping in *Sunset*, paragraph 48, where once again the Court, or your Honour was considering these issues in the particular context in that case of residential buildings. So going to paragraph 48, line 30, your Honour said that rationale is based on the control which councils have over building projects and on the general reliance which people acquiring premises to be used as a home placed on the council to have exercised its independent powers of control and inspection with reasonable skill and care, and if I can just stop there for the moment.

So what my learned friend is saying is that the twin concepts of control and general reliance where stated to relate to a home and there is nothing which would indicate elsewhere that there has been general reliance in respect of non-residential properties.

Again I would obviously make the point that here the Court in *Sunset* did leave open expressly the question of premises that were non-residential premises for future consideration. But also reading the rest of that sentence, after reasonable skill and care it continues: “And in particular to have exercised with reasonable skill and care its powers of inspection of features that will be covered up,” and this was the vice that particular attention was paid to in *Sunset* and all of these cases in respect of the council’s responsibility because obviously if the defect is covered up, if it's not properly inspected on the way through well then the subsequent purchaser who comes along is unlikely to be able to find it and that point was taken up further in the judgment at paragraph - I'm sorry I've just lost the reference. I think it maybe earlier but, there’s a section, I'm sorry, there is a section which is actually headed, there it is, - paragraph 76 and following: “Reasonable possibility of intermediate examination,” and this of course is concerned with the situation of the subsequent purchaser who

comes along and what is said in the judgment here at 76 is: “It is appropriate to address this topic in order to signal an issue which has not arisen for determination on these appeals but to which both parties referred to in the course of their submissions. In *Donoghue v Stevenson* Lord Atkin used the words: “Reasonable possibly of intermediate examination” to describe a situation in which the manufacturer of harmful product could avoid liability for negligence in its production.

The duty recognised by the House of Lords in that case arose only if there was no reasonable possibility of intermediate examination. The concept of intermediate examination has subsequently been employed in defective building cases, particularly when a subsequent purchaser is involved. This is because the defect is customarily hidden.

So, that problem or that issue is equally applicable, obviously, to commercial premises as it is to residential premises. And if that is the basis for a policy that imposes a duty of care on councils who have the control and the responsibility in respect of construction work then that is, we would say, a responsibility and control that must apply to all premises, it can't be said that there is some difference, inherent difference between a defect in a house to be used as a home and a defect in a commercial building.

My next - the next point my learned friends make is that we've already touched on earlier, that subsequent owners could protect themselves by contracting for warranties and by seeking assignments of the developer’s rights and that’s dealt with in their submissions 8.34 and 8.36 to 8.39. The answer to that, once again, is to be found in *Sunset* at paragraph 41 where *Dutton’s* case is referred to by your Honour and, in particular, Lord Justice Sachs in that case said that the argument that the owner’s rights of action against the builder was a sufficient remedy and that no sufficient rights should be available against the Council was a poor point for many reasons. He elaborated those and made the point at paragraph, at line 15 of the paragraph, that his Lordship in that case was of the view that, in the type of case with which the Court was concerned, it was particularly important that what he termed a dual liability should exist, and he gave the reason, that I referred to earlier, that the development company or the building company often formed as special purpose companies and dissolved upon completion of the particular project and as his Lordship went on to say, is recorded in this paragraph: “Lord Justice Sachs was of the view that those for whose benefit the Act was passed needed and should have

the benefit of dual liability at common law because the loss suffered would not have come about if the Council had done what it ought to have done."

So, it's that special position of the council's responsibility didn't carry out properly - the loss arises because, at that point of course the defect that can be rated back to my earlier point, that the defect becomes covered up but here the emphasis on dual liability, it was important that it should exist.

Then following on from that in the next paragraph, 42 of your Honour's judgment: "Dealing with a point to which we will make further below Lord Justice Sachs observed that the case in hand was concerned with negligence against which normal intermediate examination would not generally afford protection." So, there's the link between those two paragraphs. "The significance of this observation, as we shall see later, is that if defect that is otherwise hidden might have come to light by reason of appropriate intermediate examination, questions of causation and contributory negligence re likely to arise." So, if the subsequent purchaser could have, by reason inspection, found the defect, so it wasn't truly hidden, well then that doesn't necessarily remove the duty but it does give rise to questions of causation and contributory negligence that would have to be considered.

My learned friend's next submission which is in 8.42 that follows that is that imposing liability on councils in relation to commercial buildings will not encourage the maintenance of building standards and, again, answered in *Sunset* by reference to *Dutton,* this time though to the judgment in that case of Lord Denning, Master of the Rolls, so going in *Sunset* to paragraph 35. Lord Denning next considered the consequences of imposing liability on the Council and, in particular, whether doing so would have an adverse effect on its work. Would it mean the Council would not inspect at all rather than risk liability for inspecting badly? His Lordship saw no danger in this respect. He considered that if liability was imposed on councils it would tend to make them do their work better rather than worse.

ELIAS CJ:

Sorry what paragraph reference is that?

MR FARMER QC:

That was paragraph 35.

ELIAS CJ:

Thank you.

MR FARMER QC:

Now my learned friends then go on to make a submission in paragraphs 8.53 and 8.54 that it would not be just and reasonable for a council to be liable in tort in respect of defects in a commercial building if the original builder and advisers are not. And they refer to *Rolls-Royce v Carter Holt Harvey.* Now in that case, as we've already discussed briefly, there was a matrix of commercial arrangements between the parties and the question was whether the owner could sue, in effect, the subcontractor in tort where there was no existing contractual relationship between them and it was held it could not. That being a purely commercial situation where there was no public law aspect arising out of a statutory regulatory framework in which the duty of care was to be examined and the significance of that is to be found in the *Glen Innes School* case which I would like to take you to briefly.

That's *Minister of Education v Econicorp* and you will find that in volume 3, the same volume as *Sunset,* at tab 26 and you will recall that tab 26, volume 3, that the school hall had been built pursuant to a contract between the builder, which was Econicorp trading as Ahead Buildings. Contract entered into with the school's board of trustees. The Minister of Education owned the land and the buildings but was not a party to that contract, it was pursuant to some kind of Government policy to the effect that school boards should be responsible for their own destiny so to speak and although the funding obviously came from central Government.

Now in the judgment, the primary judgment in that case was given by Justice Arnold and he contrasts the *Rolls-Royce* type situation, that the private commercial contractual situation with the one before him where there was a contract and somebody suing in tort but in, within the context of a regulatory framework where there was a statutory regulatory framework, and if you go to paragraph 61, or perhaps go to 59 first. At 59 he's considering the arguments that were being run in the case and if I go back to 58 that - or even 57. "There are," his Honour said, "policy factors which are arguing the point the other way," that's against liability.

One is that, as Mr Hollyman submitted, "the Minister's loss is economic. The New Zealand courts have accepted that this is a relevant consideration but have not regarded it as decisive, with a reference to, in fact, the Court's judgment in *Sunset* as

well as to *South Pacific*. This is illustrated in the present case, the board's loss is an economic one yet its claim in tort against Ahead will proceed to trial as will the claim of the board and the minister against LHT, which is also for economic loss. I do not see this consideration as justifying a striking out the Minister's claim at this juncture. The most powerful policy considerations against imposing liability is the non-residential context. In *Rolls-Royce* this Court gave particular weight to the commercial context including the contractual matrix within which the alleged failure to take care arose in determining that no duty of care was owed by Rolls-Royce to Carter Holt Harvey."

In 16 he went on: "I acknowledge the force of the commercial contractual considerations, undoubtedly they are powerful, however I consider it is arguable that these considerations have less force in this particular case for the following reasons. First, arguably this was not a truly commercial situation. School boards have management obligations including as to building projects, not because they are commercial parties or because they can be expected to act as if they were commercial parties but because it is thought that there are significant public benefits, both to schools and their communities from giving them such responsibilities, albeit subject to Ministry imposed limitations and requirements. This is a policy assessment which has been legislatively implemented and has been maintained by successive Governments. Unlike the situation in *Rolls-Royce* where the relationships between all the parties were clearly commercial, the relationship between the Minister and the board is arguably at least, not commercial. Rather, it is a public law relationship in the sense that it is governed by statutory and other regulatory provisions which are structured to achieve public policy objectives. Precisely how, if at all, this should be accommodated within the duty analysis is, in my view, best left until the facts have been fully determined. In this context it maybe important to know exactly how much Ahead knew about the nature of the arrangements between the Minister and the board. Although there was a construction contract between Ahead and the board and a design contract between Ahead and LHT, there was not as comprehensive a contractual matrix as existed in *Rolls-Royce*," and then so on.

So there his Honour was dealing with a situation which was not a residential building at all. Equally it wasn't a commercial building but it was something different again and he was prepared to deal with it on that basis and in effect to examine whether a duty of care should arise, or could arise, in such a case and given the public law

framework within which the duty, question of the duty arose, he was clearly very minded to recognise the duty but said it's a matter that should await trial.

TIPPING J:

Mr Farmer, is it perhaps of significance also that the key dimension at least, or a key dimension in *Rolls-Royce* was the limitation, and Justice Arnold refers to this in his (b) on page 52 just after where you stopped reading.

MR FARMER QC:

Yes.

TIPPING J:

In *Rolls-Royce* the Turnkey Contract severely limited the liability of Rolls-Royce to Genesis and so on.

MR FARMER QC:

Yes.

TIPPING J:

It seems to me that one of the key points in *Rolls-Royce* was that the contractual matrix contained a limitation clause?

MR FARMER QC:

Yes.

TIPPING J:

It wasn't so much the contractual matrix per se although some have read it in that way.

MR FARMER QC:

Yes.

TIPPING J:

I would have thought it was more the contractual matrix in the sense that it contained that very, very important watering down if you like, of the liability I assume to –

MR FARMER QC:

Yes.

TIPPING J:

– one party and the other party could not in tort, if you like, circumvent that.

MR FARMER QC:

Yes and that's so your Honour and he goes on –

TIPPING J:

Well as we have nothing of that kind remotely resembling that here.

MR FARMER QC:

No, well because he goes on to say that because of that limitation clause there was no assumption of responsibility.

TIPPING J:

Yes, exactly.

MR FARMER QC:

Whereas here we have a statute so not only is there an assumption of responsibility, it's imposed. The responsibility is imposed by statue on the Council and the other features then arise, questions of reliance and so forth.

Now interesting also in *Rolls-Royce* the question of latent defects as an exception to what was said, even in that case, was left open and you will that case, tab 35 which I think is volume 4. No, it's volume 3, right at the back. Volume 3 at paragraph 90 in the judgment of –

ELIAS CJ:

Sorry, what's the tab, 35?

MR FARMER QC:

Tab 35, it's right at the back of volume 3 your Honour and if you go to paragraph 94, this is said there's a reference to academic works, the previous two paragraphs in fact and then it's said: "We note also that Bernstein suggests that there should be liability with regard to latent defects, subject to the effect of exclusion or limitation

clauses, reference given, Justice Kirby in his dissenting judgment in *Woolcock Street* said that courts should be reluctant to assume that a commercial entity lacked vulnerability simply because of its commercial nature and that, in that case, the appellant's lack of reasonable intermediate opportunity of discovering and protecting itself against the latent defect of which it complained had made it vulnerable to the undisclosed defect. Professor Smillie, on the other hand, said that a purchaser of a substantial commercial building would be expected to have the resources and incentive to detect major latent defects. We do not, however, need to examine this issue further as there is no allegation of latent defects in this case."

Then at paragraph 116, in 115 there is a reference to *Hamlin,* beginning: "We consider that in the circumstances of this case, the statutory context is neutral." And then in 116: "The Building Act was passed against a background of tort liability with respect to domestic and not commercial construction. It cannot, therefore, necessarily be seen even as tacit approval for an extension of liability into the commercial area except possibly where latent defects are concerned. We are not here dealing however with latent defects." So, when one examines all of these cases that my learned friend relies on so heavily there is always the sort of reservations being expressed along the way that, with latent defects, maybe in appropriate commercial cases there would indeed be a duty of care can be found.

TIPPING J:

What did the Court mean in *Rolls-Royce,* do you understand Mr Farmer, by the statutory context is "neutral"? I didn't understand there was much of a statutory context?

MR FARMER QC:

No, well, there wasn't but I must say I puzzled myself about that. I think what might be said is that there wasn't a statute in this case, that where there is a statute it's a factor, and maybe an important factor, in finding a duty of care. I think really what is intended –

TIPPING J:

So they're really saying there's no statutory context?

MR FARMER QC:

I think that's right.

McGRATH J:

The Building Act didn't apply?

TIPPING J:

No, because it wasn't a building.

MR FARMER QC:

Well –

CHAMBERS J:

No, it wasn't a case involving the Building Act, was it?

TIPPING J:

It was an electric generation plant or something?

MR FARMER QC:

Yes. I mean, the Building Act applies in the sense that if you build a building you've got to comply with it, but this is not a case involving councils' responsibilities under the Building Act.

McGRATH J:

Oh, sure, yes. It was relevant also in that, wasn't it, that the owner chose to contract with a head contractor and not to engage in subcontracts with the subcontractor –

MR FARMER QC:

Yes.

McGRATH J:

– not to have nominated some contracts or some relationship that would have given it privity.

MR FARMER QC:

Yes.

McGRATH J:

And that having been chosen, why should the Court allow it to bypass it through bringing a tort duty into the picture?

MR FARMER QC:

And I – we had this brief discussion earlier that the House of Lords went down that track in *Junior Books* but then later retracted from that position and said no, you can't sue the subcontractor in tort if you choose not to have some contractual link with them.

My learned friend's next point is that the hotel – this is, sorry, paragraphs 10.5 and 10.8 – the hotel units are not private dwellings. The owners of the units are investors in commercial premises. While similarly, of course, in *Sunset* many of the owners were investors seeking a commercial return and nothing more but, of course, they did rent their houses to tenants who would live in them, so the question then arises, as we've discussed before, how fine a distinction is that in this area?

Then the last point that my learned friends make that I wanted to refer to is paragraph 10.7 of their submissions, "Changes in the use of a building to residential cannot retrospectively impose a duty of care if there was none at the time of construction." Now this is a reference to a point I alluded to briefly earlier, that in this case the lease - the initial lease of individual apartments to the hotel company, was a 10 year lease in all the apartments other than the penthouse apartments, where the hotel had no involvement. But at the expiration or termination of that lease, it was open to the owners of those apartments to do what they wished with them: to live in them themselves, to rent them out privately to private tenants to live in, or whatever. And my learned friend's point is, well, if there was no duty of care initially, there can't be one subsequently. That submission needs to be looked at in the light of the finding in *Sunset* that there are separate duties of care, this duty of care that's owed to the original owner. That's one thing. The duty of care that is owed to a subsequent owner is a different duty.

CHAMBERS J:

But that couldn't be right Mr Farmer. If there is validity in the Council's argument, you must be able to test the question of whether a duty was owed at the time the Council is actually doing or not doing the work. A duty of care couldn't spring up later.

MR FARMER QC:

The duty exists at the time that the Council does the work. The question is to whom is the duty owed. Now in *Sunset* what was said was the duty is owed to the original owners and to subsequent owners, the subsequent owner, that the tort was, as it were, not completed until the loss was incurred and that would be incurred by the subsequent owner.

CHAMBERS J:

Yes, but the conduct is. After all, once the building is constructed –

MR FARMER QC:

Yes.

CHAMBERS J:

– the Council has now power to do anything with it. Now if it didn't owe a duty of care at that stage because of the particular use to which the place was put, I can't see how one can spring up later because the use has changed, because –

MR FARMER QC:

Well, this is – I mean –

CHAMBERS J:

I mean, all of this just shows, perhaps shows, the artificiality –

MR FARMER QC:

Exactly.

CHAMBERS J:

– of drawing lines based on use. But if that argument is right I can't think that your current submission has validity.

MR FARMER QC:

See take the - this is where the drawing of lines leads to an awful means in considering Spencer on Byron because you have the residential apartments where we would say, and even on the existing *Hamlin/Sunset Terraces* approach, there is a duty owed to them because they are residential - intended for residential use. If, to take the hotel apartment situation, if at the end of the lease the premises were to be

sold to a subsequent purchaser, the approach taken by the Council would mean that the subsequent purchaser who bought it for his own home would have no recourse against the Council?

CHAMBERS J:

Correct. That would have to follow on the Council's argument it seems to me –

MR FARMER QC:

That's right so that is –

CHAMBERS J:

– because you've got to know at the time you're doing your actual work, whether it's inspecting or whatever you are doing, you must know at that point: am I under a duty of care or not.

MR FARMER QC:

Right, right, well then the question is: to whom is the duty owed? It's not only, it's not owed just to the original purchaser.

CHAMBERS J:

Correct, it is owed at that point to the original owner/developer and to subsequent owners or prospective purchasers within the first 10 years of the building's life.

MR FARMER QC:

That's right, that's right.

CHAMBERS J:

But if there is a use restriction and if because of the initial use there is no duty of care then it seems to me subsequent change of use couldn't bring –

MR FARMER QC:

No.

CHAMBERS J:

– into play the duty of care.

MR FARMER QC:

I suppose the real point I want to make about this is to say that the very fact of that submission indicates just how the line drawing works –

CHAMBERS J:

Yes.

MR FARMER QC:

– in a very weird kind of way and particularly in the Spencer on Byron case where you have this mixture of some apartments which would arguably attract the duty and others which would not on the Council's case.

CHAMBERS J:

Yes.

MR FARMER QC:

And, in that respect, it is worth pointing out also that there is also the question on an apartment building of common property. The common property may include the exterior wall of everything on that development. In other words, the residential apartments, the so-called commercial apartments are common property and if there is damage in respect of the - If the building is leaking throughout do you say, well, the residential owners can recover but only in respect of the damage that is done to the walls which is common property on their part of the building? Or do you say, well, that's just not how we should be approaching it?

Your Honour, those are the submissions that we make.

ELIAS CJ:

Yes, thank you Mr Farmer.

MR GODDARD QC:

At the heart of this case is the 1991 building legislation and the question that your Honour Justice Tipping put to my learned friend, what interests did that legislation seek to protect? The answer which every New Zealand judge who has examined the legislation has come to and I will take the Court through the legislation to that end, is that the legislation is concerned with the health and safety of users of the building and I should add the protection of other property, a concept that is

deliberately defined in the Act to mean property other than the building in question and the allotment on which that work is being done.

A deliberate choice was made, which is explained in the legislative history and reflected in the legislation, not to protect the economic interests in the relevant building of the owner of that building.

The Court of Appeal in *Charterhall* was quite right to say, at paragraph 44, and I'll go through this case in some detail later because my learned friend didn't take the Court to it, that the Building Act does not seek to protect the value of buildings or income streams from them for commercial investors. In short, the Court said, as was the case in *Carter*, the losses claimed are not ones against which the Building Act seeks to protect.

That was a view reached after careful consideration of the relevant provisions by that Court, which was not simply following *Te Mata*, because it also had to consider an independent cause of action, based on health and safety grounds, of a kind that had been foreshadowed but not considered in *Te Mata Properties*, and the Court very carefully went through the statutory framework, the implications of such a claim, and explained why it should be struck out.

So the interests in play are the health and safety of users, protection of other property. But not protection of the building in question, not the value of that building or income streams from it for the benefit of owners.

TIPPING J:

How does one sever? I can understand the occupant, user and owner distinction, but how can you say not protection of the building itself? I don't quite understand what you mean by that.

MR GODDARD QC:

Not protection of the owner's interest –

TIPPING J:

Oh, owner's. Owner's interest in the –

MR GODDARD QC:

– in its economic value. It's exactly the distinction that your Honour drew in *Carter*. The concern of the maritime safety regime in the seaworthiness of ships is not a reflection of a concern about the economic interests of owners of ships. It's a concern about the safety of those who go to sea in them. And the Court of Appeal held, judgment that your Honour wrote, that the plaintiffs in that case were the wrong plaintiffs suing for the wrong loss because, although the very defects that rendered the ship dangerous were also to be the ones that rendered it worth $500 rather than the 200,000 that was paid for it. The purpose of the statutory scheme was to protect the health and safety of those who used the ship, not the economic interests of the owner in the value of the ship.

Precisely the same distinction lies at the heart of the building legislation. It was deliberately constructed in that way. There are some quite elaborate definitions of other property that are designed to show that the Act protects other property but not the building in question, or other buildings on the same allotment. And what the plaintiffs, the appellants in this case, are inviting the Court to do is to uphold a duty of care which would protect an interest that it is no part of the statutory scheme to protect. And that's because, and this is my second point, although this is a strike out case and the facts have not yet been tried, it must nonetheless be decided on the basis of the facts as pleaded, and there is no pleading here of any actual or threatened harm to health and safety, whether of the plaintiffs or of occupiers.

Moreover, that is an allegation that has been consciously and deliberately abandoned by these plaintiffs. I'll go to the pleadings later, but in their fourth amended statement of claim, which is under tab 4 of volume 1 of the materials, there were, in paragraphs 42, 43 and 45, allegations of health and safety risks to occupiers. Those were removed in the subsequent pleadings including the one that the plaintiffs invite - the appellants invite this Court to decide this case on the basis of the one attached to their memorandum filed just before Christmas last year. So there is no allegation that there has been any harm to anyone's health and safety or that such harm is threatened or that it is necessary to incur any costs in order to obviate risks to health and safety.

So this is, in one sense, a case that's a fortiori *Carter*, because I think we can be quite sure that the defects that caused a ship to be worth $500 probably had safety implications.

Third, I really anticipated this, the duty of care contended for by the appellants is concerned with an interest outside the scope of the legislation, exactly as in *Carter,* and we can go further and say that the duty contended for runs counter to the legislation and to key policy objectives of that legislation because among those policy objectives were removing unnecessary costs associated with building, encouraging innovation and improving the efficiency of the New Zealand building industry.

CHAMBERS J:

Well that is done –

TIPPING J:

It certainly encouraged –

CHAMBERS J:

But that is done by a different mechanism. Surely that is done by the provisions in it which say: one, councils no longer can make their own bylaws concerning the construction of buildings and ramping up the requirements that councils might have made and, two, it is done by saying that the standard you have to reach is the Building Code but you must not impose anything on top of the Building Code. That's how those objectives are met.

MR GODDARD QC:

That's part of it your Honour, but, and I will have to go through this in more detail later, three things in short in answer to that. The first is that one needs to look back at the purposes of the Act which govern the making of the Code and bear in mind that those minimum requirements were only such as were necessary to protect health and safety of users and other property. So even when we come to look at what the requirements of the Code were they are constrained by the purposes of the Act, as I've said, the plaintiffs are inviting the Court to impose a duty which goes beyond –

CHAMBERS J:

Well, if that is so we have no worry because the only duty of care there could be is a duty to be careful in approving or inspecting properties to check that the Building Code has been complied with. If, as you say, the Building Code is restricted to

health and safety well then the corresponding duty will be restricted to health and safety. The plaintiffs don't plead –

MR GODDARD QC:

And if that was so these plaintiffs could not –

CHAMBERS J:

Well they don't plead anything beyond the Building Code, do they?

MR GODDARD QC:

But they say that if you comply with the Building Code which is directed at these interests over here, you would also have delivered us something which is more valuable and so we would like that incidental benefit. So that's the point I'm seeking to make. That they are effectively piggybacking on a statutory regime designed to protect one set of interests to try to protect another and that's exactly what the Court of Appeal in *Carter* said was not permissible in terms of the law of negligence But two - that's an abstract point about the policy of the legislation - two more concrete reasons why this would run counter to the statutory objectives are, first of all, that as your Honour said to my learned friend earlier, if councils have a duty then they can and responsibly would need to increase charges to reflect, Your Honour said insurance, my instructions are that such an assurance is unobtainable and that's the sort of issue which if relevant to duty –

CHAMBERS J:

Well I did give the alternative or sufficient money to –

MR GODDARD QC:

– or sufficient to make provision, some sort of sinking the fund if that were possible or pot of money to be available to claimants. But what, of course, that would mean is that there was effectively a compulsory insurance scheme to which all developers of commercial buildings would be required to contribute, including those that had made adequate arrangements of their own to contract with responsible builders of a substantial kind, the Mainzeals, the Fletcher Constructions of this world, who can be expected to be around to answer claims –

CHAMBERS J:

Well, if that is the case why does the legislation provide for inspection of commercial buildings at all?

MR GODDARD QC:

To protect the health and safety of people who are third parties, to prevent externalities. It was a very economically oriented piece of legislation and the idea was that the owner could protect their own interests through contracting and the legislation shouldn't cut across that. I'll take your Honour to the passages of the report that say exactly this. There are third parties affected by building work who are not in a position to contract to protect their interests, people who come into the building. The extreme example is fire fighters, and you'll see they're expressly referred to. But visitors to the building who aren't in a position to contract for particular standards of safety and the owners of next door buildings and roads and things like that, who again, stand to be affected by the way the building is built but the legislation expressly prescinded from the protection –

ELIAS CJ:

Prescinded?

MR GODDARD QC:

Refrained, stepped back, decided not to engage in.

McGRATH J:

Resiled.

ELIAS CJ:

Yes, prescinded. Can I just –

MR GODDARD QC:

It's a beautiful word but there are simpler ones that would do.

ELIAS CJ:

Presumably you are going to take us at length through the statute –

MR GODDARD QC:

I am.

ELIAS CJ:

– but if one were to simply start with the purposes and principles of the Act, necessary controls for ensuring the buildings – its necessary controls relating to building work and the use of buildings and for ensuring that buildings are safe and sanitary. It's not one objective and similarly, in subsection (3) of section 6, not by way of limitation, safety, health and environmental costs and benefits. Aren't there much wider purposes this legislation serves Mr Goddard?

MR GODDARD QC:

No, your Honour and I'll explain why –

ELIAS CJ:

All right –

MR GODDARD QC:

– both on the language and by the – just because your Honour has it in front of you, that 1(a) has three limbs, necessary controls relating to building work, so that's the way in which the work is carried out, building work is defined. So that's how you do the building.

Then use of buildings. That's what you can do with them and how you can change their uses. For example, it's been built for one purpose and has the facilities suitable for that, you can't change it to another use for which it might not be suitable unless you make certain changes to the building. So I'll come to those restrictions.

The third is for ensuring that buildings are safe and sanitary and have means of escape from fire. That's what we're concerned with here, that the buildings are safe and sanitary.

CHAMBERS J:

No. Why aren't we concerned with the first one: "Necessary controls relating to building work," which then couples with section 7: "That building work must comply with the Code"?

MR GODDARD QC:

It couples, yes your Honour, it does couple with that but it couples with it via subsection (2) and if we look – since the Court has it there: "To achieve the purposes of the Act, particular regard should be had to, first of all, safeguarding people from possible injury, illness or loss of amenity, including people who enter to rescue operations and amenity." As I think most of the members of the Court will know from the many cases in this area that have vexed your Honours over the last few last years, "amenity" is defined in subsection (2) as meaning an attribute of a building which contributes to the health, physical independence and wellbeing of the buildings users. So again, it's a user-related wellbeing issue, not an economic issue and then –

CHAMBERS J:

Well why is it then that the users aren't the plaintiffs? Why doesn't the tenant of the residential property sue?

MR GODDARD QC:

And the answer to that is that they may well be able to sue if the interests of theirs that are protected are harmed –

CHAMBERS J:

Well let's suppose –

MR GODDARD QC:

– and that's not alleged in this case.

CHAMBERS J:

No but let us suppose that the tenant is suffering from spores and mould and it's jolly unpleasant, why isn't the tenant suing just for that, if that is fixed for the tenant?

MR GODDARD QC:

It is poss –

WILLIAM YOUNG J:

The tenant might just want the cost of a prescription or what it costs to get another flat.

CHAMBERS J:

Well are there any cases where the tenant has sued?

MR GODDARD QC:

In England there are personal injury cases –

CHAMBERS J:

But in New Zealand?

MR GODDARD QC:

– but in New Zealand there are none I'm aware of, where there's been a claim for health and safety injuries by a tenant, no.

CHAMBERS J:

So if the residential property is leased, on your theory, no one would be able to sue because the user –

MR GODDARD QC:

There's a possibility that the user might be able to sue because that at least would be consistent with the statutory scheme in the same way as people on a ship which sinks and who are rescued –

CHAMBERS J:

But the commercial –

MR GODDARD QC:

– could sue –

CHAMBERS J:

– investor who owns –

MR GODDARD QC:

– possibly, I don't –

CHAMBERS J:

– the residential property, on your example, ought not be –

MR GODDARD QC:

Can't sue –

CHAMBERS J:

– able to sue, should they?

MR GODDARD QC:

That's right and –

CHAMBERS J:

But *Sunset* says they can.

MR GODDARD QC:

Of the commercial – well no –

CHAMBERS J:

The commercial owner of the residential unit?

MR GODDARD QC:

Right, sorry, I thought you were asking about a commercial building.

CHAMBERS J:

No.

MR GODDARD QC:

The answer is that nothing in the legislation supports such a claim succeeding. It is not required by the legislation, or contemplated by the legislation and Justice Richardson said as much in *Hamlin*, where he said you can hardly see it as a ringing endorsement of liability but nor has Parliament overruled the existing cases, basically it's neutral and –

CHAMBERS J:

Well doesn't that lead then to the proposition that either *Sunset* is wrong or your submission as to the basic policy of the Act isn't right?

MR GODDARD QC:

No your Honour, because the *Hamlin* Court was very alive to this issue and to the absence of positive support in the statute for such claims and the Court's decision. And I'm going to go through it in some detail later, is very much founded on the reasonable reliance of homeowners, that has come to pass over some decades in New Zealand, on councils to protect their financial interests as a result of a range of specific social and economic –

CHAMBERS J:

Well there you just said it, their financial interests, not their interests as users.

MR GODDARD QC:

But not – the Court said it's not the legislation that requires the councils to protect those interests. It is the lived experience of New Zealanders, over some decades, in relation to their homes, the vulnerability of ordinary homeowners who often don't retain their own experts, the decisions that have been given by the Courts of New Zealand over some decades and what the Court described as a symbiotic relationship between the decisions of the Courts and the expectations of homeowners. And that word was very deliberately used, in my submission, by the Court over that period of time, with the result that it would be wrong to disappoint those expectations in the absence of very clear statutory signals to that effect but, as Sir Robin Cooke pointed out in that case, correspondingly there is no history of case law in relation to commercial buildings and it might well be that commercial building owners would not be able to sue because they could be expected to look after their own interests.

So the twin pillars of control and reasonable reliance were both necessary parts of the existence of the cause of action in *Hamlin* and that reasonable reliance was identified by reference to aspects of New Zealand's social history peculiar to housing and a long run of decisions confined to housing which, it was said, it would be wrong to disappoint now.

The first limb is present in relation to commercial buildings: control. My learned friend is quite right to say that there's the same measure of control in relation to commercial buildings as in relation to residential buildings on the part of local authorities. That second limb is wholly absent. There is not that expectation founded on social circumstances peculiar to New Zealand. There is not that expectation

founded on case law and the arrangements people have made of their affairs in the light of that over many decades. To the –

CHAMBERS J:

Well, if passive reliance is so important to councils, why isn't it also important in the case of the negligent builder and the duty of care he or she owes to subsequent owners?

MR GODDARD QC:

I'm going to have to deal with the position of builders and expert advisors because a thread that has run through the cases, ever since *Dutton* in fact, is that it would be unreasonable for a council to be liable where the builder would not be and there is no case law establishing, outside the residential home context, liability in tort of builders to subsequent owners –

CHAMBERS J:

No but that – you have avoided my question, with respect, because I said in the residential context, why isn't the domestic builder – when we talk about the domestic builder's duty of care to subsequent homeowners, we don't there superimpose a requirement of reliance before we find that the builder owes the duty of care.

MR GODDARD QC:

There are two ways in which one might conceptualise that. The first is that – I think some of the cases actually do frame it in terms of reliance, reliance on the builder to construct the building soundly. And it's said that that reliance actually is experienced not only by the original purchaser but also by subsequent purchasers, so I think, with respect –

CHAMBERS J:

Well, it's reliance in the sense –

MR GODDARD QC:

– that it is often framed –

CHAMBERS J:

– Justice Tipping said.

MR GODDARD QC:

Yes.

CHAMBERS J:

We're all dependent on what other people do but –

MR GODDARD QC:

And when that is coupled with – well, first of all, that reliance needs to be reasonable and generally coupled with a vulnerability, an inability to protect one's interests through other mechanisms before a duty of care will arise in such circumstances. But the other approach, the other way, this is a duty which is, in some respects, under-theorised, I think. Sir Robin Cooke, in particular, writing extrajudicially in *An Impossible Distinction* (1991) 107 LQR 46 suggested that it might be a form of product liability effectively tied to latent defects, and that someone who puts out a defective thing that's not identifiably defective may be liable in respect of it. Effectively a consumer protection right in respect of buildings as well as things, and, again, that's –

TIPPING J:

A bit like a real estate, *Donoghue v Stevenson*.

MR GODDARD QC:

Yes. And then the question becomes who are the people who are incapable of protecting their own interests in such a way that if they suffer loss as a result of a hidden defect, a hidden snail, they can sue, and that is inextricably linked to the question of what interest of theirs is adversely affected. In *Donoghue v Stevenson* it was the harm to health caused by the snail that was recoverable, not the value of the ginger beer, and that's quite important. One – our law –

TIPPING J:

No, it wasn't a surrogate warranty of quality.

MR GODDARD QC:

Exactly, and that's precisely the distinction that needs to be drawn in the commercial context. My submission here is that there is no surrogate warranty of quality, to use your Honour's phrase because it's a rather elegant one, if I may say so, with respect.

WILLIAM YOUNG J:

If that is a heresy, though, it's a heresy that's already embedded by *Sunset* so far as residential property is concerned.

MR GODDARD QC:

Yes, and the question is whether –

WILLIAM YOUNG J:

Having got on the slippery slope, should we slither and slide all the way to the bottom?

MR GODDARD QC:

This is the train that was referred to earlier, and what I was going to suggest before I turn to the legislation was that it is the difference in vulnerability of occupiers of homes that indicates the relevant stopping point for this train, that by the time we –

ELIAS CJ:

Unless –

MR GODDARD QC:

Sorry, your Honour.

ELIAS CJ:

No, no.

MR GODDARD QC:

By the time we reach, go beyond claims by vulnerable homeowners for harm to financial interests in a building, everyone else has got off this train, every appellate Court in the common law world has already got off at that point, if not before, and my learned friend's inviting the Court to join him on a train that leaves the tracks of authority and heads off into unchartered wilderness, and there are compelling reasons not to do that.

TIPPING J:

Just before we get into even more metaphor, Mr Goddard, could I just bring us back to reality by asking you, when you say the twin pillars of control and reasonable

reliance, control's not an issue, are you saying that in the commercial arena there is neither reliance or, if there is, it's not reasonable?

MR GODDARD QC:

Yes.

TIPPING J:

Is that the nub of the argument –

MR GODDARD QC:

Yes.

TIPPING J:

– because you're not reasonably entitled to rely for the purpose for which you're purporting to rely on the council?

MR GODDARD QC:

Because that is not the purpose for which the council has been given its powers.

TIPPING J:

So it all comes back to this purpose?

MR GODDARD QC:

Yes.

TIPPING J:

What is – it's all linked in with that headline issue, is it not?

MR GODDARD QC:

It is all linked into that headline issue and the question –

TIPPING J:

Because if the headline issue were against you, and I'm not expressing or forecasting a view, then it may well be reasonable to rely on the Council in the commercial arena.

MR GODDARD QC:

If the statutory power has been conferred for the purpose of protecting the financial interests of owners of all buildings, including commercial buildings, then yes, I think your Honour's right. There is a sense in which it's reasonable to rely on them to do so. You would, of course, expect to pay them to do so, and that would have certain implications which I'll argue would be inconsistent with the Act, but I think that's right.

There would remain the point made by both Lord Hoffmann and Lord Nicholls in *Stovin v Wise* that it is one thing to say to a public body: "You are responsible for protecting this interest", and yet another to say, "And if you fail to do so and that causes harm then the public purse will answer for that", and that in circumstances where Parliament has refrained from creating a right of that kind, it – there needs to be a compelling reason to impose not only the responsibility for which you're accountable through the normal public law mechanisms, but also financial liability.

ELIAS CJ:

But that submission amounts to saying that unless the statute creates a remedy, tort is excluded, and we are in the area of tortious responsibility, not statutory liability here.

MR GODDARD QC:

I don't go so far as to say tort is excluded. What I would say is that where there is no provision for a remedy of that kind then the presumption is that no liability was intended and there must be clear factors supporting the imposition of liability before tortious liability is warranted –

CHAMBERS J:

Well, there is.

MR GODDARD QC:

– and Lord Nicholls as well as Lord Hoffmann said as much in *Stovin v Wise*.

ELIAS CJ:

Absolutely, but what the case law says is that when you have a statutory duty and you apply to it the principles of neighbourhood and proximity and so on, the tortious liability, if it marches in step with the statutory duties - there's no impediment to liability and you're into the whole rationale for negligence.

MR GODDARD QC:

That removes any impediment but isn't sufficient of itself to justify the imposition of liability, and to take an example –

ELIAS CJ:

Well, you have to have neighbourhood, but you did speak a moment ago about impediment - that if the statute doesn't envisage responsibility for consequential loss then I understood you to be saying that there is an impediment to tortious imposition.

MR GODDARD QC:

They're different propositions. Statutes effectively fall into three categories, it seems to me: statutes that positively contemplate liability, those are easy; statutes –

CHAMBERS J:

Why isn't this one in that category when we know that Parliament said that certifiers had to have insurance at an acceptable level? Now the only reason Parliament can have said that is because it envisaged that where certifiers were doing the inspecting they might well be liable in tort, and the Statute also says you must sue any certifiers in tort.

ELIAS CJ:

And the council, I think.

MR GODDARD QC:

No, it only talks about suing –

CHAMBERS J:

The certifiers.

MR GODDARD QC:

– certifiers in tort –

CHAMBERS J:

So there we have –

MR GODDARD QC:

– and that was, I think, with a view to making their position analogous to that of councils.

CHAMBERS J:

So why isn't that a clear pointer to put it in your first category of cases?

MR GODDARD QC:

The Courts have said, in my submission rightly, that the 1991 Act did not seek to either impose or restrict liability but rather to preserve such liability as the courts had developed to date. So it was, again that word, prescinding, refraining from either imposing or confining liability but rather preserving such liability as existed and that's the point that was made in *Rolls-Royce* really, that the whole history of litigation to that point had been in relation to domestic dwellings. It would make perfect sense, your Honour, to impose those requirements in respect of certifiers if they had a liability co-extensive with the liability of councils established in the case law to that date which was confined to homes. So it doesn't tell us anything.

So that, in fact, is a pointer, if anything, to the legislation being in the middle category where it doesn't either contain any indications either favouring or pointing against liability.

ELIAS CJ:

Well except that we have liability for the economic loss suffered by homeowners. So the principle that the Statute is neutral doesn't take you very far in deciding what the tortious responsibility –

MR GODDARD QC:

No.

ELIAS CJ:

– in respect of commercial owners should be - does it - the breach has already been made.

MR GODDARD QC:

I'm concerned to do two things with this argument. The first is to clear out of the way any suggestion that the statue supports the imposition of liability. The second is to,

and I will do this when I go through *Hamlin*, to look very carefully at the rationale for liability in that decision and this Court's analysis of it in *Sunset Terraces* because that's the point where, in my submission, the vulnerability and corresponding reasonable reliance of homeowners come to the forefront. That's what was distinctive about the New Zealand scene that was the focus of so much attention from all five Judges in *Hamlin.*

That's why the President was able to say in that case that the decision he was reaching didn't pre-empt the question of whether there would be liability in respect of commercial buildings. It might well be thought that they could be left to fend for themselves, that was a perfectly consistent thing to say because the reasoning in that case only went so far as to look at the specific interests of homeowners, and having – and that vulnerability has informed a number of statutory provisions in New Zealand.

One of the provisions I'm going to take the Court to, and I will hand this up perhaps tomorrow morning so I don't take time now, is the Building Act 2004 and the transmissible warranties that that Act provided for in relation to household units, homes. And I will be making the submission that that shows both that that is a relevant distinction for policy purposes in this area and that it would be inappropriate for the Court to effectively erect, on the part of builders and councils, a more far-reaching liability regime than the one that Parliament saw fit to introduce in 2004.

So, precisely the same sort of analysis that the *Hamlin* Court carried out in relation to the 1991 Act - what does this legislation tell us about what Parliament did or did not see as a policy concern in this area - can be carried out in relation to the next layer of legislation: the 2004 Act. And the response to vulnerable homeowners but not others, by imposing a transmissible and non-excludible warranty of quality on builders.

I will look at the distinctions that have been drawn in other jurisdictions. In Australia we have liability in respect of homes - *Bryan v Maloney* (1995) 182 CLR 609 - but not commercial buildings - *Woolcock Street* – So, that's the station that I'm inviting this Court to get off at on the train trip, and the United States case law is to very similar effect. It's mostly achieved there by reference to, again, a common law warranty of habitability that's confined to homes and so, again, that has been seen as a dividing line that makes sense from a policy perspective and is workable in a very large or of

American jurisdictions and Sir Robin referred to some of that case law which has continued very much along those lines in an impossible distinction, your Honour.

TIPPING J:

Mr Goddard, whether it's residential or commercial I wouldn't have thought could logically affect proximity issues, it would more logically go into the policy mix, is that a – or do you suggest that it does have some impact on proximity? –

MR GODDARD QC:

Yes, it goes to both.

TIPPING J:

– you're going to develop that as we go, are you?

MR GODDARD QC:

I am but most, well –

TIPPING J:

I mean, we've got to bear in mind that although it's not a straightjacket. The conventional way of looking at it is those two steps.

MR GODDARD QC:

I was about to refer to “not a straightjacket” and the fact that factors that one judge treats as proximity –

TIPPING J:

Exactly.

MR GODDARD QC:

– sometimes turn up in another judgment under –

TIPPING J:

Well there’s overlap.

MR GODDARD QC:

– the policy heading. In *Three Meade Street* for example, his Honour Justice Venning dealt with almost nothing as policy and dealt with all of these as proximity.

TIPPING J:

Well, if you pay a fee, as I presume you always do for the pleasure of having your building inspected, it's pretty hard to say there isn't proximity. It's analogous to –

MR GODDARD QC:

Again what –

TIPPING J:

– contract but admittedly that doesn't relate to a subsequent purchaser.

MR GODDARD QC:

And it doesn't work in relation to *Carter*, your Honour. Because of course one pays a fee for a maritime survey and yet what the Court of Appeal said in *Carter* quite rightly, in my submission, was that what you pay the fee for is for obtaining an assurance addressed to those who travel on the ship that it is safe to get on it. And the Court in *Carter* said that those factors went both to proximity and to policy and, in particular, the limited statutory purpose went to both.

TIPPING J:

I have probably distracted you. It's going to come to bear somewhere.

MR GODDARD QC:

It's going to come to bear somewhere and in my submission it is relevant at both stages just as it was treated as being relevant at both stages in *Carter.* So I –

ELIAS CJ:

In the statute in *Carter*, I'm sorry I haven't reminded myself about *Carter* –

TIPPING J:

It was the Shipping and Seamen Act.

ELIAS CJ:

The Shipping and Seamen Act what's the –

MR GODDARD QC:

And then the Maritime Safety Act.

ELIAS CJ:

– what's the domestic dimension under that statute? I mean, it really was a determination, wasn't it that the purpose of the Act – I'm just feeling for why it's so significant - Once you have the breach, once you have the determination of proximity that's been arrived at through *Hamlin*, why *Carter* helps is in saying you draw a line and there is no proximity in relation to commercial owners.

MR GODDARD QC:

Because what *Carter* helps us to see is that proximity here is not founded on the statute and the statutory regulation of safety. The proximity in *Hamlin* is very much a function of the history of building in New Zealand, the vulnerability of homeowners and the reliance which homeowners with their limited resources can reasonably place on councils to protect their financial interests. That's what did all the work in *Hamlin.*

ELIAS CJ:

Well that maybe so as a matter of history but I hope that you will also take us beyond these building cases and look at the matter on a more principled basis.

MR GODDARD QC:

Absolutely, and that's why I'm referring to –

ELIAS CJ:

And I would have thought your reference to *Carter* –

MR GODDARD QC:

Yes, is part of that exercise.

ELIAS CJ:

– is part of that.

MR GODDARD QC:

Exactly.

ELIAS CJ:

My query is: does *Carter* - does the statute in *Carter,* is it really comparable to the statute we have here?

MR GODDARD QC:

And the only way I can deal with that is by going through the case in some detail which I am intending to do. I am also, and time of course is always the constraint in these matters, intending to look at the framework that your Honour referred to earlier, the developing framework for thinking about the negligence/liability of public authorities by reference to the decisions in *Stovin v Wise* for example. So there are many things I aspire to cover and I will do as many of them.

ELIAS CJ:

All right, we should not interrupt you.

MR GODDARD QC:

No, no, it's extremely helpful to have the Court's concerns about the issues drawn to my attention.

TIPPING J:

Is it inherent in your submission that you can be, to use an Atkin's word, "A neighbour for some purposes but not for all?"

MR GODDARD QC:

Yes.

TIPPING J:

That's really the nub of it, isn't it?

MR GODDARD QC:

That's what this Court said – sorry, what the Court of Appeal said in *Carter.* It's what many courts have said in other contexts because what's been said repeatedly is that liability and tort, you can't talk about a duty of care in the abstract you have to talk about a duty of care with respect to the interest or loss which is sought to be

recovered. And so what we see in a number of cases is a conclusion that the duty extends to some types of loss but not others, some interests but not others. So, yes, absolutely, your Honour, you can be a neighbour for the purpose of protecting some interests but not others.

ELIAS CJ:

And some people and not others.

MR GODDARD QC:

Yes.

ELIAS CJ:

Because that's really the distinction you are urging on us here. That it's for homeowners but not commercial property owners.

MR GODDARD QC:

Yes and there's nothing surprising in that. It's inherent in the nature of a duty of care being to take reasonable care to protect a person against a particular type of harm or loss. So you've got to know who/what interest is to be protected against.

ELIAS CJ:

If you were to adopt the consumer products analogy however, commercial owners as well as homeowners are consumers of buildings.

