

5 **Body Corporate 188529 v North Shore City Council**

10 High Court Auckland CIV 2004-404-3230
1, 8 – 12, 15 – 17, 23 – 26, 29 – 31 October; 1, 5, 6, 19 – 23,
27 – 29 November; 3, 5 December 2007; 30 April 2008
Heath J

15 *Tort – Negligence – Duty of care – Whether body corporate can sue in respect
of damage to property other than common property – Liability of local
authorities in consenting, inspecting and certifying development – Whether
local authority owed duty to leaseholder – Extent of duty of designer of
20 work in development.*

*Property law – Unit titles – Whether body corporate can sue in respect of
damage to property other than common property – Unit Titles Act 1972.*

The plaintiffs were the body corporate, individual owners and holder of
leasehold interest in a development in North Shore City. The Court accepted
25 that the development was affected by weathertightness issues and had suffered
significant damage due to water ingress. The plaintiffs claimed against the local
authority for breaching the duty of care and claimed negligence by the
North Shore City Council in issuing a building consent, inspecting the property
and issuing a code compliance certificate. They also claimed against the
30 designer for breaching the duty of care and claimed negligence by the designer
in providing a negligent design, and against the developer for breaching the
duty of care and claimed negligence by failing to properly supervise
construction of the development.

Held: 1 The terms of the Unit Titles Act 1972 did not authorise a body
35 corporate to sue for damage to property which was not common property. There
was no room to engraft upon the Act the notion of a statutory agency or
quasi-trusteeship akin to that adopted for claims under the weathertight homes
legislation (see para [118]).

Owners – Strata Plan No 43551 v Walter Construction Group Ltd (2004)
40 62 NSWLR 169 (NSW:CA) referred to.

*RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v
Management Corporation Strata Title Plan No 1075* [1999]
2 SLR 449 (CA) referred to.

2 A territorial authority owed a duty of care to anyone who acquired a
45 property, the intended use of which has been disclosed as residential in the
plans and specifications submitted with the building consent application, or was
known to the council to be for that end purpose. The duty could be no higher
than expressed in the statute itself: namely, to be satisfied on reasonable
grounds that a building consent should issue; to take reasonable steps in

carrying out inspections; and to be satisfied on reasonable grounds that code compliance should be certified (see paras [220], [221]).

Johnson v Mount Albert Borough [1977] 2 NZLR 530 discussed.

Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA) discussed.

Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd [1983] NZLR 190 (CA) discussed.

Morton v Douglas Homes Ltd [1984] 2 NZLR 548 discussed.

Brown v Heathcote County Council [1986] 1 NZLR 76 (CA), [1987] 1 NZLR 720 (PC) discussed.

Bella Vista Resort Ltd v Western Bay of Plenty District Council [2007] 3 NZLR 429 (CA) discussed.

Invercargill City Council v Hamlin [1994] 3 NZLR 513 (CA) discussed. *Woolcock Street Investments Pty Ltd v C D G Pty Ltd* (2005) 216 CLR 515; 205 ALR 522 referred to.

Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 (CA) referred to.

Stieller v Porirua City Council [1986] 1 NZLR 84 (CA) distinguished.

3 The lessee was not an “owner” to whom a duty was owed. Whether duty was owed to a lessee was a question of degree. In the present case the lessee had had both an interest as a lessee (providing it with an opportunity of subleasing the unit for residential purposes) and as manager, for which it was paid a management fee by the owners. Its real interest was in making a profit from the management agreement, and the lease was not intended to provide a long-term investment. The nature of this interest was insufficient to place this plaintiff into the category of a home-owner of the type to whom the Council owed a duty of care. The interest acquired was insufficiently proximate to the Council’s obligations in relation to consent, inspection and certification to justify imposition of a duty of care (see paras [355], [358], [359], [360]).

Invercargill City Council v Hamlin [1996] 1 NZLR 513; [1996] AC 624 (PC) distinguished.

4 Although the Council had a duty to issue a consent based on a prediction that the work could be carried out in a manner that complied with the New Zealand Building Code, in making that prediction it was entitled to assume the developer would engage competent builders or trades and that their work would be properly coordinated. On this basis the consent had not been negligently issued (see paras [399], [407]).

Morton v Douglas Homes Ltd [1984] 2 NZLR 548 referred to.

5 Waterproofing of a building was a critical issue with which the Code dealt. The Council’s obligation was to establish its inspection regime and to advise the developer of the stages at which its inspectors would be present to ensure proper code compliance, including compliance with waterproofing standards. The Council’s negligence had been a substantial and material cause of loss suffered by those plaintiffs entitled to claim against it. “But for” that negligence the losses would not have been suffered. There were no policy reasons to deny recovery (see paras [447], [449], [450]).

Dicks v Hobson Swan Construction Ltd (in liq) (2006) 7 NZCPR 881 referred to.

6 The developers had had a duty to see that proper care and skill were exercised in the building of the units and that duty could not be avoided by delegation to an independent contractor. Much of the building work on site had been carried out to a standard significantly below what would ordinarily be inspected. In performing their non-delegable duty, the developers had fallen well below the standard of care owed to the individual plaintiffs (see paras [473], [478]).

Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA) applied.

Anns v Merton London Borough Council [1978] AC 728; [1977] 2 All ER 492 referred to.

7 The designer was obliged to submit plans and specifications which were adequate to meet the requirements of the Code. There would be liability to third parties for breach of such a duty notwithstanding any limitation on the scope of contractual duties owed by the designer to the owner. Although there were faults inherent in the plans and specifications, the dwellings could have been constructed in accordance with the Building Code from the plans and specifications assuming that the builders referred to known manufacturers' specifications. This was a proper assumption to make and, therefore, there was no breach of duty by the designers (see paras [502], [545], [547]).

Result: Judgment against the Council on liability to identified plaintiffs. Judgment on liability against the developers to identified plaintiffs. Judgment in favour of the defendant designer. Judgment against the body corporate in respect of claims concerning non-common areas. Judgment against the plaintiff lessee.

Other cases mentioned in judgment

Accident Compensation Corporation v Ambros [2008] 1 NZLR 340 (CA).

Albazer, The [1977] AC 774; [1976] 3 All ER 129.

Allen v Proprietors Strata Plan No 2110 [1970] 3 NSW 339.

Askin v Knox [1989] 1 NZLR 248.

Attorney-General v Body Corporate 200200 [2007] 1 NZLR 95 (CA).

Bellefield Computer Services Ltd v E Turner & Sons Ltd (No 2) [2003] TCLR 159.

Billings (A C) & Sons v Riden [1958] AC 240; [1957] 3 All ER 1.

Blatch v Archer (1774) 1 Cowp 63; 98 ER 969.

Body Corporate 114424 v Glossop Chan Partnership Ltd (High Court, Auckland, CP 612/93, 22 September 1997, Potter J).

Body Corporate DS67995 v Hammington (High Court, Hamilton, CP 10/01, 13 August 2001, Master Faire).

Body Corporate 173457 v Dunn (High Court, Auckland, CIV 2007-404-26645, 17 August 2007, Courtney J).

Brownie Wills v Shrimpton [1998] 2 NZLR 320 (CA).

Craig v East Coast Bays City Council [1986] 1 NZLR 99 (CA).

Darlington Borough Council v Wiltshier Northern Ltd [1995] 1 WLR 68; [1995] 3 All ER 895.

De Nagy v Wellington City Council (High Court, Wellington, CP 141/00, 16 September 2002, Master Venning).

Disher v Farnworth [1993] 3 NZLR 390 (CA).

- Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; [1972] 1 All ER 462.
- East Suffolk Rivers Catchment Board v Kent* [1941] AC 74; [1940] 4 All ER 527.
- Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2003] 5 1 AC 32; [2002] 3 All ER 305.
- Fifer Residential Ltd v Gieseg* (2005) 6 NZCPR 306.
- GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SC (HL) 157; 1982 SLT 533.
- Hamlin v Bruce Stirling Ltd* [1993] 1 NZLR 374. 10
- Hansen Yuncken Pty Ltd v TS Services Pty Ltd* [2003] VCAT 2020.
- Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575.
- Johnson v Watson* [2003] 1 NZLR 626 (CA).
- Jones v Watney Coomb Reid & Co* (1912) 28 TLR 399. 15
- Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 576 (HC & CA).
- Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350.
- Liverpool City Council v Irwin* [1977] AC 239; [1976] 2 All ER 39.
- Machin (H N) v Adams* (1997) 84 BLR 79 (CA). 20
- McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA).
- March v E and M H Stramare Pty Ltd* (1991) 171 CLR 506.
- Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA).
- Murphy v Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908. 25
- Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SCNZ).
- Offer-Hoar v Larkstore Ltd* [2006] 1 WLR 2926; [2007] 1 All ER (Comm) 104.
- Price Waterhouse v Kwan* [2000] 3 NZLR 39.
- Proprietors Units Plan No 95/38 v Jiniess Pty Ltd* [2000] NTSC 89.
- Pullar v Secretary of Education* [2007] NZCA 389. 30
- Reischer v Borwick* [1894] 2 QB 548.
- Riddell v Porteous* [1999] 1 NZLR 1 (CA).
- Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324.
- Salomon v Salomon & Co Ltd* [1897] AC 22.
- Sawyer and Withall, Solicitors, Re* [1919] 2 Ch 333. 35
- Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 (CA).
- Simons v Body Corporate Strata Plan No 5181* [1980] VR 103.
- Sloper v WH Murray Ltd* (High Court, Dunedin, A 31/85, 22 November 1988, Hardie Boys J).
- Snell v Farrell* [1990] 2 SCR 311; (1990) 107 NBR (2d) 94. 40
- South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).
- Taupo Ika Nui Body Corporate v Commissioner of Inland Revenue* (1997) 18 NZTC 13,147.
- Te Mata Properties Ltd v Hastings District Council* (High Court, Napier, CIV 2004-441-151 & CIV 2004-441-569, 17 August 2007, Williams J). 45
- Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504.
- Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).
- Velich v Body Corporate No 164980* (2005) 6 NZCPR 143 (CA).

Voli v Inglewood Shire Council (1963) 110 CLR 74.
Wilson v United Counties Bank Ltd [1920] AC 102.
World Vision of New Zealand Trust Board v Seal [2004] 1 NZLR 673.
Young v Tomlinson [1979] 2 NZLR 441.

5 **Action**

This was an action in negligence by Body Corporate 188529 and by its individual members, the plaintiffs, against the North Shore District Council, the first defendant, Robert Henry Graham Barton and Kay Barton, the second defendants and R F Coughlan and Associates, the third defendant, for breaches of duties of care in the design, construction and supervision of a residential development.