MR GODDARD QC:

I think that the consumer protection analogy is very helpful here and it goes some way to explaining how my argument fits with the decision of this Court in *Sunset Terraces*. If one looks, for example, at the Consumer Guarantees Act, what you see is that the Act applies to goods that are generally acquired for personal, I think it's personal, family or household purposes, and it doesn't matter who is doing the acquiring, it's the type of good, the consumer good, that's protected.

ELIAS CJ:

But that's a choice in the legislation, whereas, as you've acknowledged, this legislation doesn't choose to make a distinction.

MR GODDARD QC:

But that explains, I think, why one might sensibly draw a line by reference to a particular type of here building or article, even if it happens to be acquired by a commercial investor. Your Honour put that question to me earlier and the answer is that it's perfectly sensible and consistent with the broad framework of consumer protection law to say we will say that these types of things will attract these protections. But other classes of goods, which are typically acquired by people who are capable of looking after their own interests, just will not. And that's the type of distinction that I'm inviting the Court to draw.

CHAMBERS J:

Yes, but that distinction is made in that Statute. There is nothing comparable in this Statute. That's the Chief Justice's point which you haven't answered, I think.

MR GODDARD QC:

And that's because this Statute does not either explicitly or, by implication, support the imposition of liability on anyone. The source of the *Hamlin* liability is external to the Statute and relates to circumstances peculiar to home ownership. I'll come to all this in more detail.

ELIAS CJ:

All right. Where do you want to take us now? Are you going to start with the Statute or are you going to –

MR GODDARD QC:

Yes, I think that is the next point to move to. So if we go to the Building Act, which is in volume 4 under tab 46, and just so we're not jumping around, pause to notice on page 3 of this printout in section 2, the definition of "amenity" that I mentioned a moment ago. Again, as focused on attributes of buildings which contribute to health, physical independence and wellbeing of users, but not associated with a disease or specific illness. And also, over the page, the definition of "other property" means any land or buildings or part thereof which are not held under the same allotment or not held under the same ownership, so this concept of other property is quite important to the purpose of the Statute, and for this purpose, and only for this purpose. I think, from memory, we have in section 4 a definition of "allotment". So –

CHAMBERS J:

So if a commercial building which wasn't built in accordance with the Code fell down on neighbouring property, you would accept that a duty of care was owed to that physical neighbour.

MR GODDARD QC:

Certainly, the protection of that neighbour would be within the scheme of the legislation. Whether there would be a duty of care still depends on some of the questions about appropriateness of imposing –

ELIAS CJ:

You'd say it hasn't yet been decided?

MR GODDARD QC:

– financial liability. It hasn't yet been decided.

WILLIAM YOUNG J:

It's a better case than these cases?

MR GODDARD QC:

And doesn't need to be decided. Your Honour put it perfectly. It would be a much better case than these ones. If – but what the irony of this case in a way is that if you have one building on an allotment and you build another commercial building next to it and part way through being built it falls on the first one and flattens it, it's very clear both that it's not within the purpose of the legislation to regulate, to prevent that. That's the owner's issue, and that, in my submission, it would go far beyond the purpose of this Act to provide protection to that owner, a fortiori, in my submission, if it's the same building which effectively is unsatisfactory or defective. But I'll come to this in more detail. So there's –

ELIAS CJ:

Seem to have a health and safety issue anyway if it lapses.

MR GODDARD QC:

Turning over then to part 2, purposes and principles which your Honour took me earlier. The purposes of the Act, necessary controls and of course to ask what's

necessary, we need to know to what end, relating to and then, three things, building work, the actual carrying out of the work –

ELIAS CJ:

Well, aren't necessary controls, if you read the whole of Act, aren't they those that ensure compliance with the Code but go no further?

MR GODDARD QC:

That begs the question of why the Code requires those things which it requires –

ELIAS CJ:

Because it's the Code.

MR GODDARD QC:

No, well I'll –

CHAMBERS J:

It wants buildings that will last for 50 years, on the whole.

MR GODDARD QC:

No, that's not how it works and I will go through the Code because that's important. What the Code requires is that other provisions of the Code be complied with for 50 years. It's not an independent lasting for 50 years objective and then when we go to the relevant objective –

CHAMBERS J:

So the Code doesn't mind shonky commercial buildings?

MR GODDARD QC:

If there is no risk to the health and safety of users, yes. Or, I should say, to other property.

TIPPING J:

Well what about loss of amenity?

MR GODDARD QC:

I'm using health and safety to include the amenity of users again which is how it's defined your Honour. Amenity is of users and it's physical wellbeing issues again. In the report that underpins this, they talk about noise and smells as the core examples –

TIPPING J:

Well drips from the roof might be somewhat analogist, wouldn't it?

MR GODDARD QC:

Well a drop from the roof –

TIPPING J:

But you're saying you don't have to put up to that if you get a cold but you do have to put up with it if it damages your whole building? I mean, I'm putting it rather flamboyantly –

MR GODDARD QC:

It's the "you" –

TIPPING J:

– Mr Goddard but –

MR GODDARD QC:

Yes, you are your Honour and I think, with respect, blurring who the "you" is because they may be different "yous" –

TIPPING J:

Well say –

MR GODDARD QC:

If the user gets a cold –

TIPPING J:

– I'm the owner of the builder and I'm sitting there cheerfully and a drip falls on my head and upsets my health, I'm protected but if lots of drips and they damage my building, I'm without relief – this is a commercial building?

MR GODDARD QC:

In much the same way as if your Honour was in a ship and water came in, if your Honour's safety was at risk you would be protected to that extent but if your shoes were ruined you probably wouldn't be.

TIPPING J:

Well touché Mr Goddard.

MR GODDARD QC:

So, it all depends on the direction the water comes from your Honour. It's really the only difference –

TIPPING J:

Well in a ship –

MR GODDARD QC:

– the only difference between this case and *Carter*, is that in this case the water comes from above and in *Carter* the water came from below, otherwise they're exactly the same.

TIPPING J:

Well you're really putting a lot of weight on *Carter*, aren't you?

MR GODDARD QC:

It's a very good illustration of some very basic principles in the law of tort. So I'm not saying that I am dependent on it but I am saying that it faithfully reflects, with respect, how the law works in this area and that the same conclusions apply. Let me come back to the Act, so that at least we finish –

TIPPING J:

But it all turns on how we read and you're embarking on this - how we read the purpose of the Act in the sense of the interests protected. That really, this case will –

MR GODDARD QC:

That is the most –

TIPPING J:

– turn on that fulcrum, in your submission?

MR GODDARD QC:

– that is the –

TIPPING J:

Does it turn on anything else because it seems to me that if –

MR GODDARD QC:

– I think if I –

TIPPING J:

– it goes your way on that –

MR GODDARD QC:

– yes, I'm –

TIPPING J:

– you're in good shape, if it goes against you that you're on bad shape –

MR GODDARD QC:

If it goes against me on that then I need to persuade the Court that this is a case like *Fleming v Securities Commission* [1995] 2 NZLR 514, (1995) 7 NZCLC 260, 697 (CA), where although the interest that's been harmed is one which the Statute intended to protect, nonetheless it is not a suitable context in which to impose liability. So that's my second argument.

TIPPING J:

That's the fallback?

MR GODDARD QC:

Yes.

TIPPING J:

I see.

MR GODDARD QC:

So if I'm successful on this, your Honour's exactly right, in my submission –

TIPPING J:

Well you're in better shape than if you lose. I'm not suggesting –

MR GODDARD QC:

Well that has to be true –

TIPPING J:

Yes, of course.

MR GODDARD QC:

– otherwise I shouldn't be arguing it, if it was completely irrelevant to success –

TIPPING J:

If we're against you on that, I'm sorry to be slightly pedantic about this, you say you would seek to escape from that on the *Fleming* line of authority?

MR GODDARD QC:

Yes, line of authorities. This is not a suitable context in which to impose liability on regulators, essentially for policy reasons –

TIPPING J:

Regulatory –

MR GODDARD QC:

– related to the regulation of commercial activity and the fact that commercial users are big enough and cleverer enough to be able to look after their own interests. So there's good policy reasons not to impose financial liability, even if the interests sought to be protected are the ones affected, as they were in *Fleming* and *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175, [1987] 3 WLR 776, [1987] 2 All ER 705 (Privy Council Hong Kong) and all those other financial regulator cases.

ELIAS CJ:

Are there, and come to it when you are dealing with the common law more generally, but are there cases where the common law has drawn distinctions between - I'm just trying to think of them between types of people in terms of –

MR GODDARD QC:

The Australian case law does exactly that at present in relation to liability for defective buildings, *Bryan v Maloney*, homes, *Woolcock Street.*

ELIAS CJ:

No I'm talking about outside this area of building regulation, I'm talking more generally.

MR GODDARD QC:

I probably need to think about that overnight.

ELIAS CJ:

Yes.

MR GODDARD QC:

Because the examples I can think of at the moment –

ELIAS CJ:

There is a –

MR GODDARD QC:

– but it may just be because I've been obsessed by this.

ELIAS CJ:

There is a Bill of Rights Act point, of course, about natural people and artificial people all having say.

MR GODDARD QC:

I don't –

ELIAS CJ:

Anyway, never mind.

MR GODDARD QC:

I don't think the Bill of Rights Act can –

ELIAS CJ:

I just like to bring –

MR GODDARD QC:

– require the same protection of commercial –

ELIAS CJ:

No, of commercial.

MR GODDARD QC:

– investors as it does of natural persons in relation to their homes, I think that would, and that's rather different. So then we have subsection - because we had subsection (6)(i)(a), it was relating to building work: how you do it, the use of buildings and for ensuring that buildings are safe and sanitary and have means of escape from fire. So what is it that buildings must be? They must be safe and sanitary and have means of escape from fire and then there is a co-ordination objective. Then subsection (2): to achieve the purposes of the Act particular regard should be had to the need to – and this is where the specific objectives of the legislation are set out.

ELIAS CJ:

Well, no, it's only particular regard.

MR GODDARD QC:

That's why I say the specific emphasis of the legislation. What your Honour is saying is that exhaustive.

ELIAS CJ:

Yes.

MR GODDARD QC:

And, in my submission, what this does is spell out what 6(1)(a) is referring to because you can't have a necessary control without saying necessary to what end. Bearing in mind that the Building Code is made under this Act for the purposes set

out in section 6. That's really my answer to your Honour Justice Chambers' point. It's whatever is necessary to comply with the Code but of course the Code has to be made under this Act and should be informed by what is necessary to achieve the Act's objectives.

CHAMBERS J:

But we've been down that track. If that argument is right and it's got, if I may say so, it seems to have considerable merit, then it follows that if there has been a breach of the Code it will ipso facto be something which potentially affects health, safety, sanitary, escape from fire and that's –

MR GODDARD QC:

Potentially, but of course one can, for a particular reason, impose a particular requirement and then it may well be that that requirement is not, you know, the detailed requirement is not met but nonetheless the objective is not impuned in that case. It can also be the case that the complaint is by someone quite different.

CHAMBERS J:

Well then you're not likely to be careless but you can't have it both ways on this. If the Code is limited in the way you suggest to these purposes then it seems to me that the conclusion one draws is that breaches of the Code have been considered by the drafters of the Code as things likely to cause harm to safety, sanitary, escape from fire, et cetera.

MR GODDARD QC:

So then we are back to the question of whether the person who is complaining is the person who suffered that harm because someone completely divorced from it can't complain about that breach. I will come back to that.

(a) "safeguarding people from injury, illness or loss of amenity in the course of use". So, two things there. First of all it's in the course of use not in their capacity as owners and, secondly, it's people, and I think this must be, your Honour, natural persons here because I don't see how anyone other than a natural person could suffer injury or illness or loss of amenity so I think we are very focused on natural persons using the building.

(b) “provide protection to limit the extent and effect of the spread of fire, particularly with regard to household units and other residential units”. So here we get a particular concern in relation to households linked to fire.

ELIAS CJ:

That would be surely broad enough to embrace in a unit title development other people in the block.

MR GODDARD QC:

Once it's been unit titled but not before.

ELIAS CJ:

Yes, I see.

MR GODDARD QC:

And that, the definition of allotment is very carefully designed to achieve that outcome and, again, then two other property, so that’s the particular focus and then (d). (d) is I think a provision that my learned friend’s argument struggles to make sense of “provide for the protection of other property from physical damage resulting from the construction, use and demolition of any building”. Now this is the limb of the Act which brings into play that definition of other property and, in turn, the definition of allotment. So it was clearly seen as an important provision and an important limitation. It's not provided for the protection of property from physical damage, very carefully what has been done –

CHAMBERS J:

Yes I would have thought this is against you because what it makes it clear is it is not focused solely on the safety of the users of this particular building. They can have wider purposes as (f) also illustrates.

MR GODDARD QC:

(f) is a wider purpose but what is happening in (d) is that certain property is being identified as within the scope of protected interests here but not, for example, another building owned by the same building owner on the same allotment.

ELIAS CJ:

But it may be that that's because this is intended to expand the concern of this legislation whereas the actual building being undertaken is obviously in focus.

MR GODDARD QC:

And when we come to the report, your Honour, we will see that that's not the position.

ELIAS CJ:

All right.

MR GODDARD QC:

So we don't need to guess about what was sort to be achieved here.

ELIAS CJ:

Well I don't know, I mean – yes, all right.

MR GODDARD QC:

Because the report makes it very clear that it's that carving out of what – this is very much a market driven, economically driven reform and whether one thinks that it has been successful or not is not, of course, the point. One has to give effect to the intended policy of Parliament.

TIPPING J:

So the argument is that the word "other" is in studied distinction to this?

MR GODDARD QC:

Yes, and that's very clear from the legislative history and material. The idea as far as this property is concerned, well that's the owners, they can decide how much to spend to protect their own property.

TIPPING J:

Yes, I just wanted to make sure I had understood the point.

MR GODDARD QC:

Yes, so it's "other" as opposed to "this" because you're talking about third parties, you're talking about externalised harm as opposed to the interests of the same owner

which it's up to them to protect, not up to this legislation to protect. That's the fundamental conceptual framework that was applied to this Statue.

CHAMBERS J:

Can I just check with you that if Spencer on Byron, which I think is 20 storeys high -

MR GODDARD QC:

Some 23, Your Honour, yes.

CHAMBERS J:

Twenty-three is it - if it were all residential units like the penthouses, you would accept that a duty of care would have been owed to these homeowners?

MR GODDARD QC:

Yes that's what this Court found in *Sunset Terraces* and it doesn't –

CHAMBERS J:

Right, even though the people involved and how big and experienced they are and sophisticated they are, are exactly the same people as in fact put this up here.

MR GODDARD QC:

As put it up? Yes.

CHAMBERS J:

Yes, but they would have a duty of care owed to them if they had chosen to make it all residential before selling it off but they don't have a duty of care because they have chosen to put some into hotel units.

MR GODDARD QC:

Is the "they" your Honour is referring to the original owner/developer?

CHAMBERS J:

Yes.

MR GODDARD QC:

I mean, it was accepted below - I don't know what my friend's stance on this is here - that no duty would have been owed to Charco, the original owner/developer, on the

basis that they had primary responsibility for undertaking the work and that you couldn't reasonably argue that the Council was responsible for protecting them from any failure to pursue their own interests in this setting. That was common ground in both Courts below.

CHAMBERS J:

So the original owner of a residential building, they have a duty owed to them though?

MR GODDARD QC:

That acceptance was in the context of this building and it's really I think for the appellants to explain –

CHAMBERS J:

Well let's –

MR GODDARD QC:

– what the meets and bounds of their acceptance were.

CHAMBERS J:

Well let's put that to one side. Just assume it's all the facts of this case, except they were all individual units. Do you accept that all the unit owners would have had a duty of care owed to them?

MR GODDARD QC:

If the application for building consent had identified this as a residential building, rather than describing it as commercial/industrial, so that the Council knew that this was a residential project –

CHAMBERS J:

And they would have done things –

MR GODDARD QC:

– and was able to charge –

CHAMBERS J:

– differently, would they –

MR GODDARD QC:

– fees accordingly and there would have been different requirements as well, yes there would be some different requirements that would apply to the building under the Code. The Act is the same in the way it applies to both but when you come down to the detailed level of the Code. You do get different requirements depending on the intended use of the building, intended use – I think there are seven in the Code your Honour –

ELIAS CJ:

Are there? Yes.

MR GODDARD QC:

– Your Honour's question earlier, I'll come to those – and so the Council was forewarned about the intended use, it could impose the appropriate requirements, it could charge the appropriate fees, in the light of the case law, going back more than 30 years now, almost 40 years.

CHAMBERS J:

Is there evidence that the fees would have been higher had it been residential?

MR GODDARD QC:

It would be – there's no evidence, in this it's a strike out and that's an issue which hasn't –

CHAMBERS J:

Well it's also –

MR GODDARD QC:

– been canvassed in evidence –

CHAMBERS J:

– it also was a claim for summary judgment –

MR GODDARD QC:

Summary judgment but again, that would have been, I think, quite a complicated exercise because you have different requirements as well for the different categories

of building. So that what you have to be asking is not whether it's just higher in absolute terms but whether it's higher, having regard to the different requirements, the different amount of work involved in checking, is there an insurance or –

CHAMBERS J:

Yes but –

MR GODDARD QC:

What your Honour is really asking is, is there evidence that there's an insurance/liability component in respect of residential but not in respect of commercial and there's no evidence on that and I don't know the answer. So, if that sort of enquiry was relevant, then it would be necessary to the imposition of duty, it would be necessary to allow the appeal, indicate that the outcome would depend on such enquiries and send it back to trial, I accept that.

I should say – no, I won't, I will say that later actually, given the time. So, back to section 6, your Honour the Chief Justice referred to subsection (3) and the national cost of benefits of controls. Now it's not surprising that costs and benefits that are taken into account are wider than the purposes for which control is being imposed because in any cost benefit exercise your Honour, you intervene, you have a regulatory intervention to achieve a particular objective but obviously you have to pay attention to all the costs and all the benefits, whether in that area or else wherever imposing it, otherwise you're not doing a meaningful cost benefit analysis, you're artificially closing your eyes to some of the consequences of the regulatory intervention.

So there's an important distinction between the purpose of intervening and relevant costs or benefits when doing a cost benefit analysis, they don't map the one to the other. 7, all building work to comply with the code, and this is the point that the Court was making earlier, there is a requirement that building work complies with the Code, whether or not a consent is required. That obligation to secure compliance is of course the obligation of the person carrying out the work primarily. I'll come to those provisions but that is where that responsibility lies. Then importantly, the restriction on requiring anyone to achieve performance criteria additional to or more restrictive than those specified in the Code which is one part but only one part of the mechanism in the Act to ensure that unnecessary costs are avoided.

Provision in section 8 that existing buildings don't have to be upgraded. But of course, in respect of existing buildings, as with new buildings, councils have powers to intervene where there are concerns about whether a building is safe or sanitary. I'm going to come to this later but, in my submission, the Act contains all the mechanisms that are needed to protect the interests of users of commercial buildings. There is no need to impose liability on councils to owners in order to protect the interests of users because where there is concern that a building is not safe or sanitary. Councils have and are accountable for the exercise of powers to require remedial action and, if necessary, to take that action and recover the costs from the owner.

So the Act contains a scheme for addressing risks to users. It's a scheme which envisages that the owner will bear the cost of taking those steps and if they cannot afford it then the council can do the work, there's a charge on the building, the building can ultimately be sold to recover those costs but it is not the case that the interests of building users will be protected if and only if owners can recover. The Act addresses that concern.

Another way of looking at it again is to say, the objective of the Act are health and safety and the protection of other property. If there is a serious concern that those interests are compromised, the Act contains a remedial mechanism for addressing this. If those interests are not invoked on the other hand, then there's no reason for any sort of duty or liability to be imposed.

ELIAS CJ:

The rectification provision – I'm sorry, this may not have been what you were talking about. The rectification provision, you're talking about if there are health and safety issues, operates after the certificate of code compliance but if there's non-compliance for a certificate of code compliance is obtained, the territorial authority has powers to intervene and to require rectification, doesn't it?

MR GODDARD QC:

Yes, there are two sets of powers which – the power is in part 9, section 64 through 75 - apply whether the building has been completed or not, in relation to dangerous or insanitary proceedings and those can be exercised anytime if it's dangerous, if it's threatening people, or if it's threatening other property –

ELIAS CJ:

But compliance with a code can –

MR GODDARD QC:

but while – yes –

ELIAS CJ:

– be compelled before a –

MR GODDARD QC:

– while it's under construction –

ELIAS CJ:

– certificate of code compliance –

MR GODDARD QC:

– you can issue a notice to rectify –

ELIAS CJ:

Yes.

MR GODDARD QC:

– which requires compliance with the Code and, again, the responsibility is the owner's obviously, to rectify that defective work. And that, in my submission, is the mechanism that the Statute contemplates for protecting the interests with which it is concerned, not liability on the part of councils. There is a scheme in place to achieve that end.

We don't need in this case, unlike *Attorney-General v North Shore City Council (The Grange)* [2011] NZLR 178, to spend time I think on part 3, the functions and powers of the Building Industry Authority, or on the levy, part 3A. Turning over to part 4, functions, powers and duties of territorial authorities and that includes, as my learned friend said, section 24, administration of the Act and regulations, receiving and considering applications for building consents, enforcing the provisions for the Building Code and Regulations and the issuing, among other things, code compliance certificates and compliance schedules. The range of functions and the manner in which those are to be carried out is set out.

Section 27 records, I mention only because your Honour Justice Chambers said but why do they keep those things then, if Mr Goddard is suggesting that the code compliance certificate is addressed only to the first owner and not to anyone else? The answer of course Sir is that it's addressed to all users over an extended period of time. So, it's not addressed actually in terms of protection to owners at all. Although it's sent to the first owner, the person to whom you're speaking, as in the certificate of seaworthiness in *Carter*, is people who might use it –

CHAMBERS J:

Yes but that was my point. That's precisely why they're there. It's because they're there for –

MR GODDARD QC:

For users over time.

CHAMBERS J:

Yes.

MR GODDARD QC:

But not for owners over time, that's my –

CHAMBERS J:

Well for prospective –

MR GODDARD QC:

– distinction –

CHAMBERS J:

– purchasers. I mean, I'm not very likely to be interested in what's happening in 1 North Street but if I was thinking of buying 1 North Street, I might be quite interested to see whether it had a code compliance certificate.

MR GODDARD QC:

And similarly I imagine, the purchasers of ships are interested to know whether they have current certificates of seaworthiness.

CHAMBERS J:

Yes, well, I think you're making a mistake in thinking that *Carter* is sort of the guiding light from on which all else turns.

MR GODDARD QC:

I think it's a very helpful signpost. It's not the light, that is the underlying principles of the law of tort, but it's a very helpful signpost perhaps, I think. I'd say also a train that's followed the signals on its journey.

ELIAS CJ:

Just thinking about light, how much longer do you think you'd require to run through the overview of the Act, because perhaps it would be sensible to complete that if it's –

MR GODDARD QC:

10 minutes.

To state the obvious, there is nothing in part 4 about territorial authorities administering compensation schemes or compulsory insurance schemes in relation to the construction of buildings of any kind.

Part 5, building work in the use of buildings imposes the obligation to seek a building consent. Section 32, before you do building work and sets out the process by which those are to be received and decided. I don't need to dwell on those provisions.

Notices to rectify, section 42, just to locate that, and then 43, code compliance certificates. One small point about code compliance certificates, this arose in the *Auckland City Council v McNamara* [2010] NZCA 345, [2010] 3 NZLR 848 case, but that was argued about a year ago, and the members of the Court were not all the same. I will just mention it again. My learned friend suggested that once notice has been given under section 43, there must either be a code compliance certificate or a notice to rectify. I just wanted to note in passing that that's not necessarily the case. If subsection (3) contemplates the issue of a code compliance certificate where a territorial authority is satisfied on reasonable grounds that the building work to which the certificate relates complies with the Code, where –

WILLIAM YOUNG J:

Well, there's a middle slot where it's neither satisfied on reasonable grounds nor is it satisfied that it needs –

MR GODDARD QC:

It doesn't know –

WILLIAM YOUNG J:

– it needs notice. It doesn't know either way.

MR GODDARD QC:

And a classic example would be where a certifier has done a large amount of the work, hasn't given the appropriate certificates, goes out of business, the council is asked to step in and the council doesn't know whether the foundations are adequate or not, it doesn't know what's inside the walls, so it's in a position where it can't do either.

ELIAS CJ:

Presumably it would notify that fact on the LIM.

WILLIAM YOUNG J:

Well, does it need to, because the fact there isn't a –

ELIAS CJ:

Well, there's no code compliance.

WILLIAM YOUNG J:

There isn't a code –

ELIAS CJ:

Yes, yes.

WILLIAM YOUNG J:

There isn't a code. A CCC would be obvious.

MR GODDARD QC:

That in itself, I think, sends up something of a flag, yes. So there is that middle point. I'm not sure it's terribly important here but it's not quite as binary as my learned friend suggested.

Use of buildings, sections 44 and 45. Again, what we see here is a little regime that applies to new buildings other than a building used only as a single residential dwelling, so we have a use-related distinction drawn in relation to whether you have to have a compliance schedule and whether or not you have to have an annual building warrant of fitness.

And then 46, the provision I mentioned earlier about change of use of buildings. If you change a use then you need to meet the requirements for the new use.

ELIAS CJ:

Is that use within this Act?

MR GODDARD QC:

Yes, so –

ELIAS CJ:

It's not a reference to resource –

MR GODDARD QC:

No, it's a different concept.

ELIAS CJ:

I see, yes, thank you.

MR GODDARD QC:

Intended use is defined back in section 2, and then there are seven categories of use in the Code which I'll come to tomorrow. Section 47 sets out certain matters for consideration by territorial authorities. Those are very much directed to safety and external risks. They're not directed to the financial interests of building owners.

Part 6 deals with the Building Code, the Regulations to be made with that, functional requirements and performance criteria to be set out, and then there are various

documents that can be used to establish compliance with the Code. Part 7, building certifiers, important background to the 1991 regime intended to introduce competitive pressures on territorial authorities but I'll come to the relevance to this later. We don't need to look at part 8.

Part 9 I've already mentioned, the dangerous and insanitary buildings provisions. Section 64(1), a building deemed to be dangerous if certain things listed, and then subsection (4) deems a building to be insanitary in certain circumstances, including harm to health and inadequate sanitary facilities and so on, and then the powers of territorial authorities in respect of dangerous and insanitary buildings set out, and this, in my submission, is how the legislature intended that these risks would be dealt with. The local authority would give a notice, the owner would fix it, and it's not a defence that you don't have enough cash in your bank account or that the local authority hasn't paid you any damages yet.

This is the point that was made by Justice Asher in the *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC Auckland CIV-2007-404-004090, 25 June 2009 case and by the Court of Appeal in *Charterhall*, that the remedy for risks to the health and safety of building users is provided for in the Act and does not depend on an award of damages. The Act doesn't contemplate that harm will be avoided only if damages are paid. That's a non sequitur, and I'll deal with that in more detail tomorrow. Section 74 and 75, ultimately the ability of the territorial authority to do the work to make the building safe if it's not done by the owner with a charge over the…

Section 76, inspections by territorial authorities, this defines inspection. It defines it for the purpose of conferring a power of entry but it's not quite right to say that there is a duty to inspect. It's a power to inspect, and a power to inspect if and to the extent necessary to be in a position to decide whether or not to issue a code compliance certificate, but if we look back at sections 48 and 49, sorry, 49 and 50, the Court will see that there are a range of other ways in which the territorial authority may be satisfied that requirements of the Code are met other than through inspection, for example through producer statements or through certificates about particular aspects of a building from a certifier or by compliance with documents issued by the BIA. So there's not a duty to inspect. There's simply a power to do so.

ELIAS CJ:

But inspection is defined in terms of taking all reasonable steps, so it doesn't mean a physical inspection necessarily. Is that the point you're making?

MR GODDARD QC:

No, I think it does mean physical inspection here, but the point is that inspection is not the only way of satisfying yourself that the requirements of the Code are met and –

WILLIAM YOUNG J:

What's – getting a report from an engineer or something?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Or perhaps – which sometimes has to happen, I guess, if there's been default in the way the building's been supervised and the code compliance certificate is retrospective.

MR GODDARD QC:

Yes, or sometimes again in – consistent with the efficiency objectives of the Act. It's reasonable to accept a producer statement from a reputable producer of a particular product or an engineer rather than carry out inspections yourself, and that may in fact provide a greater degree of assurance. So there's not a duty to inspect. There's only a power. The extent to which it's exercised depends on the –

McGRATH J:

Is it more concerned with establishing a right to inspect?

MR GODDARD QC:

Yes. That's what it's all about.

McGRATH J:

Is that what the provision's there for?

MR GODDARD QC:

It's there to say, "You have the right to go onto the property and inspect –

McGRATH J:

So it overrides the law of –

MR GODDARD QC:

– for this purpose."

McGRATH J:

– trespass or something?

MR GODDARD QC:

Yes, exactly, Sir. I'm not sure that anything hugely turns on this duty power distinction given that these functions have been carried out, but I just didn't want to be thought to be exceeding in that reading of section 76, with respect.

TIPPING J:

Is something to be read out of, for the purposes of this part of this Act, so it's confined, the definition is confined to part 9? That might have some relevance.

MR GODDARD QC:

I've never focused on that before your Honour, despite having read this I don't know how many hundreds of times. I'll think about that overnight. It might well.

McGRATH J:

It's an enforcement part really, isn't it? The offences are in here and things of that –

ELIAS CJ:

So that if the Council were doing the inspection and certification function in respect of building consents, this doesn't apply, is it?

MR GODDARD QC:

On the face of it, it doesn't apply. Rather, it's the requirement in the regulations to include, in every consent, a provision permitting access which might be relevant. I think that might be right but I'd need to get that straight overnight because it might

actually not even be a duty but not relevant at all, I'll just need to check that, to be sure.

TIPPING J:

Well if there is a requirement, I'll put it that way, to inspect, from somewhere other than this which is a limited definition, inspection must, for that purpose, carry its ordinary common sense meaning mustn't it, and to do so with reasonable care? They would hardly create a requirement to inspect and then accept that it can be done carelessly.

MR GODDARD QC:

There is no requirement to inspect, as such, anywhere in the Act but rather, the territorial authority is required to form the view contemplated by section 43, in order to issue a code compliance certificate. And what is expected is that an order to be in a position to form that view, certain steps will have had to be taken either by obtaining producer statements or whatever, or to the extent that aspects of the work are not covered by those, or by building certificates carrying out inspections.

TIPPING J:

But whatever may be the case, your argument is that the inspection function, if one can call it that, is limited to health and safety?

MR GODDARD QC:

That's what you're concerned about when you're inspecting and the last thing I was going to go to today, I've been 11 minutes so I missed my target, was the section 80 offence provisions which make it an offence obviously, for persons to do building work, essentially other than in accordance with the statutory scheme. So it's the owner and the person carrying out work who are responsible for doing that. The Council's job is simply to carry out its regulatory functions in order to protect the interests identified in section 6.

I'll go tomorrow to the Code and the even more specific health and safety objectives of the provisions in play here but I've already trespassed now two minutes on the Court's indulgence.

ELIAS CJ:

That's fine. Thank you Mr Goddard. Thank you counsel. We'll take the adjournment now and resume at 10.

COURT ADJOURNS:4.12 PM

COURT RESUMES ON WEDNESDAY 21 MARCH 2012 AT 10.02 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour. I have for the Court, I think Madam Registrar has a one page road map of what I hope to cover today and some additional materials that respond to questions put by the Court yesterday. So if I could just provide the Court with those and by way of early runs on the board, item one on my list is the Building Act and that can essentially be ticked off as covered, with this one exception which is that I got myself confused about section 76 and the power of inspection last night and I think –

ELIAS CJ:

Yes, it's a miscellaneous part.

MR GODDARD QC:

– I've unconfused myself overnight. Section 76, it's in volume 4 under tab 46, defines inspection for the purposes of that part but that same section goes on to deal with inspections for the purpose of supervising the performance of work under a building consent and what that part is doing is conferring the powers of entry needed for that purpose.

CHAMBERS J:

I acknowledge I was in error in propositions I put yesterday.

MR GODDARD QC:

No, no, Your Honour, I then successfully attempted to outdo that and did but I think now it's straight. The other thing that I should just mention in that context is over in the next tab in the Building Regulations, regulation 7, and I think the Court mentioned this yesterday, provides for the giving of notice at certain stages in the course of work to, it expressly says, for the purposes of section 76. So again, that links inspection

while work is being carried out to the potential exercise of the powers under section 76.

ELIAS CJ:

Sorry, which regulation is that?

MR GODDARD QC:

Let's go to them Your Honour because that's the next item on my list, it's the Building Regulations which include the Building Code –

CHAMBERS J:

Can I just ask one question about the Building Act which I'm still not sure about? Well, there are a number of things I'm not sure about but one in particular. When certifiers issued a forward looking building certificate under section 56(2), that was supplied, was it, to the local authority who was looking at issuing the building consent? See it's the (2)(a) one that I'm interested in and what is the provision which – does that in itself mean that the local authority had to issue the building consent or –

MR GODDARD QC:

Yes, it did, it obliged the authority to issue that consent.

CHAMBERS J:

Right, I follow.

MR GODDARD QC:

So the way it worked with consents is that a certificate could be given that was forward looking and if it encompassed all work to be carried out then, under section 50, the territorial authority was required to accept the document as establishing compliance and the –

CHAMBERS J:

Well not compliance – oh yes, not compliance in the same way that a code compliance certificate but –

MR GODDARD QC:

No, forward looking compliance and –

CHAMBERS J:

Yes, I follow, thank you.

MR GODDARD QC:

– the authority was then obliged to issue the consent if it covered all the work. That differed from the regime in relation to code compliance certificates, where it was actually the certifier who issued the CCC –

CHAMBERS J:

Yes, yes.

MR GODDARD QC:

– and the local authority wasn't required to take any step.

CHAMBERS J:

Except put it on its file.

MR GODDARD QC:

Exactly and store it under section 27.

CHAMBERS J:

Yes, so there is that slight distinction, in this case you still did need a building consent from the local authority but it was obliged to accept the certificate.

MR GODDARD QC:

Yes but that didn't arise here. If we look, in fact, at the regulations which are under –

ELIAS CJ:

Sorry, which volume are we in?

MR GODDARD QC:

Volume 4 Your Honour, tab 47 contains the Building Regulations 1992. My learned friend has just mentioned that his copy of the bundle has gone slightly awry in relation to the Regulations and some of them appear under an earlier tab. So I don't know if the Court has a problem with the Regulations, or whether –

ELIAS CJ:

What are you taking us to in it?

MR GODDARD QC:

Well let's take it a step at a time and see if it's problem, that's the best way to deal with it. So beginning at –

ELIAS CJ:

Sorry, what's the provision though that you were just referring to, the linkage one?

MR GODDARD QC:

I was just referring to regulation 7 which is on stamped page 1675, in the top right-hand corner of the authorities. So regulation 7, "Notice that building work is ready of inspection. For the purposes of section 76 and unless otherwise provided by the building consent owner or person, shall given the territorial authority certain notice," but just again, linking into the certifier regime that Justice Chambers questions, subclause (2), "Subclause (1) shall not apply in respect of building work undertaken without need for a consent and (b), any building work which a building certifier is engaged to inspect." So you don't have to do inspections, if and to the extent that a certifier is engaged to inspect which they would advise the council of at the time that a building certificate was submitted, of a forward looking kind.

ELIAS CJ:

Is there a – I'm just trying to remember, is there a provision which compels, as opposed to empowers, the council to inspect?

MR GODDARD QC:

No.

ELIAS CJ:

No but it's implicit in the scheme of the legislation that it's certainly assumed by regulation 7?

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

And the reason –

CHAMBERS J:

It's assumed somebody will inspect.

MR GODDARD QC:

It's assumed that somebody will inspect to the extent that inspection is the appropriate way of verifying compliance. That's the other important exception because there can be building certificates, or producer statements, or various documents that the authority can issue, saying that a particular type of building system meets the requirements.

CHAMBERS J:

Although presumably – that was going to be another question I had for you. Where the authority does give one of those, or you have got a producer statement, presumably somebody still has to check, do they, that it has been properly done?

MR GODDARD QC:

In relation to a producer statement, that depends on whether it's appropriate to rely on the producer to confirm, not only characteristics of the product, but also the method of installation but I'm sure –

CHAMBERS J:

So the waterproofer who has got a membrane might come along, supply the product, supervise the installation of that product?

MR GODDARD QC:

And give a producer statement and the more sophisticated and arcane the building work, the more likely it is that a local authority will rely on a producer statement. So, I mean, taking the *Rolls-Royce* case for example, that work was subject to the Building Act and the local authority, the poor local authority, will have had to form a view on whether the turbine met the requirements of the Building Act. One can assume that it's very likely that a producer statement was issued by Rolls-Royce or someone with

highly specialised expertise and that it was reasonable for the local authority to rely on that without itself inspecting every part of the turbine.

TIPPING J:

It was only certain – sorry, no, it doesn't matter, Mr Goddard. Forget it.

MR GODDARD QC:

Producer statements are a matter of judgement for the local authority as to whether or not it's appropriate to accept them, unlike documents issued by the Building Industry Authority which, by virtue of section 50, the territorial authority was required to accept as establishing compliance. Likewise building certificates, there was a mandatory obligation to accept them as establishing compliance.

Were those your Honours' questions in relation to the Act?

So turning back then to the Regulations. I dealt with regulation 7. It's probably worth just noticing regulation 3 before we turn to the Building Code. The Building Code is the Building Code set out in the first schedule, and, except as otherwise provided by the Act, each building shall achieve the performance criteria specified in the Code for the classified use of the building, and if the building has more than one classified use, any part of it used for more than one use shall achieve the performance criteria for each such classified use. So here we get into legislative recognition of different uses, different applicable criteria. So this is something that –

ELIAS CJ:

Classified use is defined, I see.

MR GODDARD QC:

Yes.

TIPPING J:

And performance criteria are not health and safety limited, are they?

MR GODDARD QC:

I'll come to those –

TIPPING J:

All right, because that seems –

MR GODDARD QC:

– because they are explicitly identified by reference to objectives which vary from requirement to requirement, which are, for the most part, health and safety.

TIPPING J:

But not entirely?

MR GODDARD QC:

Well, some are, some aren't. The one that's in issue here is solely health and safety, and that's why that's quite important, so I'll come to that.

So we have then, turning over, the first schedule, which begins on page 6 of these Regulations, stamped 1678. The Building Code. Clause A1, the classified uses, explains that for the purpose of the Code, buildings are classified according to type under seven categories. Classified use may have more than one intended use as defined in the Act.

Then there's housing. Communal residential and so on and so forth. Use number 5, commercial, use number 6, industrial and so on. So there are various classified uses which are related to, but not exactly the same as, the intended use concept in the Act. There's then an interpretation provision which largely repeats the definitions from the Act, including the Act's definition of intended use over on page 13 of the Regulations.

Then I wanted to look at some of the requirements of the Code, the way they're structured, and focus on the interests sought to be protected as we go through. So if we turn over to the first substantive requirement, it's on page 16, clause B1, structure. What again we see is the objective, and this is the structure of all of these provisions, of the requirement. The objective of this provision is to safeguard people from injury –

CHAMBERS J:

And that would apply, wouldn't it, in commercial buildings?

MR GODDARD QC:

Yes. Safeguard people from loss of amenity caused by structural behaviour and protect other property from physical damage caused by structural failure. So that pulls in that definition of "other property" that we looked at in the Act the other day. Notably absent from this is any objective of protecting this property from physical damage or loss of value caused by structural failure and certain specific requirements are of a functional and performance nature, specified –

CHAMBERS J:

Well, they couldn't possibly include that in a Building Code. That seems to me to be setting up a straw man, with respect because no one is suggesting that you would be declined your building consent because you ought to use product B because you'll get just as good result for half the price?

MR GODDARD QC:

No, it's rather the other way round, it's that if you are using a product that would – well first of all, at the most fundamental level, what interests are being protected, who are we concerned about and what interests are we protecting? What we have here is an explicit statement of those interests and that in itself is an important issue. Who is this regulator concerned to protect? What interests are they protecting? But what is not said here is that one of the objectives is to produce sound structures, the value of which will be maintained for X period, for example.

Some of the objectives that were attributed to the former regime, for example in *Stieller v Porirua City Council* [1983] NZLR 628 (HC), [1986] 1 NZLR 84 (CA), the defective weatherboard case, were there were no health and safety concerns at all but the weatherboards were likely to warp and need replacing earlier because of the knots –

WILLIAM YOUNG J:

And that was referenced to something in either the building bylaw or the provisions of the local government legislation.

MR GODDARD QC:

It was the bylaw your Honour, the standard bylaw, yes, that's right and Justice Heath said, in the first instance in *Sunset Terraces*, that he didn't think that the result in *Stieller* could follow anymore under this Act and I think that must, with respect, be

right and that's because that's not a concern of the Code anymore, unlike the old bylaws.

CHAMBERS J:

Well I could understand this entirely but it does seem to me the logical extension of your argument is that *Hamlin* and *Sunset* are wrong.

WILLIAM YOUNG J:

The argument really is that *Hamlin* is an exception that's been recognised for the reasons given essentially in *Sunset*, that the law can't have been, the 1991 Act, can't have been intended to overrule the *Hamlin* cases but that's as far as it should go, that otherwise a logic of the statute should prevail.

MR GODDARD QC:

Yes, that's exactly right and that *Hamlin* is built –

ELIAS CJ:

Well this – sorry.

MR GODDARD QC:

Sorry, your Honour.

ELIAS CJ:

Well I was going to say, this argument is well understood I think by everyone on the Bench and we don't really need to rehearse it. You're taking us through the provisions of the regulations at the moment.

MR GODDARD QC:

And I'm going to do that quite quickly, just as the foundation –

ELIAS CJ:

No, no, I wasn't trying to stop you, I was just –

MR GODDARD QC:

Trying to get me back to my task.

ELIAS CJ:

No, no, no, it's the wings I was trying to encourage to let you pursue what you're doing at the moment. I mean, it's very oddly set out this jolly Regulation, where is B1, I can't find it now?

McGRATH J:
Page 16.

ELIAS CJ:
But what is it? It's got it's objective, does –

MR GODDARD QC:
And then the functional requirement –

ELIAS CJ:
Oh, I see, it just then goes –

MR GODDARD QC:
Yes.

TIPPING J:
An objective of the structure –

ELIAS CJ:
Yes, I see.

MR GODDARD QC:
Yes, so you have an objective, then you have a functional requirement which is designed to achieve that and this is where we see the concept of performance regulation, there's a functional requirement and then performance. For example, 1.3.1 "Buildings," et cetera, "shall have a low probability of rupturing, becoming unstable,...or collapsing during construction or alteration and throughout their lives," and how you achieve that is up to you, so that's what is meant by performance regulation.

This structure of this Code with objectives, functional requirements and performance requirements, was a key element of the recommendations of the Building Industry Commission, as we'll see and it was drafted by them and like the legislation –

TIPPING J:

This expression "throughout their lives", suggests that each building is designed for a particular life. Is that –

MR GODDARD QC:

And that's B2, that's the next one –

TIPPING J:

That's B2, okay, we're coming to that, are we?

MR GODDARD QC:

So if we turn over to that because this is a not infrequently misunderstood provision. B2 Durability. B2.1, "The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this Code." So it's parasitic on, referable to, might be a better way to put it, the other objectives of the Code and when we look at 2.2, the functional requirement, the idea is that the "components and construction methods shall be sufficiently durable to ensure the building, without reconstruction or major renovation, satisfies the other functional requirements."

Then we come to performance. What we see again is that, "From the time a code compliance certificate is issued, building elements shall with only normal maintenance continue to satisfy the performances of this Code for the lesser of specified intended life" or certain periods including the 50 year period.

So it's consistent with this that you'll need to do things like clean your guttering and perhaps replace it partway through the life of the building but you won't have to undertake major reconstruction. Was is the concern here? It's that the other objectives continue to be met. So you have to look at those other objectives to understand the purpose of the intervention.

We can move fairly quickly through the next few. C1 Outbreak of fire, Objective: "to safeguard people from injury or illness caused by fire." C2.1 Means of escape. Again, the focus is on people. C3 Spread of fire. C4, Structural stability during fire, is interesting because if we look at the objective and I'm on page 27 of the Regulations your Honour, C4 Structural stability during fire. The objective of this

provision is to "safeguard people from injury due to loss of structural stability during fire and protect household units and other property from damage due to structural instability caused by fire". It's interesting for two reasons. First, because it specifically refers to protection of the thing itself that's being built, the household unit that's being built. So where that is an objective the Code says so. It's not implicit that you're always trying to protect that property and sometimes we add another property which is one of the questions that was put to me by the Court yesterday afternoon. Where there is a concern to protect the very property in question this Code says so.

ELIAS CJ:

So it only protects household units, is that the point you're making?

MR GODDARD QC:

And that's the second point.

ELIAS CJ:

Oh, I see.

MR GODDARD QC:

First of all – your Honour is way ahead of me. It does two things. It protects the property in question and the only property it seeks to protect is household units, so there is a differentiation between household units and other buildings, including hotels or schools or churches, that will be occupied by people, including hotels where people will sleep.

TIPPING J:

Well, I don't quite follow the logic of that. Why are the household units protected from fire and the other ones aren't?

WILLIAM YOUNG J:

It's the economic interest here, the economic interest, the household unit, is being protected as well as safety, whereas –

TIPPING J:

So this sort of – it at least goes as far as supporting *Hamlin.*

MR GODDARD QC:

Yes, I think it does to some extent.

WILLIAM YOUNG J:

As to fire.

MR GODDARD QC:

As to fire but –

TIPPING J:

As to fire. This is all –

MR GODDARD QC:

– not as to moisture ingress. The idea is, again, his Honour Justice Young is exactly right, that in relation to other types of property, the assumption is that the owners will make appropriate provision, that there needs to be regulatory intervention to enable escape from fire from a hotel, that's back in C2.1 but that in terms of structural stability, the concern for the structure surviving the fire is one that need only be addressed in relation to household units because of the particular vulnerability of occupants and less sophistication on the part of owners in relation to protecting their own interests.

TIPPING J:

And I see in functional requirements, household units get a mention again. So there does seem to here be a focus on household units –

MR GODDARD QC:

Yes.

TIPPING J:

– in some capacity other than, what you might call, the general.

MR GODDARD QC:

Yes, so what –

McGRATH J:

Yes, adjacent household units, is that the passage you're referring to?

TIPPING J:

Yes, adjacent household units –

CHAMBERS J:

That just means in a block of flats –

TIPPING J:

– or other property, so –

CHAMBERS J:

– doesn't it? It's making it clear, isn't it? The reference to household units means it doesn't have to be a neighbour on a different piece of property, it can be the unit right next door to you?

MR GODDARD QC:

Yes, I think that's right.

McGRATH J:

But not this unit, it would seem.

TIPPING J:

Not this unit.

WILLIAM YOUNG J:

Well maybe because – it's a bit ambiguous, avoid collapse, maybe, avoid (a) collapse and (b) consequential damage to other – it depends on how you read it.

MR GODDARD QC:

Yes, I think that is how I would read it your Honour. So it's collapse, including of the household unit where the fire is –

ELIAS CJ:

Well, another way of looking at it is that they weren't using the definition and it's simply protect household units and other property from damage.

WILLIAM YOUNG J:

C4.1(b) suggests that –

ELIAS CJ:

Yes, yes.

WILLIAM YOUNG J:

– and if you treat that as controlling the interpretation of C4.2(c), that's really what – it's two things that they're looking to preserve, or prevent.

ELIAS CJ:

Yes, yes. So it's other property and the property?

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

If it is a household unit but not otherwise.

ELIAS CJ:

Well, I don't know, that depends on whether other property is being given the definition and the –

MR GODDARD QC:

It's italicised which means it is being treated as a defined term.

ELIAS CJ:

Is that what that means?

MR GODDARD QC:

Yes, that's why they've italicised certain terms in here, that is supposed to be a helpful indication, this is a modern –

TIPPING J:

Modern drafting.

ELIAS CJ:

Yes.

MR GODDARD QC:

– drafting instrument. We can move past access routes in D1, mechanical installations D2. Then I think it's worth pausing to look at the two E requirements in relation to water. We can look fairly quickly at E1 Surface Water but again, just note because that's not the one that is invoked here but again, we have a very –

McGRATH J:

Sorry, page 1708, are you?

MR GODDARD QC:

Yes, Sir and objective, to "safeguard people from injury or illness, and other property from damage, caused by surface water and protect outfall". So again, that very careful reference to the property to be protected and that it's other property. Then when we turn over to E2, and this is the only substantive requirement that is invoked by the plaintiffs in this case, what we see is that the objective of this provision is "to safeguard people from illness or injury which could result from external moisture entering the building", and then certain requirements are imposed for that purpose.

Now, the Court put a number of questions to me yesterday about the generality of section 6 and whether it went beyond and your Honours – but what can be said with absolute clarity is that the reason that external moisture entering buildings is regulated, the reason we regulate moisture ingress, is to safeguard people from illness or injury and there is no objective here to safeguard any sort of property, whether other property or the property in question. All of those being things that are identified, where they are objectives of the relevant regulatory intervention.

So maybe, you know, even if the Court were right that the possibility of a broader range of interventions is contemplated by section 6, when we come to the intervention which it said is in play here, we know exactly why it's in the Code and we know who it is intended to protect and what interest it's intended to protect and the fact there might be other interventions for other purposes seem to me something of a red herring when it comes to a damages claim parasitic on this requirement. If this wasn't here –

TIPPING J:

Let's assume, Mr Goddard, it is intended to safeguard people and it doesn't safeguard people because it leaks. You have to spend money to put it right. You are incidentally looking after your economic interest but you are primarily, by spending that money, looking after people. I just wonder whether we aren't on a false dichotomy here.

WILLIAM YOUNG J:

You may not spend the money, you may just trouser it and leave this rotting house sitting there, or hotel sitting there –

MR GODDARD QC:

You may do what some of the plaintiffs have done in this case which is to sell and sue for the loss on sale, so they by definition, are not going to spend that money on fixing it, those plaintiffs.

TIPPING J:

Well, adopting my brother's colourful concept of trousering it which, I have to say, is I've learnt something this morning but you can't construe the purpose of these Regulations on the premise of trousering.

MR GODDARD QC:

But you can construe them on the basis that there is no logical or practical link between recovery by the owner of a loss on resale, or a cost of repairs –

TIPPING J:

But here, I have a leaky building, Mr Goddard. I'm concerned that the people are to be safeguarded. Someone has dropped me in it negligently. I have to spend money to do that, to safeguard them. My purpose is safeguarding them. Incidentally, I'm getting my asset back into shape.

MR GODDARD QC:

There are a lot of cases on this and I'd prefer to deal with that as I go through it later but –

TIPPING J:

All right, well I give notice that I see this as a very important point –

MR GODDARD QC:

It is a very important point –

TIPPING J:

– and a lot of the points, I think, are less important than this.

MR GODDARD QC:

No, you're right, this is a fundamental point. It's a point that I'm going to deal with and I hesitate almost to say this, after a number of times –

TIPPING J:

Where is it in the road map because I'm going to mark it Mr Goddard?

MR GODDARD QC:

It's dealt with in items 5 through 8, *Carter*, *Caparo Industries plc v Dickman* [1990] 2 AC 605, *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA), *Charterhall* those – and in particular, your Honour dealt with this issue in *Carter* in a way which was very helpful, so I'll come to that.

TIPPING J:

Well, I'm glad to hear that.

CHAMBERS J:

Yes, unfortunately I only got the supplementary authorities. I just realised I haven't got the road map.

MR GODDARD QC:

Road map. I have a spare copy, I'm sorry, your Honour.

TIPPING J:

Well, that's most helpful, Mr Goddard, and to my mind we can have –

CHAMBERS J:

I've got it. Justice McGrath had two, thank you.

TIPPING J:

At least from my point of view we had to have a little bit of acceleration on the road to this point of the journey.

MR GODDARD QC:

I was laying the foundations –

TIPPING J:

I know, and I'm sure they're very –

MR GODDARD QC:

– and they need to be solid.

TIPPING J:

Well, maybe it's because we've been down this road so many times, I'm getting a little impatient.

ELIAS CJ:

Is there anything in the Building Regulations that does refer to other objectives in relation to any standard?

MR GODDARD QC:

No, no.

ELIAS CJ:

Well, I was just really wondering whether you were going to go through the whole lot –

MR GODDARD QC:

No, I'm not. I was going to stop now.

ELIAS CJ:

But in order to do that, you really do have to tell us if there is anything that is of interest in this apart from the provisions you've already drawn our attention to.

MR GODDARD QC:

We see – perhaps just to take another example of a slightly differently framed one, it would be worth jumping to page 65 of the Regulations and the electricity provisions,

and there we see, in buildings supplied with electricity, the electrical installation has safeguards against outbreak of fire and personal injury. That could be read as somewhat broader, tying into the very specific references to outbreak of fire again back in section 6, and we also see another limb of section 6 being invoked in objective B, paragraph B, people with disabilities able to carry out normal activities and processes within buildings.

So the range of specific objectives that we saw in subsection (2) of section 6 turn up in relevant places in here, and in each case the ones that are relevant and that justified that regulatory intervention, are explicitly identified, and consistent with the prohibition on imposing requirements going beyond the Code, it would be wrong to decide a debate about whether or not performance or functional requirements were met in relation to a particular provision by reference to any objective other than the specific objectives identified. That would be an illegitimate purpose for a council to invoke and the argument that I'll develop is that imposing civil liability is itself a form of regulatory intervention and it's not legitimate to impose it for a purpose outside the purpose of the regulatory intervention.

I think I can move on from the Code, and I want to look at the Building Industry Commission report, which was instrumental in the enactment of this legislation as Sir Ivor Richardson explained in *Hamlin*. What the Court has in volume 5 under tab 50 is volume 1 of their report. Volume 2 is draft legislation and a draft Code that hasn't been included if – and I'm sure the Court probably has 20 copies lurking in various –

McGRATH J:

Just finishing noting the last one. Just give me the reference again to where you're going to, to the –

MR GODDARD QC:

Sorry, your Honour, the Building Code is in volume 5. Sorry, report is in volume 5 under tab 50, 5-0, and this is volume 1 of the report. Volume 2 is the draft legislation, and it's always a source of some satisfaction when one's been involved in a law reform exercise and prepared draft legislation and what emerges from the process, the parliamentary process, looks something like what one has drafted applying those criteria. The drafters of this certainly did a lot better than the drafters of the Companies Act, for example, in terms of legislation that ultimately reflected what was

recommended. The ultimate legislation is very close to the draft legislation in volume 2.

So what did the Commission think it was trying to achieve? If we go first, very quickly, to the executive summary on page 1801 – I'll use the numbers at the top right because I think that's easier – and a passage that Sir Ivor picked up in *Hamlin* reports the culmination of a decade of research and study, the building control reform and its economic impact, government response led to detailed investigation into the present New Zealand system, analysis of building codes in many other countries, proposed reform developed following extensive consultation and study with both industry and government, major features summarised below, and there are only two that I need to go to.

The first bullet point, "The New Zealand Building Code will apply nationally and will bind the Crown. It is performance based and confined to essential safeguards for the users of buildings and those directly affected by them," and we'll come to an explanation of what the Commission meant by that.

And then, down the bottom of this page, last bullet point, "A greater emphasis will be placed on the building owner and producers to ensure compliance with the Code." Greater emphasis as compared with whom? As compared with regulators. This was intended to be a shift of responsibility away from the heavy-handed local authorities, and all the other regulators involved in the process, to the building owner and producers.

Then I think we can move past part 1, which describes the process followed, to part 2, which begins on page 1820 of the bundle, and what we see in part 2 is a description of the existing control system and concerns and an economic framework for reform.

If we begin over on page 1825, "Concerns with the present system", we see that the existing complex system of control authorities and so forth has ensured that buildings which endanger health and safety of users are rare in New Zealand. All buildings have a potential for causing illness, injury, loss of life and damage to neighbouring property, those themes again, yet the incidence of these events through the country is very low. The concerns stem from other areas. Requirements are complex and prescriptive. System unresponsive to technological change, inhibits innovation. It

absorbs large amounts of resources by central and local government, and administration by building producers and compliance imposing heavy costs on the consumer. So the concern was excessive regulatory intervention, inflexibility, excessive cost, and cost contributor discussed in 2.11.

And then we come to the economic framework for reform. The economic framework's set by the government. Over the page, public expectations, and this includes passages that have been set out in *Hamlin* and some of the other decisions. "People have certain expectations of the building they use, whether that use is public or private", and there's the paragraph my learned friend emphasised, "Because buildings may pose a threat to their safety, health, or well-being in social and economic terms, people seek assurance through some form of control that all buildings meet certain essential requirements to safeguard them from risk." What the –

TIPPING J:

Just pause. "Threat to well-being in social and economic terms".

MR GODDARD QC:

Yes, so that certainly embraces the interests that are in play here, but what the report goes on to ask is how do we achieve all those concerns, and the answer is some of these are met by private contracting, your Honour, and some of them are met by regulation, and that's where the key distinction comes in.

ELIAS CJ:

And some of them are made by tort – met by tort, I suppose.

MR GODDARD QC:

Which is a form of regulation and what I think we'll see is that the guiding philosophy is that regulatory interventions including torts should not protect the value of buildings. It's said in – I'll come to that.

TIPPING J:

Okay, well, it may cut it down – you say it's cut down from the generality of that?

MR GODDARD QC:

Yes. This says, "This is what people want from buildings", and then the question becomes, of all this, "What are we looking for from our proposed regulatory regime?" And that's again, 2.16, purpose of a building control system to ensure essential provisions to protect people from likely injury and illness, safeguard their welfare, will be satisfied in construction, alteration, maintenance and use and demolition of buildings.

And then, what we see in 2.17, and for – importantly is, "The Commission fully supports the Government view that a regulatory environment which provides incentives for people to take account of the community's interest in their private dealings, is more likely to produce satisfactory outcomes with the resources available to them than prescriptive building controls imposed by authorities with little or no consideration of their economic impact," and purpose of the reform to make better use of public and private resources by removing unnecessary controls and costs from the system and encouraging initiative, innovation and progress in the industry, and thereby produce affordable buildings without jeopardising the public interest by exposing people to unacceptable risks. So that's the framework, going to get costs down as much as possible and without exposing people to unacceptable risk.

What risks are unacceptable? Well, there's a – if we turn over to page 1829, the transfer of liability, we see another set of concerns in relation to transfer of liability that is relevant here, 2.35, "Regulations transfer some building decisions and responsibility for them. To control authorities in order to reduce the risk that private decisions will not provide adequate safeguards to protect the public interest. Transfer to the regulators of responsibility and therefore of liability lessens the incentives for building producers and owners to consider risks to users and others voluntarily, or to look for the most cost effective ways to avoid these risks in a competitive marketplace."

2.36 is important in relation to the argument that is frequently made that if you impose liability you get better outcomes. It's very clear that that's not the philosophy underpinning this reform. "In the event of building failure or perceived lack of protection authorities tend to add more stringent requirements and put more resources into enforcement but regulators do not bear the cost of compliance, they're reluctant to accept new materials or innovative techniques that may increase their exposure to liability and there's no competitive incentive to encourage more efficient control management."

ELIAS CJ:

Mr Goddard, accepting all of this, you are going to have to indicate to us that the problem here is – that there is a disconnect with this aspiration and the present case, in circumstances where the territorial authority was not acting as a regulator.

MR GODDARD QC:

The territorial authority was acting as a regulator, your Honour.

ELIAS CJ:

Well it was act – no, it was acting as an administrator, it was not setting standards.

MR GODDARD QC:

No but the sense in which – it was acting as a regulator interpreting and enforcing the standards. Your Honour saw those very general performance standards –

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

In it's regulatory capacity, what the local authority has to do is to identify whether the method that's proposed for meeting those performance standards is an adequate one and obtain such information, or carry out such inspections, as enables it to form a view on whether the method chosen by the builder is going to achieve those performance outcomes.

ELIAS CJ:

Yes but if assessment is reasonable, then there won't be a cause of action.

MR GODDARD QC:

But even if it's not reasonable, what the regulator has failed to do is to protect the interests that it's charged with protecting – the health and safety interests. I will deal with positive inconsistency but what I –

ELIAS CJ:

All right but I'm just flagging, as we run through this, that this is making points about regulation which I would read as setting standards. Now you may be right that these

are very elastic standards but surely that will impact upon whether there is breach of a duty of care, rather than whether there is potential liability.

WILLIAM YOUNG J:

Just can, I mean, it's a semantic issue in a sense, you would say this is an operational – they're a regulator but rather an operational one?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Such as, for instance, the Securities Commission might be in assessing whether a prospectus complies with a prospectus requirements?

MR GODDARD QC:

Yes and so in *Fleming*, the Courts had no hesitation in describing the Securities Commission which wasn't making the rules but simply applying them as a regulator in the relevant sense. Likewise, central banks carrying out prudential supervision –

ELIAS CJ:

But this is talking about setting standards and the standards –

MR GODDARD QC:

No, it's –

ELIAS CJ:

– is it?

MR GODDARD QC:

– about the own regulatory process. If we read the whole report and I can't really take up the Court's time doing that –

ELIAS CJ:

No.

MR GODDARD QC:

– your Honour will see that there's an identification of 10 regulatory tasks which include the tasks the territorial authority performs. It's quite clear that the way the language is used in here –

ELIAS CJ:

I see.

MR GODDARD QC:

– embraces the regulatory functions of the territorial authorities.

ELIAS CJ:

All right, thank you. You might get your junior to identify what provision, in this report, refers to the regulatory functions.

MR GODDARD QC:

I'd be very happy to do that and I'll come back with that a little later today. What I want to do now is go to the part of this report which is most directly on point in terms of saying, not only that an intervention by way of imposition of liability wouldn't further the objectives of this legislation but that it would actually cut across them and that's part 3 of the report which begins on page 1840 and again we get, in 3.1, identification that buildings have to meet a wide range of user needs including the owner, occupants', visitors' needs such as the provision of shelter, so on. Then 3.2, "Many of these needs are satisfied by contract and other mechanisms of the marketplace but it's accepted that some form of regulatory control is necessary to assure people that buildings meet certain essential requirements to safeguard them from unacceptable risk."

So that phrase which the Court as seen earlier on, there are certain essential requirements to safeguard them from unacceptable risk. What are those? Scope of building controls, 3.5 "The primary purpose of building control in New Zealand should be to preserve the health and safety of people." 3.6 "User requirements related to amenity can also have a place because amenity can be closely associated with health. Situations with discomfort, smell or inconvenience are excessive or frequent, they can have eventually have adverse mental and physical consequences." 3.7, this is one of the important paragraphs, "Protection of the economic interests of people in getting value for money is not a justification for building controls, since

value and quality can be supplied through forces of the market." Then there's reference to –

ELIAS CJ:

Well that's in getting value for money.

MR GODDARD QC:

Which is the issue here.

WILLIAM YOUNG J:

Like a good unit.

MR GODDARD QC:

Yes, like a good unit that you can –

WILLIAM YOUNG J:

Instead of a dud one.

ELIAS CJ:

I see, okay.

MR GODDARD QC:

– sell for not less than you paid for it. This is –

McGRATH J:

But it's over and above what is necessary for safety, isn't that what they're talking about there?

MR GODDARD QC:

I think they're saying quite apart from that. This is not an objective we are pursuing and we'll see that again over the page, "Reference to building control measures limiting choice and increasing costs," and that includes imposing liability, imposing liability increases costs, it's a form of regulatory intervention just like any other.

Over at 3.9, "The protection or preservation of people's own property is not by itself a justification for a control. Insurance is an available choice. People should be able to

make their own decisions, balancing the risk of loss against the cost of insurance, or the cost of incorporating risk reduction measures in a building. However, the property of others, including public property and utility services, must be protected from risks a building might pose to them."

Your Honour Justice Tipping asked me yesterday if I was emphasising other property by reference to this property and I said yes, this paragraph encapsulates that most neatly Sir.

TIPPING J:

Yes, I understand that.

MR GODDARD QC:

Then we come over, last paragraph I am going to go to, 3.14 Application of principles, "In applying these principles to a Code that will satisfy the control system objectives, the Commission has determined that regulatory intervention should be limited to," so this is not only a statement of what it should achieve –

ELIAS CJ:

Sorry, where are we?

MR GODDARD QC:

3.14 your Honour, the single most important paragraph for my argument, in terms of what is both sought to be achieved and the outer bounds of what is sought to be achieved, should be limited to. Then we see, "Safeguarding health, safety and amenity, where there's insufficient assurance that voluntary arrangements will satisfy the public interests. Provisions protecting other people's property including public property that might be subject to threat by a building or building activity."

Three provisions relating to the national interest, "To follow clear Government direction or reflect existing policies affected by direct regulatory measures outside the building control system," other legislation basically.

So this is what is being pursued and nothing else. That is the necessary consequence of the analytical framework explained in the preceding 13 paragraphs and the report as a whole. In short, imposing liability for harm to the financial interests of a commercial building owner is a regulatory intervention. It's a regulatory

intervention initiated by the Court but it's a regulatory intervention, and it's a regulatory intervention which does not serve any of those three ends. So in my submission, if one had said to the Commission, is it consistent with these objectives to impose – in the statute, to write in the statute, what the appellants are inviting this Court to impose by legal obligation, civil liability, for failure to deliver a unit that has the value that they expected, the answer would be no because that imposes costs over and above the safety regulation objective and those costs are inconsistent with our regulatory framework.

ELIAS CJ:

Cannot this be read as indicating that they're not concerned with regulation which makes buildings better, or more valuable but they are concerned with defects which are a threat to health and safety but where is the indication that where a defect is of that quality, it affects health and safety, it cannot be protected by recognising the economic cost of reinstatement?

MR GODDARD QC:

That's Justice Tipping's question I think and –

ELIAS CJ:

Yes but where in –

MR GODDARD QC:

– and it's one I'm going to come to very shortly.

ELIAS CJ:

I know you're going to come to it by reference to the authorities, but what in this report, is there anything else in this report that bears on that?

MR GODDARD QC:

No, but 3.14 does bear on it directly for the reasons that I was trying to summarise earlier. Let me see if I can encapsulate it more neatly. In order to protect the interests referred to there, you need to set standards for health and safety, and you need to have a mechanism for ensuring that if a building falls short of those standards, the owner will be required to remedy them, and that's built into the legislation.

So the legislation deals not only with trying to ensure that buildings prospectively do not raise those concerns but it also contains a remedial mechanism for requiring owners to fix it. No further intervention is required to achieve those health and safety objectives.

CHAMBERS J:

Except, Mr Goddard, we do know that presumably the report writers as well as Parliament envisaged that building certifiers could be liable because they have two specific provisions capturing that, or three perhaps, if you count the 10 year longstop, but what do they say in the report as to why and when certifiers might be liable and as to why there is an insurance provision, for instance?

MR GODDARD QC:

This is a frustrating aspect of the report. There's an assumption that there's an existing liability regime and a tacit assumption that it will continue and that certifiers will have a liability co-extensive with that of territorial authorities. There is no description anywhere in the report of what the writers understand that liability regime to encompass or any statement about its objectives.

CHAMBERS J:

Well, it does seem to me then that what must have been implicit in their minds is the very question that Justice Tipping put to you.

MR GODDARD QC:

I think rather that –

CHAMBERS J:

At the very least they would be liable –

MR GODDARD QC:

For houses.

CHAMBERS J:

– for remedying health and safety concerns so that you could remove those concerns and they cost money.

MR GODDARD QC:

I don't think that's a fair inference from the report or the legislation, Sir, and it certainly goes much further –

TIPPING J:

Well, they must have been liable for remedying something. I mean –

MR GODDARD QC:

Well, harm to other property is an obvious example.

TIPPING J:

Well, that's a very strange view.

MR GODDARD QC:

Illness and injury issues.

TIPPING J:

Yes.

MR GODDARD QC:

There are a whole range of interests –

TIPPING J:

Well, we don't have personal injury claims in New Zealand so –

MR GODDARD QC:

But for illnesses of various kinds caused by exposure.

TIPPING J:

But they're not liable for the cost of putting it right to stop it from going on. That seems a very odd distinction.

MR GODDARD QC:

And the reason –

ELIAS CJ:

If they're negligent.

TIPPING J:

If they're negligent, of course.

MR GODDARD QC:

If they're negligent –

WILLIAM YOUNG J:

Well, they can put it right by saying –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– to the unfortunate owner, "You fix it up."

MR GODDARD QC:

They're responsible for putting it right.

WILLIAM YOUNG J:

"It's your house. You fix it up."

MR GODDARD QC:

Exactly, and they do that by exercising their statutory powers. The Act deals with that issue and it says you can tell the owner to fix it, and then the concern that the Act is addressed to is completely addressed.

TIPPING J:

But the fact that they've got to have insurance means that they – it was envisaged they would be liable for paying some money to somebody.

MR GODDARD QC:

And as the Court said in *Hamlin*, although this report and the legislation could hardly be seen as a ringing endorsement of the existing liability regime, these are Justice Richardson's words, nor is there anything that clearly removes the right of action and so Parliament having chosen not to do so, the assumption must be that it intended the existing level of liability to continue, but the President's judgment expressly identifies that that is confined to dwellings and that quite different

considerations arise in relation to commercial buildings, a point that his Honour had also made extrajudicially in the article, *An Impossible Distinction*, which I'll go to later. So an endorsement, yes, but only of the law as it stood and no suggestion that there was any support for an extension of that.

CHAMBERS J:

Yes, it's slightly funny that, your explanation for why commercial property is different, namely that you can be expected to have had architects and engineers and the like and protect yourself by contract, yet Parliament clearly did not envisage that architects and engineers necessarily could be relied on, which is why, in order to do the inspection part of the process, it either had to be a local authority or a registered certifier. No one else is good enough, as it were.

MR GODDARD QC:

And that's because the builders and architects and engineers were all answerable to the initial building owner and the extent to which that owner's interests were protected was a matter for contract. Do you agree to limitations on liability? Don't you? Do you ask them to do extra work or less? And those were choices which it's fundamental to the fabric of this report the owner was to make, and the consequences of that, for good or ill, would rest with them. So an owner could spend more on protecting their financial interests in the building. They would reap the benefit of that. If they spent less, correspondingly, they would wear that cost. Without that, you don't get the incentives referred to in the report for making a prudent level of investment. But none of that works for people entering the building, for example, who have not been party to those contractual negotiations and –

WILLIAM YOUNG J:

Well, the owners, on this basis, the owners can externalise their costs. They can – and that's what the TAs and the certifiers are there to limit –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– so that you have, in the unlikely example, the building doesn't fall over and damage another house.

MR GODDARD QC:

Yes, so you're regulating to deal with externalities. It's a very classic economic regulation model in which the purpose of regulation is to prevent externalities, harm to third parties who are not in a position to bargain in advance, ex ante, as, for some reason, economists like to say in Latin.

ELIAS CJ:

So if we were being pure about this, if this argument were accepted, only those – those able to sue would only be users who were harmed, leaving aside ACC, but –

MR GODDARD QC:

Yes.

ELIAS CJ:

– some exceptions, and property, adjoining or other property owners who were harmed.

MR GODDARD QC:

Yes, that would be completely consistent with the purposes for which this regulatory intervention was carried out. To go beyond that not only is not supported by its purposes but positively cuts across them because it shifts – the Court will remember that, the passage on transfer of liability – it shifts some of the costs of building failure that would otherwise be borne by the owner onto the regulatory authority, weakening the incentives of the owner to make informed choices in the market about how much protection, how much advice to buy, because there's no suggestion – let me, there's one thing – there is no suggestion that there is anything councils can do that cannot be purchased from expert advisers. There's no skill set a council has which is not available in the market in terms of engineering expertise, architectural expertise.

This is not a situation like air traffic control, a case on air traffic control. You can't buy your own private air traffic control. You are completely dependent on the air traffic control provided by the relevant regulatory authority. There's no way anyone can buy more protection than that, because one person has to do it. Imagine having competing air traffic controllers each controlling different aeroplanes. It's the sort of thing that even New Zealand in the mid-1980s didn't manage to do, although I did once see a paper suggesting the possibility. I'm happy to say it got squashed.

But that's not true of building owners in buying protection, and it's not true of subsequent owners who can either procure inspections or seek assignments of warranties or seek warranties from the – sorry, assignments of the obligations of builders and experts, or seek warranties, if necessary, supported by security from their vendor, and so on and so forth, or say, "You can't give me the assurance so I'm going to pay less because there's a risk here." They're just as well placed to do that as a local authority is to price for assuming risk, and it was the scheme of this intervention that it would be owners that did that and not regulatory authorities.

So I'm helping, I think, to establish why it was that the Court in *Charterhall* was right to say that it was no part of the scheme of this legislation to protect economic interests in buildings and cash flows, and we'll come to that in a moment. So –

ELIAS CJ:

Would there be a cause of action against an owner who decided to take the risk and whose building collapsed and injured a user?

MR GODDARD QC:

ACC of course is a significant factor when it comes to occupiers' liability in New Zealand and it has essentially meant that our case law in occupiers' liability has hardly developed but in principle, I would have thought that must be right. If you – and, I mean, it might even be strict liability in some respects but certainly if you negligently fail to take precautions, if you say no, no, don't put in that big RSJ, you know, steel joist, 4x2 will be fine and then the ceiling falls on someone, anywhere where you didn't have ACC, I would have thought liability would naturally follow. For the building, I know, we're talking about here.

ELIAS CJ:

Well I just wonder how that really furthers the objectives of the Act. Anyway, it's not important.

MR GODDARD QC:

Turning then, I can do this briefly, to *Hamlin* which is in volume 2 of the authorities, under tab 21. The Court is very familiar with this decision and I'm not going to spend a long time on it but if we begin by looking quickly at the judgment of the President which beings on page 516 of the report. At page 518 there's a heading "The legal issues", right at the bottom, two key issues, the limitation issue, *Pirelli General Cable*

Works Limited v Oscar Faber and Partners [1983] 2 AC 1 (HL) and the conformity argument in relation to *Murphy v Brentwood District Council* [1991] 1 AC 398.

So the argument was: New Zealand law should be the same as English law, follow *Murphy* and the quote from Council for the local authority is at line 5 of page 519, "There being no features to the decision which might allow it to be distinguished in a New Zealand context, Court of Appeal in New Zealand should follow *Murphy*." Then we get the President's observation, "I doubt whether the view that the contexts are materially the same can survive the analysis made by Justice Richardson."

So, are the contexts the same? No, they're not but the reasons given by Justice Richardson, referenced to the unprompted disinterment of the report done by –

McGRATH J:

Sorry, what line are you at?

MR GODDARD QC:

I'm sorry Sir, I'm at line 8 on page 519 now.

McGRATH J:

Right, thank you.

TIPPING J:

Well that's his own report he's referring to there, isn't it?

MR GODDARD QC:

Yes, a Mr Robin Cooke QC –

ELIAS CJ:

Unprompted disinterment.

MR GODDARD QC:

It seems that Sir Ivor had found it without being pointed in that direction by Sir Robin and, I must say, I've consulted Sir Robin's copy to see whether there was anything that would help us in this case and there's not. I was a little jealous to see that in those days when you did a ministerial enquiry you got a beautiful leather bound copy from Her Majesty of the report you had written, rather than a photocopied one on

your own photocopier which is the way it works now but I suppose it's a more efficient public service for all that.

His Honour goes on after referring to that to say, "A main point," I'm at line 13, "is that whatever may be the position in the United Kingdom, homeowners in New Zealand do traditionally rely on local authorities to exercise reasonable care, not to allow unstable houses to be built in breach of the bylaws. Justice Casey illuminates this aspect in his judgment in the case. The linked concepts of reliance and control have underlay in New Zealand case law in this field from *Bowen* onwards."

So what we have there is an emphasis on the home owning context in New Zealand, the issues discussed by both Justice Richardson and Justice Casey which are focused very much on the expectations of homeowners and those linked concepts of reliance and control, the twin pillars as I refer to them and as this Court, I think, has described them in *Sunset*.

The case law in New Zealand and England is described. There's a reference over on 520, at line 20, to another major United Kingdom judicial development now enjoying little judicial support in England. A decision of the House of Lords in *Junior Books*, it's described and His Honour interpolates, at line 39 that, "In this Court we have not had to consider a similar case. Following the general New Zealand approach to duty of care questions, restated in the South Pacific, it would be open to us to hold that in such a case of industrial construction the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded."

Now that passage is important for three reasons. First, it underscores that the President is saying our case law has not gone this far and the issue remains open. Second, His Honour is suggesting that there is, at the least, a respectable argument that in such cases the network of contractual relationships provides sufficient redress so tort isn't needed. In other words, it is the contractual matrix that's key rather than particular aspects of it, to pick up a theme put to my learned friend by Justice Tipping yesterday.

The third point which really arises out of that, is that the reason that that network of contractual rights is relevant to the imposition of tort duties, is not the poor argument that if you can sue one person then there's no need to sue others. Scorn was poured

on that argument by Lord Justice Sachs in *Dutton* and I received a similar response from this Court in *Sunset Terraces*, to my argument that where you have contractual rights against architects and engineers and others, then that was sufficient but the reason that Sir Robin identified this as relevant, is the same reason that the High Court of Australia later picked up in reaching precisely the conclusion that His Honour was here contemplating in *Woolcock Street* which is that one of the criteria for imposing a duty of care in tort is that there is a vulnerability in the sense of inability to protect oneself against risk or contract for the payment of compensation in the event that the risk materialises.

So vulnerability is not just vulnerability to the thing going wrong but vulnerability to the thing going wrong without having an opportunity to sheet home responsibility to someone else and what Sir Robin is contemplating here, in my submission, entirely appropriately and consistent with mainstream tort principles, certainly consistent with *South Pacific*, this issue is discussed in *South Pacific*, is that where someone is in a position to protect their own interests and to make choices about how much they will spend on that protection, who to contract with, how much to pay them to protect those interests, how much of a premium to pay for insuring that they will still be around and solvent, or that there will be financial substance to their promises.

Of course it costs more to get a promise to build something properly from someone who expects to be around in 10 years time, than it will cost to contract for the same promises from a single purpose company –

CHAMBERS J:

Well of course the purchasers here did think they were protecting themselves, by insisting on a code compliance certificate which they – and in turn, the developer from whom they bought had purchased that service from the Council and was itself relying on the code compliance certificate.

MR GODDARD QC:

It wasn't reasonable to rely on it for that purpose because it was only being provided to confirm to potential users that their health and safety would not be at risk. They way they were protecting their own interests was in the warranties they took from the owner/developer and in the provision in the agreement for sale and purchase, that the owner/developer would assign to the body corporate all their contractual rights and warranties against the builder and architects and suppliers of other products.

So what was done in this agreement of sale and purchase which contained such an assignment clause, is exactly what Sir Robin is here contemplating as something that, in the commercial context, you would expect people to be able to do which is purchase a level of protection that you're willing to pay for.

McGRATH J:

Is the President saying that this is different to the domestic house situation because you can't expect people to make decisions about those sort of risks, or take proper measures in that context but if you're coming into something that is an industrial project or perhaps, if you like, an investment opportunity, you can expect them to do so, or at least that's a possible distinction that has to be explored.

MR GODDARD QC:

I don't think I could say that the President was going further than to say that's a possible distinction that has to be explored, but yes, that is exactly the distinction that His Honour is indicating, and –

ELIAS CJ:

He is talking about industrial construction though.

WILLIAM YOUNG J:

Twenty-storey buildings, 23-storey building?

MR GODDARD QC:

Yes, this is as industrial as it gets, your Honour. This is a really big building.

ELIAS CJ:

No, I'm thinking about some of the – I'm not indeed thinking – all right, okay.

MR GODDARD QC:

Now there are two things about it. It's a really big building and I can't emphasise too strongly that any allegation that there is any, has been or is in the future expected to be any harm to health and safety has been abandoned by these plaintiffs, so this is the least linked to health and safety of any case one can imagine.

WILLIAM YOUNG J:

Can you just tell me, what happened with the claim against the builder? Was there one?

MR GODDARD QC:

There is one and it's still proceeding.

WILLIAM YOUNG J:

And the builder's Multiplex, is it?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Which is a substantial company?

MR GODDARD QC:

Yes.

McGRATH J:

The claim against the architect is against an individual rather than a firm, is that…

MR GODDARD QC:

It was against a firm which I think went into liquidation and also the individual carrying out the services –

McGRATH J:

Sorry, I've just seen the –

MR GODDARD QC:

It was both –

McGRATH J:

It was both.

MR GODDARD QC:

– I think, originally, and I think that's where things are up to. My learned friend, Mr Josephson, who know the facts of where he's up to with the various people better than I do, has confirmed that's right.

So a very important paragraph, and incidentally a fourth reason why it's important is that in *Sunset Terraces* this Court put some emphasis on the expectations that would have been created by the early case law but confirmed by *Hamlin* and the fact that eminent New Zealand Judges, having looked at the 1991 Act and the supporting material, did not suggest that there had been any change in tack so far as homes were concerned, and if the same reader has asked whether they could have any confidence that there was liability in relation to commercial buildings after reading this, I think they would have to say, "Well, I know two things now. I know that there has been no case where the New Zealand Courts have upheld such a claim in this Court whether or not it had to consider a similar case, and that, at the least, the issue is open. So there's no basis on which I can steam ahead cheerfully assuming that I should not contract to protect my own interests."

Then there is a continuing discussion of the English cases. Over the page at 522, line 7, upheavals in high level precedent in the UK have no counterpart in New Zealand. Case law reasonably constant. Since *Bowen* it's been accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities. So both in relation to builders and local authorities, the case law goes as far as builders but no further. And that continues to be discussed. There's a reference at line 42 through 45 to the fact that the damage should be classified as economic because that makes more sense of the limitation period, but that is not a magic bullet of any kind in relation to claims in New Zealand. It's simply a factor to be taken into account, as the Court of Appeal in *South Pacific* confirmed.

Turning over to Justice Richardson's judgment, the emphasis is very much on whether "the settled law in this country for nearly 20 years in relation to the liability of local authorities for latent defects caused or contributed to by the careless acts and omissions of building inspectors in carrying out inspection of houses under construction" should be departed from, and then pretty much the whole of His Honour's judgment drives off lines 18 to 19. "Legislation must be seen in its social setting." "The common law of New Zealand should reflect the kind of society we are and meet the needs of our society." What kind of society are we? There's then an extended discussion of factors in New Zealand relevant to housing and the

way in which substantial Government support for housing and making availability of housing to a wide number of people with a range of forms of support has led to a reasonable expectation on the part of house owners that local authorities will provide them with assistance and support, will ensure homes are stable and sound, and will stand behind them financially if that does not happen.

So, summing up, over on 525 at line 28 and following, some of his points, "Bylaws and the question of," I mean, item 6 is obviously where that's all pulled together, beginning up in line 17, "New house buyers not commissioning surveyors in the low cost housing field. The ordinarily inexperienced owner was contracting with a cottage builder on fairly standard plans in a manner to suit the owner's wishes and pocket. That contracting was within the framework of encouragement and often financial support from the State and of the protection provided by local body controls and adherence to the standard bylaws. It accorded with the spirit of the times for local authorities to provide a degree of expert oversight rather than expect every small owner to take full responsibility and engage an expert advisor."

Those were expectations there were never applicable in the commercial context, even in the New Zealand of the 1950s I suggest, and that are anathema measured against the regulatory policy underpinning the 1991 legislation. It does not accord with the spirit of the 1991 Act for the local authorities to provide a degree of expert oversight rather than – in place of expecting commercial building owners to take full responsibility and engage their own experts.

So summing up at this point, "Bylaws and the question of whether it was just and equitable for the local authority to be under a duty of care to the owner (and successors in title) in discharging responsibilities in relation to the inspection of houses under construction have to be considered against that background which was special to New Zealand of the times," and that explains the genesis of legislation.

There's a discussion of *Stieller* at the foot of that page and then over the page, his Honour, line 5, begins a discussion of the 1991 legislation and says, at line 22 and following, "Importantly, there is nothing in the legislation to preclude private damages claims in accordance with the existing New Zealand law for losses arising out of the negligent exercise of building control functions" in accordance with the existing New Zealand law. "On the contrary that may properly be regarded as part of the accountability at which legislation is directed," and there's the reference to the

longstop and other liability provisions that your Honour Justice Chambers has referred to.

There's reference to certain paragraphs of the report, chapter 3 to which I took the Court earlier. Over the page, the costs of controls. A passage in section 4 of the report, referred to at line 36, about liability of certifiers. Then, perhaps the crunch paragraphs, "The point of all this is that over a period of ten years building controls were the subject of detailed consideration, quite dramatic changes in approach were taken reflecting a particular economic and philosophical perspective, but without questioning the duty of care which the New Zealand Courts have required of local authorities in this field. While it may be going too far to characterise the Building Act as a ringing legislative endorsement of the approach of the New Zealand Courts over the last 20 years, nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in the field". "Great respect" for the decisions of the House of Lords but, and one has hardly ever read a judgment –

CHAMBERS J:

Well just stop there. That paragraph, on your argument, Justice Richardson was wrong, isn't he, particularly in light of what you took us to from chapter 3?

MR GODDARD QC:

There were inconsistent signals in that report about what was contemplated going forward, in relation to existing liability regimes. The paragraph that Justice Richardson sets out just above there, 4.92, does assume and your Honour put this to me earlier, a continuation of existing liability regimes. So it's not endorsed but it is assumed but it is very hard to reconcile that with chapter 3 of the report. So yes, there is a tension in the report and the way that Justice Richardson addressed that was to say well, to take away the existing rights, to undermine existing expectations and I'll come to this, would require much clearer language than was found in the 1991 legislation.

TIPPING J:

That passage 4.92, you say has got, in effect, to be read down because of all the rest of the report –

MR GODDARD QC:

No and just in its own language, "There is no reason why liability should not fall upon anyone from where it belongs in accordance with the general law." So the question is, what's the general law and the general law that was established by the decisions of the Courts of New Zealand at that time was liability in relation to houses.

WILLIAM YOUNG J:
But still an open question as to other property?

MR GODDARD QC:
Yes, exactly what Sir Robin –

CHAMBERS J:
So the approved –

MR GODDARD QC:
– sorry, what the President said a few pages earlier.

TIPPING J:
Yes, I hadn't quite noticed that.

CHAMBERS J:
The approved certifier would also be liable only in respect of certifying houses?

MR GODDARD QC:
Yes.

CHAMBERS J:
It's – yes, all right.

MR GODDARD QC:
It's in accordance with the general law, and what's the general law? The general law is as described by the President. It's confined to houses with the question of application to industrial construction being a matter of it's still open.

That, I think, is what the Court of Appeal and *Rolls-Royce* meant by saying that the statutory environment was neutral. It was really to say that the legislation didn't help

the Court very much because the question was rather what is the underlying law. I think, in fact, one could go a little further than that and I have sought to.

ELIAS CJ:

Well, you have to go further –

MR GODDARD QC:

Yes, I have.

ELIAS CJ:

– than that really.

MR GODDARD QC:

Well, I don't think I need to go further because it's enough to say that there's nothing in the statutory framework that creates the sort of relationship between building owners concerned about financial losses and local authorities that would justify the imposition of a duty of care. That's something – this is the point made by both Lord Nicholls and Lord Hoffmann in *Stovin v Wise* that where legislation provides for certain interventions but doesn't create a right to compensation then one actually needs something more to justify it, and I say the something more is not there where a concern about these interests is not there, but I also go further and say in fact it actually cuts against the policy. But that's the cherry on the top of my argument. I don't actually need the cherry, I don't think, though it's always nice to have.

Over the page, 528. Start at the bottom two lines, sorry, of 527. "Those distinctive social circumstances must be taken to have influenced the New Zealand Courts to require of local authorities a duty of care to homeowners in issuing building permits and inspecting houses under construction for compliance with the bylaws." So, very deliberately, that general law is described as a duty of care to homeowners. And again, line 6, "After a detailed series of studies over a decade the Building Industry Commission recommended major changes in building controls but did not question the responsibility of territorial authorities to homeowners for the carelessness of their building inspectors. The Building Act 1991 contains no limitations on what has now been for over 18 years the law of New Zealand in this field embodying what is essentially a social value judgment." And, of course, when one is making social value judgments it makes perfect sense to distinguish between homeowners and others, essentially on grounds of vulnerability. It's a distinction we see reflected in a

raft of legislation, including three Acts I'll take the Court to later, and in case law in Australia and in case law in the United States. So it's a social value judgment and this is a rational place to draw the line in making that judgment, essentially for vulnerability reasons.

"Against that background I consider any change in the law should come from Parliament...not from the Courts." Description of the history, the initial cases necessarily influenced by the Court's assessment at the time of particular social conditions.

Then line 16 is important. "Since then those cases have themselves been an important catalyst engendering public expectations regarding the role of local authorities in the building control process. Furthermore the cases have been the basis for legislative action. Law and social expectation have enjoyed a symbiotic relationship," and that expectation, to labour the point, relates to homes and so it continues with references to what would have to change if there was no remedy in tort by house owners against local authorities, dah de dah de dah.

At line 35, "The second is that changing the received understanding of local authority liability for negligence would have significant economic implications in this country." What is the received understanding? It's an understanding in relation to homes. And so His Honour continues.

Very briefly, I'll just touch on a couple of other passages that are particularly helpful, I hope, for the Court. The judgment of Justice Casey, at 529, agrees with the President, and at line 23 notes that liability "accords with that line of New Zealand cases over the past 20 years imposing liability on local authorities for latent defects in dwelling houses and caused", I presume, "by carelessness of building inspectors," and then there's a discussion of that case law, including over the page 530, line 13, after setting out a passage from *Murphy*. "With respect, the circumstances of home buyers in New Zealand include factors going well beyond those described by His Lordship and support a conclusion of reliance on the local bodies' inspectors doing their job properly." Home buyers rely on the local body's inspectors doing their job properly".

Then there's a discussion of the experience of many New Zealand Judges who have practiced as barristers and solicitors in house purchases and how that supports the

conclusions reached. Justice Gault makes a similar point on page 534, between lines 8 and 19, including in particular at line 14, "I am entirely satisfied that in this country the degree of reliance by house owners on local authorities to inspect buildings in the course of construction and show compliance of codes and the full recognition of that by local authorities results in a relationship necessarily incorporating a duty of care."

Then finally, Justice Mackay, after a lengthy discussion of the limitation issue on which His Honour dissented from the result reached by the other members of the Court, turned at 545 to the second ground of appeal and again, at page 546, line 7 to 22, issues discussed in the judgment of Justice Richardson, "I agree with his comments on the housing scene in New Zealand, so very different from that in the United Kingdom," and then a discussion of circumstances which point to a vulnerability on the part of homeowners in New Zealand and a reasonable reliance by homeowners on local authorities to protect their interests going beyond matters of health and safety.

So – and the Privy Council of course largely said, we defer to the judgment of the New Zealand Courts in relation to circumstances in New Zealand but it is perhaps worth looking at one aspect of Their Lordships, so it's in the next tab, tab 22, if we jump over to page 521 of the advice, line 40, the "succession of cases in New Zealand over the last 20 years deciding the community standards and expectations demand the imposition of a duty of care on local authorities and builders alike. New Zealand Judges are better placed to decide on such matters...Whether circumstances are in fact so very different...may not matter greatly. What matters is the perception...rash for the board to ignore those views."

Then "In one important respect circumstances prevailing in England at the time of *Murphy* and those prevailing in New Zealand are indeed very different." That's the statutory background and then there's reference to the Defective Premises Act which imposed on builders and others undertaking work in the provision of dwellings, obligations relating to the quality of their work and fitness for habitation.