M Josephson, P J Butler and H K Harkess for the plaintiffs.
D J Heaney, G R Grant, C J C McLean and F L McGregor for the Council.

15 *G Bogiatto* for the Bartons (leave to withdraw granted).
A Maclean for R F Coughlan and Associates.

Cur adv vult

HEATH J.

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 <i>(1) A “leaky home” case</i>	
10 [1] “Sunset Terraces” is a residential complex, situated in Sunset Road, Mairangi Bay. It is a linear unit title development comprising 21 townhouses, each of two storeys. The dwellings were built in 1997 and 1998, using untreated timber framing and monolithic cladding. “Harditex” was the product used to clad the buildings. The proprietors of the townhouses have strata titles. A body corporate was established on deposit of the unit plan.	
15 [2] When completed, the units were not watertight. Moisture ingress has occurred. The wooden framing of individual units has rotted. In many cases the decay has been severe. The body corporate and a number of individual unit owners sue the developer, the designer and the territorial authority to recover damages.	
20 [3] The total losses claimed comprise the cost of driveway repairs (estimated at \$366,300, including GST) and repairs to the exteriors of the units (approximately \$1,900,587, including GST), together with professional and other fees (yet to be quantified). The repair costs for the exterior of the building are premised on the need for the buildings to be reclad, with a ventilated cavity, to comply with current building code requirements.	
25 [4] Remediation work has been undertaken on a number of units at a cost of over \$800,000. That repair work is alleged to be defective. No claim has yet been brought against those who carried out this work, though proceedings have been threatened. In this proceeding the plaintiffs claim those costs from the defendants, on the basis that the remedial work was a failed attempt to mitigate loss.	
30 [5] Can the plaintiffs recover these losses from any or all of the three defendants?	
 <i>(2) The proceedings in outline</i>	
35 [6] Mr and Mrs Barton (the developers) conceived the townhouse development and were responsible for supervising the construction work that was undertaken through two companies which they controlled.	
40 [7] The developers commissioned R F Coughlan and Associates (the designer) to prepare plans and specifications to obtain a building consent. Mr Coughlan (a sole practitioner) undertook the work. He submitted an application for a building consent to the North Shore City Council (the Council) in June 1997. The application was accompanied by plans and specifications. The application indicated that the development was likely to cost something in the order of \$2.2m to construct. The Council issued a building consent on 11 August 1997, after receiving some additional information it had requested.	
45 [8] The construction phase began in late 1997 and continued into 1998. The Council undertook inspections of the development work during that period. The	

evidence is not entirely clear about how many inspections were carried out, but it was somewhere between 77 and 120. In any event, the Council charged the developers for only 77 inspections.

[9] Once construction work had been completed, a certificate of compliance with the New Zealand Building Code¹ (the Code) was required. Either a private sector entity or a territorial authority could certify compliance.² In this case, no private certifier was engaged. The Council (as territorial authority) issued an interim code compliance certificate for ten of the units on 29 May 1998. It issued a final code compliance certificate on 11 September 1998. The second certificate related to all units, covering both the work certified in May 1998 and that undertaken subsequently.

[10] Body Corporate 188529 (the body corporate) and a number of individual registered proprietors, lessees or assignees seek damages against the developers, the Council and the designer. No contractual obligations exist. All claims are brought for breach of tortious duties said to be owed by particular defendants to the plaintiffs. The claims are based, directly or indirectly, on weathertightness defects.

(3) *The nature of the claims*

[11] The body corporate sues to recover for all losses suffered as a result of the defects that have led to damage to the development as a whole. One of the issues for determination is whether, and, if so, to what extent, a body corporate can sue for all damage to a unit title development caused by the negligence of someone involved in the construction project.

[12] Some of the individual owners also sue. They are:

- (a) Mr and Mrs Sangha, who own unit D. They live in Australia and rent the property to a third party.
- (b) Mr Devlin, who was the former proprietor of unit F. That unit is now owned by his company, Devlin Properties Ltd. That company leases the unit to an unrelated third party. Notwithstanding corporate ownership, the claim is brought in Mr Devlin's name only.
- (c) Two sisters, Michelle and Lisa Turner, who are registered proprietors of unit G. They live in the unit.
- (d) Mr and Mrs Parkinson, who presently live in the United Kingdom and are registered proprietors of unit L. They lease their property to a third party.
- (e) Mr Halford, who is the registered proprietor of unit N. He has, in the past, lived in the unit but it is presently rented to a third party.

I refer to these plaintiffs, collectively, as the individual proprietors.

[13] Mr Halford bought his unit in 1999. The remaining owners acquired their units after March 2000, a date by which all parties agree that structural damage had manifested itself.

[14] After completion of the units, a company called Porchester Ltd acquired title to units A, B, E, I, J, K, M, N, O, P, Q, R and S. Porchester sold the units to individuals or companies. Those entities subsequently entered into a lease

1 This Code was made under Part 6 of the Building Act 1991 (the 1991 Act); see Schedule 1 to the Building Regulations 1992 (SR 1992/150).

2 See s 43(1) and (2) of the 1991 Act.

with Blue Sky Holdings Ltd (Blue Sky) as trustee for the Auckland Residential Property Trust (the ARPT). Blue Sky subleased the properties to tenants and paid a fixed amount each week to each owner as rent. Blue Sky also entered into a management agreement with each owner for a fee. In effect, Blue Sky

5 assumed responsibility for managing a rental property on behalf of each owner.
[15] Both Porchester Ltd and Blue Sky were part of the Blue Chip group. The duration of each lease was 182 weeks, with an ability to extend that lease for a period of up to one year, by mutual agreement. Following completion of that term, Blue Sky would continue to lease the units under a tenancy at will. After
10 this proceeding was initiated, the registered proprietors assigned their respective rights of action to Blue Sky in an endeavour to foreclose the possibility that Blue Sky might not have standing to sue as lessee.

[16] The owners of units C, H and L have elected not to participate in the present proceedings.

15 [17] The developers are sued for negligence. They are alleged to owe a “non-delegable” duty of care to the body corporate, individual proprietors and Blue Sky (as both lessee and assignee of the causes of action) to ensure that the construction work was carried out with proper skill and care.³ This duty is put on the basis of the developers’ role as construction supervisors and project
20 managers.

[18] The developers are alleged to have been negligent in two respects. The first is that they failed to exercise proper skill and care in the construction of the Sunset Terraces development; in particular that they failed to ensure that the building work complied with the Code. The second is that they were negligent
25 in their capacities as project managers in supervising the construction work.

[19] At the conclusion of the hearing on 5 December 2007, I was satisfied that the developers had been negligent in both respects. However, because both the Council and the designer argued that no tortious duty of care was owed to any unit owner who acquired after March 2000, I did not enter judgment
30 against the developers in favour of any unit owner who acquired after that date, for fear of compromising defences on which I had not ruled. For that reason, I entered judgment against the developers on liability in favour of Mr Halford only, together with costs and disbursements to be fixed by the Registrar on a 3C basis. Mr Halford was the only individual proprietor who had acquired a unit
35 before 2000. I give brief reasons for that decision and the remaining claims against the developers later in this judgment.

[20] The body corporate, the individual proprietors and Blue Sky sue the Council, in negligence, for failing to exercise reasonable skill and care in performing three functions cast upon it by the Act.⁴ They allege that the
40 Council was negligent in:

- (a) issuing a building consent;
- (b) inspecting the work carried out under the consent; and
- (c) issuing code compliance certificates in respect of the work undertaken.

3 These claims are based on *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) at pp 240 – 241 per Cooke J (for himself and Somers J), with whom Richardson J, at p 242, concurred on this point.

4 Relying upon *Hamlin v Bruce Stirling Ltd* [1993] 1 NZLR 374, *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA), [1996] 1 NZLR 513 (PC) and *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881.

[21] Blue Sky also sues the Council for negligent misstatement. Land information memoranda were issued on 1 October 2002. The allegation is that the memoranda falsely stated that a code compliance certificate had been issued for all units in the development. These plaintiffs contend that the statement was false because the Council (as certifier) knew it had no reasonable grounds to believe that the work complied with the Code.⁵ 5

[22] The body corporate, the individual proprietors and Blue Sky sue the designer for negligent preparation of plans and specifications for the purpose of obtaining a building consent and for failing to exercise due care and attention in certifying practical completion of the construction work.⁶ 10

[23] Both the Council and the designer deny any duty of care was owed by them to the body corporate, the individual proprietors or Blue Sky. If a duty were found, they contend that they were not negligent. If negligence were established, they submit that no loss was caused by any act or omission on their part. 15

[24] The Council and the designer also plead contributory negligence. Failure to mitigate loss is also raised.

[25] Early in the hearing it became clear, for two reasons, that it would be both impractical and undesirable to go beyond liability issues. First, there was not time for me to hear all quantum evidence; the hearing on liability itself lasted for 29 sitting days. Secondly, the basis on which any damages might be assessed would depend on particular findings of fact. It was preferable for quantum evidence to be directed to facts as found. 20

[26] One quantum issue I agreed to address concerns the so-called “targeted repairs”. The plaintiffs contend that those costs are claimable from the present defendants, as failed mitigation. The opposing view is that the remedial work constitutes a break in the chain of causation and that the plaintiffs are entitled only to sue those responsible for that work, assuming they were able to prove the work was defective. 25

(4) What has caused the damage to the dwellings? 30

The direct evidence of defects and damage

[27] There is little, if any, direct evidence of the precise state of the dwellings at the time they were constructed. The developers did not give evidence. There was no contemporary photographic evidence. Only one tradesperson (Mr Joo) was called. The senior Council inspector (Mr Blanc) has, sadly, died. Other inspectors (understandably, given the passage of time) cannot recall their inspections of the development with any particularity. 35

[28] What is clear is that water ingress problems had been identified by early 2000, at the latest. Expression of those concerns led the body corporate to instruct Mr Sean O’Sullivan, a building surveyor contracted to Prendos Ltd, to inspect the development and report on apparent defects. 40

[His Honour considered the evidence and continued.]

⁵ “Reasonable grounds” was the test for issuing a certificate (see s 43(3) of the 1991 Act).

⁶ These claims are based on *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at pp 406 (Richmond P) and 422 (Cooke J).

(c) *The causes of water ingress*

[58] In determining what defects occurred during the construction phase and what, if any, damage they caused, I am obliged to draw inferences from proved primary facts or to act on opinion evidence supported by such facts. In drawing

5 inferences, I apply the maxim that all evidence must be weighed according to the proof which it was within the power of one side to have produced and in the power of the other to have contradicted.⁷

[59] Of the 19 defects identified by the plaintiffs, Mr Grigg, Mr Bayley and Mr Smith all agreed that the two primary causes of water ingress were the

10 failure to waterproof adequately:

- (a) the balconies (decks) on the upper levels of each dwelling; and
- (b) the wing walls between the roof and parapet.