So again, we're very much in the dwelling space and what his Lordship is saying is in the area which New Zealand case law has responded to, concern about the interests of homeowners, owners' dwellings, one of the reasons we need not be exercised about having a duty of care in England is that there's legislation protecting

homeowners and I'll show the Court, later this morning, the provisions in New Zealand that have been introduced into the 2004 Act to that end in New Zealand and suggest that it would be quite wrong to add judicially a range of transmissible warranties, different in scope and beneficiary from that statutory development. I see the time your Honour is –

ELIAS CJ:

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

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.50 AM

MR GODDARD QC:

We come now to the cluster of cases which is relevant to the question that Justice Tipping put to me earlier today, well what about paying the owner so they can manage the risk of harm to the occupier? Why isn't that within the purpose, the policy of the legislation? Before I turn to the first of the cases which is *Attorney-General v Carter* which is in volume 1 at tab 3, I thought it might be useful to see if I could encapsulate the principle that I'm seeking to establish by reference to these cases.

That principle begins with the observation that the same event, or the same defect, whether in a building or a ship or a car or whatever, may pose different risks for different people. So a particular event will cause harm to different interests of different people and the proposition that I'm referring to these cases to support this that it is not fair and reasonable to rely on a regulator to protect you from a risk that is outside that regulator's remit, even if its remit involves it in seeking to prevent that event or that defect because of a different risk that it poses to different people.

ELIAS CJ:

Well it depends how you define what the remit is, doesn't it? If you define the remit as ensuring code compliance which is the obligation the statute imposes, then you might come up with a different answer.

MR GODDARD QC:

My submission would be that that's much too crude a way of characterising what they're trying to do because –

ELIAS CJ:

That's what the statute says in section 24, perhaps crudely.

MR GODDARD QC:

It requires local authorities, when seeking to do that, to make proportionate judgments, bearing in mind the purposes of the Act which are health and safety purposes. And when the local authority's attention turns to the particular provision of the Code which it has to make decisions about how much to insist on in terms of information, inspections, what charges to impose, it's doing so with a view to taking

sufficient steps to protect health and safety. So it's very much - that's it remit, is protecting health and safety –

ELIAS CJ:

Can I just – sorry, just because it occurs to me as part of this. Although you've taken us to the Code and to the general provisions, the acceptable solutions are often not as open-ended as are the performance standards, are they?

MR GODDARD QC:

That's correct and that's because what they're meant to be is one way, an optional way of meeting –

ELIAS CJ:

Yes, yes, a safe way?

MR GODDARD QC:

Yes but you don't have to do those, they're acceptable but they're not mandatory so –

ELIAS CJ:

No but in many cases, a territorial authority will not be called upon to make wholly open-ended decisions if acceptable solutions have been adopted.

MR GODDARD QC:

But that if is a very important because the Act doesn't contemplate that they will be comprehensive and in fact they never were. They were few and far between.

ELIAS CJ:

No, all right, thank you.

TIPPING J:

Mr Goddard, can I venture to put your proposition to a slightly higher level of generality, just to make sure I've got it?

MR GODDARD QC:

Yes.

TIPPING J:

Are you in effect saying that apropos of the same event, a defendant may owe a duty to one person but not another?

MR GODDARD QC:

And in respect of one type of harm and not another, that's exactly what I'm saying and that's because of what is reasonable to look to the regulator to protect you from.

TIPPING J:

Yes, you needn't elaborate, I just wanted to make sure I had the –

MR GODDARD QC:

Yes and the flipside –

TIPPING J:

Because the duty is to protect from harm, it's not a duty in the abstract –

MR GODDARD QC:

To stop this thing, that's exactly right your Honour and that –

CHAMBERS J:

Why isn't the duty simply to ensure the Building Code is enforced? That is actually what section 24(e) says. You're now reading down 24(e).

MR GODDARD QC:

No, I'm asking why do we enforce that Code.

CHAMBERS J:

We're not interested in why –

WILLIAM YOUNG J:

Yes but there are two issues. One is what's the statutory function of the local authority which obviously is to enforce the code, and the other is whether it's fair, just and reasonable for it to be liable –

MR GODDARD QC:

When this risk materialises –

WILLIAM YOUNG J:

– when risk crystallises, of a kind which you say is not within the purview of the Code or the Act?

MR GODDARD QC:

That's exactly right. It is fortuitous that the same defect may cause health and safety harms, or may not cause those harms because the owner is required to address it but may then cause a completely different sort of harm which is financial harm to the owner and the question is whether, when you've erected a regulatory regime to protect certain interest, it's fair, just and reasonable to require the regulator and through the regulator, the public purse, ordinary ratepayers in this case, to compensate for financial harms of a kind that the regulatory regime contemplated owners would manage for themselves.

They could have paid more. The fundamental problem with this is that in the commercial context which is all about investing money to get a return, commercial buildings, you have a choice about how much you spend to protect the value of your investment. You can have more or fewer experts. You can have better ones with more insurance, or more ad hoc ones. You can tailor the amount of protection you buy to the objectives you are seeking to achieve.

CHAMBERS J:

Well in the case of homes, is the liability of the local authority only to exercise reasonable care with respect to those aspects of the Building Code which are health and safety?

MR GODDARD QC:

Those which are applicable to the house which will, in the main, be health and safety ones, yes and it's therefore not –

CHAMBERS J:

So it's in some way limited, is it?

WILLIAM YOUNG J:

Well it might come with fire, I mean, if the house burns down because it –

MR GODDARD QC:

Exactly, that's why I limited that –

WILLIAM YOUNG J:

– doesn't comply with the Fire Code, then you might have a claim against the local authority –

MR GODDARD QC:

Which would actually be within the contemplation of the Act but the key point in *Hamlin* your Honour, is that liability of local authorities doesn't depend on the statutory framework, it depends on two decades of symbiotic evolution of case law and expectations in the field of housing. So you can't –

CHAMBERS J:

Yes but what I'm trying to find out is, and it comes back to the Chief Justice's question really, about the extent of the duty of care because you're now forced to acknowledge that a duty of care, with respect to inspection of homes, is imposed up to some area is covered by that. Is that area the Building Code, or is it some lesser part of the Building Code that the duty of care extends to, in the case of homes?

MR GODDARD QC:

As I understand the decisions of the New Zealand courts, it is the whole of the Code, it is taking reasonable care to ensure compliance with the Code and that is a function of the expectations that have evolved over decades, largely before the legislation was ever passed. So it's not right to treat that duty of care as a product of this regulatory regime. It's the product of decades of experience in New Zealand under a different regulatory regime, different decisions, different expectations.

What the Courts have said about this regulatory regime is not that it supports the imposition of such a duty but that much clearer language would have been required to kill it off.

WILLIAM YOUNG J:

Yes but we are now clear, that in that field, you accept it's a duty of care with respect to the Building Code as a whole –

MR GODDARD QC:

To reissuing reasonable compliance with the Building Code, that's the duty of care that I understand the case is to stand for and that's largely a product of pre-1991 case law.

TIPPING J:

I wonder before you move on, Mr Goddard, whether you agree or not that the proposition that your contending for, that is at the high level of generality, is to some extent captured in *Sunset Terraces* at para 30, where the four members of the Court said, "The nature of the damage or loss in suit is relevant to whether a duty is owed to take reasonable care to prevent it." In other words, you look at the nature of the loss or damage that's been sued for and you ask whether a duty was owed to take reasonable care, to prevent it –

MR GODDARD QC:

To prevent that –

TIPPING J:

– that loss.

MR GODDARD QC:

Exactly, your Honour, and that's a theme which runs through *Carter*, *Caparo*, where the whole point was yes, of course, a duty is owed by auditors to shareholders but it's in respect of the exercise of the powers attached to their existing shares, not in respect of future acquisitions of shares because that's not the interests sought to be protected.

TIPPING J:

But this was in the context of classification, ie pure economic loss, but I think it's a valid proposition generally.

MR GODDARD QC:

It's a completely valid general proposition which is identified in a number of the foundation cases in tort.

TIPPING J:

I'm not suggesting where that takes us. It's just an analytical –

MR GODDARD QC:

Caparo.

TIPPING J:

– or a conceptual point.

MR GODDARD QC:

Yep. The *Caparo* passages I've identified are where their Lordships make exactly that point, that it's meaningless to talk about a duty of care owed by A to B in the abstract. You have to say a duty of care to prevent what harm, and that goes to the definition of the duty so it's exactly the point your Honour was making there.

ELIAS CJ:

To ensure compliance with the Code, is the –

MR GODDARD QC:

No. It's the harm. It's not the event. That's the key point that I'm trying to make, your Honour, and that's the exact distinction that was drawn by *Carter* and *Caparo* and *Boyd Knight* and *Charterhall*.

ELIAS CJ:

Why is non-compliance with the Code not a harm?

MR GODDARD QC:

Because you've got to ask who does it affect and in what way. That's my point, that a different event –

TIPPING J:

You've got to ask what is the result of the non-compliance.

MR GODDARD QC:

Yes. What is the interest, what is the – that's affected. What is the harm that this person has suffered? Is that harm within the scope of the duty, and the importance of asking that has been repeatedly emphasised by the New Zealand Courts and the English Courts. In *Boyd Knight* the Court emphasised again that auditors signing an audit statement for inclusion in a prospectus did owe a duty to investors under that

prospectus but that it was a duty confined to assurance about the accuracy of certain information, not a duty that extended to whether or not a prospectus was issued.

CHAMBERS J:

Let me just ask you this to see if I can put what's worrying me into, as it were, a pleading form. We're dealing with a domestic home. The plaintiff pleads that the Council was under a duty of care when inspecting to ensure that the Building Code was complied with. It breached that duty by not being careful and there was a failure to comply with provisions one, two and three. As a consequence of that, the plaintiffs will have to repair the dwelling-house to remedy defects one, two and three. Would that in itself be a completely valid pleading without more?

MR GODDARD QC:

In the dwelling context, which is the context in which your Honour put it to me, yes.

CHAMBERS J:

So health and safety as such is not an essential part of the pleading there. Therefore if the plaintiffs were right here, that the duty of care should be extended to mixed buildings, or commercial buildings, the absence of a pleading about health and safety wouldn't be fatal?

MR GODDARD QC:

Well, I think your Honour's question is if health and safety doesn't matter then presumably you wouldn't have to plead health and safety. That must be true. But it's that "if". Your Honour said if a duty of care is owed in relation to commercial buildings. My point is that it's when we come to answer that question that we have to ask well, would a duty of care –

CHAMBERS J:

But hold on a second. In the case of domestic dwellings, what one is suing for is – the person whose health and safety might be affected may be other people than the actual owner, but the owner can recover the cost of repairing to get rid of those defects. Now –

MR GODDARD QC:

Or even losses on sale –

CHAMBERS J:

– in the case of a commercial or a mixed building –

MR GODDARD QC:

– where they're not going to repair. There's case law establishing that as well, so if you sell without doing the repairs and you suffer a loss on resale, you can sue for that and plainly there is no health and safety angle there.

CHAMBERS J:

Right, well if there, – the health and safety aspect of a mixed building or a commercial building there will still be people who are affected there. If it can be extended to mixed buildings then the fact that the owner might not be the person whose health and safety is affected is not, in itself, a reason for denying relief, is it?

MR GODDARD QC:

At that point we need to look at the underlying rationale for liability in respect of dwellings and ask whether it extends to any or part, or to none of the building, part of the building or all of the building and, in my submission, the furthest that it would be open to this Court to go consistent with previous decisions of this Court and the Court of Appeal and other areas about the basic lineaments of tort is to say that insofar as people have purchased units which were dwellings and which were known to the council to be dwellings at the time of construction, there is a duty of care. I'm arguing that that's not the best answer but it is an answer which is certainly open, consistent with the framework of tort but what is not open, in my submission, is to go further and impose liability in respect of the hotel units, the commercial part of the building.

CHAMBERS J:

Can I perhaps put what I think you're saying another way. The health and safety issue is a bit of a side issue. Your position is that the whole purpose of the legislation is focused on a number of considerations which on occasion will include the economic value of the house, viz-a-viz, for instance, fire safety regulations but on the whole it's not to protect the economic interests of owners.

MR GODDARD QC:

Yes.

CHAMBERS J:

As illustrated by the overwhelming health and safety focus of the code.

MR GODDARD QC:

Yes.

CHAMBERS J:

For better or worse, *Hamlin* has been applied in the current statutory environment but by way of exception, you would say, or anomaly and not to be extended so that, I mean, the truth is you face a problem because if you simply say well *Hamlin* applies post-1991 and it applies to commercial properties, i.e. properties which were intended to be let or rented or more complex schemes such as the Blue Sky ones in the *Sunset* case or Byron case, then there is no rational reason why it shouldn't apply to the functionally very similar hotel units in this case. So you've really go to say there's a line because otherwise –

MR GODDARD QC:

You end up –

CHAMBERS J:

– the statutory purpose becomes frustrated, the exception dominates what should be the rule.

MR GODDARD QC:

And in particular a line of cases which has, as its foundation, a response to the social issue of vulnerable homeowners is expanded to people in respect of whom that logic simply doesn't bite in a manner that's inconsistent with the statutory scheme. So what I'm saying is that an appropriate social value judgment, to pick up Justice Richardson's words in relation to the position of vulnerable homeowners, has been made by the courts over a long period in New Zealand now and it has continued to be implemented under the 1991 legislation as under the earlier legislation because of the importance of that social value judgment in the absence of any clear indication that it was to be departed from. But it would be peculiar and inappropriate to expand the liability regime that responds to that social value judgment informed by the vulnerability of homeowners to apply it to people who do not have the vulnerability in a way that's inconsistent with the statutory scheme, and certainly not supported in any way by it.

ELIAS CJ:

Can I ask the Building Code can of course be amended?

MR GODDARD QC:

Yes.

ELIAS CJ:

It would be consistent with the legislation to expand the concerns like the fire provision. I'm just wondering, in terms of questions of whether there is sufficient proximity and so on whether, how much emphasis can be placed on the particular, the current provisions of the Building Code. Don't you really need to concentrate on the legislation in determining that question?

MR GODDARD QC:

Both are relevant. The legislation, and the report which it was at the genesis, identify precisely the same carefully differentiated policy objectives and identify that you'll intervene in different areas in different ways, depending on which of those objectives are in play. The Code is the working out of that and it has been extraordinarily stable. There were minor amendments to it from 1991 through 2004, but the same Code is still in force under the 2004 Act with, again, relatively limited modifications. So it remains an enduring statement of the purposes of particular interventions in particular areas.

ELIAS CJ:

So has E2 stayed the same?

MR GODDARD QC:

I would have to –

ELIAS CJ:

No, it doesn't matter.

MR GODDARD QC:

– look at the detail of it, but at a general level –

ELIAS CJ:

Just be very curious.

WILLIAM YOUNG J:

I think it has, actually.

MR GODDARD QC:

Sorry?

WILLIAM YOUNG J:

Every case I've seen involving leaky homes, E2 has been the same E2, I think.

MR GODDARD QC:

I think there – yes, if there have been any changes, it's right down at that finest level. It's not the objective or the functional requirement. So this is not a regulation that chops and changes and that's why – and that's because the structure of it and the purposes of it align precisely with the policy goals of the primary legislation as identified in the Commission's report.

ELIAS CJ:

Yes, I'm still wondering whether it's the primary source for determining the scope of the – well, it determines the scope of the duty of care, but whether there is a duty of care.

MR GODDARD QC:

I think it must because let's suppose that E2 simply was absent, that we didn't regulate moisture ingress.

ELIAS CJ:

Well, then there'd be nothing against which –

MR GODDARD QC:

That's right.

ELIAS CJ:

Yes, there would be a –

MR GODDARD QC:

So it's only the fact that that requirement's in the Code that means that the plaintiffs can say, "You should have pursued this particular requirement to the specified standard." But why are we pursuing this requirement to this standard? For the objective's identified by reference to it. So no Code provision on that, no duty, which kind of suggests it's fundamental, I think, to the existence of a duty and to its scope.

So, *Carter*, volume 1, tab 3, a case about the ship *Nivanga*, and the claim in short was that the plaintiff said, well, certain survey certificates were issued negligently by the Ministry of Transport and by effectively a private certifier to whom the responsibilities passed in the context of the *Nivanga* being purchased by a New Zealand purchaser from Fiji and brought over here, the allegation being that the purchase was conditional on a satisfactory certificate of seaworthiness. The judgment of the Court delivered by your Honour Justice Tipping.

The background is set out in paragraphs 3 and following, and at paragraph 9 essentially as defects were identified and attempts to renegotiate the purchase price failed, so too the purchaser became insolvent, and paragraph 9, CWH, the purchaser, placed in liquidation a little more than a year later. Auckland Harbour Board seized the *Nivanga* and sold it for scrap, realising $500. This can be compared with the original purchase price which in New Zealand dollars was about $200,000.

I think we can safely assume that the same defects that reduced the value of the ship for its owners from $200,000, which is what they paid, to $500, also were implicated in the safety and seaworthiness issues which, it was alleged, had negligently not been identified by the people carrying out the inspections and issuing the certificates, functions exactly corresponding to those of a local authority. You inspect. As a result of the inspection, you issue a certificate. If you carelessly inspect, your certificate will be flawed. So there's that same link between inspection and certification.

And the nature of the claim, which is important, is summarised in the last few lines of paragraph 10, beginning at line 28. "All that needs to be said for present purposes about these various capacities in which the plaintiffs sue is that they each allege different forms of economic loss said to have been incurred by the plaintiffs as a result of relying on the allegedly negligent and erroneous survey certificates."

The Court then moved to look at the legislative environment, worked through the relevant statutory provisions which referred to the survey, are determining whether or not the relevant requirements of this Act and their many rules and regulations are being complied with. So it's a little bit like whether the Code's being complied with, Your Honour, exactly the same point and whether or not the ships, in all respect, are satisfactory for the service for which a ship is intended to be used, tum te tum te tum, additional survey requirements in paragraph 14, section 216 again refers, subsection (1)(c), "Such statement of the ship's fitness, in the opinion of the surveyor, are to ply on the voyages or the trade for which the certificate is issued so, again, a general statement about fitness to ply on the voyages or trade," and then paragraph 15. "From these provisions it can readily be seen the survey requirement wasn't as focused on matters of safety and seaworthiness of ships. A suggestion there was a difference between the concepts and safety and seaworthiness rejected. The purpose of this survey requirement is underlined by the passages we've emphasised and the citations from the legislation made above also apparent from the general scheme of this part of the legislation."

Paragraph 16 looks at further support for that and if we go down to line 39 we see again the important statement, "There is nothing in the legislative scheme, or in the individual sections, suggesting that survey certificates were intended to be issued or relied on for economic purposes." The subsequent legislation is then reviewed in 17 and 18 and again in relation to the new legislation, the Maritime Transport Act 1994 at line 16 on the next page 167, "There is no suggestion anywhere in any of the relevant legislation that survey certificates were intended by Parliament to be relied on by anyone, let alone the owners (actual or prospective) of ships, when making commercial decisions concerning a particular vessel. The protection of commercial interests is not a purpose of the legislation." This is a total orthodox process of identifying the interests sought to be protected.

CHAMBERS J:

Were these certificates kept somewhere centrally so that people could look at them?

MR GODDARD QC:

Yes I believe so and also, I think, posted on the ship.

CHAMBERS J:

Why in economic terms, and you know far more about economics than I do, but why is it considered sensible that if there are 20 prospective purchasers of a unit or a hotel unit or a ship, it makes more sense economically for each of those prospective purchasers to get a detailed report as to the state of the thing they are thinking of buying, rather than relying on a certificate that's been given by an expert and which has been made publicly available. What's the economic argument that supports that?

MR GODDARD QC:

I think the answer is that that's the wrong question because the argument that I'm making doesn't require that there be 20 separate inspections. Take the example of a car, your Honour. What an owner can do seeking to sell it and to maximise the price they obtain is pay the AA to carry out, or some other inspector, to carry out an inspection and made the available to every purchaser so that's actually, without needing to rely on your warrant of fitness what you do – and we don't in relation to cars, what you do –

CHAMBERS J:

Well the equivalent of the owner here did get a code of compliance certificate.

MR GODDARD QC:

But they didn't go to a private person who was willing to assume responsibility to purchasers in exchange for a fee.

CHAMBERS J:

They might have gone to a private certifier.

MR GODDARD QC:

If they went to that certifier and they agreed with them that they would assume responsibility to people in contract, under the Contracts (Privity) Act over and above what was required for the statutory purpose, then they could have done that and that would have removed the need to get multiple reports. The need for multiple reports is quite a separate issue.

There are many ways that you can achieve economic efficiency of a single report if that's expected to maximise the return from sale and that's something that vendors in many markets do, do. They sell worth certificates or warranties or, which can be

relied on but the key point here is that when you go to the safety regulator, all they are doing is providing an assurance of safety for the purpose to people whose health and safety interests are in issue. You have not bought from them protection for your commercial interests and they are not providing it and the public purse should not be called on to provide it because that's not why we regulate.

So, having dealt with the purpose of the legislation, the Court discussed the High Court judgment, then a very important restatement of common law negligence general principles, which has been referred to many times by the Courts, including this Court in *Couch* as a very helpful and concise summary of the way in which tort works.

Twenty-six is important in the context of statements but also, of course, inspections. Most cases, "No voluntary assumption of responsibility. The law will, however, deem the defendant to have assumed responsibility and find proximity accordingly if, when making the statement in question, the defendant foresees or ought to foresee that the plaintiff will reasonably place reliance on what is said. Whether it is reasonable for the plaintiff to place reliance on what the defendant says will depend on the purpose for which the statement is made and the purpose for which the plaintiff relies on it. If a statement is made for a particular purpose, it will not usually be reasonable for the plaintiff to rely on it for another purpose. Similarly, if the statement is made to and for the benefit of a particular person or class of persons, and the plaintiff is not that person or within that class, it will not usually be reasonable for the plaintiff to place reliance on it so as to oblige the defendant to assume responsibility for carelessness in its making. Hence, before the law of torts will impose on the author of a statement a duty to take care the plaintiff must show that it's appropriate, on the foregoing basis, to hold that the author has or must be taken to have assumed responsibility to the plaintiff to take reasonable care in making the statement."

Then there's an inquiry into policy considerations. Line 12, "When, as in the present case, the environment which brings the parties together is legislative, the terms and purpose of the legislation will play a major part in deciding the issues which arise. It is the legislation which creates and is at the heart of the relationship between the parties. It will often contain policy signals bearing on that aspect of the inquiry." And in the commercial building context, that's all there is. In the residential one, there's decades of history and the symbiotic relationship between case law and

expectations. That doesn't exist. All we're looking at is the legislation and the policy signals it contains. No new criteria in the foregoing and response to commentary.

Then we get to, over the page, page 170, the common law negligence, this case. "Mr Ring and Mrs Fee argued that as the legislative purpose in the present case was safety, it was not reasonable for the plaintiffs to rely on the survey certificates for the quite different purpose of protecting their economic interests. Mr Hooker, who accepted that safety was one of the purposes, did not, in our view, advance any other tenable purpose. He argued the Court should find that protection of economic interests was within the statutory purpose. We find ourselves quite unable to accept that contention. The statutory scheme and language simply do not support it. It cannot reasonably be said that the MOT and M&I assumed or should be deemed to have assumed responsibility to the plaintiffs to take care in issuing the certificates not to harm their economic interests in the *Nivanga*. Hence the necessary proximity between the parties is absent." So that's why I said, in answer to your Honour Justice Tipping's question yesterday, this goes to proximity.

"There are essentially two reasons for that conclusion, one more fundamental than the other, albeit each is fatal to the plaintiffs' case. The first and more fundamental problem the plaintiffs face is that, as we have discussed, the statutory environment is such that the purpose of the certificate was entirely different from the purpose for which the plaintiffs claim to be entitled to place reliance on it. The second is that in none of the capacities in which the plaintiffs claim to have suffered loss were they the person or within the class of persons who were entitled to rely on the certificates. They do not sue as passengers on the vessel or as crew or as other seafarers, damaged in a material way by the allegedly negligent certificates. In a sense the second problem can be viewed as a manifestation of the first. We mention it simply to exemplify the plaintiffs' essential difficulty in another way. For these reasons, we hold that there was no relevant proximity between the parties so as to satisfy that criterion for the imposition of a duty of care."

Just pausing there, the fact that these defects could have been remedied by expenditure by the owners was not seen by the Court as overcoming the difference between those two interests and the interests that were and were not protected by the Court. It could hardly be thought that if that equation was a valid one it wouldn't have occurred to the Court in this case. It was not seen as a relevant response.

Thirty-five. "Had it been necessary to address policy issues, we would have found that the plaintiffs were in difficulty on that limb of the inquiry as well. MOT and M&I were in the position of regulators of the safety of shipping in New Zealand. There is a legitimate public interest in regulatory bodies being free to perform their role without the chilling effect of undue vulnerability to actions for negligence. Whether it be a case of failing to issue or of issuing a survey certificate, the threat of legal liability for economic loss might subject the survey authority to inappropriate pressures to the detriment of the overall public interest."

Exactly here too, inappropriate pressures on local authorities to require inurance, precaution, inspection, investment, playing safe in relation to building techniques in a way which is exactly contrary to the policy objectives of the 1991 Act.

Imposing charges for insurance which involve effectively a collective scheme on commercial building owners in a way that's inconsistent with the objective of the Act to minimise interventions and costs.

So, "For this kind of reason," continuing at line 6, "the trend of authority is generally not to hold the regulator liable to the regulated for economic loss, even if negligence can be shown, *Yuen Kun Yeu*, *Fleming*, *Cooper v Hobart* (2001) SCC 79. We agree with Mrs Fee that the New Zealand building inspector cases are sui generis."

Why are they sui generis? They're sui generis because they depend not on the legislative policy and the harms which the current legislation intends to protect against but because they depend on a vulnerability established through decades of experience under previous regimes and in other social conditions. So it's confusing to reason from those to the sort of matters before the Court in *Carter* or in this case because other things are in play.

This is not a decision that is in any sense unique or special. I don't mean that in any disrespectful way, your Honour but rather to suggest that it's very much within the mainstream. Paragraph 38 lists numerous cases involving ships and planes and other forms –

TIPPING J:

Well I think there is a helpful link in *Caparo* with *Reeman v Department of Transport* [1997] 2 Lloyd's Rep 648, that's why I mentioned it there.

MR GODDARD QC:
Yes.

TIPPING J:
It needs careful attention I think in this case.

MR GODDARD QC:
The *Caparo* link, yes exactly and that's why – it's the next case on my list. I should say that, in terms of time, I'm not making wonderful progress but I'll do my very best.

I think that's really – and then at 39, the Court concluded, "For all these reasons our ultimate conclusion is that it would not be fair, just or reasonable to impose on the MOT and M&I duties of care of the kind asserted against them, i.e. to take care to guard the plaintiffs against economic loss as a result of their relying on the survey certificates upon which the case is based." So, should be struck out.

We can turn then to *Caparo* and the passages referred to by the Court in *Carter*. That's in volume 2 of the bundle, under tab 12 and it's one of the cases which is in the bundle in a slightly funny way.

The principle speeches were delivered by Lord Bridge and Lord Oliver. Lord Bridge's speech begins at 614 but I think, given time pressures, we should perhaps jump to 625, letter (d), His Lordship describes the position of auditors in relation to the shareholders of a public limited liability company, quoting Lord Justice Bingham in the Court of Appeal, very much along the lines one would expect.

If we turn over the page to 626, just above letter (c), after that quote, we see, "No doubt these provisions establish a relationship between the auditors and the shareholders of a company on which the shareholder is entitled to rely for the protection of his interest. But the crucial question concerns the extent of the shareholder's interest which the auditor has a duty to protect. The shareholders of a company have a collective interest in the company's proper management and insofar as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers and general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy."

It goes on to say, beyond that, the interests are not meant to be protected. Over the page, 627, halfway between letters (c) and (d) is one of the two paragraphs on which I place particular emphasis, having just discussed the distinction between exercising rights attached to your existing shares and purchasing additional shares, his Lordship said, "I believe it is this last distinction which is of critical importance and which demonstrates the unsoundness of the conclusion reached by the majority of the Court of Appeal."

Then this passage, "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 suffered is relevant to the existence and extent of any duty to avoid or prevent it, *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (HCA). Assuming for the purpose of the argument that the relationship between the auditor of a company and the individual shareholders is of sufficient proximity to give rise to a duty of care, I do not understand how the scope of that duty can possibly extend beyond the protection of any individual shareholder from losses in the value of the shares which he holds. As a purchaser of additional shares in reliance on the auditor's report stands in no different position from any other investing member of the public to whom the auditor owes no duty."

ELIAS CJ:

Do we have *Sutherland Shire* in the bundle?

MR GODDARD QC:

No it's not in the casebook. Would it be helpful if I obtained a copy?

ELIAS CJ:

No it's all right I can get hold of it. Justice Brennan was –

MR GODDARD QC:

Dissenting.

ELIAS CJ:

Dissenting, yes.

MR GODDARD QC:

I think in *Sutherland Shire* but not on that issue.

TIPPING J:

I don't think – this point I don't think was the subject of argument or dissent.

MR GODDARD QC:

This issue was not the area of controversy.

ELIAS CJ:

I'm not sure that that's right but that's my hazy recollection of the case.

TIPPING J:

Have to check it out then.

MR GODDARD QC:

Let me turn now to page 651 of *Caparo* and in the speech of Lord Oliver after discussing the decision of the Court of Appeal and the role of auditors, His Lordship said, on page 561 at letter (f). "It has to be borne in mind the duty of care is inseparable from the damage which the plaintiff claims to have suffered from its breach. It is not a duty to take care in the abstract but a duty to avoid causing to the particular plaintiff damage of the particular kind which he has in fact sustained."

Can't improve on the analysis in the judgment of Justice Brennan in *Sutherland Shire* which is then set out again and over on 652 from just below letter (c). "In seeking to ascertain whether there should be imposed on the advisor a duty to avoid the occurrence of the kind of damage which the advisee claims to have suffered it is not, I think, sufficient to ask simply whether there existed a 'closeness' between them in the sense that the advisee had a legal entitlement to receive the information on the basis of which he has acted or in the sense the information was intended to serve his interest or to protect him. One must, I think, go further and ask in what capacity was his interest to be served and from what was he intended to be protected. The company's annual accounts capable of being utilised for a number of purposes and if one thinks about it it's entirely foreseeable they may be so employed. But many of such purposes of absolutely no connection with the recipient status or capacity.

Before it can be concluded that the duty is imposed to protect the recipient against harm which he suffers by reason of the particular use that he chooses to make of the information which he receives, one must, I think, first ascertain the purpose for which the information is required to be given," and so on.

Of course it's a statutory purpose and at 654, over the page, letter (d), just above letter (d), "To widen the scope of the duty to include loss caused to an individual by reliance upon the accounts for a purpose for which they were not supplied and were not intended would be to extend it beyond the limits which are so far deducible from the decisions of this House. It is not, as I think, an extension which either logic requires or policy dictates. I'm not prepared to follow the majority of the Court of Appeal in making it."

So an inquiry into the statutory purpose for which auditors supply their report and a conclusion that it's only the interests sought to be protected by this legislation the protection of which auditors are accountable for.

Boyd Knight picks up and adopts those passages of *Caparo* and applies them in New Zealand. It's in volume 1 under tab 9. It's the case I mentioned earlier in relation to auditors who had given a report contained in a failed finance company's prospectus, a cyclical form of litigation this and we are seeing quite a bit of it again now, and importantly, if we look at, the headnote summarises it accurately on the first page of, line 39. "*Boyd Knight* admitted that reasonable care on its part would have led to the discovery of certain frauds and (b), if they had been discovered the audit report would not have been given and the prospectus would not have issued."

So giving the report was a but-for cause of the investment and of the investors losses but they failed in their claim and they failed because the loss flowed to them not by their being misled by inaccurate information in the report but simply from the fact that the inaccurate audit report was given and the critical passages are in the judgment of Justice Gault, paragraphs 5 and then 8 through 15 and perhaps particularly 14 and 15 where the concept of the type of damage suffered is considered, "It is necessary to contemplate loss suffered by investors who did not rely on the information in the accounts," a citation from *South Australia Asset Management* and the point that you don't owe a duty of care to protect someone for losses which would have occurred even if the information had been correct. A slightly different point but the same basic theme.

Then, perhaps more importantly, in the judgment of his Honour Justice Blanchard, beginning at paragraph 45, discussing *Caparo*, it sets out the passage from *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 (CA), of the President. Justice Richmond explains why that means, at paragraph 47, lines 41 and following, that to the extent the statement of claim directly relied on negligence in the performance of the audit, the claim was bound to fail and then 48, "alleged duty of care said to arise because an auditor signs an audit report to enable an issuer company to comply with the Securities Act must be considered with this background in mind. In the case of a statutory duty, the scope of the duty is determined by deducing the purpose of the duty from the language and context of the statute," and then it is explained over the page that the same applies to common law duties of care arising in a statutory context.

Paragraph 52, "An auditor giving such a report must know full well that in order to raise funds from the public the company is obligated to give the document in which it appears to investors and will do so as part of a process to encourage them to invest. The audit report will obviously give comfort in relation to the financial statements. I have no doubt that these factors give rise to the necessary closeness of relationship between the auditor and those who invest on the strength of the prospectus, so that the auditor owes them a duty to be careful in the giving of the certificate...The harder question is as to the nature of the duty, when and to whom it is owed. On this question the common law background which I have been discussing and the respective roles of the auditor and trustee are of importance," and then the two passages from *Caparo* that I took the Court to are set out emphasising that you need to ask to whom is the duty owed and by reference to what kind of damage or harm.

It's not an abstract duty. It's a duty that has to be defined by reference to a particular type of harm which is complained of by the plaintiff in the relevant case and the implications of that for the case before the Court and then set out in paragraphs 54 through to 56 and the conclusion is reached in 57 that even where, "if the accounts had been accurate no prospectus would have been issued – in other words, that "but for" the inaccuracy there could have been no loss to a new investor." The limited scope of the duty of care must be remembered, must all be a reliance on the basic features of the financial statements, evidence they were considered by the plaintiff and, taken as a whole, relied on.

So, in other words, what is the interest sought to be protected. It's an interest in receiving accurate information and if that interest was not compromised because no attention was paid to the information there is no liability even though the negligent audit statement was a but-for case of the relevant loss.

Charterhall. My learned friend took the Court to *Te Mata Properties* and identified some of the difficulties in understanding that judgment which result from its rather unusual structure in which the majority wrote about three paragraphs and the minority about 90.

One can only speculate on the process by which that particular allocation of writing tasks evolved but *Charterhall* is I think a much more helpful, more clearly structured analysis of the issues and it does look at them afresh because there was a whole new cause of action in play there which the Court had to look at.

So volume 3, tab 33 and I think Your Honour Justice Chambers was much too self-deprecating about how much original analysis there was in this judgment because it really did engage with the issues as it needed to.

So, a luxury lodge suffered a fire, the owners fixed the damage and then sued to recover cost of repairs, lost income and damage to chattels. The judgment of the Court delivered by Justice Arnold and the background is set out.

ELIAS CJ:

Sorry, it was economic loss in the sense of loss of income?

MR GODDARD QC:

And cost of repairs.

ELIAS CJ:

And cost –

WILLIAM YOUNG J:

Might have been a bit unlucky, mightn't it? Was there any particular emphasis placed on the fire in the way in which the fire provisions focus on the value on the building?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Well, there was?

MR GODDARD QC:

Yes, there was.

WILLIAM YOUNG J:

Right.

MR GODDARD QC:

But the – well, there was, is all I need to say for present purposes. Paragraph 13, the Court notes that after Justice Fogarty had given his decision declining to strike out, the Court of Appeal had decided *Te Mata Properties*, and at line 15, "Mr Hunt for Charterhall and Mr Parker for Blair and Co argued *Te Mata Properties* could be distinguished, for reasons we discuss below. Finally, we note that, prior to the hearing, Mr Hunt submitted a draft amended statement of claim which adds a further cause of action against the Council. We deal with that below also." It's that further cause of action which the Court had to consider from scratch.

The Court, after summarising strike out principles, looked at the claim against the Council and said at 17, "two decisions of the Court which require discussion – *Te Mata Properties* and *Carter*" – need firstly to discuss *Hamlin*. Goes through *Hamlin* in some detail. At 23, the Court notes that "the features identified by Justice Richardson go to residential properties built for typical New Zealand homeowners." Then at line 13, "But they have little or no relevance in a commercial context," so *Three Meade Street*.

ELIAS CJ:

Sorry which page – oh yes, thank you.

MR GODDARD QC:

Then 24, "Turning then to *Te Mata Properties*, we begin by reiterating that no party suggested the case was wrongly decided," and that's exactly right, as your Honour

Justice Chambers put to my learned friend, this case was decided on the basis that *Te Mata Properties* wasn't being challenged.

The decision was summarised. Going over the page. Here we get to the new analysis by the Court of Appeal in this case, paragraph 28, "As we have already noted, prior to the hearing of the present appeal, Mr Hunt filed a draft amended statement of claim", amended the allegations in the claim against the Council, based on its actions in considering, approving and administering the consent and included a new cause of action which alleged the Council owed Charterhall, duty to exercise reasonable care and skill to ensure the lodge would provide safe conditions for those occupying it and the appellant and all users of the lodge will be safeguarded from injury, illness or loss of amenity and protected from harm by fire. So this was an attempt to run –

WILLIAM YOUNG J:
But was the particular provision in part F of the Building Code which unusually treats the building as properly the protection of the Building Code relied on?

MR GODDARD QC:
Certainly there was discussion of the limb of section 6(2) which pulls in property but I can't remember if the provision of the Code was every gone to, it might not have been. I genuinely don't remember. It's not referred to in the judgment.

A lot of attention to the special risk of fire and concerns about it in the Prevention of Fire Metropolis Act. It was all explored in some depth before Justice Fogarty, who was particularly concerned about the fire aspect, as we'll see in a moment.

So, 29, "Given the Court's decision in *Te Mata*, if Charterhall is to avoid having its claim against the Council struck out, it must show it is arguable that under New Zealand law the Council owed it a duty of care to prevent the construction of a building which contained a defect that threatened the health and safety of anyone who might occupy it for the time being". Return to this below.

Then there's a discussion of *Carter* and 32 is quite a helpful paragraph. "The present case is distinguishable from *Carter* in the sense that the new cause of action in the amended pleading does seek to invoke directly health and safety concerns (assuming for the moment that local authorities' obligations relate in whole or part to

health and safety). However, in another sense it is not distinguishable. This is because, despite the previous point, Charterhall does not sue as a person whose health and safety has been put at risk. It is, after all, a company which owns and operates a luxury lodge. It sues because its economic interests have been injured, as is clearly shown by the loss of income component of its claim. We discuss the significance of this point below." There are loss of income elements in the present claim before this Court as well, I just mention in passing.

Submissions for the respondent summarised, 34, 35. 36, "Despite these submissions we are satisfied that the effect of the decisions of this Court in *Te Mata Properties* and *Carter* is that Charterhall's claim against the Council cannot succeed and must be struck out."

"As Justice Casey noted in *Hamlin*, the duty of care recognised in New Zealand cases 'has not always been limited to the avoidance of physical damage to property or danger to health and safety of occupants: in appropriate situations a wider duty not to cause economic loss to the plaintiff has been recognised and damages awarded on that basis'. So the *Hamlin* duty of care is not based on a need to protect health and safety but on the wider considerations identified by Justice Richardson. The imposition of the duty essentially reflects a value judgement that seeks to recognise the particular housing arrangements that have developed in this country. As we have said, these considerations have little relevance in a commercial context."

Reference to *Couch* in 38. Over at 39, "As we have already said, Charterhall cannot be characterised as vulnerable in the same way as house owners." This is the essence of it. "As is to be expected, it had its own advisers. It was able to (and presumably did) manage the risk of errors by its contractors through the contractual arrangements which it made with them. This tells against the imposition of a duty of care".

So that's the link that I was seeking to make earlier. The ability to contract goes to vulnerability. It's not just the poor argument that if you can sue other people you don't need to be able to sue the Council. It is that if you can protect yourself, and it's reasonable to expect people to protect themselves and to live with the consequences of the extent to which they have or have not done so, if they are not vulnerable in that sense then duties of care in tort are not required, precisely the argument contemplated by the President in *Hamlin* in that dictum.

Forty – "the loss which Charterhall suffered was not the direct result of the Council's actions, in the sense that the Council did not itself physically damage the lodge." "The allegation is the Council allowed the lodge to be built with an inherent defect." "Whether or not such loss is properly," I'm at line 14, "properly or usefully characterised as simply economic loss, it is of the same type as loss resulting from leaky building syndrome or defective foundations. That is, loss of the same type as at issue in *Te Mata*." Reference to fire as a hazard.

Forty-two. "Nor do we see the new cause of action based on health and safety as affecting the analysis. Clearly the Building Act does have a purpose of protecting the health and safety of those who use buildings, as Mr Goddard accepted." Reference to *Three Meade Street*, *Mt Albert Grammar*. "But the fact that a body has statutory responsibility for a task (even in the form of a statutory duty) does not necessarily mean that it will be liable at common law for damages to anyone who suffers loss as a result of its careless performance of the task". And that's been very well established. It refers to a text which summarises the cases. "And even if the imposition of a duty of care in relation to health and safety was consistent with the policy of the Building Act, Charterhall does not, as we have already noted, sue as a person whose health and safety has been jeopardised. It sues as an entity which has suffered financial loss, in part through property damage but principally through loss of income."

There was a similar situation in *Mt Albert Grammar*. There the Minister of Education and Board of Trustees advanced the health and safety argument in support of their claim against the Auckland City Council for damages resulting from the construction of school buildings which suffered leaky building syndrome. In the course of striking out the claim, Justice Asher noted that if the focus of the building legislation was on health and safety, the Minister and the Board were not the correct parties. The Judge noted the loss was purely financial and there were other mechanisms for ensuring health and safety obligations were met.

That's a very thoughtful and carefully reasoned judgment which is in the bundle and I don't have time to go to it but I would commend it to the Court's attention. His Honour goes through the expectations that we can reasonably have of the Minister and Boards of Trustees that occupants of school buildings will not be exposed to risks of health and safety, that those risks will be obviated through their

voluntary action if not the local authority can compel it. What they are left with is not a risk. We know the snail is in the bottle and someone has taken the snail away, it's just the wasted expenditure on the ginger beer.

44, in the result the Court said, and I always like paragraphs that begin in this way, we "accept Mr Goddard's submission" that the Building Act does not seek to protect the value of buildings, or income streams from them, for commercial investors. In short, as was the case in *Carter*, the losses claimed are not ones against which the Building Act seeks to protect.

WILLIAM YOUNG J:

All of this does rather seems to have been based on a complete misunderstanding of section (f), part F of the Building Code, doesn't it, because I mean, in reality if you look at that – I know it's not a complete answer but there is a sort of a series of assumptions that are incorrect.

MR GODDARD QC:

The relevant Code provisions were only concerned with injury to people and harm to other property –

WILLIAM YOUNG J:

No.

MR GODDARD QC:

– and this –

WILLIAM YOUNG J:

But fire damage is damage to the property, isn't it?

MR GODDARD QC:

No there are several different Code provisions and some of them are concerned with – the issue I think in this case if I remember rightly, was a spread of fire issue and the concern there is other property not the property in question. There was a – I don't want to get bogged down in it now.

WILLIAM YOUNG J:

Bogged down in it, okay, but I mean it is an interesting point because there would be a reasonable case for saying that where there has been a fire caused by a failure to comply with fire code requirements which could have been but wasn't picked up by the building inspector, then the owner might have a claim for damages.

MR GODDARD QC:

Not in respect of lost income I think from the building work, was the bulk of the claim in this case, that's not an interest sought to be protected.

ELIAS CJ:

That's not a claim here.

MR GODDARD QC:

Yes it is. It is a claim here.

ELIAS CJ:

It is a claim?

MR GODDARD QC:

It is a claim here. Among the losses sought to be claimed are lost income from the hotel units while remedial action is taken.

ELIAS CJ:

Right.

MR GODDARD QC:

So it's the cost of repairs, lost income, in some cases losses on sale. People have sold their units and are saying, well we've realised less and then the stress damages that are the general damages that are a feature of most of these claims. What there is no claim for is any harm to health and safety or a claim for damages by reference to whatever needs to be done to obviate a risk to health and safety. It's the whole of the repairs and the whole of the loss of income while they are carried out that's sought to be recovered.

And so, at 45, these considerations point against a finding of proximity of the sort that exists in relation to the owners of residential dwellings. Further, it is implicit in what we have already said that we do not consider that policy factors justify the imposition

of a duty of care and then there are some four policy points that are identified. Duty of care owed to all users of commercial buildings, a wide class, and it's important I think to bear in mind the huge significance that allowing this appeal would have for local authorities in terms of the huge additional number of properties and value of properties in respect of which duties of care would be owed. This is not a single or one-off case. It has implications literally for thousands, potentially, of claims of a kind that have never before succeeded in New Zealand or England or Australia or Canada.

(b) "While the Council exercised some control in relation to the lodge (for example, Charterhall could not build it without a building consent)," and this is important, "the party best placed to protect Charterhall's interests in the design and construction of the lodge was Charterhall itself. It was able to, and did, retain architectural and other experts. Among these are the people primarily responsible for the defect in the chimney design, and therefore for the losses which Charterhall suffered. It is to them that Charterhall should look to recover its losses. As a matter of principle, we see no justification for requiring councils (in effect) to act as insurers for building owners against the negligence of their contractors, or against the possibility that those contractors will become insolvent, so that the owner cannot recover from them." There was no contractual relationship between the overseas architects in that case and importantly, 30, but that does not meet the point. Charterhall was able to protect its position in relation to the work performed by its architects, i.e. it's not vulnerable. The policy rationale for tort is just not invoked.

(c) The "Building Act provides little or no support for the imposition of a duty of care in a case such as this" –

ELIAS CJ:

Well it's an interesting comment to have made and then say but that does not meet the point because they seem to be saying both?

MR GODDARD QC:

No, they're saying you could have contracted, so the fact that they chose not to contract is irrelevant, so that is exactly what – there was an argument here that the overseas – there were two lots of architects and overseas –

ELIAS CJ:

It's all right. Yes, I understand that.

MR GODDARD QC:

Yes and what the Court was saying was, you can't say but we didn't contract to work with them because you could, you could have contracted for those rights and if you chose not to and that may have been cheaper for you, such is life and that's consistent with the philosophy of the Building Act.

"(c) In our view, the Building Act provides little or support for the imposition of a duty in a case such as this. It's important to note that the Court in *Hamlin* justified the imposition of a duty in respect of house owners, essentially on the basis of public expectation, house owner reliance and practice. Rather than identifying anything positive in the Building Act to support the imposition of the duty, the Court noted there was nothing in it to cast doubt on the many earlier judicial decisions which it held there was a duty. Given the absence of expectation, reliance and practice in the present context, and the absence of positive indicators in the Building Act, we see no policy justification for the imposition of a duty of care." It puts much better than I do, the argument I've been trying to make the morning which is unsurprising perhaps, given its author.

"Finally we note the imposition of a duty of care in the context of commercial buildings has been rejected in the United Kingdom and in Australia. There is no reason that New Zealand should adopt a different approach in the commercial context. Acknowledge the Canadian Courts have recognised a duty to take care to avoid dangerous defects in the context of commercial buildings but the distinction between dangerous defects and other defects has difficulties, *Murphy*, *Rolls-Royce*. In any event, that approach does not seem to be consistent with this Court's analysis in *Carter*." The fact that defects were dangerous didn't help recover the economic loss.

So "we consider that neither the existing", which was subject to *Te Mata*, "nor the proposed", which wasn't, "cause of action against the Council has any prospect of success, so Charterhall's statement of claim against the Council must be struck out." This is a very carefully reasoned decision of the Court of Appeal which reflects an understanding of the statutory scheme and the New Zealand and overseas case law and, in my submission, it is not a decision that should be reversed by this Court, as the appellants are inviting the Court to do. It is a careful consideration of the open

question identified by the President in *Hamlin* which gives a principled and cogent answer to it.

I'm not going, given the time –

ELIAS CJ:

Well I'm not sure that the Court can sit tomorrow but I want to enquire of counsel whether it's possible?

MR GODDARD QC:

Yes, I can.

MR FARMER QC:

I've got a hearing in the High Court, your Honour.

ELIAS CJ:

Yes, all right, thank you. We will probably have to set some time limits but we might confer about this and give another indication when we resume. We'll take the adjournment now.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.17 PM

ELIAS CJ:

Did counsel discuss at all when we can resume because we feel we are not going to finish today. Mr Farmer, you are not available tomorrow, are you available Friday?

MR FARMER QC:

No, your Honour.

ELIAS CJ:

When are you available Mr Farmer.

MR FARMER QC:

I could come back next week but I've discussed this with my learned friend and I believe we will finish today.

ELIAS CJ:

All right. We don't want this rushed. If we don't finish and this might provide some incentive, I'm not sure but if we don't finish, we could resume next Monday if that suited, or Friday of this week?

MR FARMER QC:

No, I can't do Friday. Monday, if you can guarantee the weather. I had eight hours this Monday at Auckland Airport waiting to get on an aeroplane.

WILLIAM YOUNG J:

We can provide that guarantee.

MR FARMER QC:

Of course, your Honour.

MR GODDARD QC:

Your Honour exercising new powers.

ELIAS CJ:

Mr Goddard?

MR GODDARD QC:

I can do Thursday or Friday this week. I'm closing in a long trial all of next week, so I'm afraid I can't do next week. The following week, beginning the 2nd of April, I'm clear all week if that's any use to the Court.

MR FARMER QC:

Yes, I could do that week.

TIPPING J:

I'm not.

ELIAS CJ:

Others aren't, right.

MR GODDARD QC:

It would be helpful to know whether we're going to continue because to give my learned friend the time that he needs for his reply which is what we did discuss, I would need to finish by 3.30 and that would certainly involve rushing. I would be galloping through the rest of my material to do that.

ELIAS CJ:

Well, speaking for myself, I don't want you to gallop, so let's decide that we are going to need another day and I'm just trying to – what date are we then talking about, the?

MR GODDARD QC:

We'd got as far as the week beginning the 2nd of April which leads us through to Easter.

ELIAS CJ:

That's no good for the Court.

MR GODDARD QC:

No. So I don't know how the Court would be placed perhaps on the 18th or 19th or 20th?

ELIAS CJ:

Well I'm really reluctant to see this go off as long as that. Mr Farmer, when can you come?

MR FARMER QC:

Well, all of next week.

ELIAS CJ:

Oh, all next week –

WILLIAM YOUNG J:

No, no, it's Mr Goddard that's got a –

ELIAS CJ:

Mr Goddard can't do next week.

TIPPING J:

No day next week?

MR GODDARD QC:

I –

ELIAS CJ:

You're not essential –

MR GODDARD QC:

I'm not on my feet for the whole of – no, I'm not essential. It's closings, it's a week of closings after three weeks of trial. I will be on my feet second in that, so I could –

TIPPING J:

A week of closings after three weeks of evidence, that seems excessive?

ELIAS CJ:

Heavy law.

MR GODDARD QC:

Yes, lots of law.

WILLIAM YOUNG J:

Couldn't you leave it to your juniors for Mr Farmer's reply, if we finished you today?

MR GODDARD QC:

I'd rather – yes, that's possible, or I could, I'm sure, miss one day of next week, while other parties are closing –

ELIAS CJ:

Which day then?

MR GODDARD QC:

I think probably it would make sense for me not to be there on the Monday, on the basis that the plaintiffs are closing first, so they'll go Monday, Tuesday. That will give me time to catch up.

McGRATH J:

You might be able to negotiate a Tuesday start, Mr Goddard, next week.

MR GODDARD QC:

Or even a Wednesday start. Oh, Tuesday start for the hearing?

ELIAS CJ:

Yes.

MR GODDARD QC:

Being able to play the card of the Supreme Court having – yes, that's not bad, your Honour.

ELIAS CJ:

I think that –

McGRATH J:

I couldn't possibly comment on that.

ELIAS CJ:

Which Court are you in?

MR GODDARD QC:

The High Court, in front of Justice Fogarty, he's sitting up in Wellington for that purpose.

ELIAS CJ:

Oh, he'll be eminently reasonable, I'm sure. Well I think we better aim for Monday and, I mean, that is not convenient for some members of the Court but I think it would be better to have it all heard in an orderly way, so that would be good. Thank you.

MR GODDARD QC:

Thank you, your Honour, so that's Monday the 26th?

ELIAS CJ:

Yes, thank you. All right, carry on, Mr Goddard.

MR GODDARD QC:

In that case, I shall refrain from galloping and merely proceed at a reasonable – something better than a walk still I hope, a trot perhaps. I do want to go to my item 9, *Sunset Terraces* because I think I really need to deal with the argument that some passages in that judgment require the Court to accept the appellant's argument, that's in volume 3 of the bundle, under tab 30.

I'm going to focus on paragraphs 46 to 54 and in particular, paragraph 53 which my learned friend returned to numerous times in the course of his submissions and answering questions from the Court. So this is the judgment of the majority, I'm not quite sure what term to use with plurality in the American term –

ELIAS CJ:

It's a dreadful term.

MR GODDARD QC:

It is. Does your Honour have a preferred, or better one?

ELIAS CJ:

The many.

TIPPING J:

Of the four.

MR GODDARD QC:

Of the four, given by your Honour Justice Tipping. After going through the facts of the case and the origins of the *Hamlin* principle, your Honour turned, at 46, to the scope of *Hamlin* and whether it should be confined to the facts of that case or should extend to all residential premises, that is, all premises designed for residential users, the Court of Appeal found to be the right solution in these present cases.

Judgments in *Hamlin* of course, written with the facts of that case in mind. The argument I presented there was that the duty should apply only to single standalone modest dwellings whose owners personally occupied them but that, the Court said, would be an unpersuasive restriction on the duty, quite apart from the difficulty of having to decide when a dwelling was more than modest.

So two themes there which recur. One, that those restrictions are not consistent with the purpose of the duty and second, that it's not capable of efficient administration and those are the two themes that run through the next few paragraphs really.

Paragraph 48, "no principled basis for making the *Hamlin* duty dependent on whether the dwelling in question is stand-alone or part of a block of dwellings or how many dwelling units there are in the block. Any such limitation would, in any event, be inconsistent with the rationale for the duty". So what is that rationale? The "rationale is based on the control which councils have over building projects", item 1 and 2, "on the general reliance which people acquiring premises to be used as a home place on the council to have exercised its independent powers of control and inspection with reasonable skill and care and, in particular, to have exercised with reasonable skill and care its powers of inspection of features that will be covered up." There's a reference at footnote 70 to the linked concepts of reliance and control which was also picked up by the Privy Council.

What's the purpose of the duty? 49, "[t]he duty affirmed in *Hamlin* is designed to protect the interests citizens have in their homes". Now, your Honour Justice Tipping suggested to my learned friend that the idea of the habitation interest had been disavowed, I think was your Honour's term by the Court in *Sunset Terraces,* with respect

TIPPING J:

No, it was only the terminology, Mr Goddard.

MR GODDARD QC:

I was going to say –

TIPPING J:

I just didn't like the terminology but it is referred to in the footnote.

MR GODDARD QC:

And I understood this very much as an acceptance that that interest, labelled perhaps in a different way, not with the terminology, was at the heart of the duty. So the duty is designed to protect the interest citizens have in their homes, and that's a theme that comes through very strongly in the *Hamlin* judgments.

"As a matter of principle and logic that duty should extend to all homes, whatever form the home takes". That's the Court rejecting the submission I made that I was building quite a fancy home with lots of experts at the time and that I wasn't relying on the council, and the Court initially advised me not to make that concession in public and then, as a matter of law, overruled it. So that duty should extend to all homes, whatever form the home takes. "Distinctions based on the ownership structure, size, configuration, value or other facets of premises intended to be used as a home are apt to produce arbitrary consequences". So that's the arbitrariness not linked to the policy. "Furthermore, the *Hamlin* duty must be capable of reasonably clear and consistent administration". The need for a clear line, a workable test for the many Courts and tribunals that have to consider this.

50 deals with the argument that councils should not owe a duty of care in cases where professionals have been involved. That is not a viable proposition for several reasons and I accept completely that, put in those terms, it's not a viable proposition. To say merely, oh, professionals have been involved so there should be no duty of care is a poor argument. Lord Justice Sachs, not viable as this Court said here, but that's not the argument I am making here and I want to emphasise that the vulnerability argument that is being made in this case is not the argument addressed in paragraph 50 and therefore can't be answered as my learned friend sought to by saying, but, ho, ho, this Court has already rejected that in paragraph 50. My argument is a quite different one. It is that when we come to commercial buildings

matters of industrial construction, to echo the President in *Hamlin*, we can expect the building owner to look after themselves. They are not vulnerable in the relevant sense because whether or not professionals were involved they were able to make the choice about the extent to which they did wish to involve professionals, how much they wished to pay them, what protections and assurances they wished to contract for. So it's a vulnerability argument, not a never mind because there are other defendants argument, and that's an argument that was, for example, fundamental to the analysis of the High Court of Australia in *Woolcock Street.*

That runs through the whole of that judgment and it's also an important factor in the decision of the Court of Appeal in *Rolls-Royce* that Carter Holt was a large commercial player that was able to decide what contracts it wanted to enter into, what protections to contract for if it wanted to contract for rights against Rolls-Royce it only had to say, this is how we want to structure our arrangements. They chose not to, they can be expected to take both the benefits and the disadvantages of the choices they have made. There is not that ignorance, there is not that vulnerability that requires an intervention by the law to provide protection that has not been purchased.

McGRATH J:

So if you look at the problem of someone who is buying after foundations have been covered up, cladding has been imposed, and you have a – any defect has become latent, I'm just struggling a bit with what the difference is between whether it's your dwelling house or whether it's a multi, an investment of some kind that you're going into. I mean, I can understand that – you've pointed at various times basically really saying, well, they can take the risk if they can't contract. If you can't get someone to check it, they can take the risk. Just explain to me what it is is the difference, or is it really just that *Hamlin* is an anomaly and we shouldn't get too concerned about *Hamlin*?

MR GODDARD QC:

No, there is a difference and it really goes to the social value judgement that the Court referred to in the *Hamlin* context, which is whether one can reasonably expect people to either assume a risk or price for it. So your Honour is exactly right. There are some defects that can be identified by examination, but problems with foundations often, but not always, are not among those, and *Woolcock Street* was a foundations problem.

So it was equally difficult for the purchaser in that case to investigate the state of foundations as it would be for someone buying a house, but the difference was that they were a commercial investor buying a commercial building and it was open to them either to seek warranties from their vendor that there was no problem, coupled with such security as they were willing to pay for all the way up, of course, to a letter of credit if you wanted that sort of assurance, although that would be very unusual in this context, or to seek assignments of the vendor's claims against the original builders and experts, or to say, "I am not able to inspect the foundations. You are not willing to warrant their soundness, even though you had this built only a few years ago. In those circumstances, I am only willing to pay you this reduced amount. Do you want it or not?" That's a level of analysis and assumption of risk that our law says it's reasonable to expect from investors in commercial property. It's not a level of sophistication and self-protection that we expect from homeowners. So the social value judgement treats differently the more and less sophisticated.

And your Honour will see this flowing through into legislation in this field shortly, the legislature making exactly that same distinction between homeowners and other people, imposing compulsory non-excludible transmissible warranties of quality to protect the owners of homes, but not other buildings, because we think that they are not able to protect their interests, whereas owners of other buildings are.

McGRATH J:

So that's the 2004 Act?

MR GODDARD QC:

Exactly, your Honour, and the special procedures for pursuing claims which again are confined to dwelling houses in the weathertight homes legislation of 2002 and 2006. So in three statutes enacted within the last decade, we see different treatment of the owners of dwelling houses because of their lesser level of sophistication and their reduced ability to understand and bear risk.

ELIAS CJ:

What about the assumption of sophistication by commercial entities? I mean, New Zealand is a country of quite small business.

CHAMBERS J:

Well, it's so artificial, isn't it? There'll be some very sophisticated commercial and some very unsophisticated in the same way as the investor owners of residential property, in para 53, some of them will be incredibly sophisticated.

MR GODDARD QC:

The difficulty here is that there's a spectrum. At one end of the scale you have the extremely unsophisticated purchaser of a very modest home who plainly has the strongest case for protection, and you pass through owners of increasingly grand houses, increasingly sophisticated owners, then in the commercial spectrum you have small businesses right through to the Carter Holts and Telecoms of this world. I would suggest that it is fanciful to think that Carter Holt, Telecom, Chorus when it's putting lines in the ground and contracting with people to do that and their subcontractors need the protection of tort and should not be held to their contractual protection, they're not able to manage the risk.

As soon as you accept that there are two poles, in respect of which reasonable social difference, social value judgements can be made and, it seems to me, that the law has to draw a line and we're then in the area of line drawing, discussed at some length by his Honour Justice Young in the Court of Appeal in *Sunset* and briefly by this Court in *Sunset* as well and how one goes about that. It is not, in circumstances where the Courts have quite rightly acknowledged, that they're in the area policy, social value judgements and line drawing, it makes no sense to say that because the very smallest investors and the most modest homes need protection and we're going to provide blanket protection to Telecom and Carter Holt.

When I tried to press – in fact it was Justice Arnold in *Sunset* in the Court of Appeal, with some anomalies that could arise on either side of the line, that the Court was suggesting to me as a likely one, the one that Justice Heath has suggested, his Honour said to me eventually, "Well Mr Goddard, if you're going to draw a line, then on the very edges of that line there are always going to be some anomalies, there are always going to be some tensions, aren't there?"

I found it very hard to answer that. His Honour was right but it's not a reason to do something extraordinary and unjustified in relation to large commercial buildings because of a concern to provide protection to the smallest residential ones, especially, and let me add an especially because your Honour is still looking somewhat sceptical, in circumstances where to do so is not required in order to

achieve any of the policy objectives of the legislation that brings the Council into contact with Carter Holt and in circumstances where requiring Carter Holt to pay the Council to ensure the soundness of its new factory would be positively counter to the incentives that the statutory regimes seeks to create.

Back to *Sunset*. That was paragraph 50 which ends by saying, "The part played by the professionals should not absolve councils from liability; the proper way to reflect their involvement is require them, if negligent in a relevant way, to bear an appropriate share of responsibility for the ultimate loss". Yes, except that, in circumstances where the ability of the owner to protect themselves through appropriate contracts is such that they're not vulnerable, there's simply no policy case for a duty of care in tort.

Paragraph 51, "For these reasons we agree with the Court of Appeal that if a building's intended use, in accordance with the plans lodged with the council, is the most appropriate determinant of the scope of the *Hamlin* duty," and that's essentially what I'm asking the Court to say here as well.

"Councils owe a duty of care, in their inspection role, to owners, both original and subsequent, of premises designed to be used as homes. That's as far as the Court needs to go for the purpose of deciding the present appeals", where they need to decide to what extent the Council may owe the same duties of care in relation other premises should be left to what now turns out to be this case. The Court declined my invitation to examine the precise language used by the members of the Court in *Hamlin* but what is clear, I think, is that the housing context in New Zealand was essential to that judgment. It would have made no sense without those references and that was the litigation history that was referred to as the symbiotic source of community expectation, turning into decision, turning into expectation.

Paragraph 53, "The consequence of the *Hamlin* duty being formulated in this way is that the Council's contention that 'investor' owners of residential property should not be within the scope of the duty and must be rejected. By parity of reasoning the Blue Sky units are not excluded...The focus is on the use of the premises, not on what relationship their owners have to the premises," and what I understand the Court to be giving in the next few lines and in paragraph 54, is three reasons for rejecting that argument.

The first is that the pre-1991 Act case law is inconsistent with the exclusion I was suggesting. So the emphasis on settled expectations comes into play to that extent and the absence of any clear language changing the law. That's the reference to *Bowen* and *Johnson.*

Second, "[t]he proposed exclusion", and this is the part my learned friend relies on, "[t]he proposed exclusion would not be consistent with the policy reasons for the duty. Protection of a non-owner occupant, such as a tenant, can be achieved only through a duty owed to the owner, as it is only the owner whose pocket is damaged as a result of the negligence of the building inspector. It is only the owner who can undertake the necessary remedial action". Now that passage says that the proposed exclusion would not be consistent with the policy reasons for the duty.

If we go back to the policy reasons, that's paragraph 49, protecting the interests citizens have in their homes. As I understand this passage, what is said is that our concern is still the interests that citizens have in their homes, the way we are going to protect the interests of citizens who do not own their homes in the safety of those homes.

So we are still in the homes base and we are still concerned with the interest that citizens have in their homes, is by compensating the owner for the loss in value to give them additional funds which may, and hopefully will, be used to meet the cost of repairs, but that doesn't tell us anything about whether other interests, interests of people who visit offices or Courts need to be protected by imposing liability to the owner of those different buildings because the interest citizens have in their homes, which is the rationale for Hamlin, is not in play there and it is important I think to seek to apply this in a manner which is consistent with other lines of authority such as *Carter, Caparo, Boyd Knight* which emphasise that we must pay attention to the interests that are in play and only compensate the interests that are within the scope with the relevant regime unless there is some compelling reason to go further.

That compelling reason to go further is present in relation to homes but it is not present in relation to other buildings and the last couple of sentences in paragraph 53 should not, in my submission, be read or applied in a manner that is inconsistent with *Carter* and *Caparo* and *Boyd Knight.*

The third reason for rejecting the argument is that "the proposed distinction would not be straightforward to administer in cases where the owner was building or buying for both personal residential purposes and to let or sell other units. As Professor Stephen Todd acknowledges in the *Law of Torts in New Zealand*, the intended use of a building provides a reasonably workable test, at least for most cases. We would add that this criterion best satisfies the purpose of the duty and the need for clarity of application".

And one might add, also responds to the point that your Honour Justice Chambers put to my learned friend about the time at which the duty must either exist or not exist and this, I think, is a telling point for focusing on intended use as communicated to the council at the time it carries out its functions. It can't be the case, I can accept now, that a duty of care comes or goes depending on who owns a house, a dwelling, from time to time. The duty either exists when the council is carrying out its functions or it doesn't. So if the council is to know whether or not it owes a duty of care and it must be entitled to know that when it performs its functions if only to be able to charge appropriately, then that has to be determined by reference to the circumstances at the time it carries out its functions.

By definition, at that stage, it's impossible to know who will own the home over time, whether it will be someone who lives in it, whether it will be someone who lets it, and for that reason the character of the owner, and it might be added, whether or not the building is eventually unit titled because that has to come after it's built in terms of the statutory scheme. You can't unit title something until the structure has been erected and you have certificates from the local authority that the walls and things are in place, whether or not there are leases. The provisions of the lease which both I and my learned friend invoke for various purposes, at the end of the day are a complete red herring here because those leases weren't signed and might never have been entered into at the time the building was then built.

CHAMBERS J:

If at heart this is really just a social value question, why would it be so terrible to say, "Well, we'll put our line, even though there may be an anomaly, we will say that all building inspections will potentially give rise to liability, and councils can just factor that into their inspection fee; charge in exactly the same way as presumably they have factored it in in the case of residential dwellings." Why would that be an economically inefficient solution?

MR GODDARD QC:

I'm just trying to write all the reasons and then I'll run through them to make sure I don't miss any. So the first reason is that when the Courts make social value judgements of this kind, they are subject to disciplines in terms of consistency with precedent case law and the basic principles of tort law, which don't apply to legislators who can construct whatever scheme seems best, and to draw the line in the place that your Honour has suggested would be inconsistent with, would create, in my submission, insuperable tensions with other parts of our law of tort and I have in mind, in particular, *Caparo*, *Boyd Knight*, *Carter*.

CHAMBERS J:

It may, although we already, on your argument, have an existing anomaly.

MR GODDARD QC:

The goal has to be to keep the tension within manageable bounds and it's a question of degree. It would be much greater. In my submission, *Charterhall* steers the path that is, in responding to that line, that is most consistent with what has gone before, and with the policy choices that Courts in other jurisdictions that we regard as our principal comparators have made in contexts which are indistinguishable. No one's suggested there's anything different in the commercial context in New Zealand as compared with the UK or Australia or, unlike the housing scene, there's nothing, in the appellants' argument, nothing in any of the cases I can see suggesting it's different. So you'd have to ask why would we draw the line somewhere different, if we accept the basic principles of our tort law are essentially consistent and the circumstances are not materially different.

So consistency with the fabric of the common law is my first reason, and that's not an efficiency argument but it is an argument which I think is relevant in a Court as opposed to sitting in an office in the Department of Building and Housing arguing about what might go in the Building Act 2013.

Second, it would be a surprising social value judgment because rather than seeking to compensate vulnerable and relatively unsophisticated homeowners out of council funds for losses that they are not well placed to bear, we would be standing that judgment essentially on its head and levying ordinary New Zealanders, ordinary ratepayers, to compensate the owners of commercial buildings. Your Honour said,

well, why not charge for that? I don't think the Court can ignore the fact that we are dealing here with liability under the 1991 Act, which has been replaced by the 2004 Act, and we are essentially looking backwards to decide what to do about a large number of cases that have already arisen or that may arise in respect of action taken in the past against the backdrop of unexpectedly large liabilities having materialised.

The appellants have put considerable emphasis on the leaky building crisis and clearly see it as a relevant factor for the Court to take into account. One respect in which it's relevant is that we know that there are large losses looking for a home and we also know, from the Court of Appeal decision in *Sacramento – Attorney-General v Body Corporate* 200200 [2007] 1 NZLR 95 (CA), that one of the issues that this scheme encountered as soon as it was set up is that it wasn't possible to obtain insurance on a liability arising basis, but only on a claims-made basis.

Now there's no evidence before the Court of this, and if evidence on these issues was important then the Court would need to allow the appeal and send the matter back for trial with evidence about insurance and economics and all those things being given, but, again, what I think it's legitimate for the Court to take judicial notice of is that in circumstances where what you have is claims-made policies and a significant unexpected sphere of liability emerges, such as leaky building liability, insurers do not continue to offer cover. It's not a question of price. It simply ceases to be available, and that is the position in relation to certain types of liability.

So it's not the case that one can pay a premium now for protection against claims made in the past in this area funded out of consents. It is the case that imposing liability would transfer hundreds of millions, if not billions, of dollars of losses from commercial building owners to ratepayers, including, rather ironically, whoever currently lives in Mr Hamlin's house, modest home in Invercargill, and that seems, with respect, to be an odd social value judgment. We don't normally seek to socialise the losses of commercial parties. We do, we see this in a range of forms of legislation, frequently seek to socialise, to spread losses suffered by vulnerable members of society.

One might almost say that that's one of the hallmarks of a civilised and compassionate western society. We don't generally say, "Oh, dear," when large

commercial investors suffer losses, "we should socialise those." We leave that to the market.

So, from an efficiency perspective, it's inefficient to socialise such losses. It creates perverse incentives going forwards. From an equity perspective, looked at here and now in the light of where we find ourselves, it would be a very peculiar choice to make to essentially transfer from ratepayers, including the inhabitants of ordinary homes, large sums by way of compensation to commercial players who, as it turns out, have suffered losses and cannot sheet those home to the people with whom they contracted.

That's quite a digression from paragraph –

TIPPING J:

I wish I'd thought of all that when I was writing this judgment.

MR GODDARD QC:

I merely understood myself to be expanding on your Honour's comments and that is why, in my submission, the –

TIPPING J:

Where are we now, Mr Goddard?

MR GODDARD QC:

I'm just wrapping up my comments on *Sunset*. I've finished with *Sunset* and I'm saying that there's nothing inconsistent in *Sunset* and in the arguments being made. To the contrary, it is wholly consistent with that decision and with the policy rationale for the *Hamlin* duty identified in it, and there are compelling reasons not to go further.

That then brings me to the legislation.

Oh, that was my third reason, I've turned back, answering your Honour's question, which is that to draw the line in that place would cut across carefully considered statutory interventions that have occurred in the intervening years.

So if we go now to my item 10, and this is in the bundle I handed up this morning, the first thing I want to look at is the Building Act 2004. I haven't inflicted the whole of

this rather lengthy Act on the Court. Hopefully, after the cover page, the second page that the Court has should be part of the interpretation provisions, section 7, and the definition of "household unit", which "means a building or group of buildings, or part of a building or group of buildings, that is used, or intended to be used, only or mainly for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household". It doesn't include "a hostel, boarding house, or other specialised accommodation". Just pause there to notice that the penthouse units in Spencer on Byron would be household units within that definition, none of the rest of the building would.

Notice also that the focus is on homes or residences of households, so it's a homes-based distinction not an owner based one. Almost all the distinctions I invited this Court to draw in Spencer and the *Sunset* also are not drawn in here, and when we turn over then to the next page in the extract which is page 251 of the Act, what we see in the 2004 Act is a new set of provisions that weren't present in the 1991 Act. So in the light of the leaky building crises, the legislature has reflected on whether there is a policy gap in the building regime and has decided that there is in terms of the protection of the interests of owners and this is what should be enacted in order to address it and what we see is an application provision, 396, 397 to 399 "apply to a contract entered into on or after the commencement of this Act, that provides for building work to be carried out...in relation to one or more household units or the sale of one or more household units by, or on behalf of, a residential property developer". And this applies at paragraph (b), "despite any provision to the contrary in any agreement or contract".

Then 397, the implied warranties. "Despite any enactment or rule of law in every contract to which this section applies, so that's building or sale of homes, the following warranties about building work to be carried out are implied and are taken to form part of the contract: (a) that the building work be carried out in a prompt and competent manner in accordance with the plans and specifications and in accordance with the relevant building consent", so we have a warranty to the owner. (b) Certain warranties in relation to materials. "(c) That the building work will be carried out in accordance with and will comply with all laws and legal requirements including...this Act and the regulations", this includes the Code, and "that the building work will be carried out with reasonable care and skill", completed by a certain date. There is a warranty that I suspect is breached from time to time, as anyone who has

built a house knows, and that it will be suitable for occupation on completion and any other purposes will also be met.

398 – "Proceedings for breach of warranties may be taken by a person who was not party to contract... An owner of the building or land in respect of which the work was carried out under a contract to which this...applies may take proceedings for a breach of any of the warranties set out in section 397 as if the owner were a party to the contract", and the proceedings includes adjudications and WHRS claims and 399, a person may not give away the benefit of warranties. You can't contract out of these protections but you can settle claims that have arisen.

So what we see here is a careful response of the kind that a legislature can tailor but which a Court is not well placed to tailor.

ELIAS CJ:
What do these – what contracts do these apply to?

CHAMBERS J:
If you're having something built for you, a house would –

MR GODDARD QC:
A home.

ELIAS CJ:
So is it with a builder?

MR GODDARD QC:
It's with a builder or a –

ELIAS CJ:
So it's –

MR GODDARD QC:
– or if you buy it from a developer.

ELIAS CJ:
So it's quite limited in scope. It's not a – it doesn't –

TIPPING J:

A subsequent owner can sue the builder or developer for a breach of warranty.

MR GODDARD QC:

Yes, exactly.

ELIAS CJ:

Yes, yes.

TIPPING J:

That's all it does.

ELIAS CJ:

Yes, that's all it does.

MR GODDARD QC:

Yes, but what has happened is that the legislature has said, is there a concern about the protection of owners in relation to whether building work complies with building consents and with all applicable laws and legal requirements and has said, yes, there is a cap we're concerned about, let's fashion a response. Who should it apply to? It applies to people building or buying homes. Why? Because the social value judgment the legislature has made is that that is the group that is vulnerable, that is not likely to protect its own interests with appropriate contracts, because you could contract expressly for all this if you wanted to and that needs to be –

McGRATH J:

Well you couldn't contract for it all because you couldn't contract the original builder, could you?

MR GODDARD QC:

No, but the original owner could because this only applies to new contracts.

McGRATH J:

The original could, yes, but –

MR GODDARD QC:

So someone, a commercial builder – someone seeking to have a commercial building built could contract with the builder for their own benefit and the benefit of their successors in title that –

WILLIAM YOUNG J:
They can sign the claim anyway, can't they, the –

MR GODDARD QC:
Yeah.

WILLIAM YOUNG J:
The agreement doesn't have to be for the benefit of successors in title.

MR GODDARD QC:
Exactly.

WILLIAM YOUNG J:
It could still be assigned.

MR GODDARD QC:
So you can –

WILLIAM YOUNG J:
In fact, it sometimes is that they sometimes are assigned.

MR GODDARD QC:
And quite often is, and again, just by way of illustration, it's not relevant to the risk, that is exactly what was contemplated by the agreement for sale and purchase of every unit in this building, in Spencer on Byron, was that the original owner developer would assign to the body corporate all their contractual rights against builders and experts.

TIPPING J:
In some senses this is a statutory assignment.

MR GODDARD QC:
Yes. So what this is saying is –

TIPPING J:

Can you jump to the end so that we can see what the point of this is, Mr Goddard, and understand it in the light what's this relied on for?

MR GODDARD QC:

Two things. Firstly, to say that a nuanced scheme for protection of the interests of owners of homes has been developed and it would be inappropriate for this Court in effect to subsume that in a broader and less nuanced regime.

TIPPING J:

You mean that we should regard this as being all that the legislature would allow?

MR GODDARD QC:

Or that the legislature thought that social policy in New Zealand in 2004 required by way of remedy for existing concerns, yes.

ELIAS CJ:

But what about – does the Act carry on the existing indications of, or the indications in, the 1991 Act?

MR GODDARD QC:

That the general law continues, yes, essentially.

ELIAS CJ:

And Limitation Act provisions –

MR GODDARD QC:

Yes.

ELIAS CJ:

– and the indication of when a territorial authority won't be – does it have certifiers still and –

MR GODDARD QC:

No.

ELIAS CJ:

It doesn't have certifiers?

MR GODDARD QC:

Certifiers as such have gone.

ELIAS CJ:

So who inspects? Is there still an inspection regime?

MR GODDARD QC:

There is an inspection regime. It is normally the territorial authority. There is another creature that can perform that responsibility sometimes with a different name, and I just can't quite remember what it is, but my learned junior will help me with it.

ELIAS CJ:

And is there any exclusion of liability for territorial authorities in respect of their functions?

MR GODDARD QC:

No more than in the 1991 Act.

ELIAS CJ:

No.

MR GODDARD QC:

So the existing law, the general law, continues, and I think one would have to say that any argument that it was excluded by implication because of the introduction of these provisions, which is essentially the argument that succeeded in England in relation to the Defective Premises Act, would be a difficult one to make in the light of this Court's judgment in *Sunset Terraces* about the need for absolutely explicit changes to those rules, but what I'm – so I'm not suggesting –

ELIAS CJ:

No.

MR GODDARD QC:

– that the 2004 Act has brought to an end the law relating to *Hamlin* but I'm essentially seeking to run an argument parallel to that which was made by Justice Richardson in relation to the 1991 legislation, which is to say that the Court should be slow to change the law in a significant way where Parliament has returned to the area and has itself addressed what the rules of the game should be, including here, protections for owners.

TIPPING J:

But only in respect of those who are performing the building work.

MR GODDARD QC:

Yes, and –

McGRATH J:

So how can –

MR GODDARD QC:

So Parliament could have said, "We're going to legislate for a compensation scheme administered by territorial authorities" and it hasn't. So if there was a concern that councils should be paying compensation to all building owners where there is a negligent failure to administer it, it would have been very easy to deal with that and set up a remedial regime.

The social value judgement embodied in this legislation is that there was a problem in relation to transmissible warranties from builders and property developers across the specific topics described here.

McGRATH J:

There was a privity of contract problem, and it's overcome that.

MR GODDARD QC:

More than that. Also a failure to contract for appropriate protections problem. Not only is that a privity issue but people actually – owners of homes weren't contracting for these protections and the social value judgement is that these are protections they should have that will be deemed to be in their contracts and that can't be excluded.

TIPPING J:

There's nothing at all novel about these warranties. They're all such as would almost inevitably be implied into a building contract in the first place. All that's happened is that you don't have to be in privity of contract.

MR GODDARD QC:

And that they're non-excludable, and which is important, and the no limitation clause.

TIPPING J:

Well, I can understand the force of that point, but you can't contract them away.

MR GODDARD QC:

But let's ask why this applies only to homes given that, as you say, much of it is familiar, and in my submission this ties into my vulnerability point. This is the second reason I want to go to this.

TIPPING J:

Sorry, I don't understand what you said initially, why this applies only to homes.

MR GODDARD QC:

Yes.

TIPPING J:

But it doesn't say that, or it says it through the reference to household units, yes.

MR GODDARD QC:

Yes. So it applies only to homes. Why? It applies only to homes –

TIPPING J:

I think this is a more fertile –

MR GODDARD QC:

Yes, these –

TIPPING J:

– ground.

MR GODDARD QC:

Your Honour's exactly right. This is the main point I want to make. Why does it apply only to homes? Because homes are different because there is a level of vulnerability and lack of ability to understand, manage and assume risk in relation to home ownership that is not present in relation to other buildings. So –

CHAMBERS J:

Spencer on Byron, had it been constructed after this Act, the penthouse owners would have got the benefit of this warranty, wouldn't they?

MR GODDARD QC:

Yes, if you follow the logic of this, where I think you end up is allowing the appeal in part so far as the penthouse units are concerned.

TIPPING J:

Because this talks about buildings and parts of buildings.

MR GODDARD QC:

Yes, the definition of household unit includes a part of a building that is the home or residence of not more than one household. So it would apply to the penthouse units.

TIPPING J:

Indeed.

MR GODDARD QC:

Absolutely. So if we follow the logic of this through, the penthouse apartment owners are within the scope of the policy concern identified here. The owners of the rest of the building are not. And –

ELIAS CJ:

But the policy concern is really with inadequacy of contracting with builders. You really can't say that it goes much further than that, can you?

MR GODDARD QC:

I think I can say that it's a policy concerned with a category of building that is identified as the subject – as a vulnerability area –

ELIAS CJ:

Yes.

MR GODDARD QC:

– and contracting with builders –

ELIAS CJ:

Yes.

MR GODDARD QC:

– in relation to that vulnerable area.

TIPPING J:

I think it's that latter part that's the more important one.

MR GODDARD QC:

Yes.

TIPPING J:

It's the fact that it gives in your argument a slight signal that homes are in a different category from commercial premises.

MR GODDARD QC:

Yes, exactly.

TIPPING J:

Vis-à-vis the need for this transmissible warranty.

MR GODDARD QC:

Exactly, and given the point that was made in *South Pacific Manufacturing* and picked up again in *Hamlin* that the New Zealand Courts attempt to develop the common law in harmony with statute, it seems to me that the Court can properly look to this as the *Hamlin* Courts did to the 1991 legislation and say, well, in harmony with the statutory signals about areas of vulnerability, areas where special protection is required we can extend the protection to all homes, which is what this Court has already said in *Sunset Terraces* and we can stop there because that's a sensible place to stop.

So that's an argument which goes some of the way with my learned friend, goes down two floors and then stops I think.

CHAMBERS J:

The logic of this life carrier crosses, you say, because I take it it's not your argument that if there weren't civil liability on councils in the commercial setting, that their standards would drop –

MR GODDARD QC:

Absolutely, that is my argument.

CHAMBERS J:

Right, so that if, therefore, in the case of a mixed building such as *Sunset Terraces* – such as Spencer on Byron, there wouldn't be a policy reason to exclude civil protection, to exclude from the protection of civil liability those who owned the penthouses because it won't affect what the council, how the council –

MR GODDARD QC:

Does.

CHAMBERS J:

– how the council acts or does but it would then put them on a par with all other homeowners.

MR GODDARD QC:

Yes, and while no civil liability regime is required to ensure that a public body which is accountable to the BIA, through the BIA to the Minister, echoes of another case, performs its functions properly. What we have seen identified as a concern in the case law and identified in this context as a concern in the Building Industry Commission's Act is the fact that if you impose civil liability on a regulator you do tend to make them unduly conservative –

ELIAS CJ:

Heavy handed.

TIPPING J:

Cautious.

MR GODDARD QC:

– and heavy handed, cautious, against the backdrop of a legislative regime that was meant to encourage innovation and experimentation and the reason for that in terms of economics, your Honour keeps saying how – is that, in technical terms, is that a regulator can externalise the costs of increased precaution. Civil liability doesn't have the effect of internalising to the person who enjoys the benefits or the costs of that precaution as well because were you a regulator you can say, oh, we're worried that we might be liable so we are going to make you spend more and –

WILLIAM YOUNG J:

You'll require sort of thousands of tonnes of concrete to be poured into the ground for formations where perhaps only a hundred tonnes was necessary.

MR GODDARD QC:

Or – yes, or you will require all sorts of very sophisticated forms of independent certification and assurance that the right amount of concrete is in the ground when, in fact, it would have been perfectly sensible to accept and produce a statement from the person who did the pouring.

TIPPING J:

Well you overcook everybody to head off the occasional one that is going to be careless.

MR GODDARD QC:

To head off the people who haven't properly managed their own commercial risks and yet you charge all the people who have properly managed their commercial risks again so you can compensate the people who haven't. Now we may think that sort of loss spreading makes sense in relation to owners of homes but there is no strand of case law I can think of to suggest that that's a sensible thing to do in relation to commercial buildings. So that's what I seek to draw from this.

And the next two items in the additional bundle I can move over very fast. It's the Weathertight Homes Resolution Services legislation from 2002 and 2006. All I want to notice there, and it's the same essentially in both, is that these regimes for

resolving leaky building claims apply only to dwelling houses. If we look at the 2006 – 2002 Act if that's the first one in there, which logically it should be I think, on page 3 of this ugly printout for which I apologise, is the definition of dwelling house. Any building or apartment, flat or unit within a building that is deemed to have as its principle use occupation as a private residence. So, again, we have that concept of a private residence, a home.

CHAMBERS J:

So again the penthouse owners here could have used these services.

MR GODDARD QC:

Certainly, under the 2002 Act. I think it's a little bit complicated in terms of procedure in the 2006, I want to do more work before I answered that question and I will before I come back but, again, if you look in that Act still, just down, further down that page at section 7, criteria for eligibility of claims. The "claim may be dealt with under this Act only if (a) it's a claim by the owner of the dwelling house concerned and it's an eligible claim", so it's only dwelling houses. So again when we say, well, which buildings are we most worried about in terms of facilitating resolution of these issues? We single out a particularly vulnerable group who can't be expected to go through the normal dispute resolution process who need particular help and that's the owners of dwelling house.

ELIAS CJ:

But, I mean, that's a legislative choice, it's a legislative remedy which is, one can see the reason for it being targeted to homeowners but you can't necessarily extrapolate out from that to the question of more general liability in tort.

MR GODDARD QC:

I think the Building Act is more important for that purpose.

ELIAS CJ:

Yes.

MR GODDARD QC:

I agree with that but what I would say is that this response directly to the argument that it's not a workable line because we see it being used in legislation for a range of purposes and it responds directly to the argument that there is nothing special about

homes and their owners because we've said, yes, in a number of contexts there is something special, there is something different and it seems to me that when the Court comes to make what has been frankly acknowledged as a policy choice, a social value judgment, the fact that this is a workable line which has been adopted for a range of purposes in this context has some magnetic force.

ELIAS CJ:

Yes, I see its application in that context.

MR GODDARD QC:

That deals with items 10 and 11 on my road map and I come then to situating this issue in the broader regulator liability context and there are a raft of authorities I could have referred to in this situation, in this head. *Stovin v Wise* I think is a particularly helpful discussion of some of the conceptual difficulties that need to be grappled with. The judgments of both Lord Nicholls dissenting and Lord Hoffmann for the majority, it's in volume 4 under tab 37.

It's a case which is not on all fours with the present one because it's personal injury and it was very much an omission case but it remains, I think, an enormously helpful survey of some of the difficulties in this field. After the head note and summary of argument, their Lordships speeches begin on page 298 of the report. The majority was Lord Goff, Lord Jauncey and Lord Hoffmann, Lord Slynn and Lord Nicholls dissented but for the points that I want to make there's actually no difference between the approach of Lord Nicholls and the approach of Lord Hoffman. It's really only in the application of that to be a factor, that case –

ELIAS CJ:

It's only on whether there was a duty or not that they divided.

MR GODDARD QC:

It that particular case, yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

But actually the principles to be applied were not described in materially different terms and certainly not in terms of what matters for this case. We can move fairly quickly over the passage on liability for omissions and omissions in proximity. On page 933, public authorities and liability of omissions. Probably worth pausing to notice at letter (f), something which I think we can all agree with which is that, "The liability of public authorities for negligence in carrying out statutory responsibilities is a knotty problem," and the history of attempts to grapple with it is then summarised.

An important point, over the page on 934, halfway between letters (b) and (c), "[t]he *Anns* principle has to cope with a complication absent from other landmark decisions", *Donoghue*, *Hedley Byrne*, "Typically, although not necessarily, the effect of an application of the *Anns* principle will be to bring home against an authority a liability for damages for failure to perform public law obligations created by statute. Thus in the *Anns* case, unlike *Donoghue* and *Hedley Byrne*, it's necessary to consider legislative intention. A resort to *Anns* is not required when Parliament created a statutory duty and also, expressly or impliedly, a cause of action for breach of the duty." That's not our case obviously.

"The problem only arises outside the area where Parliament has willed that the individual shall have a remedy in damages." The critical, a very important couple of sentences. "This gives rise to the difficulty of how much weight should be accorded the fact that, when creating the statutory function, the legislature held back from attaching a private law cause of action. The law must recognise the need to protect the public exchequer as well as private interests...essentially on this latter point that so many divergent views have been expressed." General agreement that the law is unsettled. Particularly helpful sort of agreement.

Then there's a long list that looks rather like a demanding tutor's reading list for tort cause. Then the statutory framework and this is where Lord Nicholls links the issue into the statutory framework. "Against this background I must now map the route which is a matter of legal analysis I believe is applicable in the present case. Public authorities discharging statutory functions operate within a statutory framework. Since the will of the legislature is paramount in this field, the common law should not impose a concurrent duty inconsistent with this framework. Common law duty must not be inconsistent with the performance by the authority of its statutory duties and powers in the manner intended by Parliament, or contrary in any other way to the presumed legislative intention."

The point that a statutory framework makes things easier in some ways. This is Lord Hoffmann's point, there's no why pick on me response available to a public authority because they've already been given a statutory responsibility in the field usually.

At letter (e), "The matter goes much further. Sometimes a concurrent common law duty would not impose any additional burden, in the sense of requiring an authority to act differently from the course already required by its public law obligations. In such cases a major impediment...is not present. This calls for elaboration." That's then discussed, when is that a concern, when is it not?

I think, if we come down to halfway between letters (d) and (e) on page 936, after discussing the facts of that case, His Lordship continues, "Hence the conclusion, that a concurrent common law duty would not impose on the council any greater obligation to act than the obligation already imposed by its public law duties. The common law duty would impose, not a duty to act differently, but a liability to pay damages if the council failed to act as it should. This is the consequence which considerations of proximity must especially address in the present case. Was the relationship between the parties such that it is fair and reasonable for the council to be liable in damages for failing to behave in a way which merely corresponds to its public law obligations? In this type of case, therefore, the reluctance of the common law to impose a duty to act is not in point. What is in point, in effect though not in legal form, is an obligation to pay damages for breach of public law obligations."

Then a very important paragraph. "This leads naturally to a further feature of the typical statutory framework. This feature points away from public bodies being subject to concurrent common law obligations. When conferring the statutory functions Parliament stopped short of imposing a duty in favour of the plaintiff. This is so when there is a statutory duty not giving rise to a cause of action...even more marked when Parliament conferred a power. Without more it would not be reasonable for the common law to impose a duty, sounding in damages, which Parliament refrained from imposing. For this reasons there must be some special circumstance, beyond the mere existence of the power, rendering it fair and reasonable for the authority to be subject to a concurrent common law duty sounding in damages. This special circumstance is the foundation for the concurrent common law duty to act, owed to a particular person or class of persons. It is the presence of this additional, special circumstance which imposes the common law duty and also

determines its scope. Viewed in this way there is no inconsistency in principle between the statutory framework set up by Parliament and a parallel common law duty."

The special circumstance in *Hamlin* being the vulnerability of homeowners and the long history of liability in New Zealand. So that's the X factor. It imposes the duty and determines it scope. So because it relates to homeowners, that's the scope.

Then, perhaps just the next paragraph – "Statutory powers and proximity". "What will constitute a special circumstance, and in combination with all the other circumstances amount to sufficient proximity, defies definition and exhaustive categorisation save in the general terms already noted regarding proximity. The special circumstance must be sufficiently compelling to overcome the force of the fact that when creating the statutory function Parliament abstained from creating a cause of action, sounding in damages, for its breach. Factors to be taken into account include," and there we see a list of the various factors that have been in play in different cases, including halfway between (e) and (f), "the presence or absence of a particular reason why the plaintiff was relying or dependent on the authority as in *Hamlin*."