Those opinions were consistent with the evidence of Mr O'Sullivan, Mr Sheppard, Mr Blaiklock and Mr Beran.

[60] Generally, the experts accepted that decay had been accelerated by water ingress from below. The more water that enters the timber framing, whether from above or below, the faster decay occurs. Mr Bayley expressed some doubts about the extent of lower-level ingress as a source of damage but, in my

15 view, his evidence on this topic was coloured by his desire to persuade me that Council inspectors could not have seen the nature or extent of agreed defects while inspecting the property.

[61] It is possible only to make broad assessments of the causes of the damage to the units. My assessment is that:

- (a) About 75 per cent of the damage caused by water ingress occurred through the failure to waterproof adequately the balconies/decks.
- (b) About 20 per cent of the water ingress damage can be attributed directly to the lack of weathertightness at the top of the parapet wing walls.
- (c) The balance of 5 per cent can be attributed to lower-level ingress (primarily at the front of the dwellings) arising through problems with the edge/berge detail, inadequate drainage at pavement level at the front of the units, inadequate waterproofing of the junctions between a concrete masonry wall and the clad timber framing and inadequate drainage of surplus water from the roof to the ground.

[62] It is unnecessary to go further into the alleged defects, given the level of agreement among the experts on the major causes of the damage. I regard any remaining defects as de minimis in nature. I emphasise that, at this stage, I am not deciding whether any acts or omissions of the Council or the designer caused loss to the body corporate or the individual owners. Those issues are

35 discussed later.

[63] What follows is a general discussion of the problems identified. I am satisfied that there has been a consistent pattern of defects across all of the units.

7 *Blatch v Archer* (1774) 1 Cowp 63 at p 65, *Snell v Farrell* [1990] 2 SCR 311 at p 328 and *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2003] 1 AC 32 at para [13].

(d) Inadequate waterproofing of the decks

[64] Both Mr O’Sullivan and Mr Blaiklock referred specifically to the inadequate waterproofing of the deck area as a major contributor to subsequent moisture damage caused to the timber framing. Their evidence was confirmed by Mr Grigg, Mr Bayley and Mr Smith.

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[65] In his drawings, the designer had specified that a trade-name product, “Butynol”, should be used to waterproof the decks. That trade name (like “Hoover” or “Xerox”) also has a more generic meaning. Butynol (or a similar product) was not used. Instead, a liquid applied membrane was chosen. Had that membrane been properly applied it would probably have worked.⁸ But the experts agreed, contrary to evidence given by the tiler (Mr Joo), who allegedly applied the waterproofing membrane, that any membrane applied was installed only as a “edge bandage” incapable of performing the weathertightness function.

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[66] As a result of the inadequate waterproofing of the deck area, a small gap was left around the edge and the wind was able to blow pooled water into and under the ranchslider sills. The photographic evidence supports the unanimous conclusion of the expert witnesses that water has seeped from the deck area into the timber framing and has been the major contributor to decay of the timber framing.

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[67] Mr Grigg, Mr Bayley and Mr Smith placed different emphases on the percentage contribution of this defect to the damage manifested. My assessment, having compared their evidence with that of Mr O’Sullivan, Mr Blaiklock and Mr Beran, is that about 75 per cent of the damage arose from this source.

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(e) Inadequate waterproofing of the wing and parapet walls

[68] All experts agreed that water ingress from the wing walls, to the rear of all units and to the front of one of the blocks was a major cause of damage to the timber framing. In particular, the failure to waterproof adequately at the top of the parapet wing walls led to the influx of rain water in sufficient quantities to decay both the timber framing and the cladding. While the rear wing walls were severely decayed at a level below the decks, Mr Grigg acknowledged that the predominant cause of that damage was inadequate weatherproofing of the decks themselves.

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[69] The three experts were in general agreement that the walls dividing the units, above and below the decks on the northern face of each unit, were not built in accordance with the Harditex manufacturers’ literature. In addition, there was no detail on the designer’s plans to identify the way in which the wing walls were to be constructed. No capillary gap was left. The wing walls failed because they allowed water to enter the timber framing. In turn, that caused rotting and cracking, as well as contributing to decay of timber near the deck.

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⁸ A similar issue, relating to the failure to use the Butynol product on decks, was discussed in *Riddell v Porteous* [1999] 1 NZLR 1 (CA).

[70] The manufacturer's specifications (1996 technical information published by James Hardie Pty Ltd) was not followed. That information required the application of some waterproofing agent to prevent water entering at the roof junction and decaying timber framing below.

5 [71] A separate head of claim involved the use of untreated timber framing in the wing and intertenancy walls. The use of untreated timber, on today's standards, was a grave mistake. The use of untreated timber with a monolithic cladding, such as Harditex, was not known to be fraught with danger in
10 a factor that goes to the speed with which decay occurred as a result of the failure to render this part of the building envelope weathertight.

[72] Mr Grigg, Mr Bayley and Mr Smith all accepted that this failure to waterproof was the second most serious cause of the damage. I assess that it represented about 20 per cent of the cause of the damage that occurred.

15 (f) *Lower-level ingress*

[73] The third and more minor contributing factor to the defects is the water ingress from below.

[74] There have been a number of contributing factors which have led to water ingress from below. Without the particular combination of events, it is
20 unlikely that the damage would have been significant from this particular source. Its effect was secondary to the two major causes, in the sense that it operated to accelerate decay of the timber framing rather than to act as a substantial cause of damage in its own right.

[75] There is some evidence of moisture being recorded in an area below an
25 edge/barge tile installation which permitted ingress across the apron to the roof framing and under the apron to the wall framing. Mr Grigg, Mr Bayley and Mr Smith agreed that gaps existed at the ends of the joinery head flashings. Those gaps allowed moisture to enter the timber frame, due to the absence of
30 any sealant. That moisture, having entered through the external building envelope, caused damage to the timber framing. The damage was, generally, to be found around both sides of the garage doors and along the side of the garage, a location to which water was also falling from the lower roof area, due to the inadequate waterproofing of the wing wall/parapet area.

[76] Mr Grigg was of opinion that the finished pavement levels and slopes
35 around the garage and front door entries did not allow for adequate drainage of surface water. In his view, that caused standing water which, in conjunction with other water congregating at ground level, led to moisture seeping through the garage retaining walls.

[77] Mr Bayley and Mr Smith disagreed with that assessment on the basis
40 that there was adequate water drainage through cesspits and silt traps. Mr Bayley considered that excess water appeared to have been caused to some extent through blocked gutters above the front entry areas, arising from lack of maintenance.

[78] All three experts agreed that there were inadequately waterproofed
45 junctions between the concrete masonry walls and the timber framing clad with Harditex. In particular, the absence of "Z-flashing" seems to have exacerbated this problem. While Mr Bayley considered no damage was apparent from this defect, I prefer the evidence of Mr Grigg and Mr Smith, which is indicative of this being a contributing factor to lower-level water penetration.

[79] While there may be issues of responsibility flowing from (primarily) Mr Bayley's evidence, I am satisfied that water was pooling in the manner indicated by Mr Grigg and that, in combination with other aspects to which I have already referred, additional moisture ingress from below occurred.

[80] I assess these combined defects as causative of 5 per cent of the damage that has resulted from moisture ingress. Because these causes represent a combination of defects, I do not regard it as desirable to analyse whether the Council or the designer was negligent in relation to any particular component part. The causative effect of each is too minor to justify that approach and the causal potency is not sufficient to be regarded as substantial and material cause of any loss suffered.⁹ The lower-level ingress causes do, however, have relevance to the information available to the Council when it made its decision to issue its code compliance certificate.

(5) *Can the body corporate sue?*

(a) *The body corporate's claim*

[81] The first issue is to determine whether the body corporate has standing to sue the Council, the developers and the designer in respect of their alleged negligent acts or omissions. This is a discrete issue from whether a duty of care is owed to it by any of the defendants. It involves the right to sue in respect of the individual units and common property comprised in the unit title development. The issue falls to be determined in light of the separation of responsibilities between individual proprietors and the body corporate, set out in the Unit Titles Act 1972.

[82] The body corporate sues to recover all losses suffered as a result of damage to various parts of the residential complex. Counsel for the body corporate contends that a duty of care in negligence is owed by all three defendants on the same basis as if the claim was that of an individual home-owner. The only difference, in respect of the damages claimed, is that general damages claimed by individual plaintiffs are not sought by the body corporate. The only claim in respect of common property relates to the driveway, but that claim is pursued only against the developer.

(b) *The scheme of the Unit Titles Act*

[83] A body corporate is a creature of statute. It is constituted under the Unit Titles Act. A general discussion of the scheme of that Act can be found in *World Vision of New Zealand Trust Board v Seal*.¹⁰

[84] The 1972 Act has been described as a "statutory moulding" of the Torrens system of land registration to provide for the ownership of flats and business premises.¹¹ Three purposes can be gleaned from the long title to the Act: namely, (a) to facilitate the subdivision of land into units that are to be

9 See *Johnson v Watson* [2003] 1 NZLR 626 (CA) at para [18] and the discussion at para [233] below.

10 [2004] 1 NZLR 673 at paras [21] – [52]. See also, for background to the 1972 Act and a discussion of likely problems arising from it, the New Zealand Law Commission's discussion paper and final report: "Shared Ownership of Land" (NZLC PP35, January 1999) and (NZLC R59, November 1999).

11 Hinde, McMorland and Sim, *Land Law in New Zealand* (2004), Vol 2, para 14.022.

owned by individual proprietors; (b) to facilitate its subdivision into common property that is to be owned by all the unit proprietors as tenants in common; and (c) to provide for the use and management of the units and common property.