Again, if we say, particular reason why they were relying as in *Hamlin*, that particular reason is the vulnerability of homeowners and the long history of dependence of homeowners on councils in New Zealand and the special circumstances applicable to housing in New Zealand.

A discussion of reliance and the equivalent concept in some circumstances of dependence. A passage from Justice Mason in *Sutherland Shire Council* set out there. The over the page at 938, halfway between (b) and (c), "Reliance, or dependence, may be a sufficient basis but will not always be so," and this is a very important passage again, I think, for understanding why there can be a distinction in this area between homeowners and others in our case.

"Reliance, or dependence, may be a sufficient basis but will not always be so. Everyone is entitled to expect that an authority will behave as a reasonable authority, in accordance with its public law obligations, but reliance of this character will usually not be enough. Otherwise a concurrent common law duty might readily arise in almost every case." When would that not be true?

"Nor, conversely, is reliance a necessary ingredient in all cases. Proximity cannot be confined by fixed restraints applicable in all cases." Then we get really into a discussion of the facts of that case but that analysis, in my submission, is precisely the right broad conceptual framework to bring to bear here, especially when coupled with the emphasis that we saw in *Caparo* and *Carter* and *Boyd Knight* on a duty not existing in the abstract but only by reference to a particular harm against which the defendant must take care to protect the plaintiff –

ELIAS CJ:

It's only one of the factors that Lord Nicholls identifies of particular harm.

MR GODDARD QC:

The type of harm is one factor relevant to whether or not –

ELIAS CJ:

Yes.

MR GODDARD QC:

– there should be a duty. The point made in *Caparo*, *Boyd Knight*, *Carter* is a little bit different which is that you can't describe a duty divorced from the interest to be protected –

ELIAS CJ:

I know but that is not what Lord Nicholls seem to be saying in the context of a – negligence in the context of a statutory duty.

MR GODDARD QC:

I don't know that that's right your Honour and I take your Honour –

ELIAS CJ:

Well he identifies it as only one factor.

MR GODDARD QC:

It's one of the factors to take into account but when you've identified that, it is one of the factors that both leaves to its imposition and determines its scope. If we go to the top of page 937 again. "It's the presence of the additional special circumstance

which imposes the common law duty and also determines its scope." So if the special circumstance relates to vulnerability to a particular type of harm, then it – so perhaps, yes.

ELIAS CJ:

Yes, I understand.

MR GODDARD QC:

Lord Hoffmann's speech begins at 941 and again, I think we can move quite quickly through – or we can skip over the facts of the case, the trial, the discussion of acts and omissions. Heading 5, "Omissions in the Court of Appeal" which I think is about their discussion, not about their sins thereof.

At 6, "Public authorities", page 946. Again, the focus initially, mostly on positive duties, on page 946 near letter (f), the famous "no 'why pick on me?'" argument point. Negligent misconduct in exercise of statutory powers discussed in (a). Omission to use statutory powers in (b) and then I think we can jump to page 951, heading 8, "Policy and operations".

His Lordship notes, "Since *Anns* there have been differing views...over whether it was right to breach the protection which the *East Suffolk* principle gave to public authorities. In *Sutherland Shire Council* Justice Brennan thought it was wrong," but his Lordship said, "I think...he was the only member of the Court to adhere to such uncompromising orthodoxy. What has become clear, however, is that the distinction between policy and operations is and inadequate tool," and I think that is well accepted in New Zealand.

"In *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 at 172, [1988] AC 473 at 501, Lord Keith said it's not a touch –

CHAMBERS J:

We don't really have this problem in our case though, do we, Mr Goddard?

MR GODDARD QC:

No, it's very operational.

ELIAS CJ:

Yes, it's not an omission.

CHAMBERS J:

But also it is effectively a duty here. I know the council doesn't have to inspect if a certifier is chosen and the council may rely on producer statements but, accepting that, the structure of the Act is that there must be an inspection.

MR GODDARD QC:

Yes, we don't have that –

CHAMBERS J:

Your other arguments, I can see the point of your other arguments, I'm simply raising the problem that this particular one doesn't arise here.

MR GODDARD QC:

It doesn't and the only reason I've started here is that, if we turn over the page, it's in the section of the speech, that's some issues that are relevant, are discussed, although the heading is not a particularly heading because, if we go to 952 and look at, after discussing public law discretions and saying it may be that sometimes there is no discretion but a person who didn't receive a service should not necessarily have a cause of action discusses why and then it's just below letter (d), "In terms of public finance, this is a perfectly reasonable attitude. It's one thing to provide a service at the public expense. It's another to require the public to pay compensation when a failure to provide the service has resulted in loss. Apart from cases of reliance...the same loss would have been suffered if the service had not been provided", in other words, if the council had done nothing at all, if it hadn't been there as a regulator. "To require a payment of compensation increases the burden on public funds. Before imposing such an additional burden, the Court should be satisfied that this is what Parliament intended. Whether a statutory –

CHAMBERS J:

Well, again, we're not really in that category because the service the council provides here is not a public expense. It's one for which the users of the service pay the full amount.

MR GODDARD QC:

Pay a fee which the council does its best to set at a level which is appropriate but –

CHAMBERS J:

Well, the statute or the regulations say how they are to set the fee but they are fully entitled to recover all their reasonable costs so it's not a public funding like roads are or something.

MR GODDARD QC:

It's not the pure though because, again, of this point that it's not actually possible to buy in the year in which you grant consents, insurance to cover all liability you incur in respect of those consents for all time.

CHAMBERS J:

Yes but that's a different point, that's the compensation point. I was –

MR GODDARD QC:

Yes.

CHAMBERS J:

– pulling you up merely saying, well the second sentence of that paragraph isn't applicable to the current case.

MR GODDARD QC:

In my submission it is in part because of the impossibility of recovering on a one-off basis a fee which will necessarily cover the cost of the service, bearing in mind that liability may not arise for some years –

CHAMBERS J:

Okay.

MR GODDARD QC:

– and that you may then not be able to insure against it or – and you certainly can't retrospectively come back and charge more.

ELIAS CJ:

But insurance isn't the be all and end all of this because after all the council isn't liable if it performs carefully. So it's not – the council is not an insurer here.

MR GODDARD QC:

Only where the standard that is applied, to some extent with the benefit of hindsight, to what councils were doing is held to be inadequate.

ELIAS CJ:

But that's a different point. That's attacking whether there has been negligence.

MR GODDARD QC:

To have liability for negligently providing a service that is provided in a large number of cases by human beings is inevitably to incur a certain level of cost over time. That's why large organisations insure against liability and can expect a certain number of claims over time.

ELIAS CJ:

Well doubtless the fee is set in that knowledge but –

MR GODDARD QC:

I think we shouldn't get too bogged down in this because –

ELIAS CJ:

– well we shouldn't get into that but the point I would like to make is that it does seem to me that what Lord Hoffmann is saying, particularly in his reference to the *X and others (minors) v Bedfordshire County Council* [1995] 2 AC 633, [1995] 3 All ER 353 where again, he's relying on a case where there was negligent discharge of a duty. He's only talking about these cases of omission and whether in the exercise of discretionary powers with high policy content it's right to impose a duty, but where powers have been exercised what's the problem about requiring, unless there's a statutory impediment which he identifies of course, he's said himself there's no 'why pick on me?' there with proximity unless there is something in the statutory regime which says that liability isn't appropriate, and you've addressed us at length on that.

MR GODDARD QC:

I have. I think his Lordship does go further than that and say that even where there is a statutory duty, a positive obligation to do something, it doesn't follow that failure to do it should always bring in its train either liability to pay compensation or liability at common law for negligently performing that duty and his Lordship goes on expressly to discuss that in relation to powers and circumstances where the power is exercised

it's performed negligently. It is still an extra imposition, it is still an extra burden which someone has to pay for however it's recovered and whether it is the public through taxes, or the public through consent fees, it's still the public. I think that might be a better answer to your Honour's question actually. It's still the public however you do it. You're still spreading that loss and is that what the legislature would have expected as a consequence of this scheme, given that it would be perfectly possible not to regulate in this area and leave people to their remedies, in theory, that's not a choice that's made in practice?

So after discussing the point – so statutory duties, for example, are dealt with at letter (h) and on 952 across to 953 and at letter (d) on 953 there is a discussion of a duty of care being based on the existence of a power and there's that public law link which has not found favour in New Zealand or Australia but the second point I think is valid. "[S]econdly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised" or, I might add, was not performed carefully.

ELIAS CJ:

Well he draws a big distinction between those two.

MR GODDARD QC:

He does.

ELIAS CJ:

Yes.

MR GODDARD QC:

Well, except he's talking here about a situation where it would be irrational not to exercise the power, so in public law terms you're obliged to do so.

ELIAS CJ:

Yes, but it's the manner of exercise whereas here –

MR GODDARD QC:

Mmm, I understand.

ELIAS CJ:

– it's quite clear how it's to be exercised, or that it's to be exercised. It's an administrative – it's a much more administrative decision and the decision whether to remove half a hill or whatever it was in *Stovin v Wise*.

MR GODDARD QC:

Yes. I won't go through it but I was really just going to look at the discussion then –

ELIAS CJ:

Look at what he says about the Lighthouse too.

MR GODDARD QC:

Which page is –

ELIAS CJ:

This is just about particular and general reliance so it is a very –

MR GODDARD QC:

Particular, that's the last section I was –

ELIAS CJ:

– it's an excellent case because it does touch on everything but I think there is as much in it agin you as for you.

MR GODDARD QC:

The last thing I was going to look at was over the page 954 and the discussion of general reliance of which the outstanding example was said to the be the judgment of Justice Richardson in *Hamlin* and just to make the point there that this is a ground for imposing a duty of care that "has little in common with the ordinary doctrine of reliance because the plaintiff doesn't even need to have expected the power be used or even known it existed". Refers to general expectations in the community which the individual plaintiff may or may not have shared. "A widespread assumption that a...power will be exercised may affect general patterns of economic and social behaviour...Thus the doctrine of general reliance requires an inquiry into the role of a given statutory power in the behaviour of members of the general public of which an outstanding example is" *Hamlin*. And, again, which of the members of the public whose conduct and expectations were in issue? Homeowners.

ELIAS CJ:

It's the next paragraph that refers to the matter that we were discussing a moment ago. Uniformed routine nature so that one can describe exactly what the public authority was supposed to do.

MR GODDARD QC:

That's a necessary but not a sufficient condition for imposing liability is what his Lordship is saying.

ELIAS CJ:

It takes you a long way.

MR GODDARD QC:

I'm sorry, Your Honour?

ELIAS CJ:

It takes you a long way by comparison.

MR GODDARD QC:

Well it makes it possible to impose liability but it doesn't, as Lord Nichols pointed out, remove the need to ask whether imposing an obligation to pay compensation is consistent with or –

ELIAS CJ:

Consistent with the statute.

MR GODDARD QC:

Yes.

ELIAS CJ:

If the statute is clearly, the policy of the statute is, again it, clearly that's determinative and the statute is always going to be, as he says, an extremely important consideration but he does say that where matters are of a uniform and a routine nature, powers of inspection for defects clearly fall into this category.

MR GODDARD QC:

But I don't understand his Lordship to be saying that the liability which results extends to forms of harm outside the scope of the regulatory endeavour.

ELIAS CJ:

Well, he's not dealing with that.

MR GODDARD QC:

He's not dealing with that.

ELIAS CJ:

No.

MR GODDARD QC:

So many things though it covers –

TIPPING J:

I think it's that second leg of the double rather that the first, it's the difficult point in this case. That is to say, 'for what'.

MR GODDARD QC:

For what and perhaps Lord Nicholls' speech is almost more helpful although the theme of public expenditure was one that I did want to pick up from Lord Hoffmann as well to show that both of their Lordships were making that point because the "for what" has implications for what you're asking the public to fund –

TIPPING J:

Your case is that Parliament has already made, implicitly at least, that judgment.

MR GODDARD QC:

Yes and that extending –

TIPPING J:

And the Courts should not compensate beyond the scope of that judgment.

MR GODDARD QC:

Yes and that there is nothing in the policy of legislation of the risks, the social risks, it seeks to address –

TIPPING J:

Yes, well I don't know, I mean –

MR GODDARD QC:

– to require that –

TIPPING J:

– I admire everything in *Stovin v Wise* but I don't honestly think they're discussing the crucial issue.

MR GODDARD QC:

In that case, it's a good thing I've finished with that case. It's really only that general point that liability is something over and above the obligation to perform the task and that there's a further leap involved in that, that I seek to rely on it for.

I'm not going to go through the extracts I've provided from Booth and Squires. One could spend a long time reading that book and amassing examples of inclusion or exclusion of liability in similar circumstances –

ELIAS CJ:

So is that all that it provides, examples, is that –

MR GODDARD QC:

It provides a theoretical discussion on the first few pages I've included, 209 through to 213, from the general duty of care chapter and in particular, I just draw the Court's attention, in there on page 210, there's a heading regulatory authorities which says, 4.76, "Statutory purpose considerations particularly pronounced in cases involving health and safety regulators and other regulatory authorities. No doubt because the regimes tend to have purposes that are easy to ascertain and it will thus be clear when the claimant is attempting to impose liability on the authority that contradicts those purposes."

At 4.77, "One concern is that liability ought not to be imposed that would require authorities to avoid harm different to that which the regulatory regime aims to prevent, that might call the authority in contradictory directions, leave it to fulfil

inadequately the role for which the powers are conferred on it," and that's a concern in this case for the reasons canvassed a moment ago –

ELIAS CJ:

How does, in this case, permitting the tort, how does that –

MR GODDARD QC:

Pull the authority in –

ELIAS CJ:

– pull it in a contrary direction?

MR GODDARD QC:

By encouraging them to impose excessive precaution requirements in order to meet those open textured performance obligations on commercial owners and by requiring them to charge every commercial building owner an additional amount to manage the liability risk which is inconsistent with the goal of minimising costs and ensuring that people are free to manage their own costs. So two quite distinct limbs.

ELIAS CJ:

They only have to act reasonably, reasonably carefully.

MR GODDARD QC:

But it's impossible to do that in every case –

ELIAS CJ:

All right.

MR GODDARD QC:

– when you carry out –

ELIAS CJ:

Well it's an argument against –

MR GODDARD QC:

– tens of thousands –

ELIAS CJ:

– liability in any context.

MR GODDARD QC:

But it's particularly an argument against liability in circumstances where the compensation would be paid in respect of an interest which is not the one that there's a public interest in protecting.

You're imposing additional costs which is inconsistent with the goals of the regime, to protect an interest which it's no part of this regime's goal to protection. That's, in a nutshell, what I'm saying.

WILLIAM YOUNG J:

Are there more acceptable solutions in relation to domestic buildings than commercial or industrial buildings, do you know?

MR GODDARD QC:

I don't know but I'll find that out before Monday. Whether there are more or not, one might expect them to be more relevant to domestic buildings because they tend to be a rather more standard construction.

WILLIAM YOUNG J:

Yes, it's sort of the equivalent of the old building bylaw prescriptive approach, put the bearers at these centres, use these size nails and it's going to be all right.

MR GODDARD QC:

Yes, my learned junior Ms Mitchell will know this, I don't. I'll interrogate her over the weekend.

TIPPING J:

There's quite a useful footnote, 231, to this passage that you were just referring to. It's not directly related to the passage, where I note that Lord Oliver in *Murphy* apropos of the defective Building Act, wasn't it?

MR GODDARD QC:

Yes.

TIPPING J:

But that's effectively what you're inviting us to find here, apropos of the New Zealand Building Act.

MR GODDARD QC:

Yes and to say that, if we look at the building legislation, the legislation is similar and the objectives are the same. The reason that *Hamlin* is an appropriate New Zealand response relates to special circumstances to do with homes but the statutory lineaments are the same.

So that's the general discussion and then the next chunk is an extract from chapter 13 on health and safety regulators and I could have also provided chapter 14 on other forms of regulators, bankers and so on and so forth. What, the reason I provided 13 is that it discusses regulators of all the different types of transport as well as other things and what the Court will see is that *Carter* is squarely in the mainstream in the common law world on that. There is one exceptional decision which I felt I ought to provide the Court in the common law world, imposing liability in respect of certificates of fitness of trucks to the owner where the truck is less valuable and that's another decision I've included in this little bundle, *Rutherford and Attorney-General* [1976] 1 NZLR 403 which is a decision of Justice Cooke at first instance. Interestingly not cited in *Attorney-General v Carter.* Your Honour was asking about this in another case years ago and I've been trying to find it –

TIPPING J:

Yes, that's always been regarded as a fairly controversial –

MR GODDARD QC:

It's a highly controversial decision and it is –

ELIAS CJ:

I think it's rather good.

MR GODDARD QC:

– and that perhaps explains some of the exchanges I've had with your Honour today. It is a highly controversial decision which as the survey in chapter 13 of Booth and Squires shows is very much alone in the jurisdictions that they have surveyed in relation to this issue but there it is in a footnote identifying that in New Zealand the

position appears to be different. In my submission this case can't survive *Carter* with which it's directly inconsistent but I felt I should provide it and bring it to the Court's attention.

So the liability of regulators and I could have added in here but it didn't seem necessary given that I had touched on them earlier, the *Carter, Caparo, Boyd Knight* line of cases which make that second point about which interest is to be protected and the inappropriateness of extending liability beyond that.

13, the position of the builder and architect and so on. Now your Honour Justice Chambers, said to my learned friend, Mr Farmer, yesterday, well, why should the council be in any different position from the builder and the architect and all the other people, why wouldn't they be liable? And there are essentially two reasons for that. One is a general one which is that it's the builder and the other people who contribute to the construction process and are paid for it who, together, design the product which is sent out into the world and is either sound or defective.

CHAMBERS J:

That argument I have some difficulty with because most buildings require input from a whole range of different people and I would have thought that the inspector or the person who gives the consent in the first place is just one of a team really.

MR GODDARD QC:

But they are not solely responsible for any part of the exercise, they are just checking and that's –

CHAMBERS J:

No but look –

MR GODDARD QC:

– the key difference is that –

CHAMBERS J:

But nor will the builder be responsible for every part. The builder will have subcontractors and will be relying on engineers to tell the builder –

MR GODDARD QC:

They are collectively the people who build it and what the council is doing is checking that certain interests have been, are not compromised by the way in which those other people have done their work so –

CHAMBERS J:
Well the supervising architect is a bit the same though.

MR GODDARD QC:
The difference is that they have been retained by the owner to provide them with an assurance that they are getting what they have sought so the supervising architect is providing a service, directly or indirectly, to the owner to assure them that they are getting what they sought to buy. That is not the role of the regulator.

CHAMBERS J:
Anyway, your second reason might be more compelling.

MR GODDARD QC:
The second reason is that the cases have in fact distinguished between commercial construction and other cases, in relation to liabilities of builders and architects and so forth. So, far from them always being liable and therefore saying, so why isn't the council always liable, the cases on the whole have found liability in relation to home construction on the part of the builder and certain types of expert but not in the commercial context.

So for example, in Australia it's been rejected in *Woolcock Street*. In the UK it's been rejected in *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177, [1988] 2 All ER 992. In the United States jurisdictions, the vast majority of them, there is no liability in tort. There is a transmissible warranty of habitability, it apples to homes. So across a broad sweep of common law jurisdictions, precisely the distinction that I'm contending for here is drawn in relation to builders as well.

CHAMBERS J:
And other professionals.

MR GODDARD QC:
A fortiori, other professionals.

CHAMBERS J:

Ah, well that I can see is a very powerful point if that's the case.

MR GODDARD QC:

And –

ELIAS CJ:

Do we have – is that referred to, I can't remember, in your submissions?

MR GODDARD QC:

It's dealt with in my written submissions. In my written submissions it's touched on in a few paragraphs, subject to the fierce constraints of the 30 page rule, one always has to decide what to emphasise and what to de-emphasise and half the time one gets it wrong, or at least I do.

WILLIAM YOUNG J:

Or just put in more material.

MR GODDARD QC:

That's the other solution but at –

TIPPING J:

Where is it in your submissions Mr Goddard?

MR GODDARD QC:

At 8.53 and 8.54 and I also touched –

CHAMBERS J:

Yes, no, that didn't – yes, you didn't give us those cases though that you say establish the proposition. Well certainly not in those paragraphs you don't.

MR GODDARD QC:

No, I've said as noted above, without a reference which is not terribly helpful. In relation to the United States, the reference is 8.52. In relation to Canada, it is –

ELIAS CJ:

Do we have Partlett, do we?

MR GODDARD QC:

Yes, I've provided that in my bundle, in the bundle of authorities. It essentially confirms that the trend that Sir Robin discusses in *An Impossible Distinction* has continued with continuing rejection of tort liability but also increasing imposition of warranties of habitability in relation to homes –

TIPPING J:

Is the situation with regard to this business about relevant contracts, network of relevant contracts, is that on account of limitation or exclusion of liability in those contracts, or –

MR GODDARD QC:

It's on account –

TIPPING J:

– is it just because there are contracts regulating the relationship per se?

MR GODDARD QC:

It's that fundamental point that choices have been made to structure relationships in a particular way with rights of recourse against some people but not others, or to take or not to take assignments and that we can expect commercial parties to live with those choices but the cases often also go on to observe that the risk of cutting across those networks would be to compromise limitations of liability, where they're included, or –

TIPPING J:

But if you took an assignment, you wouldn't have to get the consent.

MR GODDARD QC:

It would depend on the provisions of the contract but –

TIPPING J:

Well it would be unlikely. If owner number one assigns rights to owner number two, you wouldn't have to get the consent of the tortfeasor.

MR GODDARD QC:

Well you'd just have the contractual right, you would expect.

TIPPING J:

Yes, so I don't quite – you may want to come back to this Mr Goddard because I don't quite see the logic of it. If you can get at them through assignment – maybe I just haven't fully understood the point?

MR GODDARD QC:

The point there – oh, Your Honour is saying, so what's the problem with proposing liability. It is that whether the contract is capable of assignment and what rights and what limits on those rights are provided for and that are all matters of bargain and that imposing a tort duty cuts across all those matters which you can expect commercial parties to bargain for.

TIPPING J:

I can understand entirely if there is limitation of liability or exclusion of liability. It would be quite strange if number two could circumvent such a contractual provision.

MR GODDARD QC:

So by assignment you preserve all the nuances of the contractual regime including limits on liability, exclusions of liability –

TIPPING J:

Exclusions.

MR GODDARD QC:

– and dispute resolution mechanisms which is often an important submission to arbitration which is common in commercial construction contracts so the importance of saying we will stick with the contractual network and give effect to that and give effect to assignments is that what has been bargained for as between builder and owner will be what is imposed. It's not possible for a tort duty to respect all of those refinements and every contract will include a balance of rights and restrictions on rights.

TIPPING J:

So, in effect, this means that in a commercial context a subsequent owner can't sue, for example, the negligent builder absent in express assignment of that right?

MR GODDARD QC:

At which point the rights they have are conditioned by the contract –

TIPPING J:

Conditioned by the contract.

MR GODDARD QC:

– and of course, and this is very important, vulnerable to any set-off if the price hasn't been paid. I think again the problem shouldn't be ignored of tort right circumventing things like set-off –

TIPPING J:

Yes, I am entirely in sympathy with that. I think it is perhaps more that that's the key thing, that some sort of per se.

MR GODDARD QC:

It's not the magic of the fact there are contracts but it is the fact that contract – the contractual regime immediately brings into play all the attributes of contracts and all the rights between the parties including rights of set-off, limitations, exclusions of liability, dispute resolution mechanisms, that means that that's the right way for dealing with these cases in the commercial context. It doesn't –

TIPPING J:

Just in commercial cases.

MR GODDARD QC:

It's our starting point of the common law that it's the appropriate way to deal with it in general but we have then identified a group of particular vulnerable people who shouldn't be subject to those restrictions and that's why the common law has developed transmissible warranties, have had a bit of ability in some countries and why we've legislated for them.

ELIAS CJ:

Yes, but that – I hadn't quite appreciated, that is because there is a contractual regime which, in which vulnerable people are particularly vulnerable and so the legislature and, you say, the common law in some jurisdictions has moved to redress

that imbalance but we are in a situation where there is no legal relationship apart from a tortious one. So when you answered Justice Chambers that there had been comparable distinctions that was in the context of this redressing the imbalance and contractual par, it was in that context was it?

MR GODDARD QC:

Two contexts that I think make this line of cases relevant. The first is again that it sheds important light on the viability of home ownership as a method of identifying the vulnerable when we're making these decisions about the lineaments of liability and that's just as it's relevant in relation to builder's liability so too that vulnerability applies to the same group when we come to consider councils. In fact perhaps there are three points.

The second and related point is that one of the reasons we say that homeowners are vulnerable is precisely that they can't be expected to adequately protect their position through contract whereas we do expect commercial participants in the building market to be able to do so.

The third point is that there is a long line of cases, beginning with *Dutton* in fact but including *Anns* and I think in *Murphy* and in New Zealand at least, *Three Meade Street,* that have accepted that it would be peculiar for a council to be liable in respect of defects in a building to a subsequent owner if the builder wasn't liable to a subsequent owner. It seems odd that the person who is primarily responsible for the defect might not be liable but that the council could be and so the cases have consistently said so, are builders liable because that's a relevant factor to take, to subsequent owners, to take into account when deciding whether or not councils should be liable.

It would be an odd system of law that made councils liable but not the original builder who created the defect, who had primary responsibility for it and, in the house context, the answer is mostly, so we're going to make those builders liable but that's not been the answer outside that context which means that what has been accepted as a pre-condition for it being fair, just and reasonable to make councils liable which is the person who is primarily at fault is also liable, is absent in the commercial building context.

Lord Denning took that approach in *Dutton*. I think, several of their Lordships in *Anns*, it's in one of my footnotes, all the references to that.

ELIAS CJ:

Now, we're at 4 o'clock. Where are you at? Are you going to be taking us, when we resume on Monday, through 13 to 17, is that...

MR GODDARD QC:

Yes but I will move extremely quickly through 14 to 17 which goes back to my submissions because really, I've made most of the arguments in those -

ELIAS CJ:

So how long do you expect to be Mr Goddard, about?

MR GODDARD QC:

I would have thought that I would need something less than the first session.

ELIAS CJ:

Ah, you think you will go – all right, until about 11.30, all right.

MR GODDARD QC:

Yes, if that's all right with the Court and then my friend would –

ELIAS CJ:

Yes. I just wanted Mr Farmer to know where he stands.

MR GODDARD QC:

Well, if I were to aim, I mean, I'm very happy to be guided by the Court. I think I can, without galloping or rushing unduly, conclude by 11.30 and that would mean that my friend hopefully may be able to finish before lunch and it may be a half day sitting rather than a full day –

ELIAS CJ:

Well, we won't hold him to that. We want to hear from him and so if we need to go into the afternoon we shall but we'll resume at 10 o'clock on Monday.

MR GODDARD QC:

Your Honour.

ELIAS CJ:

Thank you.

COURT ADJOURNS: 4.02 PM

COURT RESUMES ON MONDAY 26 MARCH 2012 AT 10.00 AM

ELIAS CJ:

Yes, Mr Goddard.

MR GODDARD QC:

Your Honour. First of all three quick homework tasks that the Court set me. The first was your Honour the Chief Justice's question about terminology in the Building Industry Commission report and description of what local authorities do as regulating, or regulatory, and I'll just provide the paragraph references which I think are most helpful in a report which, it has to be said, is not remarkable for its precise use of terminology, but they are paragraphs 4.11, which describes the whole system for regulating buildings as a set of 10 tasks, then 2.74 where those 10 tasks are listed including the tasks the local authorities perform, and 4.48 which identifies which of those tasks local authorities perform.

McGRATH J:

Sorry, I'm a bit slow. What their reference is to paragraphs in –

MR GODDARD QC:

I'm sorry, your Honour. They are references to paragraphs that shed light on –

McGRATH J:

Paragraphs in what?

MR GODDARD QC:

In the Building Industry Commission report, which is in volume 5 under tab 50. The Chief Justice asked whether a reference somewhere else in the report to regulation included what territorial authorities did or whether it was just making the rules, and this is as much help as I can provide on that, but in my submission it is clear from the overall structure of the report also that they are seen as regulating in the relevant sense.

McGRATH J:

Thank you.

MR GODDARD QC:

The second question, which was also, I think, your Honour the Chief Justice's, was whether acceptable solutions are relevant mainly to domestic construction, and I attempted an answer but said that I would check whether I had that right and I'm glad to say I mostly did. My instructions are that a typical *Hamlin* house with timber framing could be built largely, if not entirely, using acceptable solutions but that for a high rise building, such as the one we're concerned with here, few, if any, are likely to be relevant, and I was told that some bathroom details might be the subject of acceptable solutions but none of the basic construction techniques.

And just anticipating why, or turning to the context in which your Honour asked me that which was the reference to liability being imposed more readily where a task is more routine, what I think that tells us is that in the commercial construction context, in particular major commercial buildings, because of course there is a spectrum, the council's performing a much more sophisticated and evaluative role which involves applying judgment to specific designs and specific site conditions to ascertain whether the performance requirements of the Code are met.

So I think you could say that at one end of the spectrum, a simple timber-framed house, it is much more of a checklist approach against the acceptable solution and more of a routine exercise. At the other end of the spectrum, where designs are specific, more or less unique, it's a much more evaluative, unique one-off task.

But I do have to accept also that I couldn't suggest there's a bright line in which all houses are built using acceptable solutions and all commercial buildings are built without them. It depends on the construction techniques that are adopted, the nature of the structure.

The third question was whether under the Building Act 2004 a person other than a territorial authority can issue consents, carry out inspections, grant code compliance certificates, and the answer is that the Act does provide for the registration of persons other than local authorities as a building consent authority under section 191 and following. There are various criteria, which include having adequate means to meet any liabilities that may arise in performing those functions, that's section 192, and a quick scan of the register of building consent authorities shows that to date there are only councils on that list. There are, in fact, at present no non-council building consent authorities.

Those were the three issues that I had made a note of as outstanding and I can then come back to my road map. I was on item 13, the position of the builder and architect and so on. I'd just begun that and as the hearing came to an end last Wednesday I was attempting to explain why it was that it would be unreasonable for the council to be liable if builders and other experts weren't, and I had got as far as saying in principle it seems odd that the person primarily liable for the defect would not be liable in tort but that a council would be. What I have done, and the Court should have a one-page note with a picture on the second page, a diagram on the second page, that was handed up this morning, is just try to pull together my submissions on this, which were scattered through my written submissions, so that this is more accessible.

I begin by saying it's not fair, just and reasonable, the ultimate test, of course, in terms of imposing a duty of care. Not fair, just and reasonable to impose a duty of care in tort on a local authority that's owed to the initial and any subsequent owner of a non-residential property in respect of financial loss suffered by that owner, unless a duty of care in tort in respect of that same loss is owed to the owner of that property by builders, advisers, subcontractors, and so on.

In footnote 1, I list some of the cases where that has been said, where the Courts have said, "Well, that would make no sense," beginning with Lord Denning in *Dutton* and Lord Justice Sachs agreed with him on that point. It's implicit. There's no pinpoint reference there. Their Lordships in *Anns*, their Lordships in *Murphy*, and Justice Venning in *Three Mead Street*. They are the –

CHAMBERS J:

Well, only the first two of those would have been in Parliament's mind when they passed the Building Act though, wouldn't they, and both of those did envisage that builders could be liable to third parties in tort.

MR GODDARD QC:

In respect of houses.

CHAMBERS J:

Well, that's a question.

MR GODDARD QC:

That's the context in which the decisions were delivered and the question is whether the rationale for imposing liability in that context extends more broadly, and that's really the question that's before the Court now.

CHAMBERS J:

Well, yes, okay, that's…

MR GODDARD QC:

Then I provide an example of a typical commercial construction arrangement. It's the one shown in the diagram. We've got O, the owner developer, contracts with B, the builder, the head contractor, a construction contract that will often contain arbitration and various liability limitation clauses and B will have many subcontractors. I've just shown one, S, and assumed a subcontract that contains limitation of liability clauses. So it's broadly paralleling the *Rolls-Royce* contractual structure.

There's also a contract between O, the owner developer, and A, the architect, and of course O has a relationship with the council based on the Building Act 1991, a regulatory relationship, not a contractual one. After the building is built, O sells the building to P, the purchaser, under a contract for sale that contains no warranties as to quality. The council grants building consent, carries out inspections and issues a code compliance certificate.

So my paragraph 3, what happens if defects in the cladding are discovered by P and those defects result in failure to meet the Building Code requirements in respect of external moisture, E2, which, as we saw last week, is the relevant requirement imposed to protect health and safety of persons using the building.

Suppose also that the defects were caused by the negligence of S, the cladding subcontractor, that the head contractor B and the architect A were negligent in their control and supervision of the work done by S and the council was negligent in its inspection of the cladding system.

The point that is implicit, I think, in the statements of the Judges in footnote 1, and also in the analysis of Sir Robin Cooke, which I'll come to in a moment, in *An Impossible Distinction*, is that it wouldn't be fair, just and reasonable if P could sue the council in tort but P didn't have a tort claim against S and B and A. Otherwise, in proceedings brought by P, the council would be liable for 100% of the loss suffered

by P and could not join any of S or B or A and, in particular, seek contribution from S as the person primarily responsible for the defects and thus for the loss.

ELIAS CJ:

Are they liable though, in respect of the same loss?

MR GODDARD QC:

Well, what I'm suggesting is –

ELIAS CJ:

Well, you're suggesting that –

MR GODDARD QC:

– that they must be otherwise there would be an unfairness and that to the extent that there is any difference in my submission –

ELIAS CJ:

No, no, I'm thinking about is the council liable for the same loss because on one view the council is liable for the loss which results from failure to discover the defects which is not the same loss as the builder would be liable for.

MR GODDARD QC:

No, the builder is liable for bringing about the defects.

ELIAS CJ:

Yes.

MR GODDARD QC:

But in the domestic house building context all the cases proceed, rightly in my submission, on the basis that the loss for which they are liable is the same although the source, and they are both liable in tort.

CHAMBERS J:

Well it is the same though, isn't it, because each of them have contributed –

MR GODDARD QC:

To the present –

CHAMBERS J:

– to the same loss which is –

ELIAS CJ:

To the present, yes.

CHAMBERS J:

– that –

MR GODDARD QC:

The presence of the defects.

CHAMBERS J:

– that you've erected a building which threatens health and safety of people who are going to be in it.

MR GODDARD QC:

Obviously the obligation of the builder and experts to the first owner at least goes beyond that because they have a range of contractual obligations.

CHAMBERS J:

True, true.

MR GODDARD QC:

But it seems to me that –

CHAMBERS J:

But in tort, I'm talking about their tort liability.

MR GODDARD QC:

– in tort, in the house cases that have considered this, yes, they have all proceeded on the basis that there is liability for the same loss and that that is why you can award contribution as between those contributors to the loss with typically awards allocating about, if it's just a straight builder/council case, 80 to 85% responsibility to the builder, 15 to 20% to the council. That's discussed in the first instance decisions in both *Sunset* and *Byron* which are in volume 1 of the authorities. Where you have other

experts in play as well, that tends to correspondingly reduce the share of responsibility of the council, if you've got a builder and an architect and you've got the council residually responsible, but that's precisely my point. In the housing context it's been held that builders and all these experts and subcontractors are liable in tort, and it's been held that the council is liable in tort and that means that all the relevant parties –

TIPPING J:

If we held, Mr Goddard, if that the council should be liable in relation to a non-residential building it would follow, wouldn't it, logically, that everyone else would be liable?

MR GODDARD QC:

That's precisely my submission and that, therefore, this Court would be overruling *Rolls-Royce,* for example, because in relation to the subcontractor you would be finding necessarily that the subcontractor was liable to the initial and subsequent owners and yet its liability to the initial owner that was exactly what was rejected in *Rolls-Royce.*

TIPPING J:

I just wanted to tease out –

MR GODDARD QC:

Yes.

TIPPING J:

– that that is the consequence for which you are, to which you are drawing our attention.

MR GODDARD QC:

That's my, yes, that's my paragraph 6, your Honour, that's where I'm headed, your Honour –

TIPPING J:

I'm sorry.

CHAMBERS J:

I'm sure everyone would agree that that would be unfair if only the council could be liable. The question really though is whether, on the case law that preceded the Building Act 1991, it truly was confined, the liability in tort truly was confined to residential properties and if you read the cases from the 1980s of which there were a number in the Court of Appeal and one in the Privy Council and indeed the English authorities prior to *Murphy,* there wasn't really any suggestion that the liability was something special for houses, it was all about these being people who'd contributed to the erection of a building which posed a risk to those who were in it and, therefore, the owner of the building were held entitled to recover the cost making the building safe again.

MR GODDARD QC:

The early cases didn't involve any sort of sustained focus on the difference between three different types of loss, the direct damage to health and safety of a user, the cost of putting right the defects that posed that imminent danger to health and safety and the cost of fixing all the defects, the economic loss suffered by an owner which might go well beyond what was necessary to remove the immediate risk to health and safety.

The cases did – *Dutton* did touch on that because, of course, the impossible distinction that Lord Denning referred to in that case, which was picked up by Sir Robin as the title of his article in the 1991 *Law Quarterly Review*, was a distinction between liability for damaged health and safety that has occurred and liability for the cost of removing that risk, and that case went so far as to say you can recover for the immediate cost of removing that risk but didn't suggest liability for a broader range of losses.

What then happened was that that liability, in particular in the New Zealand cases, was extended effectively to the cost of repairing defects, reaching its high point in *Stieller* where there was no question of risk to health and safety but the weatherboards didn't comply with the bylaws and it was held that there was a duty of care in respect of the cost of replacing the weatherboards which were too knotty.

Implicit in that line of cases were two themes. One was liability for putting out into the community an item which had latent defects but which appeared sound, and the other side of that coin, which didn't receive a lot of attention really until the 1990s, both in England and in New Zealand, was the vulnerability of the person acquiring

that item, the fact that they couldn't reasonably be expected to manage the risk of acquiring an item with that defect but rather could reasonably rely on the builder and architect and engineer and council for the soundness of that item.

It was an increasing focus on the importance of vulnerability as an element of liability that, for example, produced the decision of the High Court of Australia in *Woolcock Street* where that's the single most important reason for denying liability on the part of the engineer to a subsequent purchaser, and in my submission underpins what the President said in *Hamlin* about the Courts not having had to consider a case of industrial construction in New Zealand yet and how *Junior Books* was not an issue that the New Zealand Courts had had to consider and that the position might be different, and again, as we'll see in a moment when I go to the article, that was very much Sir Robin's approach writing extrajudicially.

So in my submission the cases were concerned with houses. A lot of assumptions about the housing context are built into the Court's reasoning if your Honour reads them looking to see whether that's present. There are a lot of assumptions about the vulnerability of homeowners that are made, for example, by the *Dutton* Court but without using the V word because it wasn't part of the tort discourse at that time, and –

ELIAS CJ:

I'm sorry, I thought Lord Denning did refer to vulnerability in the sense of referring to foundations being covered up. Was that…

MR GODDARD QC:

Yes, the concept is present but I don't think the word was used at that – your Honour might be right, it might even have been –

TIPPING J:

I think it was implicit in some of his language because he talked in his colourful way about this poor woman who didn't have the resources and didn't –

MR GODDARD QC:

That's what I was trying to suggest, your Honour, is that the theme of the vulnerability of Mrs Dutton and the fact that she didn't have the resources to check for these latent

defects or implicitly the sophistication to price for them or contract in relation to them pervades the whole of –

ELIAS CJ:

I thought it was not so much – maybe I'm wrong. Maybe it's *Stieller* but it wasn't so much the particular individual. It was the fact that once foundations are covered up no one can have a look, because – yes, I think, I'm pretty sure it was in *Dutton* because there was reference to usually people will get surveyors.

MR GODDARD QC:

But the surveyors can't, yes.

TIPPING J:

But that's a different type of vulnerability I think.

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes it is.

MR GODDARD QC:

That's the distinction that the High Court of Australia draws in *Woolcock Street* between exposed to the risk and being unable to manage the financial implications of that risk and that's a distinction that we find across many areas of the statue book, for example, the Consumer Guarantees Act being the most striking example, as I mentioned the other day.

So I would say your Honour that no, the language in the early cases doesn't emphasise in the way that *Hamlin* does, this is about homes, this is about homeowners but the analytical framework that is brought to bear assumes a level of vulnerability and inability to manage risk which is more properly characteristic of homeowners and that that context is important and that was really the point that the President was making in *Hamlin* where he said, "We haven't had to consider those cases yet. We might get to a different place. This might matter." My submission is yes, it does matter. When the Court is required to turn its mind to this it has to

choose and the choice is not just in relation to councils, your Honour Justice Tipping's point stealing my thunder really –

TIPPING J:

Well, not really Mr Goddard, it's a fairly muted thunder if I may respectfully say so.

MR GODDARD QC:

It really is meant to address the suggestion that if you take a step then where you end up is with council liability and the point is –

TIPPING J:

Well it does tend to undermine the contractual nexus, or lack of it, thesis.

MR GODDARD QC:

It really would have to follow, in my submission, that *Rolls-Royce* is wrong.

ELIAS CJ:

But, Mr Goddard, if you look at your diagram, exactly this sort of arrangement may well feature in a house building so –

MR GODDARD QC:

Yes, and the difference is –

ELIAS CJ:

Yes, what's the distinction?

MR GODDARD QC:

– well, why don't we go to *An Impossible Distinction* and to *Woolcock Street* and see how the Courts have drawn it. My short answer is vulnerability of homeowners as compared with the ability of owners of non-residential buildings to look after themselves in Sir Robin's language, that that's what it's about. A presumed vulnerability in relation to homeowners which entitles them to look to everyone involved in the process as compared with the absence of vulnerability in the commercial context which means that parties should be held to their contractual rights to what they have bargained for and what they have paid for.

ELIAS CJ:

Might not the bargain, though, enter into the liability of the council because of contributory negligence concepts and matters such as that. If you bargained to limit the liability of the, so that the builder's liability to you is limited –

MR GODDARD QC:

It's consistently been said that that can't affect subsequent purchasers and in principle then contract –

ELIAS CJ:

Yes, subsequent purchasers, yes.

CHAMBERS J:

I don't see why the tort liability cuts across the contractual matrix because the tort liability is limited to health and safety considerations, that's all tort is guaranteeing you, that you will be safe in buildings or we're trying to make you safe in buildings. Now you may well have contractual duties way and above that but nobody should be building unsafe buildings and we're very fortunate now with the Building Code because, as you've analysed it, and at the moment I think correctly, it is essentially to do with health and safety and so it becomes a convenient document to look, well that's the only thing you have to safeguard, is make sure it coincides with the Building Code and low and behold, that's exactly what section 24(e) talks about. So I don't see that it is cutting across the contractual matrix.

MR GODDARD QC:

It is to the extent that the liability can be to persons whose interests other than health and safety are affected. If your Honour, your Honour, some of your Honour's comments are very consistent with what was said by some of their Lordships in *Murphy* which was the obligations are health and safety obligations. There is no inconsistency between tort and contract if the tort liability is limited to harm to health and safety.

So for example, some of their Lordships were prepared to say that there is definitely a duty of care owed by the builder and the council and others, even in the commercial context, two people who are injured by a building for example. There is that personal injury liability and that that is not in any way inconsistent with contract but they said because you have to pay attention to the interests that are affected, a

duty of care in tort to take care to prevent causing harm to the financial interests of building owners, would cut across the contractual arrangements and is not justified –

CHAMBERS J:

Well, that's where I think that paragraph in *Sunset*, I can't give you the number but is the answer to that submission of yours, I would have thought.

MR GODDARD QC:

And I'm going to deal with that in some detail later because that's certainly how my learned friend has presented it as well, in my submission, that is –

CHAMBERS J:

It may be the famous –

MR GODDARD QC:

– that's not right –

CHAMBERS J:

– paragraph 53, I can't remember –

MR GODDARD QC:

It is 53, I think your Honour –

CHAMBERS J:

– but that seems to me the answer to that proposition but anyway, you deal with that when you wish to.

MR GODDARD QC:

I will. Just coming briefly back to the note, I don't think I need to spend much time on it except, what I'm really saying is, this is a package here that in the example given it would not be fair, just and reasonable for the council to be liable to owe for any loss in respect of which S and B and A were not liable in tort and, as I say in 6.2, that's inconsistent with the reasoning and I could have said the result in *Rolls-Royce*. It's contrary to the position in Australia. It's contrary to the position in the UK and it's contrary to the position in Canada, with the exception that I mention in footnote 2, that if the defect were a dangerous one that posed an imminent risk to health and

safety, then the amount recoverable, there would be a duty of care in tort, with the amount recoverable being the cost of removing that risk.

I refer to a very helpful text Linden which is in – I won't go to it now but it's in the bundle of authorities in volume 5, tab 55. It's written by Justice Linden and Professor Feldthusen –

TIPPING J:

Do you know Mr Goddard, whether in Canada this is just an anticipatory thing or whether, say there has matured this risk, this dangerous – and it's actually caused damage to health and safety, what is the Canadian approach then?

MR GODDARD QC:

My understanding is that one would be able to recover both for the health and safety harms that have been suffered and for the cost of taking steps to remove continuing risk.

TIPPING J:

For the future?

MR GODDARD QC:

Yes. So for example, *Winnipeg Condominium Corp No 36 v Bird Construction Co* [1995] 1 SCR 85 was a case where a huge section of cladding had fallen from a building onto the pavement, as they call it, below and there was recovery for the cost of reinstating that cladding and fixing the cladding on the building as a whole, so that more didn't fall on people.

CHAMBERS J:

But if the cladding hadn't already fallen, would it have been permissible under Canadian law to recover the cost of preventing –

MR GODDARD QC:

Ensuring that it didn't, yes.

CHAMBERS J:

Yes.

TIPPING J:

On proof that it was liable –

MR GODDARD QC:

That it was a dangerous defect –

TIPPING J:

– to fall. There concept of dangerous defect is a little slippery.

MR GODDARD QC:

I was about to say exactly that, that the case law involves quite a lot of – rather unsatisfactory explanation of what is a dangerous defect –

TIPPING J:

It's really confined, I think primarily, isn't it, to British Columbia and I know the Supreme Court was in *Winnipeg* but *Winnipeg* was a pretty vivid sort of case.

MR GODDARD QC:

Yes.

TIPPING J:

Most of the cases are British Columbian, aren't they?

MR GODDARD QC:

Yes.

TIPPING J:

Because that's where the problem is, or was.

MR GODDARD QC:

That's where the same problem that we had in relation to weathertightness occurred. There are a scattering of cases in other provinces. My learned friend points out quite rightly in his submissions that there is no Supreme Court or other high level appellate authority conclusively ruling out liability in the non-dangerous defect context and that's actually where – and Linden is good on this. Perhaps we will go to it in fact because it is important.

It's in volume 5 of the authorities, under tab 55 and after explaining – the relevant passage begins on page 479 of the textbook, see "Defective Products and Structures" and after noting at the foot of 479 that there's no category of economic loss claim where there's greater diversity between and among the various common law jurisdictions, the learned authors say the rule in Canada is that one may recover economic loss related to correcting dangerous defects in the product or structure.

Question of recovery for non-dangerous defects left open by the Supreme Court. The United States authority *East River Steamship Corp v Transamerica Delaval Inc* (1986) 476 US 858 (SC) discussed and in fact there's a helpful summary of the reasoning of the Supreme Court of the United States on page 480, about the middle of the page, the reasons behind the no recovery position adopted in most United States jurisdictions and England best explained by the United States Supreme Court. A shame for their Lordships in *Murphy* but points to the US Supreme Court there, the authors say.

The Court said the traditional tort law concerned with personal safety is reduced when the only injury is to the product itself. Economic losses can be easily insured. Contract law and the law of warranty in particular is well suited to commercial controversies because the parties may set the terms of their own agreements. "A manufacturer can restrict its liability within limits by disclaiming warranties or limiting remedies. In exchange the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, there is no reason to intrude into the parties' allocation of the risk."

Then there's a discussion on 481 of the origins of the Canadian dangerous defect exception, the dissenting judgment of Justice Laskin in *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189 and then at the foot of the page, embraced by the Court in *Winnipeg Condominium v Bird* and the authors say it's the law today in Canada, the effect of *Winnipeg Condominium* described in the first paragraph on 482.

Then an interesting paragraph. "It is however more of an open question whether the Canadian Courts will extend recovery and negligence to non-dangerous defects." English Courts do not permit tort recovery for any defects, dangerous or not. "Gradually most American states that once allowed tort recovery for non-dangerous defects are abandoning that position, opting instead to deal with merely shoddy

products by commercial and consumer law statutes in the common law of contract." The Canadian decisions following *Winnipeg Condominium* dealing with non-dangerous defects seem to fall into three categories. Some refuse to strike a claim for non-dangerous defects on a preliminary motion, hold it's a viable issue to be determined at trial. Then the cases seem to disappear so you don't get the next round bubbling up to the appellate level.

Others seem to misinterpret *Winnipeg Condominium* and allow recovery. Finally there are those where recovery has been denied, either because the loss has been allocated by a contract between the parties or it's unrecoverable for other reasons.

"While many appellate decisions have held that recovery for non-dangerous defects is disallowed as a matter of law, others have taken the view the matter is too uncertain to justify striking out at the pleading stage." That's, I think, a helpful summary of the state of the Canadian cases.

Then, I think a helpful observation, "If the Canadian Courts ever did decide to extend negligence law to purely non-dangerous defects, it's most likely they would do so for defective residential housing, as has happened in Australia and New Zealand." And then there's a discussion of a particular case.

So that's where Canada is, and this, of course, coming back to the case before the Court, is not one where there's any allegation that the defects are dangerous. Rather the allegation to that effect, which was made in an earlier pleading, has been deliberately abandoned. So again it's not a case of perhaps that could be pleaded but – and they should – the plaintiff should be given a chance. They've deliberately chosen not to plead that. Perhaps unsurprisingly, when they continue to operate the building as a hotel, it would be a little concerning if they were pleading that it posed an imminent danger to people while trading, and one wonders whether that didn't have some influence on the pleading choice.

In any event, we're here. We've got a non-dangerous defect case, so, on the Canadian case law, which does tie things back to whether there's a danger or not, not to compliance with particular standards designed to remove danger. So it's not a Code type arrangement. It is, actually the inquiry is, is there a danger, then there is liability, with the more complex position outside that.

So that, I think, explains what I was trying to say last Wednesday. It was said much better by Sir Robin Cooke, if you still have volume 5, in the article *An Impossible Distinction* which is under tab 51 of that fifth bundle which began with the relevant passage from *Dutton* and notes that nowhere in that passage about liability do the words "contract" or "tort" appear. Whether or not their omission was deliberate or merely a result of the natural sweep of Lord Denning's language it's significant that he was able to state the law without invoking those technical yet ill-defined concepts and much of this article is concerned to argue that liability, at least in the house context, is appropriate but that it might well be more naturally conceptualised as an implied warranty of habitability than as a duty of care in tort, that that would be a more constructive way to think about it.

That's where Sir Robin ends up on the last page, really picking up that idea, and so over the page, 47, the main theme in the present article will be that in relation to negligence of builders, manufacturers and local authorities true issues are becoming obscured by the use of labels contract and tort and the doctrinal difficulties that those are said to pose.

Sir Robin deals throughout in tandem with the position of builders and other advisors and local authorities and treats them as very much going hand in hand and that's why I think this article is particularly relevant to the issue I'm dealing with now. When should all be liable, when should all not and the suggestion that there are important differences in the commercial context. Sir Robin traces the development of the English case law including with *Murphy* as the end point of that development on page 55, and says diplomatically at the bottom of page 56. "With such strong voices on each side, there is a strong temptation to say that both must be right" and "[i]n an analytical sense that can indeed be said."

It goes on to discuss the distinction between the definition of the scope of duty and by whom it's owed and to whom. Sir Robin discusses warranty law in America on page 58 and following, quotes from *East River Steamship* and I've already taken the Court to the key passage in that in the Linden extract. Sir Robin summarised the American position on page 60 about a third of the way down the page, turning to the American house building cases making it clear, unable to undertake a comprehensive search.

"There are undoubtedly a number of States that, so far, continue to adhere to the privity requirement. I'm not sure how many...remain in which there is no redress for remedial expenditure necessarily incurred by a 'downstream' purchaser...But it has been stated judicially that by 1980 at least 35 State Courts had afforded some measure of protection for purchasers of new homes by implying some form of warranty of habitability". In this field a growing tendency to dispense with the privity requirement.

It's an extensive passage set out from some of the American judgments then over on page 63, negligence by inspectors. The American position discussed and essentially authorities split depending on whether the duty is treated as a general one owed to the public at large or to particular homeowners, and over at the foot of 64 Sir Robin notes that where the local authority has been directly responsible for allowing a substandard house on the market. So it's not merely a case of vicarious liability grounds for imposing liability even stronger reference to the Canadian decision of *City of Kamloops v Nielsen* [1984] 2 SCR 2.

Then the merits, and this is the section I wanted to pause on for a moment, Sir Robin notes that it is not easy to pinpoint in the speeches in the *Murphy* group of cases, reasons why as a matter of substantial justice the United States Courts which favour a house builder's liability to third parties for negligence or a local authorities liability for carelessness on the part of inspectors are wrong. Obviously partly referred to, explained by the fact the House of Lords weren't referred to those relevant decisions, not the sole explanation. Their Lordships don't approach the issues from the point of the view of substantial justice, the merits, they're concerned rather with doctrinal difficulties or assumptions and the floodgates argument. Also an important point about legislation covering the field.

Discussing doctrine, Sir Robin says, "the difficulties would seem largely to disappear if the enlarged and common sense conception of warranty is admitted." After discussing how that would work, says at the foot of the page, "The warranty approach would not naturally be apt as a basis for holding a local authority liable for negligence in inspection but there seems to be no doctrinal difficulty here. If it be accepted that the authority's duty of care stems from control (and consequent reliance by homeowners), there's nothing irrational in holding that the duty extends to taking reasonable care not to cause, or contribute to causing, economic loss to

homeowners." As we'll see, it's no accident that it's homeowners that Sir Robin refers to here.

"Risk of economic loss from being misled into the purchase of a home which deceptively looks stable is one of the very kinds of risk which the duty would be imposed to guard against." So you'd have co-extensive warranty obligations on the part of builders and others, tort obligations on the part of local authorities.

The middle of the page, Sir Robin anticipates that, "Notwithstanding the *Brown* case and what was said by Lord Oliver..., it's reasonably foreseeable that in New Zealand we may be faced with an argument that, as to the liabilities of both builders and local authorities," that pairing again, "New Zealand common law should now change course in the light of the recent House of Lords decisions", inappropriate to comment on that issue. "The point to be made here is that for the foregoing reasons, purity of doctrine does not inextricably compel the denial of remedies in this field; the question is one of the merits or policy. The issue becomes, in Lord Keith's phrase in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL), whether it's just and reasonable that a duty of care of particular scope," that emphasis on scope again, "be incumbent on a defendant...as Lord Fraser said in the *Mineral Transporter*, some limit or control mechanism has to be imposed on the liability of a wrongdoer towards those who have suffered economic damage and consequence of his negligence. Undoubtedly this requires and as Lord Keith emphasised, a careful analysis in weighing of all the competing considerations. Several elementary considerations stand out here."

So what are the considerations that Sir Robin regarded as elementary? "First,... feasible, though not obligatory, to draw a distinction between realty and personalty, as is traditionally done in many areas and branches of the law," and this is really Sir Robin responding to the argument well, we don't do this in relation to chattels, so how can it be appropriate to do it in relation to houses? A theme that came through very strongly in the speeches of their Lordships in *Murphy.* Sir Robin says well, this is not an unheard of distinction.

"Secondly," about 10 lines down, "the floodgates argument is entitled to some weight but not necessarily a decisive weight." That as never an argument that stood in the way of some of the cases in this area.

"Thirdly," and this is singled out as particularly significant. So we've got some elementary considerations, three of them and the particularly significant one is that it's "very widely recognised that homeowners should have some remedy against negligent builders. Opinion is probably much more divided in relation to commercial builders. It can be said that purchasers of such buildings should be able to look after themselves. The American cases on the warranty of habitability do not extend to them. In the New Zealand Court of Appeal of the relevant cases that we have had to consider so far have been about dwellings."

Then the policy considerations that come into play in relation to dwellings are discussed in the next couple of pages. At the foot of page 68, second to last paragraph, "In New Zealand we're disposed in matters of public policy to try to develop the common law...on a course parallel with that chosen by Parliament."

Then a few lines further down, "The consumer protection policy of our Fair Trading Act, an Act which has some application to land as well as goods, might be relevant when some of the questions discussed in this article arise for further judicial consideration." So again, what we have is Sir Robin explicitly identifying this as effectively an area of consumer protection policy and of course Sir Robin was writing before the Consumer Guarantees Act had been enacted. Had that been on the statute book, in my submission, Sir Robin would have seen that as even more directly relevant to the question of how the common law might develop in relation to houses because that really picks up the personalty sphere and imposes obligations on suppliers of products and their manufacturers where those products are of a kind that's generally used for personal family or household purposes. The same distinction that we find in many contexts and it might be added in many international instruments, for example, the UNCITRAL conventions on international sales of goods which don't apply in that consumer sphere in relation to goods that are generally for personal family or household purposes.

So that link back to consumer protection discussion of the legislation that arguably fills the field in England and whether or not it does and at the foot of 69 Sir Robin says, I suspect this is unduly diffident, that he's not sufficiently well informed to venture a view about the overall adequacy of the present English system for protecting homeowners, insurance is not the only factor from the point of view of evolving common law principle, dominant policy factors should be the straight

forward cannons of conduct generally accepted in the community however imperfectly observed by most of us.

Then his Honour concluded by looking back to *Bowen* and the approach that he adopted there of a duty not to put out carelessly a defective thing and no reason compelling the Courts to withhold relief in tort from a plaintiff misled by the appearance of the thing into paying too much for it and that being misled by appearance point obviously is much more relevant again to vulnerable purchasers than to sophisticated purchasers who will either seek information or discount if they can't get it, and the conclusion that prima facie who puts into the community an apparently sound and durable structure intended for use in all probability by a succession of persons should be expected to take reasonable care that it is reasonably fit for that use and does not mislead.

Now that's not the path our law has gone down but it, I think, provides an important indication of the conceptual underpinnings of this area of law as one of the principle contributors to it saw it and that is very much that it's an area of consumer protection policy that where you put out items that may mislead relatively unsophisticated purchasers then you should be accountable for defects in them and certainly Sir Robin was at some pains to say that what we see across the common law world is wide recognition that homeowners should have some remedy against negligent builders that the position may well be different in the commercial sphere because they may be able to look after themselves and that they are able to look after themselves is what the High Court of Australia said emphatically in *Woolcock Street* and it's what the Court of Appeal of New Zealand said in *Rolls-Royce.*

I won't go, I think, to *Woolcock Street.* I have provided some references in 13.3 of my little road map from last week but the principle theme which I've mentioned already is that *Bryan v Maloney*, the case on liability of builders for negligently constructed homes, does not imply liability on the part of those who contribute to the construction of commercial buildings because commercial building owners are not vulnerable. That was a case about foundations so it was a latent defect case and it was accepted by some of Their Honours that it might well not have been possible to carry out inspections. Others surmised that it might have been. It was a preliminary point of law which –

ELIAS CJ:

Too many of them are.

MR GODDARD QC:

That was essentially what Justice Kirby said, your Honour, but he wasn't prepared to decide whether there was or was not a duty of care without much more information about whether that particular purchaser was vulnerable in those circumstances.

Perhaps just pausing there, I should note that one of the reasons I think these are coming up as preliminary points of law is because the courts in New Zealand have emphasised the desirability of drawing bright lines in this area. The way that these arguments were originally run if I think all the way back to the High Court in *Te Mata Properties* was that the keystone, touchstone, the key point was vulnerability and that a helpful way to think about this might be that generally homeowners were vulnerable but not always, and you could show that they were sophisticated and not reliant on a council.

TIPPING J:

Well, if you did it on a case by case basis how vulnerable is vulnerable? I mean, it becomes almost unmanageable I would have thought.

MR GODDARD QC:

That's pretty much what the Courts have said, that you can't do it on a – that it's not workable.

TIPPING J:

I'm very willing to be persuaded otherwise but that's a prima facie view that you've got to have some sort of lines otherwise each case is going to have to be fought.

MR GODDARD QC:

Whenever –

ELIAS CJ:

Unless there are no lines.

TIPPING J:

Unless there are no lines and then every case will be fought.

MR GODDARD QC:

Yes. Where there is a line which is defined by reference to general standards and principles which, at the end of the day, is what we have in relation to duty of care in tort. What tends to happen is that there are some clear cases well away from the line where there obviously is no liability, some clear cases away from the line where there obviously is and then, yes, a contested grey area where cases do tend to be fought and where matters go to trial or are settled because of uncertainty about precisely where the line will lie.

TIPPING J:

Well if the test was individual vulnerability what would be, what more could you say, it would be a case-specific inquiry presumably in every instance?

MR GODDARD QC:

Yes you would say a consistent with –

TIPPING J:

And there may be cases where obviously someone was vulnerable and obviously someone wasn't but, I mean, it's the tension between individual justice and having some sort of clarity and certainly.

MR GODDARD QC:

Yes and that's essentially going to be my submission when we come to the penthouse apartments is that if the Court accepts the submission that in general there is no liability in relation to purely commercial cases which is in my submission consistent with the scheme of the legislation and the interests sought to be protected consistent with the case law elsewhere in the common law world, which there is no reason for us to have a different approach to, there is nothing in our commercial environment that requires a different result, nothing in our legislation that justifies a different result, then – and very good reasons of the kind explored in *Rolls-Royce* to hold people to the contractual protections they have contracted for and not crossed the contractual framework.

If that's the position then really how the penthouse apartments are dealt with depends on how much individualised justice we seek to do to each owner within a mixed-use building or whether, recognising that it will be a little bit rough and ready because a duty will be imposed on councils and builders and others in respect of

some parts of a building but not others, some financial interests in a building but not others, before you can define those with precision because you don't have a unit plan at that stage, or whether the preference is to have a very bright line which is based on the description of the building in the consent application as a whole and that is, it's exactly how one –

TIPPING J:

How difficult to administer would a segmented approach, the plaintiff's fallback position here if they don't, if we are going to segment how difficult would that be to administer. In other words, the penthouses here are an individual that are identifiable. It's clear, presumably from the plan that was put in, that they were going to be of a different character, if you like, from the hotel units.

MR GODDARD QC:

That was always explicitly identified, yes, so although these –

TIPPING J:

What's the problem, Mr Goddard? I'm just working on a hypothesis at the moment.

MR GODDARD QC:

Yes, no, I understand that Sir. The problem that I discussed in section 9 of my submissions is that at the time the council is performing its functions one doesn't know the details of where the outer limits of particular units within a unit title building lie. So, for example, you don't know whether exterior walls are going to be common property, are part of a particular unit.

WILLIAM YOUNG J:

Why does that matter because presumably at the coalface all the inspector is going to be interested in is whether the building complies?

MR GODDARD QC:

Yes, it makes –

WILLIAM YOUNG J:

They are going to say, oh, I'd better take particular care because this is residential or, oh, gee, this is commercial so it's once over lightly.

MR GODDARD QC:

I was going to make exactly that point. That should make no difference to what the inspector does on the ground. Where it would potentially be relevant is when it comes to charging fees in a way that reflects potential liability for some part of the building because fees depend on the value of the building work to be done and historically, at least, there hasn't –

TIPPING J:

I wouldn't have thought it was beyond the ingenuity of the likes of your client and others to work that out, Mr Goddard.

MR GODDARD QC:

No, it's not beyond the ingenuity of council especially given all the other uncertainties that affect that sort of calculation and I have to accept that this would not be the greatest one.

CHAMBERS J:

I would love to know whether historically councils have charged less for commercial inspections than they have for residential.

MR GODDARD QC:

And I think my answer last week was that I don't know what the analytical framework was –

CHAMBERS J:

Well your submission keeps suggesting that they are charging.

MR GODDARD QC:

Not charging less than for residential because that all depends on the relative sophistication and complexity of the building. I mentioned earlier the relative importance of acceptable solutions in relation to residential. It could well be that because it's easier to inspect residential buildings and harder to inspect commercial ones, the fees for commercial ones would be higher even if there was no liability in respect of them but there was in relation to residential. The fees are –

ELIAS CJ:

Well that might be right but it may be that it's simply done off the dollar amount as the building industry authorities levy is.

MR GODDARD QC:

And it will be done differently from authority to authority and with varying degrees of sophistication depending on the local authority. I don't think that –

TIPPING J:

But unless Mr Goddard, sorry to interrupt, but unless there was some major impediment, if the principle was if home's fine, nothing more and you could clearly identify homes in a block and non-homes, it would leave me cold initially, it was something very powerful to suggest that we shouldn't have a some sort of segmented approach. To say that because it's 49% residential and 51% commercial everybody's out, it seems altogether far too blunt and I know we are on to a slightly different point but –

MR GODDARD QC:

Yes, I, no, no, I'm very –

TIPPING J:

– it seemed to me we needed to move a bit because otherwise –

MR GODDARD QC:

No, I'm very happy to deal with that. As I think I accepted last week it would be well consistent with the mainstream of case law in New Zealand and elsewhere to adopt that sort of segmented approach, that's essentially a policy choice for this Court and –

TIPPING J:

What is – is there anything you can advance against it?

MR GODDARD QC:

The impediment is that there would be some uncertainty about the precise boundaries and value of the parts of the building in respect of which a duty is owed. That has been seen by Judges in some cases as an impediment to drawing that distinction but I couldn't submit to your Honour that it was a major impediment.

TIPPING J:

In the individual case there may be some slight awkwardness.

MR GODDARD QC:

Yes.

TIPPING J:

But that's about it, isn't it?

MR GODDARD QC:

That's about it.

TIPPING J:

It's not unmanageable?

MR GODDARD QC:

No, it's not unmanageable. It's a slight reduction of the brightness of the line in order to achieve a more nuanced range of outcomes.

WILLIAM YOUNG J:

That's just really a matter of words, isn't it, because you would say, I mean, what Justice Harrison has going for him is that he just applies the line. It's residential duty of care if it's not –

MR GODDARD QC:

In some cases where I think we will end up on that approach is having, the simplicity of the majority's approach below is that you just look at the intended use and you have an answer whereas necessarily on Justice Harrison's approach you have to say, well, we need to look at a wider set of information available to the council –

TIPPING J:

When they are doing intended use are they doing it on a dominant – when it's a multi-use building are they doing it on what they see as the dominant use or the greatest proportionate use? This intended use strikes me as being a bit woolly.

MR GODDARD QC:

As I read the Act and the Code, all the intended uses should be identified but –

TIPPING J:

Well in that case –

MR GODDARD QC:

– generally, certainly in this case and in others I have seen, that tends not to be the case, the predominant use is identified.

ELIAS CJ:

Well what happens with timeshare apartments?

MR GODDARD QC:

Your Honour, I just don't know, I mean, it's not necessarily the case that something is built to be a timeshare. That's a classic example of a decision which can be made further down the track –

ELIAS CJ:

No, but I'm thinking of down the track, somebody who ends up with a defective apartment, maybe that's a reason to go back to the majority opinion of the intended use foreshadowed?

MR GODDARD QC:

Well I think you certainly have to look at the intended use at the time the council performed its functions because the duty – and that's Justice –

CHAMBERS J:

Well, what is the answer on the timeshare?

MR GODDARD QC:

If –

CHAMBERS J:

On your thesis?

WILLIAM YOUNG J:

It's probably residential, isn't it? It's just a fractionated holiday property, isn't it?

MR GODDARD QC:

Yes, I think that's right Sir, I think that's probably –

CHAMBERS J:

Well, how does –

MR GODDARD QC:

– right, unless it's also operated with a significant letting component. So I think –

TIPPING J:

Well, they usually are, I think.

CHAMBERS J:

Well, they usually are.

MR GODDARD QC:

Well, I think you would have to look at what was communicated to the local authority about the intended use and if it was simply told this is a case of commercial construction, this is a commercial property, it's a hotel or motel –

CHAMBERS J:

Well, but some timeshare owners will use theirs the whole time and won't let them out, others will let them out.

WILLIAM YOUNG J:

Isn't that just like the *Sunset* case where some of the unit owners were never going to occupy them?

MR GODDARD QC:

Yes. You can't look at what people ultimately do, you have to look at what was intended at the time it was built and, perhaps most importantly of all, what's communicated to the council about what is intended because it can only be what they know that drives whether or not they owe a duty of care and –

CHAMBERS J:

Well, how does the hotel in this case really differ from a timeshare because weren't these hotel investors, they did have rights to occupy their units, didn't they? Am I right on that, for some of the time?

MR GODDARD QC:

They were able – not that this was something which of course forms part of the plans and specifications, submitted use, but the expectation at the time of construction which was reflected in the leases, was that they could use the property, it was for either 14 or 15 days a year but that if their one was busy they would be put in another one, so it's not actually specific to your – it's much more a right to free accommodation, or pre-purchased accommodation somewhere in the hotel.

TIPPING J:

Unless it's open slather, we're bound to have some difficulties around the margins. I mean, if it's for open slather, I mean, duty of care to everybody?

MR GODDARD QC:

Yes, that's exactly right and the fact that a test will raise some difficult issues at the margin is, I accept, not a reason to reject it in the case law, even more than it is in legislation.

ELIAS CJ:

Well, what's the test that you apply?

MR GODDARD QC:

The test is –

ELIAS CJ:

There must be some principle that's being applied, that's why I asked at the beginning –

MR GODDARD QC:

That in relation to homes, buildings that are intended as homes, there is –

ELIAS CJ:

But why intention, why is intention helpful in this context?

WILLIAM YOUNG J:

Well nine times out of 10 it is going to be perfectly obvious whether it's a house or it's a factory, it's not going to be problem.

MR GODDARD QC:

Yes, that's right.

WILLIAM YOUNG J:

It's on the margin, where you've got something that's suitable for residential purposes, but which isn't really like a home, that you start to have arguments if the duty of care is a home duty, a duty to homeowners.

MR GODDARD QC:

Yes and –

TIPPING J:

Well, if the test wasn't intention, warts and all, we'd have to revisit *Sunset*?

MR GODDARD QC:

Yes, that's right and the answer is that –

ELIAS CJ:

Perhaps we should.

MR GODDARD QC:

Well, the alternative really is a case by case inquiry into all the factors relevant to imposition of duty of care, in particular vulnerability. So one can do – have an absolutely bright line, one can have no distinctions I suppose, one can look to intended uses because that's the best available guide to presume vulnerability. On the whole, homeowners are accepted as a vulnerable class and that's how our law draws lines in relation to consumer protection generally –

ELIAS CJ:

But the –

MR GODDARD QC:

– I don't get less protection –

ELIAS CJ:

No.

MR GODDARD QC:

than less sophisticated consumers, even though I'm probably better placed than many when it comes to buying a computer or a, I don't know, the other gadgets that I have a weakness for –

McGRATH J:

You're really contemplating that intention will always be transparent at the time that application is made, consent to build is given?

MR GODDARD QC:

Necessarily because under the Act one had to advise the council of the intended use. So the intention is a legis – that's a better answer than any I've managed so far, on this point. There is a statutory requirement to communicate how you intend to use the building to the council. So it is something which should be apparent and in the vast majority of cases, as his Honour Justice Young said, what – the description that's provided will mesh with reality, there won't be messiness or edges or incompletenesses and everyone will know where they stand.

CHAMBERS J:

Yes, it's a different question though as to whether Parliament imposed that requirement for purposes of tort liability, or whether it imposed it because different parts of the Building Code apply differently depending on what your use is going to be.

MR GODDARD QC:

In 1991, I think we can say that Parliament didn't turn its mind to the scope of the common law liability but rather left that –

CHAMBERS J:

Well, that is not what –

MR GODDARD QC:

– to the Courts –

CHAMBERS J:

– the Privy Council thought in *Hamlin*. Part of the reason the Privy Council said that we're not going to get involved in here is because Parliament has studied this topic in depth and chose not to change –

MR GODDARD QC:

Not to go there –

CHAMBERS J:

– the existing law.

MR GODDARD QC:

– that's exactly – that was what I was trying to say, is Parliament chose not to go there without taking any view on what "there" was. It said, the courts have laid down certain principles in this area, presumably they will continue to elucidate those. We are not restricting that but also there's nothing in the Act that could be understood to extend it. It's been left to the courts and that's what the Court of Appeal said in *Rolls-Royce* when they talked about the statutory framework being essentially neutral. What the Court was meaning was that there are no helpful indications in the Building Act 1991 about what Parliament understood the then existing scope of tort liability to be.

Coming back to the question though about whether intended use is relevant to liability issues, what we see very helpfully in the 2004 Act, is an indication that it is because in the 2004 Act we see Parliament saying yes, where a building is intended to be used as a household unit, then warranties, special protections that are in place whether or not the purchaser is smart enough to contract for them, will be provided. So that's direct –

CHAMBERS J:

But we're not really interested in the 2004 Act, are we because we're simply interested in whether, in 2000 and 2001, on the then statutory framework, this council could reasonably consider it was under a duty of care?

MR GODDARD QC:

I think your Honour, as interested in the 2004 Act as it was appropriate for the *Hamlin* Court to be in the 1991 Act which is that it provides helpful policy signals and the policy signal that's provided by the 2004 Act is that there is a meaningful distinction, in policy terms, between household units and other types of building; a meaningful distinction focused on the presumed vulnerability.

CHAMBERS J:

I'm not sure that is right. There's a fundamental difference between what the Court of Appeal was concerned about in *Hamlin*. It was concerned about the fact that *Murphy* had changed, turned upside down, what was believed to be the common law in England and New Zealand and they were concerned to see whether well, have we been talking nonsense for the past 20 years and that was why they thought well, we better look at the 1991 Act to see whether it gives us a pointer from Parliament as to whether we've been talking nonsense.

MR GODDARD QC:

And the question now is, have we just been talking about houses for the last 30 years, or is the fact that we were just talking about houses an irrelevant distinction that's not something we should pay attention to in this area and similarly we have a helpful indication from Parliament that it is a relevant distinction in this area with important policy implications. So it tells us two really important things, that it's a workable distinction at the end of the day, that warranty applies to the bits of Spencer on Byron, well, if you built Spencer on Byron now it would apply to the bits that were household units and not the other bits.

WILLIAM YOUNG J:

How would it apply to the timeshare example? Did you know, I mean, or –

MR GODDARD QC:

I'd have to sit down and look at the language and work through it but my initial reaction is that it's not the home of anyone and therefore wouldn't apply.

WILLIAM YOUNG J:

Right.

MR GODDARD QC:

I think that's probably right, Sir.

ELIAS CJ:

Well, does that mean that baches aren't covered?

MR GODDARD QC:

No because it's a home, it's just that's it's only a temporary home for a particular family.

TIPPING J:

A secondary home. Well it does say, "Only or –

MR GODDARD QC:

The earthquake –

TIPPING J:

– "Only or mainly for residential purposes." That's the definition of household unit in the 2004 Act. A residence – a home or residence of not more than one household. That might –

MR GODDARD QC:

Yes.

TIPPING J:

– be a bit of a problem.

MR GODDARD QC:

The home or residence of not more than one household, that's what I was thinking of.

TIPPING J:

But that was what you were thinking of, yes.

MR GODDARD QC:

So I don't think that applies to a timeshare but it does apply to a holiday home.

TIPPING J:

"Does not include a hostel, boarding house or other specialised accommodation."

MR GODDARD QC:

A distinction we see, in another place we see that distinction drawn of course is in the Earthquake Commission legislation which relates to essentially similarly defined homes and, again, that's a vulnerability theme coming through, different set of social concerns, different set of policy responses. So it tells us that it is a workable distinction, there will be some boundary issues but if the legislature considers that it is an acceptable test for the courts and other decision makers to be applying in that purpose there is no reason to reject it here and it tells us that it has policy resonance here and that, therefore, it may well not be an accident of history that the cases have been focused on homes because there really are different concerns in play. So I think it gives us exactly the same sort of help, Sir.

TIPPING J:

Do we have any statutory history of this household unit and this concept of the warranty attaching only to household units? Is there any guide there that Parliament saw that protection as being desirable as a matter of policy as opposed to, I mean, it's implicit that they only had it but is there any discussion that you're aware of?

MR GODDARD QC:

Not that I'm aware of but I haven't looked recently –

TIPPING J:

No.

MR GODDARD QC:

– and I can't even remember whether I did once, I'm afraid.

TIPPING J:

That's all right, Mr Goddard, that's fine, we can look –

MR GODDARD QC:

That's a gap in my recent research. yes, but I'm afraid I can't help.

TIPPING J:

– to the extent it's appropriate we will need to look.

MR GODDARD QC:

Yes, but I'm afraid I can't help on that, I just don't remember. I've really covered, I think, most – well I've certainly finished 13 and if I just look quickly at my section 8 of my main submissions, I doubt that there is anything that hasn't been covered in the course of going through the other parts of the roadmap and responding to submissions. I do think that the fact that this has been seen as a workable and relevant distinction by all the Judges in the cases listed in my paragraph 8.10 is not without it's importance.

TIPPING J:

On page 22 of your submission, Mr Goddard, you referred to the article by David Partlett and you say the policy rationale for treating commercial building owners differently is discussed. Do we have that article in the materials?

MR GODDARD QC:

Yes, it's in volume –

TIPPING J:

I'm not asking you to take us to it I just wanted to know if it was there.

MR GODDARD QC:

It's in volume 5.

TIPPING J:

Volume 5, is it?

MR GODDARD QC:

Under – I will just give you the reference, Sir. It's in volume 5 under tab 54.

TIPPING J:

Thank you.

MR GODDARD QC:

And it's essentially what Sir Robin anticipated in the *Impossible Distinction* article that they are able to look after themselves, that there's not the same vulnerability.

TIPPING J:

So you would say not only is it an impossible distinction it's an irrelevant distinction? Sorry, it is a relevant distinction?

MR GODDARD QC:

It's a different distinction I think.

TIPPING J:

It's a different distinction.

MR GODDARD QC:

I'm not – but that distinction – Sir Robin was not arguing that the residential/commercial distinction was –

TIPPING J:

No.

MR GODDARD QC:

– an impossible distinction, it was the distinction between liability after the event for harm and liability in advance –

TIPPING J:

Quite.

MR GODDARD QC:

– for removing the risk. I'm not attacking that distinction but there's another one which Sir Robin expressly floated as likely to be relevant which in fact we find in most of these systems.

TIPPING J:

Well he expressly reserved the position for commercial buildings in his judgment in *Hamlin*, as I read it.

MR GODDARD QC:

Yes, as did Justice Blanchard in the Court of Appeal in *Riddell v Porteous* [1999] 1 NZLR 1 (CA), so it's something which has been flagged as an open issue in New Zealand for a long time and this is the case in which it comes to be answered.

Charterhall of course also and this Court got one day into the process of considering that and then for procedural reasons it went away.

Then I did just want to emphasise 8.41 and 8.42 of my submissions. The point that there is actually a positive inconsistency with the objectives of the 1991 Act, the policy of the 1991 Act and imposing liability on councils in the commercial building context because that would in turn impose on commercial building owners, in effect, a compulsory insurance regime and impose costs that are unnecessary, insufficient, and to emphasise that far from encouraging the maintenance of standards, the suggestion made by the appellants, this is my 8.42, what is much more likely given the ability of regulators to impose the cost of precaution on others, was the excess precaution and a reluctance to approve innovative building techniques directly at odds with the Act. So there's no anomaly in distinguishing for duty of care purposes between relative standard homes and the complex other buildings.

Going through the case law in other jurisdictions and I've really dealt with this. I haven't gone through *Murphy*. There are some useful discussions of these issues in it, while recognising that on the residential front New Zealand has chosen to go in another direction. Your Honour's taken me to 8.52 which I was going to go to.

That brings me to the last point I really did want to pause on which is on my page 23, the suggestion that liability should be imposed on commercial building owners in order to protect users. So this is – in fact it's paragraph 54 I think of *Sunset Terraces*. The Court said well, a duty owed to the owner if a building will protect a non-owner occupant such as a tenant and what the appellants argue at paragraph 39 of their submissions. The argument is a general application is effective, what your Honour Justice Chambers put to me earlier today and that the 1991 Act goal of protecting users of commercial buildings would be advanced by providing a remedy to the owner of a commercial building.

I think that what the appellants are doing and a measure of diffidence is always appropriate in making submissions to a Court about what was intended by a recent judgment of that Court but the problem, it seems to me, with the appellants' approach is that it really takes, at paragraph 54 of *Sunset Terraces,* out of context –

ELIAS CJ:

Where do we find *Sunset Terraces*?

MR GODDARD QC:

Sunset Terraces is in volume 3 of the authorities, it's under tab 30.

ELIAS CJ:

Thank you.

TIPPING J:

It's 53, it's the last –

MR GODDARD QC:

It is 53, I don't know – that reference is just wrong in my paragraph 8.55. It's important, I think, to read that in the context of the discussion of the scope of *Hamlin*, beginning at paragraph 46 which I took the Court through in some detail last week and in particular paragraph 49, where the Court said that the duty affirmed in *Hamlin* is designed to protect the interests citizens have in their homes –

TIPPING J:

Well, at least – well, I suppose I'm in the position that I could say but perhaps I shouldn't, the natural reading of this seems to me to be, it's dealing with a tenant of a home?

MR GODDARD QC:

Mmm, that was my submission, that the concern is to protect a tenant of a home, to protect that interest that the tenant, the citizen tenant has in the home they live in and a concern –

TIPPING J:

Well, the express reserving of the commercial premises issue can hardly fit with us saying well, you know, go for it, under the last part of paragraph 53.

ELIAS CJ:

Well, that's why it is like that. You can't build more on it than that, this point was explicitly reserved, I think, in anticipation of this case queued up.

MR GODDARD QC:

Yes. So that's really all I was going to say about that, is that certainly I didn't understand the Court to be pre-empting this discussion in paragraph 53 and, it seems to me and it's really your Honour has very helpfully clarified that the interest that is being protected by compensating the owner of a home is the interest citizens have in the homes that they live in and that's consistent with the concern for homes and protecting the people who live in them by providing warranties to the owners, that we see in the 2004 Act –

TIPPING J:

Well, look at the second line of 53, "Investor owners of residential property," that's the context of the paragraph.

MR GODDARD QC:

Yes, that's all I was going to really say about this paragraph, is that context is everything and that the argument that the appellants make that the approach is of more general application, faces the two difficulties that I identify in my paragraph 8.56.

First, it's irreconcilable with the reasoning and the result in *Attorney-General v Carter* and all the cases of that kind throughout the common law world because it is not the case that we say oh well, the best way of protecting the safety of people who sail on ships is to give the owner of the ship a right of action, they'll be able to recover some money, fix the ship and everyone will be safer and if that was an appropriate way of approaching the issue, then it seems to me very hard to suggest that the *Carter* Court would have reached the result they did merely because the explanation that was put forward for the duty didn't notice that obvious point.

So if we compensate owners for harm to their financial interests whenever that might in fact lead to the furtherance of a different policy goal, the protection of someone else's health and safety, then *Carter* would be wrong.

Second, it seems to me that it overlooks the provision that's made in the Building Act for requiring a building owner to remedy defects in the building that pose a risk to health and safety of building users –

CHAMBERS J:

Can I respectfully just question that proposition? No one is denying that under the Building Act there may be a requirement on the owner to remedy defects and that applies of course whether it's commercial or residential but that doesn't tell us anything about whether the owner ought to be able to recover from someone else if the defect is the result of somebody else's fault?

MR GODDARD QC:

That's where, I think, the themes that we see coming through in the homeowner cases again are important. The emphasis that often homeowners will be of modest means, a lot of emphasis in *Hamlin* and in *Bryan v Maloney* in Australia –

CHAMBERS J:

But that won't prevent them being – they will still have to comply with that duty under the Building Act.

MR GODDARD QC:

The difference, I think, is that there is an implicit recognition that it is much more difficult for homeowners to simply fix it and unacceptable in social policy terms to say to them, if you can't afford to fix it, take the hit and go. So the fact that a house will typically be the largest investment that a person makes is a point that we see in a number of the decisions, *Williams v Mount Eden Borough Council* (1986) 1 NZBLC 102, 544 (HC), I think from memory that's made, it's certainly made in *Bryan v Maloney* in Australia, it's a point that turns up, again if my memory serves me rightly, in *Hamlin*.

So what I say in (b), I think we can say without hesitation in the commercial sphere, we can say well look, if there's a health and safety risk the builder owner can be required to remedy it. If they've got the means to carry that out, it will be done and they've simply taken a loss to their pocket and the Act is not about that. If they don't have the means to do the work the council can carry out the necessary work and recover the cost from the owner or sell the property pursuant to their charge in order to recover those costs or, of course, the owner can sell to a person with the means to do the work at a discount that reflects the expected cost and, again, that's not a kind of harm with which we have any concern in the commercial context, it's one of the risks associated with owning a commercial building and there is no reason for the public purse to protect against that risk, either by ratepayers or by levying all people carrying out building work.

I think that's a very important point the Court made to me in argument to me last week, that it's the public that pays, whether you cover it through consent fees or from ratepayers it's a charge on the public and we don't, there's no reason to shift that risk to the public but the vulnerability of homeowners means that our concerns are engaged in a quite different way where the statutory response would impose a cost on homeowners that either they simply can't bear or that is disproportionately large and unmanageable for them and that we don't expect them to assume for themselves, that the social history of New Zealand shows we don't expect them to bear for themselves.

So my (b) says the health and safety defect, if it's identified, is like seeing the snail in the bottle. Once you've seen the snail you don't drink the ginger beer you go and buy another bottle of ginger beer and that's a loss that we are very comfortable expecting commercial building owners to assume. New Zealand social history suggests we are more diffident about saying to homeowners, tough that's your loss, and again we see that distinction turning up in the 2004 Act where we say, no, you are entitled to shift that loss to the builder and you can't even contract out of that.

It also, I think, the use that the appellants seek to make of this argument overlooks the real prospect especially in the commercial sphere that recoveries by owners will not be spent on repairs but rather that the building will simply be sold at a discount and what you see people suing for is a loss on resale and the amended statement of claim that's been provided to the Court in this case includes a large number of claims for losses on resale. So there is no suggestion that those plaintiffs would spend money on remedying the defects because they are no longer owners, they have just taken a hit and it's a straight forward commercial loss, a financial loss, it's not the sort of loss the Building Act was designed to guard against and compensating them has absolutely no logical or practical link with the carrying out of remedial work.

The last point here that even if this is a relevant argument in cases where there is a dangerous defect in the Canadian sense, let's provide the money to remove the danger. This is not a case where the plaintiffs say that there is a danger that they need money to remove and I, the importance of that cannot be overlooked. On the pleadings here this concern simply is not engaged because the plaintiffs are not saying there is a risk to health and safety, an imminent danger that we need to be put in funds to remove.

That's not the only response, there are the more general ones earlier but it is, I think, a particularly telling one on the facts of this case. Otherwise I think I've covered the issues I intended to cover. The Court has my written submissions. Unless there are issues I can assist with, I have, for one of the first times in my life, finished at a time I predicted.

ELIAS CJ:

Well done. All right, we'll take the morning adjournment now, thank you.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.47 AM

ELIAS CJ:

Yes, Mr Farmer.

MR FARMER QC:

If your Honours please, I've handed up to the Court a written outline of the points of reply. I was able to do that as a result of my learned friend, helpfully on Thursday or Friday, sending me a copy of the document that he handed up this morning. So I've really been forewarned, as it were, as to what his submissions were today.

Now there are just two major points, or submissions that he makes that I want to address and the first of them is the question of the purpose and scope of the Building Act and in particular whether it is intended, or could be said to be intended to protect the financial interest of commercial owners along with other kinds of owners of buildings and the second one which you'll see at the bottom of page 2, is the question of whether you can sue the council if, and it's a very big if, builders, architects, engineers, et cetera, do not owe a duty of care in respect of commercial premises.

So going back to the first point, my attempt there is to summarise what my learned friend has submitted to the Court which is that the Building Act does not have the purpose of protecting the financial interests of commercial owners. Its purpose is to protect vulnerable, and the concept of vulnerability, there's a lot of emphasis been placed on that, homeowners and my learned friend has taken the Court through the provisions of the Code which he points to – or those that point to the objectives as being to safeguard people against illness or injury and he concludes from that the cases on all fours with *Carter* where similarly it was said in that case, a very different kind of case on the facts, financial interests were not within the statutory objectives.

Now, first of all, we need to consider in response to that the question of the Code and then look at the statute. The Code, we would say, is not so unequivocal and you've been taken to it so I won't go back to the specifics but you'll recall clause B2 of the Code which deals with durability, the 50 year lifespan of a building and that applies to all buildings without distinction. So too does the very critical E2.2 which is concerned with ingress of moisture and the like. That refers to buildings without distinction, not specifically to household units and you would have seen the odd provision in the

Code where it is intended to apply only to household units, then there is a specific exemption from the requirement, of commercial or other kinds of buildings but otherwise the Code generally applies to all buildings.

Now moving from that, if your Honours please, to the statutory purposes and we had the argument last week that they are contained in sections 6 and 7. We say they're very broadly stated. The three objectives stated in section 6, I've summarised here, the controls in trust of the TAs apply to these three facets of buildings. First, building work, all building work, no distinction. Secondly, the use of all buildings, again no distinction. Thirdly, the need to ensure that buildings are safe and sanitary, have means of escape from fire and again, no distinction between one building type and another.

So that's the basic policy statement and when one is considering the issue that arises in this case, as to whether the duty, the common law duty is somehow within the scope of that policy, we would say, first of all, that it is but secondly, really my learned friend has an even higher task and that is he has to show that the common law duty is inconsistent with, not necessarily just consistent with which we would say it is but inconsistent with the statutory policy and in that respect we rely on Lord Nicholls' statement in those terms in *Stovin v Wise* and I'll just give you the reference, it's page 935 at letter (b). What he said was that there can be no common law duty inconsistent with the framework of the Act.

Now my learned friend's response to that, as I understand it, would be that there is an inconsistency because a liability to commercial owners would impose costs on commercial building owners, where in fact the Building Act was intended to achieve greater efficiencies in respect of buildings by way of the new form of control that the Act introduced. I'll come back to that because there is a response to that specific submission that he makes.

Now going back up on the page, my subparagraph 2 at the end of where I've dealt with, section 6 and 7, there's also the important – that was section 6 I'm sorry, there's also of course section 7 that all building work, again without any distinction, must comply with the Building Code. It's the council's duty, as we've seen many times through this hearing, statutory duty to enforce the Building Code, section 24(e) and then there's section 76 which provides the mechanism by way of powers of inspection for carrying out that duty in respect of buildings that are under construction

and also there is the further provisions which perhaps we haven't placed a lot of weight on, so I would like to maybe take you to them briefly.

The powers to deal with buildings after completion, that at anytime after completion might become dangerous or insanitary and, if you recall, the Building Act is in tab 47 of – sorry tab 46 of volume 4 and the point about section 64 and section 65 is that there are those statutory powers to require, particularly in section 65, to require a building which is either dangerous or insanitary to be fixed and the definition of insanitary in section 64(4) specifically includes or provides that a building is deemed to be insanitary if in (b) its provisions against moisture penetration are so insufficient or in such a defective condition as to cause dampness in the building or in any adjoining building. So there we have provisions, statutory provisions, again without distinction between one kind of a building and another, that are directed specifically at buildings where there is moisture penetration as a result of some defect or another in the building. I'm going to come back to that section later to deal with the trousering point if I – as your Honour Justice Young referred to it and which my learned friend cottoned on to this morning as well as providing him with a good argument.

Now my third paragraph on the first page says that if the Code is complied with and enforced then, of course, builder defects will not occur and health and safety will not be threatened and one starts with that proposition. That's the responsibility of the council to make sure the building is properly built and if it carries out that responsibility correctly then the strong likelihood is that there won't be a problem and that will mean, among other things, that owners of buildings will not suffer loss, in particular subsequent purchasers of such buildings will not suffer loss, in the form of repairs or depreciation in value.