5 **[85]** Subdivision of land is effected by the deposit of a plan specifying the units in relation to a building or buildings already erected on the land.¹² The deposit of a unit plan creates a stratum estate in freehold or in leasehold.¹³ An indefeasible title, under the Land Transfer Act 1952, is created on deposit of the unit plan.¹⁴

10 **[86]** Body Corporate 188529 came into being on 29 April 1998 when the unit plan (DP 188529) for the Sunset Terraces subdivision was deposited with the District Land Registrar. A body corporate has perpetual succession and a common seal.¹⁵ It can sue and be sued.¹⁶ Initially, a body corporate is comprised of the registered proprietor of the land to which the unit plan relates¹⁷ but, later, it comprises all proprietors, for the time being, of the individual units.¹⁸

15 **[87]** A body corporate may sue and be sued, in the same way as any other corporation.¹⁹ While a body corporate is authorised expressly to “sue for and in respect of damage or injury to the common property caused by any person, whether that person is a unit proprietor or not”,²⁰ that particular power does not limit the generality of its ability to engage in litigation.²¹

20 **[88]** While the ability to sue is not limited, the fact that the statute expressly provides for the body corporate to sue in respect of damage “from in and to common property” suggests that the body corporate cannot reach beyond the common property. That view was taken in *Body Corporate DS67995 v Hammington*²² by Master Faire, who held that a body corporate for a terraced motel containing 40 units did not have standing to sue on a lease to which it was not a party. The Master said:

25 “[Section 13(2) of the Unit Titles Act] makes the body corporate capable of suing and being sued in its corporate name. Subsection (2) provides that [the body corporate] may sue for, and in respect of, damage or injury to the common property caused by any person, whether that person is a unit proprietor or not. That, however, provides no assistance to the specific position which is before me. *Neither section creates a right in the body corporate to sue specifically on behalf of each individual unit registered*

12 Section 4(1) of the Unit Titles Act.

13 Section 4(2).

14 *Disher v Farnworth* [1993] 3 NZLR 390 (CA) at pp 400 – 401.

15 Section 12(4) of the Unit Titles Act.

16 Section 13(1).

17 Section 12(1). Usually the developer or its nominee. This can have consequences for purchasers of individual units, as the developer will have the ability to change the body corporate rules (compare paras [172] and [173]).

18 Section 12(2). See also *Taupo Ika Nui Body Corporate v Commissioner of Inland Revenue* (1997) 18 NZTC 13,147 and *Body Corporate DS67995 v Hammington* (High Court, Hamilton, CP 10/01, 13 August 2001, Master Faire).

19 Section 13(1).

20 Section 13(2).

21 Section 13(2).

22 (High Court, Hamilton, CP 10/01, 13 August 2001).

proprietor in respect of a lease which they may enforce by the operation of s 112 of the Property Law Act 1952.” (Emphasis added.)

Master Faire’s view is consistent with the duty of the body corporate to keep common property in a state of good repair.²³ I agree, with respect, with his analysis.

[89] Section 14 of the Unit Titles Act also specifies the way in which proceedings in tort should be brought against an owner or occupier of particular land or premises, notwithstanding any rule of law to the contrary. The statute makes it clear that, for the purpose of any such proceedings, “[t]he common property and each of the units shall be separate premises”.²⁴ Where tortious proceedings are brought in respect of common property, the body corporate is deemed to be the owner and occupier of that property, with the consequence that any judgment must be entered against the body corporate itself.²⁵

[90] If sued in respect of common property, a body corporate may join any one or more of the proprietors or former proprietors whose “negligence or unauthorised act or omission” may have given rise to the cause of action against the body corporate.²⁶

[91] Subject to the provisions of the Unit Titles Act, a body corporate is empowered to carry out any duties imposed upon it by its rules.²⁷ However, if the default rules set out in Schedules 2 and 3 to the 1972 Act are changed, they must, to be valid, be *intra vires* the power to amend set out in s 37(5) of the 1972 Act.²⁸

[92] The body corporate is obliged to insure and keep insured all buildings and other improvements on the land to their replacement value.²⁹ A distinction is drawn between insurance of the building and its contents, the latter being the responsibility of the individual proprietor.

[93] Subject to the terms of the 1972 Act, the body corporate must “control, manage, and administer the common property and do all things reasonably necessary for the enforcement of the rules”.³⁰ One of those obligations is to keep “common property” in a state of good repair.³¹

[94] In order to raise finance to deal with management of the common property and to meet outgoings (including insurance premiums, rent and repairs), the body corporate is empowered to establish and maintain a fund for such administrative purposes and to determine, from time to time, the amounts to be raised for that purpose.³²

23 Section 15(1)(f) of the Unit Titles Act. See also *Body Corporate 173457 v Dunn* (High Court, Auckland, CIV 2007-404-26645, 17 August 2007, Courtney J) at para [3], in which the Judge held that s 15 did not confer any power to levy in respect of work done to individual units.

24 Section 14(2)(a).

25 Section 14(2)(b). See also *Body Corporate DS677955 v Hammington* and *Body Corporate 173457 v Dunn*.

26 Section 14(2)(b), proviso.

27 Section 15(1)(a).

28 Generally, see *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143 and *Fifer Residential Ltd v Gieseg* (2005) 6 NZCPR 306.

29 Section 15(1)(b) – (e) and (j) of the Unit Titles Act.

30 Section 15(1)(h).

31 Section 15(1)(f). See also r 2 of the default rules of a body corporate set out in Schedule 2 to the 1972 Act.

32 Section 15(2).

[95] A body corporate is prohibited from involving itself in trading activities, but, otherwise, is granted all powers reasonably necessary to carry out the duties imposed upon it by the Act and its rules.³³ Any instrument affecting common property must be executed by the body corporate, provided it has been approved by unanimous resolution.³⁴

[96] Common property is held by the proprietors of all units as tenants in common in shares proportional to their unit entitlement.³⁵ Proprietors of *all* units are empowered to sell or lease part of the common property or grant an easement over all or any part of it.³⁶ The emphasis is on the “proprietors” acting together as a common group, as opposed to the unruly situation that could develop were each registered proprietor entitled to deal with “common property” individually.

[97] The fundamental theme of the statute is the distinction between the individual units (for which each registered proprietor takes responsibility) and common property (the domain of the body corporate). The distinction is logical. Individual registered proprietors can deal only with individual property, whereas “common property” is owned by *all* proprietors and must be managed by the body corporate for the common good of all.

[98] The body corporate is the corporate vehicle through which efficient management of common property is undertaken. The body corporate is administered by a committee with assistance from a secretary.³⁷ Sometimes, depending on the size or complexity of the development, a commercial company will provide secretarial services for reward.

[99] Two further issues require particular emphasis. First, it is the body corporate that has the duty to provide a certificate of any proprietor’s liability, if requested to do so.³⁸ The second concerns the ability of the proprietors, or a purchaser or mortgagee of a unit, to amend the default rules set out in Schedule 2 to the 1972 Act by unanimous resolution.³⁹

[100] Any prudent person intending to buy a dwelling within a unit development will seek a certificate under s 36 of the 1972 Act from the body corporate. The purpose of a s 36 certificate is to advise a purchaser or a mortgagee of any outstanding obligations or risks relating to the acquisition of a unit or securing borrowing against it. The certificate must identify contributions required of a proprietor to the body corporate, the manner and time of payment of that contribution and the extent to which any contribution has been paid by the existing proprietor.⁴⁰ The body corporate is also required to identify any amount payable by the existing proprietor to the body corporate.⁴¹

33 Section 16.

34 Section 17(1). See also ss 18 and 19 of the Unit Titles Act, dealing with registration of transfers of and additions to common property.

35 Section 9(1).

36 Section 9(3).

37 Section 2, definition of “committee”. See also the default rules set out in rr 4 – 13 of Schedule 2.

38 Section 36.

39 Section 37.

40 Section 36(a) – (c).

41 Section 36(d). That amount is calculated by reference to ss 14(3), 15(2) and 32 of the Unit Titles Act.

[101] The certificate must state whether the body corporate has performed or entered into any contract to perform any repair, work or act in respect of which the existing proprietor is likely to incur a liability⁴² and the rate at which interest is accruing in respect of any amount owing to the body corporate by the proprietor.⁴³ Section 36 states expressly that the certificate shall be conclusive evidence, “in favour of any person dealing with that proprietor” of the matters certified in it. 5

[102] The body corporate is also required to certify whether it has “received notice that any proceedings are pending against the body corporate”.⁴⁴ Although that suggests a contingent liability, the required disclosure does not go so far as the identification of any damage to the unit development that might have manifested itself prior to the purchaser or mortgagee seeking a certificate. 10

(c) The body corporate rules

[103] The body corporate must have rules by which its proprietors are bound.⁴⁵ Default rules are set out in Schedules 2 and 3 to the Unit Titles Act.⁴⁶ Schedule 2 provides rules which may only be amended by unanimous resolution.⁴⁷ The rules in Schedule 3 (relating to the use of individual units) can be changed by resolution of a general meeting of the body corporate.⁴⁸ 15

[104] The powers and duties of a body corporate are set out rr 2 and 3 of Schedule 2 as follows: 20

Powers and duties of body corporate

- 2 The body corporate shall –
 - (a) Repair and maintain all chattels, fixtures, and fittings (including stairs, lifts, elevators, and fire escapes) used, or intended, adapted, or designed for use, in connection with the common property or the enjoyment thereof: 25
 - (b) Repair and maintain all pipes, wires, cables, ducts, and all other apparatus and equipment of whatsoever kind and wheresoever situate which may be reasonably necessary for the enjoyment of an incidental right which may from time to time exist by virtue of section 11 of the Unit Titles Act 1972: 30
 - (c) On request, produce to any unit proprietor, or a registered mortgagee of any unit, or any person authorised in writing by any unit proprietor or registered mortgagee of any unit, all policies of insurance effected by the body corporate under the provisions of section 15 of the Unit Titles Act 1972 and the receipt for the last premiums paid in respect thereof. 35
- 3 The body corporate may –

42 Section 36(e). Such liabilities are referable to s 33 or s 34 of the Act. The general nature of the repair, work or act should be stated.

43 Section 36(ea).

44 Section 36(f).

45 Section 37(1).

46 Section 37(2).

47 Section 37(3) and (5).

48 Section 37(4).

- (a) Borrow any money necessary to enable it adequately to perform its duties or exercise its powers:
- 5 (b) Invest any money for the time being held by it (whether in a fund established under section 15 of the Unit Titles Act 1972 or otherwise) in any of the modes of investment for the time being authorised by law for the investment of trust funds:
- (c) Establish a current account at a bank, and nominate for the purposes of this paragraph 3 persons (including the secretary) of whom any 2 may operate the account:
- 10 (d) Enter into any agreement with a proprietor or an occupier of any unit for the provision of amenities or services by it to the unit or to the proprietor or occupier:
- (e) Grant to a proprietor of a unit or to anyone claiming through him any special privilege (not being a lease) in respect of the enjoyment of part or parts of the common property: provided that any such grant shall be determinable by special resolution.

[105] Section 37(5) of the 1972 Act provides:

20 (5) Any amendment of or addition to any rule shall relate to the control, management, administration, use, or enjoyment of the units or the common property, or to the regulation of the body corporate, or to the powers and duties of the body corporate (other than those conferred or imposed by this Act):

25 Provided that no powers or duties may be conferred or imposed by the rules on the body corporate which are not incidental to the performance of the duties or powers imposed on it by this Act or which would enable the body corporate to acquire or hold any interest in land or any chattel real or to carry on business for profit.