So for that reason we submit that our draft statement of claim, amended statement of claim, which my learned friend a number of times has criticised, is appropriately pleaded in the way that it is in paragraph 38 when it alleges that the council was in breach of its duty in failing to identify that the building work did not meet the performance requirements of the Code.

Secondly, in issuing a code of compliance certificate when the building did not comply and your Honour Justice Chambers put to my learned friend if there had been a breach of the Code, and I have added the word "ipso facto" that breaches the section 6 purposes and we would make that submission that that must be so and if

whatever the, within those broad statutory purposes as stated in section 6, if within that as illustrated particularly by the provisions of the Code, one can find a concern about health and safety which certainly one can do, then our submission would be that necessarily the pleading that we've made must encompass that particular, what might be called a sub-objective or a part of the broader objectives.

Now from there what we do in paragraph 4 at the top of page 2 is turn to –

WILLIAM YOUNG J:

Could you perhaps just – sorry. I don't know that I fully understand this. Are you saying that it is a component of your case that the building is insanitary?

MR FARMER QC:

Yes, as statutorily defined, yes, because it, because moisture ingress is permitted as a result of defects in the construction of the building.

WILLIAM YOUNG J:

And is that refected in the proposed statement of claim?

MR FARMER QC:

It is because of the fact that the Code or the Building Code requires that the building be constructed in a way that does not allow –

WILLIAM YOUNG J:

I see, but it's only – it's not sort of, it's, a health and safety issue isn't explicitly pleaded to the extent –

MR FARMER QC:

No, no.

WILLIAM YOUNG J:

– to which it's pleaded it's by incorporation of the reference.

MR FARMER QC:

That's right, my learned friend is saying we have abandoned health and safety in our pleading and what we say is we've pleaded it more generally and it will necessarily include health and safety.

WILLIAM YOUNG J:
Okay.

ELIAS CJ:
You've pleaded that it didn't comply with the Building Code?

MR FARMER QC:
Yes.

ELIAS CJ:
And you say that means that –

WILLIAM YOUNG J:
If you read the pleading with the statute and the Building Code that means that you're pleading it's insanitary.

MR FARMER QC:
Yes, and you plead, and you read the facts.

TIPPING J:
Non-compliance with the Code, ipso facto engages health and safety?

MR FARMER QC:
Yes, that's right.

WILLIAM YOUNG J:
Well, in these respects anyway.

MR FARMER QC:
Yes, and the facts that are alleged in the statement of claim as to what the problem is makes that plain, that what we're talking about here is water ingress.

Now paragraph 4 at the top of page 2 we say there's been held – what we turn to now is the question of economic interests. Just what is – are economic interests within the framework of the Act, the policy of the Act, as to the objectives of the Act as to what is protect – are they within –

ELIAS CJ:

Do you have to go as far as this though because surely your argument is that the Act is background to the common law duty you're relying on?

MR FARMER QC:

Your Honour is, with respect, quite correct, we don't have to go this far but because my learned friend has put so much emphasis throughout his submissions to the effect that economic interests are not within the protection of the Act, then we say well, actually even at that initial starting point he stumbles. In that respect, we refer to Justice Casey, if I can take you to that in *Hamlin* itself, so *Hamlin* from recollection is volume 2 and Court of Appeal is tab 21 and the passage that I'm referring to is at page 529 and there was, in effect, a reference to one of the cases his Honour refers to, namely *Stieller* this morning.

So 529, at line 27, his Honour said, "It is important to note the duty of care recognised in these cases has not always been limited to the avoidance of physical damage to the plaintiff's property, or danger to the health or safety of the occupants: in appropriate situations, a wider duty not to cause economic loss to the plaintiff has been recognised and damages have been awarded on that basis. See *Stieller*, *Williams v Mount Eden Borough Council*, *Brown v Heathcote County Council (No 2)* [1982] 2 NZLR 618 (HC), the case as noted by the President in which Privy Council upheld an award for economic loss".

Now there was some discussion this morning as to that part of this Court's judgment in *Sunset Terraces*, leading up to paragraph 53 which I'm disappointed that my learned friend, after the many times I referred to it last week, this morning got the number wrong. In particular, this morning there was a discussion about paragraph 49, the duty affirmed in *Hamlin* as designed to protect the interests citizens have in their homes and paragraph 53, beginning with the consequence of the *Hamlin* duty being formulated in this way, is that the council's contention that investor owners of residential property should not be within the scope, the duty must be rejected and, of course, all of those paragraphs are dealing with a residential home situation because that's what the case was about.

My reliance, heavy reliance at the end of the last week, on the last part of paragraph 53, that the protection of the non-owner occupant, the tenant, could be achieved,

could only be achieved it's said here, through the duty being owed to the owner because it was the owner's pocket that was damaged and because it was the owner who could undertake the necessary remedial work. My point about that part of the paragraph is that that provides the mechanism by which the duty to occupiers of buildings is best, or is able to be properly enforced and the defects remedied.

Yes, of course this whole passage is about homes but just above paragraph 53, at the end of paragraph 51 in fact, is of course the express reservation for future argument about the situation of duty in relation to commercial premises.

So the point that we make therefore, in my paragraph 5 on page 2 is that the duty of care which we say is owed to, which is owed to building owners does in the way that's described at the end of paragraph 53, support the policy of protecting the health and safety of occupiers if it's health and safety that we want to focus on. Now if I could deal with the trousering point –

ELIAS CJ:

What is that point, I'm sorry, I just can't remember?

MR FARMER QC:

The point was that allowing the owner to recover –

ELIAS CJ:

Yes, I'm sorry, yes he can just put it in his pocket, yes.

MR FARMER QC:

– may not be translated through into actually getting the remedies done because if the owner, the owner might keep the compensation in his pocket.

ELIAS CJ:

Yes.

MR FARMER QC:

And what we would say about that is that actually the means of preventing that happening is in those sections I took you to a little earlier, 64 and 65.

ELIAS CJ:

The council can compel it.

MR FARMER QC:

The council can compel it. A council can compel it if it's the owner who still owns the property, he's paid full value for it not knowing about the defects. He then discovers the problem, he then sues the council, the council pays compensation but one can be sure that along with the cheque will be a notice under section 65, now remedy the problem and that's in effect compensating you for the – that's bringing your now diminished valued building back to what you thought it was when you bought it.

WILLIAM YOUNG J:

But giving a 65 notice can't be dependent upon the council acknowledging liability.

MR FARMER QC:

No, no, of course not.

WILLIAM YOUNG J:

And the council may say, well, we don't think we're liable but what we do know is that this building isn't in great shape and has got to be addressed.

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

And is it actually the case that councils have issued section 65 notices after settlement?

MR FARMER QC:

Well, I have no idea your Honour, and how could I have on a stage of a proceeding like this one –

WILLIAM YOUNG J:

Yes, I suspect not, yes.

MR FARMER QC:

– and my point is, your Honour, that the very point you've just made, that the council certainly does have the power to order the, and should responsibly order the

premises to be rectified to protect occupiers and future owners for that matter. If, on the other hand, the position is that the defect has been discovered by the owner and he then sells the building, it's known to be a defect, he sells the building at a depreciated value and sues for his economic cost, financial cost of the value that he's lost, in effect what that does is to restore him to where it makes him whole again. I think the new owner, however, has bought the property at a bargain price because of the problem can be served with a section 65 notice and no doubt will be if the council again is carrying out its responsibilities properly and so it will end up with, having lost the bargain but at the same time also having to pay for the cost to be repaired. So both the original owner, the vendor and the purchaser will end up where they would have been had there been no defect and everyone would be happy.

Now going to paragraph 7 on page 2 we, therefore, say, submit that it's not correct to say, therefore, as the council does that the objectives of the Act are restricted to health and safety but even if it is viewed that way protecting the financial interests of building owners through the common law duty of care to them facilitates the carrying out of that objective.

Now I want to turn to the Building Industry Commission report if I could because my learned friend relies heavily on it but didn't really take you through many of the provisions in it that do illuminate the policy much more clearly than those provisions to which he referred to and what we say about it –

CHAMBERS J:

I think a crucial point here which hasn't been made is the question of timing that report preceded the House of Lords decision in *Murphy* so that at the time that it was drafted those preparing the report and the draft bill would have had in mind a law of negligence in this area which was consistent throughout the Commonwealth.

MR FARMER QC:

Well, it, yes, but one could equally say that Parliament passed the statute on the basis of that report.

CHAMBERS J:

Correct, correct.

MR FARMER QC:

Yes and what is very – there are two points that can be made about the report. One is that it recognised the duty of care, the pre-existing duty of care, by territorial authorities to building owners and that it would continue under the new Act and one finds that not only in the report itself but also in the statute and I've got the references here which we'll look at in a moment.

The second point – perhaps there are three points. The second point is that the statements that are made do not exclude commercial buildings from the statements of policy that are made in the report. The third point is that it in fact dealt with the whole issue around how councils were going to manage their liability for the future and how risk allocation and cost allocation was to occur as between builders, owners and councils.

So if I could maybe take you to that report now and then we'll look briefly at one or two provisions in the statute. So the report was in volume 5 at tab 50 and I wanted to start with 4.78 first of all, paragraph 4.78 which you'll find on page 1874 of the bundle. There you'll see there's a heading of potential liability exposure and what is said is, "Applying the principles adopted by the Commission, the alternative procedures for certification incorporated in the controller system affect the potential legal liability for negligence in checking code compliance by the parties involved. Statements by building producers that personal work or work carried out under the direction of the producer complies with the code are voluntary. Should the TA choose to accept such statements, its potential legal liability remains in tact." In other words, the fact that there are these producer statements doesn't, of itself, absolve the TAs of any potential liability that they may be under.

Then what the report goes on to consider is a section, you'll see at the bottom of the page, headed approved certifiers and this has been touched on before but you'll see, beginning paragraph 4.92 under the heading protection from financial loss, the question of ensuring that the relationship between liability of the builder and that of the TA and alternatively that of the approved certifier is dealt with here. So if I could read this 4.92, "When a builder producer is at fault, be that the architect, engineer, builder or any other member of the building team, the owner has a right of action for damages or for breach of contract. If the fault lies with the builder in common with the TA and/or the approved certifier, 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. A builder can evade liability by bankruptcy or winding up but a TA cannot. The

purpose of insisting upon an approved certifier having adequate insurance cover is to protect the owner from any exercise of this means avoiding liability –

WILLIAM YOUNG J:

What did they come to when they – did they actually specify what they thought adequate insurance cover was?

MR FARMER QC:

Not in the statute as such. Whether it was done by some sort of administrative –

WILLIAM YOUNG J:

I know in the end it was a rather –

MR FARMER QC:

– as part of the approval, I don't know –

WILLIAM YOUNG J:

– as it turned out, useless claims made policies of $500,000 cover –

MR FARMER QC:

Yes –

WILLIAM YOUNG J:

– which all sort of disappeared once the – when they weren't renewed.

MR FARMER QC:

– I mean, one would have expected that the correct way to do it was by when giving approval to someone to be a certifier that as a condition of the approval they should stipulate what they –

WILLIAM YOUNG J:

Well, they couldn't get it. Certifiers couldn't get the insurance that the Building Industry Commission envisaged –

MR FARMER QC:

That may be the reason why the whole thing collapsed under its own weight –

WILLIAM YOUNG J:

But I was just going to say, if the insurance policy was only $500,000 that might indicate houses, not factories but I can't remember if it's actually in the report.

MR FARMER QC:

I don't know either, I don't think it is. I have read the report. I don't remember seeing it there.

Then in 4.94 there's a reference to a position in the UK regarding the liability of all the parties involved for latent building defects and I will just quickly read that. "Damage claims for building defects have increased in recent years. Attempts to apportion blame in the event of building failure is a protractive and expensive legal exercise. Many clients of the industry attempt to cover against future potential problems by legal documentation to enable them or whoever may own or occupy the building in the future to sue building producers to recover their losses. These claims are extended beyond those directly involved in the contract to include the control authorities who approve the building and who have negligence in checking and inspection could be proved, could be made to pay if the contracted parties cannot be found to have insufficient – cannot be found or have insufficient insurance cover. There appears to be a misguided belief that if the insurance market can be sorted out the problem of liability for latent defects will be solved. Clearly getting it right the first time is more important than trying to prove someone is to blame for mistakes." Getting it right the first time means doing the job properly in the first time.

Then if we go to, you'll see 4.85, I won't read all of that but there is reference to it being in a central part of the alternative procedure that the approved certifier had to accept liability for negligence and what is said then in that next sentence is, "The same principle must apply if an approved certifier is not involved in a construction or an occupancy consent is given by the TA in equivalent circumstances and with the same result.

Then if you go over to paragraphs in part 6 and I'm going to start with 6.17 which is on page 1898, and this deals with the question of cost and my learned friend, in rather threatening tones, suggested that this will be billions of dollars, or many millions of dollars involved if you extend the duty of care and what we submit is that this report, and indeed the Act, actually provide the mechanism for ensuring that councils can control and manage risk appropriately and so if I can begin with 6.17.

"Operating costs for territorial authorities. The role and responsibilities of TAs in the administration enforcement of building controls are reinforced. The responsibility for checking information prior to construction and checking that the Code is compliant with during constructions rests firmly with the TA." Then, "This responsibility remains, it can only be offloaded in part if and when the alternative procedures in the legislation are available to and chosen by the building owner." That's obviously the certifier situation. "The nature of the Code itself confirms the responsibility of the TA to provide technical expertise appropriate to individual projects for its proper administration using either in-house staff or contracted assistance from the industry. Many existing controls which are predominantly prescriptive have not required these resources."

That, with respect, is the answer to my learned friend because what is said that is if the, to take his example, if it is a complex building, if it is a building that has some bespoke technique or method of construction or design feature or whatever it may be, if it's not part of the general run of the mill case, well then the TA does have the responsibility and, for that matter, the power to – power in the sense of obtaining reimbursement by way of increased charges from the owner, it has the responsibility, if necessary, to obtain contracted assistance. That is to say, to hire special experts or obtain technical assistance from contracted parties to carry out it's statutory responsibility and what is said here is the responsibility is that of the TA to make sure all of that happens.

So 6.19 continues. "The reforms are intended to encourage TAs to charge realistically for the control services they provide and to ensure that appropriate indemnity insurance is in place for any potential liability or risk they may incur through negligence and their duties. TAs that identify their use of resources clearly will ensure that the real cost of their part in the total control system fall where they belong, with the individual user of the system, the building owner and also with the community where the perceived benefit is common." So it's a user pays system for the most part and supported with indemnity insurance and the like where that's feasible.

Then we have in 6.20, "If territorial authorities are to respond to the challenges of the marketplace they need to be able to set their own charges for the services they supply. This means that section 690A of the Local Government Act that effectively restricts them from charging to make a profit will cease to be applicable to the

building control system," and you'll recall, I think there were a whole lot of old case law that I seem to remember myself, about local bodies only being able to charge for services that, without making profit, otherwise it would be regarded as some of tax, I think was the argument that was run –

TIPPING J:

I don't follow the logic of that. Just because they can charge more if they need to have more assistance, they are still not going to be making a profit, are they?

MR FARMER QC:

Well, a profit, presumably meaning a margin, a margin.

TIPPING J:

A bit dubious that logic, I would have thought but anyway, the point you're making doesn't really lie there, does it?

MR FARMER QC:

No, it doesn't, it doesn't. Then 6.21, "Territorial authorities will be able to offer meaningful reductions in fees for processing consents for construction, use of buildings, where the owners own quality assurance programme is such as to satisfy the TA that only limited inspection is necessary to satisfy its obligation to the public." Now that's the producer statement example of my learned friend, that simple house producer statements, this has been tested, it's been accepted as proper building process. Then, in those situations yes, the council can safely accept that, charge less and it can charge more though for a situation where that is not the case.

Then the paragraph continues, "This is an encouragement to owners to carry more of a responsibility for ensuring code compliance in the private arrangements they make with their building producer." So the commercial builder, the commercial owner, perhaps will be incentivised to encourage his architect, where he can, to design in a way where they do use commonly accepted processes that are subject to producer statements and the like. If they don't, then that's fine, they can make that choice but then they will have to pay for it in the form of increased inspection costs of the council.

Then 6.22, "Territorial authorities that underinsure or undercharge for the services they are required to provide will certainly not be helping the system to function

efficiently. However, no regulation of charges is proposed, it will be up to the communities concerned to decide to what extent they are prepared to subsidise one section of the community, namely those who wish to have a building constructed. Accountability to ratepayers should lead to realistic charges."

So if the council doesn't charge properly, in the case of a complex building, whether it's a commercial building or whether it's some multi-millionaire's $30 million house in Paritai Drive in Auckland, in either case, it's up to the council to charge realistically to reflect the inspection services they would be required to provide in such a case. If they don't, so that ultimately the local community bears the cost of the council's failure to do so and of the cost of any damages claim, compensation claim that may later be brought, now that's a matter for which the council should be properly accountable to its community for.

Then the only other paragraph I wanted to read is on the next page, 6.25, "The community, as well as the building owner, users and neighbours, has an interest in the liability for damages in the event of negligence in checking code compliance, if negligence by the TA inspector is held to have contributed to defect or damage. Payment of the damages is certain, whether or not the TA insures against this potential liability, any uninsured damages payment is unconditionally underwritten by the ratepayers," and that's the same point as the one in 6.22.

TIPPING J:

Mr Farmer, did this Commission that produced this report have any lawyer on it, or a lawyer with any experience in this field?

McGRATH J:

Mr Hanna was the lawyer.

TIPPING J:

Am I asking a sensitive –

MR FARMER QC:

He certainly had the experience.

TIPPING J:

Am I asking a sensitive question, am I?

McGRATH J:

Mr Hanna was the Auckland City solicitor.

TIPPING J:

Auckland City solicitor.

MR FARMER QC:

He was indeed, yes, Butler White & Hanna, as it was, as the firm was in those days and, yes, extremely experienced in this area.

McGRATH J:

Well, experienced in the local authority area generally –

MR FARMER QC:

Yes, yes.

McGRATH J:

Not so much perhaps in insurance about –

MR FARMER QC:

Not, perhaps not insurance, no, no. Now just looking at the statute briefly, the Building Act, the provisions there so far as recognising liability in tort for this situation are concerned we have the provisions that deal specifically with the certifiers and we looked at those earlier, I don't need to take you to them specifically but sections 56.5, 56.5 requiring the building certifier to have insurance in respect of any insurable civil liability that might arise and then similarly 57.2 –

WILLIAM YOUNG J:

Can I just take you back a little bit? I just see paragraph 6.30 of the Building Industry Commission report does give values for the insurance of certifiers which they say of not less than 200,000 for small buildings including housing and not less than 400,000 for other buildings.

ELIAS CJ:

Sorry, what para is that?

WILLIAM YOUNG J:

Para 6.3 your Honour.

MR FARMER QC:

Thank you, your Honour, I'd overlooked that or forgot it because I did read the whole report at some point. So in the statute then, 56.5, 57.2 requiring, which says, 57.2 says a building certifier shall not in terms of the engagement limit any civil liability, he can't have an exclusion clause in his arrangements with the owner.

Then in terms of council liability, that's dealt with specifically in sections 89, 90 and 91(3). 89 provides that no civil proceedings should be brought for an act done in good faith under the Act against a member builder referee or employee of the authority or a member or employee of a territorial authority or a member of a committee appointed by the authority or a territorial authority. So it's the individuals you can't sue but that necessarily assumes that you can sue the territorial authority and that becomes clear enough in the next sections.

Section 90, civil proceedings against a building certifier in respect of the exercise by the building certifier of the building certifier statutory function in issuing a building certificate or a code of compliance certificate to be brought in tort and not in contract and that building certifier is defined as a person approved as a building certifier by the Building Industry Authority under Part 7 of the Act.

And then section 91, limitation defences, 91(3), for the purposes of subsection (2), which is the 10 year provision, the purpose of subsection (2) of the section, if a civil proceedings are brought against a territorial authority then the date on which, of the act or omission is the date of issue of the consent or certificate or determination. So clearly envisaging that civil proceedings in tort would be or could be brought against a territorial authority but then applying the 10 year limitation.

And I also, the final provision I would like to take you to in the Act is section 28 which is relevant to those provisions in the report that I took you to. It empowers a territorial authority to fix charges of any or all of the following kinds. (A) Charges payable by applicants for or holders of building consents for the carrying out by the territorial authority of its functions under the Act, charges for the issue of code of compliance certificates and so forth, and then in subsection (2) where a charged fixed in accordance with subsection (1) is in any particular case inadequate to enable a

territorial authority to recover its actual and reasonable costs in respect of the matter concerned, the territorial authority may require the person who is liable to pay the standard charge to also pay an appropriate additional charge to the territorial authority.

McGRATH J:

So does that mean they're not bound by what they specify in advance, as it were, doing –

MR FARMER QC:

Specified in?

McGRATH J:

Specified at the time they give the consent. They're not bound by what they specify then, they can wait and see how much they put into it by way of their resources?

MR FARMER QC:

Yes, that's so. For example, if it got to the stage of the issuing of the certificate of code compliance and it was felt that there was a necessity before issuing that to do some further inspection work because of particular features of the decision then yes, that provision could be invoked.

So that deals then with the first section, or the first main submission that my learned friend made and now I'd like to turn to the one that he dealt with principally this morning. The submission made was that it was not just and reasonable that councils should be liable if builders, architects, engineers and subcontractors did not owe a duty of care in respect of commercial premises and –

ELIAS CJ:

Is this the one that you say depends on an if?

MR FARMER QC:

Yes, and that point came out this morning from, I think, your Honour Justice Tipping. Now, top of page 3, the authorities relied on by the council by my learned friend are principally *Rolls-Royce*, and also the other cases that he referred to in his footnote in his supplementary note that he handed up to you this morning and I'll deal with them.

Rolls-Royce first of all and we covered this, I think, in our submissions earlier, it has – first of all, it has rather special facts which we would say coloured a lot of the thinking of the Court in that case. The owner which was Carter Holt Harvey, had the opportunity itself to contract with the subcontractor which was Rolls-Royce and it was aware of the provisions in the contract between Rolls-Royce and Genesis Energy, aware of the exclusions in particular in that contract but it chose not to become itself a party to those arrangements with Rolls-Royce in order to obtain the appropriate contractual protection in respect of any defective work done by Rolls-Royce.

Now that's not a position that can be stated in relation the purchasers of the Spencer on Byron units, they came along - they either bought off the plans or they came along subsequently –

TIPPING J:

Is a point of a more general weight but marching alongside this submission, Mr Farmer, and supporting it perhaps, is that in our facts, no one contracts with the council.

MR FARMER QC:

Yes, yes –

CHAMBERS J:

Well, I would have thought –

MR FARMER QC:

– because this is a council, just a moment your Honour. This is –

TIPPING J:

This is a council case –

MR FARMER QC:

– a council case, whereas *Rolls-Royce* was not. I'm sorry, your Honour.

CHAMBERS J:

I would have thought there was another ground of distinguishing *Rolls-Royce*. In *Rolls-Royce* what was effectively trying to be remedied by the law of tort was a failure of the plant to conform with contractual specifications. Here, as I understand the

claim that the owners are bringing, they're not concerned with, so far as the council is concerned, whether or not the building contract was complied with. It is a different point, namely whether the building code was complied with and they obligations, for instance of Multiplex towards these people, again their obligation in contract with presumably be determined by their contractual obligations. The only obligations we can possibly look at in tort, and it maybe even narrower than this, but it's compliance with the Building Code, no more perhaps no less. I don't know but that seems to me the ground of distinction.

MR FARMER QC:

It is and there is a further ground of distinction which is referred to in the note, which is that the Court of Appeal in *Rolls-Royce* expressly put to one side the question of latent defects. So *Rolls-Royce* was not a latent defects case and in the paragraphs I referred to, and I think I took these to you the other day, 94 and 116, the Court left that question aside and, of course, latent defects is the very essence of the claims that are being made in these housing and commercial building cases.

ELIAS CJ:

Well, it's really the purpose behind inspection that otherwise they won't be obvious –

MR FARMER QC:

That's right and –

ELIAS CJ:

– or a main part behind –

MR FARMER QC:

I mean, the foundation is the obvious example. The council's inspector should inspect before the concrete is poured and so forth, should satisfy himself or herself about the type of soil, whether the soil is likely to sag, the *Woolcock* case I will come – the *Woolcock Street* case I will come to on that point, but similarly in relation to all the other features of construction, the flashings and so on that, the cladding, all of those things which typically have given rise to the problem of the leaky building, those are things that cannot be seen after it's done. All you see is a lovely painted plaster wall. What you don't see is what's behind that wall. What you don't see is the cladding. What you don't see is whether there is a cavity there, et cetera.

So *Rolls-Royce* we would say is not, certainly not definitive and we would say is a very different kind of case and one that certainly can't be taken to the length that my learned friend takes it.

Now turning to the cases, his footnoted cases, Lord Denning in *Dutton* that was a case where the builder was, of course, held liable to a subsequent purchaser. My learned friend says, oh, yes, but he was dealing with a home, and so he was, but when one – I won't take you to the judgment but throughout he refers to buildings, he, the emphasis is on building, the building of houses rather than on the intended use of the house for a home although, of course, that's what it is intended to be used. My point is there was no reference by or reservation, reference to or reservation by the Master of the Rolls to commercial buildings being in any different situation. So it's neutral, you can't, I can't rely on it to say that it's authority for a duty being owed in respect of commercial buildings. I can rely on it to say that the policy that Lord Denning was enunciating is equally applicable to commercial buildings but it's really largely neutral as a precedent and it doesn't, in that sense, help my learned friend except, but it does say this, that the emphasis is very much on the occupier, protecting the occupier or those who use buildings, his Lordship said. Those who use buildings should be protected and that's equally true of any kind of building, it must be. Things happen in buildings during the daytime as well as at night-time so the –

TIPPING J:

That's a charming way of putting it, Mr Farmer.

MR FARMER QC:

It's my – I know. It's my *Glen Innes Primary School* point, yes.

TIPPING J:

I see.

MR FARMER QC:

That children go to school during the day, they don't sleep there at night but they deserve just as much protection as those who do sleep there at night, well not in the school but in the house and so too do those who go to during the day and sleep at night in a hotel and so it goes on. You understand the point.

TIPPING J:

I absolutely do.

MR FARMER QC:

And, of course, in those earlier cases there was a lot of emphasis in the English cases, in particular in *Dutton's* case on protection also of occupiers from injury and there hasn't been that emphasis in our law because of course we don't have any longer a common law claim by someone who is injured, for personal injury, except of course a claim maybe for exemplary damages, in a particularly bad case but the fact that we have an accident compensation system, in my submission, doesn't lead to a different outcome because it's not just personal injury that is being protected here and illness can be just – an illness that might arise for example, from working day after day in a commercial building where there is dampness in the air, that is just as, should be just – of similar concern to the law as would be something falling on your head.

CHAMBERS J:

Well, you might argue that the fact that we have an accident compensation scheme makes it more important that a duty of care be recognised because the whole idea behind accident compensation was that you would encourage safety because the negligence action for the personal injury wasn't there but you would encourage safety through other mechanisms. So for instance, the health and safety legislation and the like and criminal responsibilities. So it seems to me that the argument could still run that we still want safe building and they are to be encouraged.

MR FARMER QC:

Yes.

ELIAS CJ:

Indeed, there's arguably the sort of ill health one can contract in insanitary buildings is not covered by ACC, so there would be a gap.

MR FARMER QC:

Yes, indeed, that's – I was trying to make that point actually, that, yes, yes.

ELIAS CJ:

Oh, I'm sorry.

TIPPING J:

Insanitary problems would be a gradual process, wouldn't they, rather than an accident?

MR FARMER QC:

Yes, that's the difference but –

ELIAS CJ:

Well the respiratory illness that –

TIPPING J:

I'm saying that supports the –

ELIAS CJ:

Yes, yes.

TIPPING J:

– thesis.

ELIAS CJ:

Yes.

MR FARMER QC:

Now my learned friend relied quite heavily today on *Murphy* and last week on *D & F Estates*. Now those cases – there is of course the specific statutory enactment in England of the Defective Premises Act which has its own particular features but those two cases of course have to be considered in the light of the Privy Council's ruling in *Hamlin* which had those two cases before it and said the New Zealand Court should be free to follow their own development notwithstanding those cases and I've got the reference here but Lord Lloyd, delivering the judgment of the Privy Council in *Hamlin* at that reference, page 520, specifically referred to those two cases when saying the New Zealand Courts should be free to develop the common law to take account of New Zealand conditions.

The Canadian cases, we would submit, do not support my learned friend. The Canadian cases in fact followed *Anns*. They specifically rely heavily on *Anns* in

upholding a duty of a builder to subsequent purchasers but they do, as my learned friend has very helpfully showed this morning, they do in fact, at least on the authorities as they exist now, they do limit the scope of the duty to those situations where there is foreseeable and substantial risk or danger to the health and safety of the occupants. So it may be that the scope of the duty there is somewhat less but, as my learned friend also fairly acknowledged, the whole question of commercial versus residential is still an open question in Canada. I've given a reference here to the *Winnipeg* case where *D & F Estates* was expressly not followed but *Bowen v Paramount Builders* was referred to with obvious approval and in *Bowen* of course the builder was held liable to the subsequent purchaser as well.

Now, then we turn to *Woolcock Street* which is arguably – it might be the best authority that my learned friend has, to exclude a duty being owed to the builder or to, in that case, an engineer in respect of a subsequent purchaser. Now *Woolcock Street*, of course, is not a case about councils, it is a case though about the liability in tort of an engineer to the subsequent purchaser but again that case has got some rather unusual facts.

The engineer was sued in tort by the subsequent purchaser when the foundations sagged and what actually happened though was the engineer when he was engaged had actually recommended to the owner the engagement of a geotechnical expert and the owner refused to do so. So the engineer's brief from that point became limited, a limited role necessarily by choice of the owner and it was that fact that features very prominently in the judgments of the majority in that case.

TIPPING J:

One might think that perhaps the question was more whether there was a breach rather than whether they should have been at –

MR FARMER QC:

Yes, yes, indeed, indeed.

TIPPING J:

Just on the bare –

MR FARMER QC:

That's, that would be the submission that I would certainly make about that but –

ELIAS CJ:

It was dealt with as duty of care was it, yes.

TIPPING J:

It was dealt with – yes.

MR FARMER QC:

It was with as duty it was, that's right, but one could see that there are, the possibilities there would be certainly that as your Honour Justice Tipping suggests, that rather than throwing out the duty conceptually that perhaps what could be said is that the engineer, while owing a duty, had not breached the duty because his, the duty, his duty had to be perhaps examined in a more, as being a more limited one by virtue of contractual instruction.

TIPPING J:

Well, I'm not familiar with the intersticies of this case but, just on the face of it, if he recommended something which the owner declines –

MR FARMER QC:

Yes.

TIPPING J:

– and that would probably have removed the problem or –

WILLIAM YOUNG J:

But they never heard any evidence on it did they so they wouldn't –

TIPPING J:

No. They don't know that.

WILLIAM YOUNG J:

– they don't necessarily know that it would have.

TIPPING J:

But it –

MR FARMER QC:

No. But could I make this point about it, about that particular case also that, as I said, it wasn't a case that concerned the question of councils at all. I would, I am going to take you to the case so if you find that volume 4 at tab 45 and I'm going to come back to his Honour's judgment, Justice Kirby's judgment that is. But he states an interesting fact that's not referred to in the other, in the majority judgments, and you will find that at paragraph 126 on page 562, paragraph 126, after reciting that the first respondent was a company of consulting engineers, the second respondent was a particular engineer employed by them. He said, "The construction of the building took place –

ELIAS CJ:

Sorry, where are you, paragraph?

MR FARMER QC:

Paragraph 126.

ELIAS CJ:

Yes, thank you.

MR FARMER QC:

"The construction of the building took place between '97, 1987 and 1988," just note that in passing, that's a long time before the litigation came, the subsequent purchaser came along and sued, it's a case where the 10 year limitation here would have probably excluded the claim, it would certainly have excluded the claim and that is an aspect of the majority's thinking that I will come back to.

In any event he carries on, "It is at that time that the relevant acts and omissions of negligence were alleged to have occurred. The building contains warehouses and offices with no residences. It is situated in the city of Townsville. That city abuts the Pacific coast at Queensland. It is a commonplace that buildings erected in the vicinity of water – including an oceanic coastline – are often liable to subsidence. It is elementary that such buildings often need special care in the design and placement of foundations. So it was to prove with the subject building," and no doubt that's why the engineer recommended the geotechnical expert report.

My point though about that is that it's an interesting question to consider. If this had been a case where the council had been sued and if it had been a case therefore where on that statement it would have been obvious to a council that this is exactly the sort of thing that should be inspected and if necessary geotechnical assistance should be obtained, it would be a very odd result if the council could say well, we're not liable for what is clearly otherwise to be regarded as negligent conduct on our part because the owner and the engineer here didn't undertake the obvious course that should have been undertaken, particularly in circumstances where it was the owner's ultimate choice not to undertake it.

So, the point I'm making there is that while it may be fair to say that in general terms a council should not be liable if the builder is not liable, even that as a proposition is rather, becomes a bit mushy around the edges in a case such as this one, where really the exclusion of the builders or the owners, initial owners, responsibility is by contract when a council, not trammelled by any of that in coming to look at, carrying out its inspection duties, clearly on the facts of the case, ought to have ensured that the matter was properly investigated and its failure to do so should leave it responsible in law to the subsequent purchaser. Now –

ELIAS CJ:

Is that any different from saying that the council has a distinct responsibility?

MR FARMER QC:

No, no, that's exactly what I'm saying, yes.

ELIAS CJ:

Yes, yes.

TIPPING J:

It perhaps hasn't been completely noted but in the *Sunset Terraces*, some emphasis was placed on the independent role of the council.

MR FARMER QC:

Yes, and indeed your Honour, in *Sunset Terraces* it's worth noting that in that particular case the architect, in the Courts below, was found to be under a duty but was ultimately found not to be liable for breach because he had a limited brief as well.

WILLIAM YOUNG J:

Well, he just did the plans, didn't he and he was asked to only do plans to the point that would be required for a building consent, I think.

MR FARMER QC:

I think he also certified – my learned friend Mr Josephson can say better –

WILLIAM YOUNG J:

But wasn't he held liable on the certification claim?

MR FARMER QC:

Yes, yes, he was but not on the –

WILLIAM YOUNG J:

On the design plan.

MR FARMER QC:

– design plan. Now, just going back, staying with *Woolcock Street*. So I basically said it certainly has some unusual facts to the extent that your Honours –

ELIAS CJ:

I'm sorry. Would you take that – because the responsibilities are distinct, I take it that you would say they're not necessarily co-extensive at all and in some cases the council might have much more expertise and the background to intervene than say a builder?

MR FARMER QC:

Well, that would certainly be the case, for example in Townsville here, where the council must have approved and inspected many, many buildings being built on the ocean, on the coastline and who knows what the situation was with this particular developer, whether they came in from outside the area, or whatever, whether the owner, whether he was just motivated to save costs or whether he in fact made his own judgment that it wasn't necessary but clearly he was wrong.

So yes, I do go that far but I also say that even if one doesn't go that far, that in general terms, the notion that a builder, or one of these other professionals, is not

liable in tort to a subsequent owner in respect of commercial premises on the basis that somehow that the contractual arrangements between the original owner and the builder, or the engineer or whoever it maybe, are decisive, we would say that the case law doesn't go that far. *Woolcock Street*, as I say, the majority judgments does support my learned friend perhaps in going that far but it does have those rather peculiar facts around it that do permeate the judgments.

What is helpful from the majority, what is a feature also of the majority judgments is this concern that in respect of a building such as this one where the subsequent purchaser perhaps comes along many years later, in that case 13, 14 years later and the defect doesn't emerge until that time, then that gives rise to all sorts of problems at trial, and you will see that referred to particularly in the judgment of Justice McHugh who concurred with the other Judges, majority Judges but gave a separate and quite lengthy judgment and he –

ELIAS CJ:

So is your, your argument based on this is what, that we have a limitation period?

MR FARMER QC:

Yes.

ELIAS CJ:

So this is not a concern?

MR FARMER QC:

That's not a concern, or not a concern to the same extent and so I make that point about it and then perhaps the other point, the other point I've already made is to the rather special facts. Where the judgment of Justice McHugh is helpful though, he rejects the floodgates argument I think, at page 553, at letter, sorry, paragraph 97, "In determining whether the common law should recognise a duty of care, the possibility that its recognition might lead to a flood of claims is a ground for rejecting the existence of a duty. However, New Zealand and Canada have long recognised tort claims for economic loss arising out of defective premises without apparently being flooded with litigation". My learned friend may disagree with that, I think he's made quite a nice living over the last few years out of this litigation – I'm sorry about that.

ELIAS CJ:

He's built a house.

MR FARMER QC:

Yes, he told us that. Similarly the decision of this Court in *Bryan v Maloney* does not appear to have caused a list of Australian Courts to be flooded with claims that could not have been brought but for that decision.

He does also say on the opposite page at 94, well perhaps 93 first. 92 refers to *Bryan v Maloney* and then 93, "Once the courts rejected the traditional view that professional persons such as solicitors and architects could only be sued in contract, it became likely that, in building cases, tortious remedies would extend to third parties affected by the performance of the contract. The better view in all cases – not merely building cases – is that the capacity of a person to protect him or herself from damage by means of contractual obligations is merely one – although often a decisive – reason for rejecting the existence of a duty of care in tort in cases of pure economic loss." So he doesn't close the door totally, he says it's an important factor and maybe decisive in some cases.

TIPPING J:

I missed that reference, Mr Farmer.

MR FARMER QC:

It's paragraph 94, your Honour, of Justice McHugh's judgment. And Justice Kirby, whose judgment we, I won't take you right through at all. I've given some references in the, on page 4 to the passages that are particularly useful. We would say, with the greatest respect, that he is, his judgment is to be preferred if this Court is of the view that ultimately it comes down to a stark choice between the majority and the minority in *Woolcock* in terms of the outcome of this case and what we say is that, as I say, I've given references that I think are helpful. One of the points he makes quite strongly is that really strike-out applications are not the appropriate way of dealing with this kind of common law duty case and that, and you will see that at paragraph 123 and 124, and 124 ends up with the statement, "When the boundaries of liability in negligence are pushed forward it is often because detailed evidence, adduced at trial, appears in its totality to call out for a remedy or to indicate that one is not appropriate."

He makes the same point, he comes back to it at page 565 at paragraph 136, and because negligence law is a common law invention, et cetera, he says – it's perhaps a slightly different point, he says that the, "in the sequence of events described," this is two-thirds of the way down the paragraph, "it would not, in my view, be unreasonable to suggest that a forensic burden rests on the respondents to invoke a clear rule of law to exculpate themselves from liability for their apparent carelessness with it's readily foreseeable consequences. Most," yes, here's the point, "Most especially would this be so where the respondent seeks summary relief in advance of the full trial on the issues."

Then same point you will see also on page 566 at the top of the page, paragraph 138, I won't read that and then the final point though that is very helpful from his Honour's judgment is at paragraph 168 which is on page 575 where he specifically deals with the vulnerability argument, vulnerability in particular in relation to commercial premises. He says the vulnerability of the appellant arises from the circumstances of the case. "Vulnerability is not confined to cases of poverty, disability, social disadvantage or relative economic power as the majority suggest. It extends to those who, like the plaintiffs in *Perre v Apand Pty Limited* [1999] HCA 36 might be carrying on a profitable economic enterprise but who are exposed to an insidious risk by the acts of others about which they were unaware and against which they could not reasonably protect themselves. That is the...case here".

"I accept" in 169, "I accept that the capacity of an entity to protect itself and its interests is an important factor in determining vulnerability. However, it is not the only one. In a commercial context there may be many more to be considered – assumption of risk, known reliance and commercial pressures but to name but a few. With the benefit of hindsight it is easy to suggest that an entity should have protected itself. However, courts should be reluctant to assume that a commercial entity lacked vulnerability simply because of its commercial character". And of course we are dealing with latent defects. That's something always to be borne in mind when considering that question.

ELIAS CJ:

What is the, I don't know *Perre* or *Perre* or whatever it is.

MR FARMER QC:

No.

ELIAS CJ:

What sort of case was that.

MR FARMER QC:

Perre's case, you will see it at page 141, it concerned the liability of a neighbour for losses suffered by the growing of prohibited potato seeds on a nearby farm resulting in economic loss.

ELIAS CJ:

Right.

TIPPING J:

It's a pure economic loss case, so-called, pure.

MR FARMER QC:

Yes, so-called.

TIPPING J:

It was very pure in that case.

MR FARMER QC:

Pure economic. Your Honours I've almost finished. Do you want to adjourn or shall I finish?

ELIAS CJ:

It's sensible to finish if, yes, thank you.

MR FARMER QC:

So then I, in paragraph 6 on page 4, I turn to two New Zealand Court of Appeal authorities regarding negligent builders and subsequent non-contracting owners, the first of course was *Bowen.* It was a case concerning a block of flats but the discussion throughout the judgments is expressed in general terms, the references throughout are to buildings not to homes or houses and you'll – I've given some references, particularly to the judgments of the learned President and Justice Woodhouse where you'll pick that up.

The second case is the *Glen Innes Primary School* case. The Court of Appeal in that case was not prepared to strike out a claim in tort by the owner of the property, who was the Minister of Education, the contract being between the school board and the builder and I've referred specifically –

ELIAS CJ:

Where do we find that one?

MR FARMER QC:

You'll find that in, it's volume 3, tab 26. So it was a strikeout case.

McGRATH J:

It was special circumstances though was it not, Mr Farmer, because it was a case, as I recall it, where there was a separate statutory body that owned the school for reasons of accountability, achieving education policy in a particular way and, it seems to me, it has that own Government policy flavour which doesn't necessarily bear on the matter more generally than that.

MR FARMER QC:

Well, it certainly was a case where the general Government policy was to leave it school boards to be responsible, that the Minister provided the money but this is part of an allocation to the school board and then it was up to them to decide what they did with, how they spent it and, in this case, what the contractual arrangements they entered into with the builder and – but of course, the point I make about it, it wasn't a case of a home and I do give you the references to Justice Arnold's judgment where he does rehearse the various policy arguments. You'll find that on page – I won't take you through them, from page 49 onwards, the submissions that were made on both sides about policy which echo the submissions that you've heard here and that have made in relation to commercial versus residential.

At paragraph 59, on page 51, he says, "The most powerful policy consideration against imposing liability is the non-residential context. In *Rolls-Royce*, the Court gave particular weight to the commercial context (including the commercial matrix) within which the alleged failure to take care arose and determining no duty of care was owed".

Then in 60, he says, “I acknowledge the force of the commercial/contractual considerations. Undoubtedly they are powerful, particularly given the significance that *Rolls-Royce* accords to the existence of contracts.”

Then 61, “However, I consider it is arguable that these considerations have less force in a particular case for the following reasons. Arguably this was not a truly commercial situation,” so he’s got this intermediate category of here’s residential, here’s commercial and then there’s something in the middle. “School boards have management obligations, including as to building projects, not because they’re commercial parties, or because they can be expected to act as if they were, but because it is thought there are significant public benefits, both to school and their communities, from giving them such responsibilities, albeit subject to Ministry imposed limitations and requirements.”

This is Your Honour Justice McGrath’s point, “This is a policy assessment which has been legislatively implemented and has been maintained by successive Governments. Unlike the situation in *Rolls-Royce*, where the relationship between all the parties were clearly commercial, the relationship between the Minister and the board is, arguably at least, not commercial. Rather, it is a public law relationship in the sense that it is governed by statutory and other regulatory provisions which are structured to achieve public policy objectives”. And that was what was absent from *Rolls-Royce*, there was no statute, no public interest, no public policy, no public law aspect to the matter.

His Honour said, “Precisely how, if at all, this should be accommodated within the duty analysis is, in my view, best left until the facts have been fully determined. In this context, it may be important to know exactly how much Ahead,” that was the builder, “knew about the nature of the arrangements between the Minister and the Board. Although there was a construction contract between Ahead and the Board, and design contract between Ahead and LHT,” which is in effect the architect, “there was not as comprehensive a contractual matrix as existed in *Rolls-Royce*, et cetera, et cetera.”

Then in 62, “In summary, then, I accept that there are significant policy considerations appointing against imposing a duty of care to the Minister...However, there are features, in particular the precise nature of the relationships...which raise a

question of the force of those considerations in the present case", so I'm not competent that the claim will necessarily fail.

Perhaps just one final point. My learned friend referred to Building Act 2004 and he really said, I think, that because of the presumed warranty provisions in that Act – the Act is really just an re-enactment of the 1991 Act with the addition of the presumed warrant of provisions and then we also have of course – yes, sorry, just with that, that's always relied on in that respect. He said well, really it's become, it's sort of rather akin to consumer protection legislation.

He referred to the Consumer Credit Contracts Act. Well of course, Credit Contracts Act does have a particular definition of consumers, if one starts with that proposition. In other respects though, commercial companies are consumers as well and the Fair Trading Act which my learned friend also sought to rely on, is often –

McGRATH J:

Consumer Guarantees Act, I think it was, wasn't it?

MR FARMER QC:

Oh was it, the Guarantees Act, I'm sorry, my notes said Credit Contracts Act, I made a mistake on that. In any event, the point is the same, the consumer is defined rather narrowly to be what we would perhaps regard as a consumer, the person who walks into a shop and buys something at retail. Whereas the Fair Trading Act, by contrast, is often invoked by commercial parties in commercial disputes and that's because the general provisions are that no person shall carry on trade in a way that is misleading or deceptive. That applies across the board to everybody that a commercial entity deals with, including other commercial entities.

So our submission would be that that is not a meaningful policy distinction under the 2004 Act that he seeks to draw, that would exclude the duty of councils if it otherwise applies on the arguments that we've advanced.

Those are the submissions in reply, if your Honours please.

ELIAS CJ:

Thank you, Mr Farmer. Thank you counsel for your help. We will reserve our decision in this matter.

COURT ADJOURNS:3.12 PM