30 [106] In my view, s 37(5) makes it clear that only powers or duties incidental to the performance of duties or powers imposed on it by the 1972 Act may be amended. Section 37(5) has the effect of forbidding any change to the rules that creates a responsibility for the body corporate going beyond common property, or anything incidental to it.

35 [107] In this case, the body corporate purported to amend rr 2 and 3 of Schedule 2. The amendment was effected at a time (30 April 1998) when the developers owned all units within the unit title development. Accordingly, the democratic process by which individual owners were intended to determine their rules was not available to any of those who purchased units from the developers.

40 [108] For the purpose of this proceeding, the amendments to r 2 assume some significance. The amended rule stated:⁴⁹

The body corporate shall (in addition to any other duties imposed on it by the Act):

- 45
- (b) *Keep clean and in a state of good repair* and from time to time

49 Compare with the default rule set out at para [104] above.

when the condition so requires paint *the exterior and roof of the building of which the Units form part excluding the exterior of the windows of each Unit.* (Emphasis added.)

[109] The 1972 Act makes it clear that a certificate of title for an individual unit must be in the name of the “registered proprietor” and “not the body corporate”.⁵⁰ A deposited plan must define the boundaries of the individual units, so that the District Land Registrar is able to issue a certificate of title to the unit in favour of a purchaser.⁵¹ In this case, the plan defines that boundary “to the external face of exterior walls and glass adjoining, common property and accessory units and to the centre line of walls between adjoining units”. So, the outside face of an exterior wall is part of an individual unit.

[110] In my view, the provisions of the Unit Titles Act contemplate corporate responsibility for the maintenance or repair of common property only. Applying the Court of Appeal decision in *Velich v Body Corporate No 164980*,⁵² the amendment to r 2(b) of the default rules was ultra vires because it purported to confer an obligation on the body corporate inconsistent with the powers and duties conferred by the Act. Thus, the amendment was outside of the powers to vary the rules authorised by the Unit Titles Act.

[111] The issue of vires was also considered by Rodney Hansen J in *Fifer Residential Ltd v Gieseg*.⁵³ In that case, the Judge considered the extent of the proviso to s 37(5) and the meaning of the phrase “not incidental to the performance of the duties or powers imposed” on the body corporate by the 1972 Act. Rodney Hansen J said:

“[43] The duties imposed by the Act on a body corporate are found in s 15 of the Act and in r 2 of the Second Schedule. They are conveniently summarised in the judgment of Paterson J in *Chambers v Strata Title Administration Ltd* (2004) 5 NZ ConvC 193,864 at para [41]:

‘The duties specified in the Act relate to insuring the buildings and other improvements on the land, paying the premium on the insurance policies, keeping the common property in a state of good repair, complying with notices issued by local authority or public body requiring repair work, the control, management and administration of the common property, the enforcement of any lease or licence under which the land is held, the enforcement of any contract of insurance, the establishment of a maintenance fund for administrative and other expenses, and the levying of the proprietors to maintain this fund. The statutory rules contain a provision headed “Powers and Duties of Body Corporate”. The duties relate to the repair and maintenance of chattels, fixtures and fittings, the repair and maintenance of essential services, and the production on request by certain people or insurance policies.’

As Paterson J concluded, the duties imposed by the Act are relatively limited.

50 Section 8(1)(a).

51 Section 8(1). See also the definition of “unit” in s 2.

52 (2005) 6 NZCPR 143.

53 (2005) 6 NZCPR 306.

[44] I accept [counsel’s] submission that r 2.2(g) [of the particular body corporate’s rules] is not incidental to any of the duties imposed on the body corporate by the Act. It is not incidental in the sense of being naturally attached to, or arising from, or naturally appertaining to any of the duties – the meaning ascribed to ‘incidental’ by Paterson J in *Chambers* at para [44] and subsequently adopted by Ronald Young J in *Body Corporate 199883 v Clarke Family Associates Ltd* (2005) 5 NZCPR 947 at para [39]. Rule 2.2(g) purports to create an entirely independent duty which requires the body corporate to agree to the development of the seventh floor. I accept the respondents’ submission that whether r 2.2(g) is interpreted narrowly, as they contended, or broadly, as argued for the plaintiff, the duty it imposes is not incidental to the performance of any duty imposed by the Act and is therefore ultra vires.”

[112] I have also considered whether the terms of either the Weathertight Homes Resolution Services Act 2002 or the Weathertight Homes Resolution Services Act 2006 apply to provide standing to a body corporate where none existed before. I hold they do not.

[113] The 2002 and 2006 Acts expressly permit a body corporate to sue for losses caused to units (in the nature of a dwellinghouse)⁵⁴ comprised in a multi-unit development. Not only is the body corporate given standing to sue under those statutes, but the individual proprietors are expressly barred from suing in their own names.⁵⁵ In effect, for the purposes of providing a relatively simple and efficient regime to deal with non-complex cases, Parliament has provided a means by which the body corporate can act as a statutory agent of the owners, in a manner akin to that of trustee and beneficiary.

[114] The Weathertight Homes Resolution Services Act 2006 replaced its 2002 counterpart “to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings”.⁵⁶ The 2006 Act recognises the systemic nature of weathertightness problems arising as a result of the implementation of the Building Act 1991, the Building Code and the construction methods used in that period. Claims can be brought before the Weathertight Homes Tribunal if water had penetrated a building or complex “because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration” and damage had resulted from that penetration.⁵⁷

[115] Reporting on the multi-unit claims provisions of the 2006 Act, the select committee said:⁵⁸

“The main purposes of the multi-unit amendments are to ensure that as far as possible a ‘whole of complex’ approach can be taken to these leaky buildings, and to enable bodies corporate and other groups to bring claims

54 Section 5 of the Weathertight Homes Resolution Services Act 2002 and s 8 of the Weathertight Homes Resolution Services Act 2006 – definition of “dwellinghouse”.

55 For example, see ss 8, 16 and 17 of the 2006 Act.

56 Section 3 of the 2006 Act.

57 For example, see s 16(b) and (c) of the 2006 Act in the context of multi-unit complex claims.

58 Social Services Select Committee, Weathertight Homes Resolution Services Amendment Bill (75/2), 29 November 2006, commentary, p 4.

to the [Weathertight Homes Resolution Service]. With a few exceptions, single residential unit owners will not be able to bring separate claims. Instead, a representative will bring a claim for all weathertightness damage to common areas and residential units in a multi-unit complex. The representative will be able to bring a claim only where the owners in the complex agree to it. For those decisions, if a representative's body corporate rules, constitution, or lease require more than 80 percent of owners to agree, the bill allows that no more than 80 percent of owners entitled to vote will need to agree. In bringing a claim, the representative will need to provide a statutory declaration that at least 75 percent of residential unit owners in the complex have authorised the representative to bring and resolve claims in respect of their dwellinghouses. Both provisions are a balance between a 'whole of complex' approach and allowing some leeway for the possibility that some owners may 'hold out', and not agree to a claim being brought."

[116] The purpose for which the body corporate was given exclusive standing to sue under the 2002 and 2006 Acts was to simplify an approach to common problems faced by individual owners. Action through the body corporate had to be authorised by the individuals who make up that entity in the usual way. There was no intention to interfere in the right of individual claimants to bring claims not supported by other owners in respect of damage to individual units. The "representative action" approach must be viewed in that light. The procedures adopted under the 2002 and 2006 Acts cannot affect the question of standing to sue in this Court. That issue must be determined on the basis of the functions of the body corporate cast upon it by the 1972 Act.

(d) Analysis

[117] Exclusive jurisdiction to deal with water ingress claims was not conferred on the Tribunal. Both a right of appeal⁵⁹ and an ability for the Tribunal to refer questions of law to the High Court⁶⁰ were included within the statutory regime. What the statute did not do, however, was to provide a right to sue in other jurisdictions (including the High Court) if, otherwise, the body corporate had no standing to sue.

[118] In my view, the terms of the 1972 Act do not authorise a body corporate to sue for damage to individual units. There is no room to engraft upon the Act the notion of a statutory agency or quasi-trusteeship akin to that adopted for claims under the weathertight homes legislation. A similar conclusion was reached in *Owners – Strata Plan No 43551 v Walter Construction Group Ltd*,⁶¹ a decision of the Court of Appeal of New South Wales.

[119] Practical considerations also militate against the introduction of such a gloss. An individual owner might not be entitled to obtain a judgment because of some break in the chain of causation or contributory negligence in respect of

⁵⁹ Section 93 of the 2006 Act.

⁶⁰ Section 113.

⁶¹ (2004) 62 NSWLR 169 at pp 178 – 179 per Spigelman CJ, with whom Ipp and McColl JJA agreed.

the particular loss suffered. Yet, if a body corporate were entitled to bring what is, in effect, a class action, there would be a real risk that the body corporate might pursue claims in a manner that results in a windfall to or double recovery by a particular proprietor.

5 [120] Whether the body corporate or the individual owners bring a claim, it is necessary to consider separately and discretely the position in respect of each unit. In my view, it would be wrong in principle to attach liability to a defendant even though there was a break in the chain of causation in respect of losses suffered by individual proprietors. There is no reason in principle to justify circumventing the conventional rules relating to causation.⁶²

10 [121] My conclusion is inconsistent with Singaporean authorities to which Mr Josephson referred me. In particular, he referred me to a decision of the Court of Appeal of Singapore that he contended supported the proposition that a body corporate could sue for breach of a tortious duty by a person responsible for building defects (*RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075*).⁶³ I was also referred to Australian decisions,⁶⁴ to the same effect. However, I hold that they turn on the particular provisions of the statute under which the body corporate (or its equivalent) was constituted and have no application within the New Zealand environment.

20 [122] *Simons v Body Corporate Strata Plan No 5181*⁶⁵ provides an illustration of a case in which a body corporate's capacity to sue in respect of common property was interpreted in a manner that enabled boundaries to an exterior wall of a particular unit to come within the ambit of any claim. In that particular case, the causes of damage had been identified as beginning with the penetration of the outer wall, a cavity brick wall, by water. The difficulties that can emerge from the way in which the draughtsman's pen identifies boundaries to the units were discussed in *Simons*. In that case, while an external wall was common property, only one unit owner could obtain the benefit of any repairs. That situation can be contrasted with the present case, in which the outer face of the exterior wall falls within the ambit of common property.

30 [123] Acknowledging that New South Wales authority suggested a body corporate had a right to sue in respect of external walls which were part of the common boundary of the unit and common property,⁶⁶ Lush J preferred to put his approach on a more narrow basis:⁶⁷

40 "I am concerned with making good defects in the original construction of the main structure of units built in a block. I would not take the same view of the question of benefit if, for instance, the defect was defect occurring, in an area of common property, in fittings or equipment supplying a service to one unit only, for instance a blocked or leaking pipe."

62 See Part 7 of this judgment.

63 [1999] 2 SLR 449.

64 *Hansen Yuncken Pty Ltd v TS Services Pty Ltd* [2003] VCAT 2020, *Owners – Strata Plan No 43551 v Walter Construction Group Ltd and Proprietors Units Plan No 95/38 v Jiniess Pty Ltd* [2000] NTSC 89.

65 [1980] VR 103.

66 *Allen v Proprietors Strata Plan No 2110* [1970] 3 NSW 339.

67 *Simons v Body Corporate Strata Plan No 5181* at p 108.

In my view, for present purposes, *Simons* can be distinguished on its facts. It may or may not be necessary to consider the point specifically in another case.

[124] On the analysis I have adopted, I am satisfied that the body corporate has standing to sue for losses caused to common property but has no right to sue in respect of damage done to individual units.

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(6) *Does the Council owe a duty of care in tort?*

(a) *Development of a duty to “home-owners”*

[125] Since *Bowen v Paramount Builders (Hamilton) Ltd* was decided in 1976, it has been settled law in New Zealand that a builder owes a duty of care to any person whose property they should reasonably expect to be affected by their work. The builder’s duty is to take care to prevent damage to the property. The duty was expressed as one owed by the builder to any person whom he or she might reasonably foresee to be likely to suffer loss (either personal injury or injury to property) arising out of the negligent creation of a hidden defect which is a source of danger.⁶⁸

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[126] In *Johnson v Mount Albert Borough*,⁶⁹ Mahon J, on the authority of *Bowen* and *Dutton v Bognor Regis Urban District Council*,⁷⁰ held that a local authority which, knowing a house to be built on filled ground, had issued a building permit without requiring foundations that would have been adequate or had failed to ensure, by inspection, that adequate foundations were used, was liable to the owner if damage was caused by subsidence.⁷¹ Mahon J said:

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“ . . . the borough was negligent in failing to exercise reasonable care in the issue of a building permit and in failing by its authorised officer to observe the inadequacy of the foundations upon inspection, having regard to the knowledge of the council of the unstable ground upon which the building was to be constructed.”

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[127] That duty of care was, implicitly, upheld on appeal.⁷² The Council did not challenge Mahon J’s holding that a duty of care was owed. Rather, its grounds of appeal were that the action was statute-barred or that an apportionment of liability between the Council and the developer was wrong.⁷³ The duty found by Mahon J was set out in the joint judgment of Cooke and Somers JJ, without criticism.⁷⁴ The third member of the Court, Richardson J, agreed with the joint judgment but added some additional observations on the limitation issue.

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[128] *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd*⁷⁵ was a sequel to the *Johnson* case. That litigation was a contest between the Council and its insurer as to whether the Council was entitled to recover for negligence of the type upheld by the Court of Appeal in

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68 At pp 405 – 406 per Richmond P, 416 – 419 per Woodhouse J and 423 – 424 per Cooke J.

69 [1977] 2 NZLR 530.

70 [1972] 1 QB 373 (CA).

71 At p 533.

72 *Mount Albert Borough Council v Johnson*.

73 At p 238 per Cooke and Somers JJ.

74 At p 237.

75 [1983] NZLR 190 (CA).

Mount Albert Borough Council v Johnson.⁷⁶ In the insurance appeal, Cooke J explained those authorities imposing a duty of care in tort on a council as based on “control”. Cooke J said:⁷⁷

5 “The line of cases establishing that a local authority may be liable in tort to a purchaser for negligently allowing inadequate foundations derive the liability from control. The local authority’s control of building in its district has been held to carry a duty to take reasonable care in performing the statutory functions. In the sweep of his judgment in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 394 – 395, 10 Lord Denning MR included some references to advice by professional men. As I read those passages, however, Lord Denning saw the liability of a Council’s engineer or inspector as stemming from the fact that he knows or ought to know that, if he does his work of inspecting and passing the structure badly, persons such as the plaintiffs may be injured. It is not at all 15 clear that Lord Denning would have described the injury as caused by negligent advice. And there is no reference to advice in the judgments of the majority of the Court of Appeal in that case, Sachs and Stamp LJJ.” (Emphasis added.)

Both Somers and Jeffries JJ agreed with Cooke J on that point.⁷⁸

20 [129] Between 1979 and 1994, a number of decisions of the Court of Appeal applied and developed the duty articulated in *Mount Albert Borough Council v Johnson*.

25 [130] In *Morton v Douglas Homes Ltd*,⁷⁹ Hardie Boys J discussed the basis for local authority liability in negligence to present and future owners, in the context of the Council’s building permit and inspection functions. His Honour said:⁸⁰

30 “Where, as here, a local authority has statutory responsibility for providing and ensuring compliance with building bylaws, the duty of care it owes to present and future owners is in two generally distinct areas. There is the area of permit approval, and there is the area of inspection during the course of the work. Examples of cases in which the former, has been considered are *Hope v Manukau City Council* (a judgment of Chilwell J, Auckland, A 1553/73, delivered 2 August 1976) and 35 *Johnson v Mount Albert Borough Council* [1977] 2 NZLR 530 (Mahon J), whilst the latter is the subject of the now classic cases of *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 and *Anns v Merton London Borough Council* [1978] AC 728, and perhaps, most recently, *Dennis v Charnwood Borough Council* [1982] 3 WLR 1064 and *Acrecrest Ltd v W S Hattrell & Partners* [1982] 3 WLR 1076.

40 The plaintiffs all plead negligence in both areas. In the first, there is alleged a failure by the Council to require that the work authorised by the permit complied in all respects with the bylaws ‘and in particular its requirement that foundations and the concrete terrace should rest upon a

76 [1979] 2 NZLR 234 (CA).

77 At p 196.

78 See also Sir Robin Cooke, “An Impossible Distinction” (1991) 107 LQR 46, p 51.

79 [1984] 2 NZLR 548.

80 At pp 600 – 602.

solid bottom and piling should be driven to a solid bearing', in accordance with Mr Smith's report. In the second area, the allegation is that Mr Kennedy did not adequately supervise the work so as 'generally to ensure that the structure constructed rested upon or was attached to the piles which were in turn driven to a solid bearing'.

In the area of permit approval, the duty as I apprehend it is to take reasonable care to ensure that the plans and specifications show a structure that complies with the bylaws and other requirements which it is the local authority's responsibility to administer. The duty is emphasised by cl 2.9.1 of the Model, which I have quoted earlier in this judgment, which entitles the engineer to withhold a permit until he is satisfied that there has been such compliance. The bylaws relating to foundations were not produced, but from the wording of subcl 2.4.2 of the Model, also quoted above, I am clear that that part of the Council's duty is to take reasonable care to ensure that 'the strata will support the building without detrimental settlements' (para (ii) of the subclause). The duty must also extend to checking the proposed method of construction of the foundations, but in the absence of the necessary information I cannot be more specific. I consider however that I am entitled to assume that the bylaws required, in the words of the pleadings 'minimum standards of construction and durability'.

The scope of the [inspection] duty in this respect, so far as it relates to foundations, has been succinctly defined by Lord Wilberforce in Anns (p 758) as being 'to take reasonable care, no more, no less, to secure that the builder does not cover in foundations which do not comply with bylaw requirements'. That definition obviously does not extend to driven piles, the stability of which is not capable of visual confirmation once the pile driver has gone from the site. I do not think that the fact that the local authority has not thought fit to impose a permit condition as to professional observation and certification means that its inspector has no duty with regard to driven piles, but it means that that duty can only be duty to satisfy himself by inquiry, to the extent that he cannot do so by personal inspection." (Emphasis added.)

[131] In *Brown v Heathcote County Council*,⁸¹ Cooke P explained the prevailing approach to negligence cases, particularly those involving building defects. He said:

"I do not suggest that it is necessary to read all [the Court of Appeal decisions between 1969 and 1986, listed earlier in the judgment] to understand the decision in the present case. What does warrant some emphasis is the question of approach. When a New Zealand Court is urged, as counsel for the appellant urged us here, not to hold that a duty of care existed in a kind of factual situation not precisely covered by existing authority, the whole matter should be weighed against a background and in the spirit of what is now a not inconsiderable body of indigenous New Zealand case law. One of its features is perhaps a certain simplicity.

81 [1986] 1 NZLR 76 (CA) at p 79.

That does not mean that we cannot learn from developments overseas. Indeed New Zealand Courts have probably been readier than any other national Court sufficiently known to me to look to overseas precedents for guidance, as is natural for a small country with our history and connections. As already indicated, recognition of the need to have regard to developments elsewhere has been part of the reasons for the time we have taken over this case. Moreover, although our existing negligence law is significantly indigenous in its origins and development, we have borrowed freely and gratefully from ideas formulated by leading Judges in other countries.”

[132] Richardson J and Sir Clifford Richmond did not explicitly endorse Cooke P’s observations, but did say:⁸²

“In these circumstances it is not necessary that we write a separate judgment dealing with the broader issues of liability in negligence except to make one comment. These questions have come before this Court on many occasions over the last 10 years and we share [Cooke P’s] view that while we will always benefit from decisions in other jurisdictions, in this evolving area of our law New Zealand Judges have developed a considerable body of law in this field. Ultimately, and building on that jurisprudence, we shall we think have to follow the course which in our judgment best meets the needs of this society.”

[133] The Court of Appeal’s judgment in *Brown v Heathcote County Council* was upheld on appeal to the Privy Council.⁸³ Lord Templeman, delivering their Lordships’ advice, held that there was an insufficient degree of proximity between the Drainage Board and the Browns so as to found a duty of care because the Drainage Board’s statutory functions of flood protection, research and recording of flood levels did not bring it into proximity with any individual landowner. However, on the facts, the Drainage Board had assumed a duty of care in favour of Mr and Mrs Brown.⁸⁴ Having reached that conclusion, Lord Templeman added:⁸⁵

“Their Lordships are not now required to consider the authorities to which the President referred because the present appeal falls to be decided on the question whether a sufficient degree of proximity existed between the Drainage Board and the Browns. Their Lordships respectfully and gratefully acknowledge the useful summary by the President of various factors which are to be taken into account and may not yet finally be defined or refined in the evolution of the common law tort of negligence. The President also alluded to another problem which does not arise in this case, namely the question whether and in what circumstances a statutory duty imposed on a local authority otherwise than for the preservation of health or safety creates a common law duty in negligence. *In determining that question there will inevitably fall for consideration, in the light of the consequences of Anns v Merton London Borough Council [1978] AC 728,*

82 At p 83.

83 [1987] 1 NZLR 720 (PC).

84 At p 725.

85 At p 725.

the desirability on the one hand of the Courts and not the legislature deciding to compensate anyone who suffers damage which could have been avoided, and the desirability on the other hand of not making the ratepayer or taxpayer an insurer and indemnifier against loss.” (Emphasis added.)

[134] In *Stieller v Porirua City Council*,⁸⁶ the Court of Appeal held that 5
bylaw-making powers conferred on local authorities were wide enough to cover
construction of soundly built houses and the resultant safeguarding of people
who might occupy those houses against the risk of acquiring a substandard
residence. The construction of houses with good materials in a workmanlike
manner was something that the Court considered was within the Council’s 10
control. Therefore, it was appropriate that a territorial authority might be liable
for defects in exterior cladding even though questions of safety and health did
not directly arise.⁸⁷

[135] In my view, those observations, in *Stieller*, were no longer good law at 15
the time of the Sunset Terraces development. Once the 1991 Act was enacted,
a consequential amendment was made to the Local Government Act 1974
(in force in 1997 and 1998) to forbid a Council from making any bylaw
purporting to change performance criteria specified in the 1991 Act or in the
Code.⁸⁸

[136] In *Craig v East Coast Bays City Council*,⁸⁹ the Court of Appeal held that 20
a local authority dealing with an application for planning consent owed a duty,
at least to neighbouring owners whose amenities should reasonably be foreseen
to be closely and directly adversely affected by the proposal, to take reasonable
care to act within its powers.⁹⁰ Tompkins J, delivering the principal judgment
with which Richardson J agreed, put the duty as one of exercising reasonable 25
care in ensuring compliance with a district scheme and not permitting a
departure without observing procedural requirements.⁹¹ This duty, while not
strictly relevant for the purposes of the present case, was probably the
high-water mark in the expression of Council liability.

[137] *Craig* was distinguished in the recent case of *Bella Vista Resort Ltd v* 30
Western Bay of Plenty District Council.⁹² The Court of Appeal, in *Bella Vista*,
preferred the approach taken by it in *Morrison v Upper Hutt City Council*⁹³ in
holding that a Council did not owe a duty of care to an applicant when
determining a resource consent application under the Resource Management
Act 1991. Referring to changing views on the extent of a territorial authority’s 35
liability in negligence, William Young P, in *Bella Vista*, said:

86 [1986] 1 NZLR 84 (CA).

87 At p 94 per McMullin J, delivering the judgment of the Court of Appeal.

88 Section 92(1) of and Schedule 4 to the 1991 Act, enacting a new s 684A of the Local
Government Act 1974. An identical provision is now in force (s 152 of the Local
Government Act 2002), which has been amended to refer to the Building Act 2004 and the
present Code. See also the numerous consequential amendments effected by s 92(1) of
and Schedule 4 to the Building Act, which inserted similar provisions into other statutes.

89 [1986] 1 NZLR 99 (CA).

90 At p 101 per Cooke P.

91 At p 107 per Tompkins J and p 101 per Richardson J.

92 [2007] 3 NZLR 429 (CA) at paras [44] and [45] per Robertson J, [70] and [71]
per William Young P and [88] – [89] per Chambers J.

93 [1998] 2 NZLR 331 (CA).

“[70] In the 20 years which have elapsed since *Craig* was decided the tide has very much gone out on negligence claims. *Craig* therefore seems anomalous in light of more recent authorities in New Zealand (particularly *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331) and elsewhere. Indeed, were it not for the *Craig* decision, I would have had no difficulty in concluding that this appeal ought to be dismissed. I am, however, reluctant to overrule (or treat as overruled) – especially on a strike-out application – a fully considered judgment of this Court. *Craig* was not cited in *Morrison*, a consideration which has troubled me. On the other hand, in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC), *Craig* was referred to (at pp 516 – 517) without disapproval, and perhaps more importantly, as one of a number of cases which the Privy Council, in the end, would appear to have regarded as being authoritative in New Zealand, although perhaps anomalous in light of the jurisprudence in other jurisdictions.

[71] Further, the arguments about *Craig* have highlighted for me the dangers of dealing with issues of policy on the basis of assumptions. When I first considered the arguments in the case I was very much influenced by the risk that local authorities subject to such a duty of care might be inappropriately cautious about notifying resource consent applications. But presumably local authorities (and their insurers) have, since the 1980s, been aware of the *Port Underwood* [1982] 1 NZLR 343 (HC) and *Craig* decisions and have been aware of the potential for civil liability to be imposed in these circumstances. And there was no empirical evidence put before us to suggest that any such awareness has had a distorting effect on the way in which local authorities exercise their responsibilities under the Resource Management Act 1991. As well, despite ‘floodgates’ arguments being available when *Craig* was decided, litigation of the present kind would not appear to have become common.”

[138] Chambers J added:

“[77] In my view, *Morrison* . . . is the controlling authority, not *Craig*. *Morrison* involved a set of facts which are in essence identical to the assumed set of facts in the present case. In that case, Ms Morrison applied for consent to erect a townhouse on her parents’ property in Upper Hutt. The Upper Hutt City Council declined Ms Morrison’s application, based on its interpretation of ‘neighbourhood’ in a particular clause in the district scheme. The council also considered there were ‘no unusual features regarding the land or the application which would warrant the granting of a specified departure’ (at p 334). Ms Morrison did not appeal to the Planning Tribunal against the decision of the council refusing her application. Instead, she made a second application for planning consent, as by this time the district scheme had been amended. Her application was again refused. She appealed to the Planning Tribunal, which allowed the appeal and granted Ms Morrison a specified departure. Ms Morrison then erected the townhouse. Because of the lapse of time, the building costs and finance costs were more than they would have been had the first application been granted. She then sued the council in negligence, claiming that the council breached a duty of care owed to her in the way it dealt with her first application.

...

[89] The President notes that *Craig* was referred to ‘without disapproval’ by the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at pp 516 – 517. I do wonder, with respect, whether Lord Lloyd of Berwick, who wrote the Privy Council’s advice, had actually read *Craig*, as he refers to it as one of a group of cases decided in 1986 which, he says, ‘applied the principles stated in *Bowen v Paramount Builders* and *Mount Albert Borough Council v Johnson* to building defects other than faulty foundations’. While that comment is true of the other cases in the group, *Craig* itself, of course, had nothing to do with building defects or with negligent work by council building inspectors. *Craig* and *Morrison*, like the present case, are not in the *Hamlin* category, which presumably explains why *Hamlin* and its sister cases were not referred to by the *Morrison* court.”

[139] The existence or extent of a local authority’s duty in respect of inspections was reconsidered by the Court of Appeal in *Invercargill City Council v Hamlin*.⁹⁴ The Court of Appeal reaffirmed the duty articulated in *Mount Albert Borough Council v Johnson*,⁹⁵ notwithstanding an invitation from counsel for the local authority to revisit that line of cases in light of subsequent English authority. That authority included *Murphy v Brentwood District Council*,⁹⁶ in which the House of Lords declined to follow its earlier approach to Council duties of care set out in *Anns v Merton London Borough Council*,⁹⁷ a decision on which much of the New Zealand jurisprudence in this area had been based.

[140] *Hamlin* was a case involving a single dwelling with defective foundations. While the 1991 Act had come into force at the time of the hearing in the Court of Appeal, the underlying events had occurred many years before, in the 1970s. The Court of Appeal held that a territorial authority is liable to a home owner (and subsequent owners) for defects caused or contributed to by the negligence of a building inspector.⁹⁸

[141] The Court of Appeal’s decision in *Hamlin* can be read as putting the local authority’s duty on the dual basis of Council control over the building process and, more generally, community expectations. As to the latter, Cooke P said that “home-owners in New Zealand . . . traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws”,⁹⁹ while Richardson J referred to “what has been the settled law in this country for nearly 20 years in relation to the liability of local authorities for latent defects caused or contributed to by the careless acts and omissions of building inspectors and carrying out inspection of houses under construction”.¹⁰⁰ The duty was deliberately limited to home-owners.

94 [1994] 3 NZLR 513 (CA).

95 [1979] 2 NZLR 234 (CA).

96 [1991] 1 AC 398. This appeal was heard by a Bench of seven Law Lords.

97 [1978] AC 728.

98 At pp 522 per Cooke P, 527 – 528 per Richardson J, 529 per Casey J, 533 per Gault J and 546 per McKay J.

99 At p 519.

100 At p 524. See also at pp 529 per Casey J and 533 per Gault J.

[142] The real contest in the Court of Appeal was whether the settled law to which Richardson J referred should be reversed on the basis that the duty was inconsistent with a line of more recent English authority. The Court of Appeal said it should not.

5 [143] The Privy Council¹⁰¹ upheld the right of the Court of Appeal to develop this aspect of the law of negligence as it saw fit, so that the “common law [might be adapted] to the differing circumstances of the countries in which it has taken root”.¹⁰² Lord Lloyd of Berwick, delivering the advice of the Privy Council, observed that the “particular branch of the law of negligence
10 with which the present appeal is concerned is especially unsuited for the imposition of a single monolithic solution”.¹⁰³

[144] Mr Heaney and Ms Grant, for the Council, invited me not to follow the decisions of the Court of Appeal and Privy Council in *Hamlin*. Their submission is based on material changes in the socio-economic fabric of
15 New Zealand society (on which Richardson J had placed particular reliance in *Hamlin*) and the intervening enactment of the 1991 Act.

[145] Ms Grant submitted that, while the Court of Appeal and the Privy Council had both referred to the 1991 Act and the socio-economic conditions in their decisions, there had been inadequate argument (because the
20 Act was not relevant to the appeal) either before the Court of Appeal or the Privy Council on its impact on the duty.¹⁰⁴ Ms Grant submitted that the nature of the performance-based regime introduced by the 1991 Act (in preference to the pre-existing prescriptive regime) demanded that the issue be reconsidered afresh.

25 [146] Alternatively, the Council submitted that the duty should be confined to the type of factual situation involving a single dwelling of the type discussed in *Hamlin*.

[147] This proceeding represents the first occasion on which this Court has been asked to rule on whether, and if so to what extent, a territorial authority
30 owes a duty of care to an owner or successor in title¹⁰⁵ of a dwelling comprised within a multi-unit development of this scale, constructed after the Building Act came into force. If a duty were owed, the scope of the duty arises for consideration. This includes the question of whether the inspection duty confirmed in *Hamlin* extends to the building consent and certification functions
35 undertaken by the Council under the 1991 Act.

(b) The duty to “home-owners”

[148] In *Hamlin*, while addressing the Council’s submission that the later English authority ought to be followed in preference to the earlier Court of Appeal decisions, Richardson J made the point, at p 524, that the “social and
40 governmental context in which” New Zealand courts had consistently “upheld

101 [1996] 1 NZLR 513 (PC).

102 At pp 519 – 520.

103 At p 520.

104 The report of argument (appearing in the official English reports) in the Privy Council (*Invercargill City Council v Hamlin* [1996] AC 624 at pp 628 – 629) suggests that issues were raised about the relevance of the 1991 Act and the socio-economic underpinnings of the duty confirmed by the Court of Appeal, but were not addressed in the judgment.

105 In this context I use the phrase “a successor in title” to include not only subsequent purchasers, but also assignees and lessees of the dwelling.

duties of care on the part of local authorities towards house owners in relation to building inspections” during the 1970s and 1980s remained important in determining whether the duty of care should remain.

[149] Richardson J identified six “distinctive and long-standing features of the New Zealand housing scene at that time”:¹⁰⁶

- 5 “1. The first was the high proportion of occupier-owned housing. Home ownership by people in all walks of life was the goal and to a large extent the reality. Reference to the New Zealand Official Year Books confirms that over 70 per cent of permanent housing was occupier owned and that over 80 per cent of permanent housing was in detached houses on their own sections. 10
2. The second was that much of the housing construction, including low cost housing, was undertaken by small-scale cottage builders for individual purchasers. Reporting in 1971 the ‘Commission of Inquiry into Housing in New Zealand’ ([1971] 4 AJHR H-51) chaired by R B Cooke QC noted at p 192 that the New Zealand house was not a factory produced article but was custom built to suit the site and the owner. Apart from comparatively few major operators most firms in the building industry were small with some 85 per cent of home builders employing fewer than six workers (p 186). Over the last 40 years the ratio of state/private housing starts has seldom reached 10 per cent. 15
3. The third was the nature and extent of governmental support for private home building and home ownership. From last century the state accepted substantial responsibility for financing low cost housing. For many decades the State Advances Corporation was the vehicle through which low interest loans were made available for low cost new housing purchases and state house tenants were financed into the purchases of houses they had been renting. Amongst the innovative schemes designed to facilitate home ownership were suspensory loans, homestart and sweat equity programmes, state guarantees of mortgages and the capitalisation of the family benefit, the last of which helped nearly 100,000 families into their own homes in the 1960s (p 56) – at a time when the total population of New Zealand was only about 2.5m. 20 25 30 35
4. The fourth was the surge in house building construction in the buoyant economy of the 1950s and 1960s. In 25 years through to the mid-1970s the housing stock more than doubled.
5. The fifth was the wider central and local governmental support for private home building. The first standard model building bylaw was published in 1935 and by the 1970s almost all territorial local authorities had adopted and were working under the New Zealand Standard Model Building Bylaw NZSS1900 published by the Standards Association of New Zealand in 1964. ‘The Review of Planning and Building Controls’ published by the Office of the Review of Building Controls in 1983 noted in para 10.10 (p 25) that building 40 45

106 *Hamlin* (CA) at pp 524 – 525.

inspectors filled a significant advisory and educative role spending 10 per cent to 60 per cent (depending on location) of their time in that way. The Review also noted (para 7.1) (p 16) 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. Again, the Commission of Inquiry Report noted (pp 193 – 194) that the Building Research Association, which was funded by the levies paid on construction work normally due when the building permit was issued, intended to provide a central source of information, advice, testing and research on housing design, cost, user, and planning requirements. The high social interest in standards and amenities was also reflected in the terms of reference of the Commission and the discussion in its report.

6. The sixth was that it has never been a common practice for new house buyers, including those contracting with builders for construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building. In the low-cost housing field the ordinarily inexperienced owner was contracting with a cottage builder on fairly standard plans amended to suit the owner’s wishes and pocket. That contracting was within the framework of encouragement and often financial support from the state and of the protection provided by local body controls and adherence to the standard bylaws. It accorded with the spirit of the times for local authorities to provide a degree of expert oversight rather than expect every small owner to take full responsibility and engage an expert adviser.”

[150] Richardson J’s underlying theme was that intending purchasers of single dwellings in New Zealand ought to be able to rely on institutional checks and balances, provided through statutory regulation of the construction of buildings, in deciding whether to buy a home. In other words, purchasers ought to be able to rely on Council oversight of building works and not be required to incur the significant costs of engaging an expert adviser or their own project manager to ensure that their dwelling was constructed in accordance with prevailing building norms. This theme provided the foundation for reliance on “community expectations” about the manner in which Councils ought to fulfil regulatory functions cast upon them by law.

(c) *Does the “home-owners” duty continue to apply?*

[151] Immediately before the 1991 Act was enacted, the construction industry was regulated through a series of unconnected bylaws, regulations, statutes and industry standards, all of which were administered by different government or non-government agencies. Four distinct subsystems that governed building controls can be identified:¹⁰⁷

- (a) *Government departments:* 19 government departments were

¹⁰⁷ Report of the Building Industry Commission to the Minister of Internal Affairs, “Reform of Building Controls” (1990), para 2.7.

empowered by 60 specific Acts to make building regulations and rules specific to their particular jurisdiction.

- (b) *Local authorities*: initially 213 city, town and borough councils issued local building bylaws. That was eventually consolidated when most local councils adopted the New Zealand Standard Model Building Bylaw. 5
- (c) *Standards Association of New Zealand (SANZ)*: the Standards Act 1988 gave the SANZ council the general function of developing national standards for adoption in New Zealand. Such standards covered a wide range of building products, from specification of polythene pipes to recommendations for appliances in domestic kitchens. 10
- (d) *Other public and private agencies*: some building control duties were delegated to other bodies entrusted with certain non-building responsibilities under other Acts. For example, the Liquor Control Commission under the Sale of Liquor Act 1962. 15

[152] There is no doubt that, since deregulation of the New Zealand economy began in 1984, there has been a much greater emphasis on market imperatives than was the case in the 1970s, an era characterised by social welfare and interventionist policies. The Building Act was enacted in an endeavour to achieve greater efficiency and to promote innovation. That objective led to a change in focus within the regulatory framework: a performance-based regime was to replace the prescriptive regime previously in force. 20

[153] In its report to the Minister of Internal Affairs in 1990, the Building Industry Commission said that:¹⁰⁸ 25

“ . . . [building] requirements are complex and prescriptive; the system is unresponsive to technological change and inhibits innovation, and it absorbs large amounts of resources by central and local government in its administration, and by building producers in compliance, imposing heavy costs on the consumer.” 30

[154] The Building Industry Commission considered that, in a perfect world, “every control provision should represent a balanced position between acceptable cost and acceptable risk”, while recognising that “[i]ndividual and community perceptions on what are acceptable risks and acceptable costs for the benefit of reducing risks vary greatly, depending on the individual person and the circumstances”.¹⁰⁹ 35

[155] The Commission also considered the extent to which adequate protections might occur through greater use of insurance schemes. It noted the theoretical possibility that the “need for a control authority to approve and inspect buildings on the community’s behalf could . . . be replaced by regulating the arrangements between insurers and building owners and producers”.¹¹⁰ However, the Commission concluded that “insurance does not remove the need for regulatory building controls” because some controls were 40

108 Paragraph 2.10.

109 Paragraphs 2.20 and 2.21.

110 Paragraph 2.46.

required “to ensure that commercial objectives [did] not outweigh the social objectives of building control” or to “defeat the purpose of reform by conservative attitudes to innovation”.¹¹¹

5 [156] Recognising that insurance was, nevertheless, a significant factor in the “overall control system” the Commission recommended “that further consideration be given to the setting up of a housing guarantee scheme when the national [building] code is in place, to ensure that all dwellings are built and completed in accordance with its requirements”.¹¹² A guarantee scheme, based on one operating in the State of Victoria, was proposed but, ultimately, not adopted.¹¹³

10 [157] The proposed guarantee scheme was designed to apply to detached dwellings of one or more levels intended for permanent occupation. It was also intended to apply to private holiday homes (even though they might be occupied intermittently), ground level separately occupied dwelling units joined together (but excluding motels and other forms of transient accommodation), a separately occupied dwelling unit in a multi-storey residential building and within a building designed primarily for commercial or industrial use, those parts of the building not designed for commercial use. Excluded areas would include, for example, common access ways, alterations carried out after the Code came into force and dwelling units held under a cross-lease, company lease or unit title system.¹¹⁴

15 [158] The 1991 Act was enacted after what Richardson J described as “a decade of research and study” which culminated in the Building Industry Commission report. Richardson J cited extensively from that report¹¹⁵ to support his view that the Act was not intended to make any change to the nature of any duty of care owed by the Council to third parties as a result of negligent performance of any function cast upon it.

[159] Relevant extracts from the report on which Richardson J relied, to which I have not yet referred, are set out below:

30 “2.14 People have certain expectations of the buildings they use, whether that use is public or private. 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 . . .

35 2.15 Where voluntary private arrangements by building owners and the industry cannot be relied on to provide this assurance to the public, regulatory controls are imposed by Government to define building performance and procedures for compliance with essential user requirements to an extent that will satisfy reasonable community expectations.

40 2.16 *The purpose of a building control system should be to ensure that*

111 Paragraph 2.48.

112 Paragraphs 2.48 – 2.50.

113 Appendix 7, where the proposed guarantee scheme was set out in detail.

114 Clause 2.2 of Appendix 7. It was intended that the guarantee apply only to residential accommodation in respect of which a building consent had been granted after the 1991 Act had come into force (cl 2.1).

115 *Hamlin* (CA) at pp 526 – 527.

essential provisions to protect people from likely injury and illness and to safeguard their welfare, will be satisfied in the construction, alteration, maintenance in use and demolition of buildings.

- 2.17 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. 5
- 2.18 The purpose of the reform is to make better use of both public and private resources to regulate building activities: 10
- by removing unnecessary controls and costs from the regulatory system
 - by encouraging initiative, innovation and progress in the industry and thereby produce affordable buildings without jeopardising the public interest by exposing people to unacceptable risk." 15

[160] Richardson J concluded:¹¹⁶

“ . . . over a period of ten years building controls were 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 1991 as a ringing legislative endorsement of the approach of the New Zealand Courts over the last 20 years, there is nothing in the recent legislative history to justify reconsideration by this Court of its previous decisions in this field.*” (Emphasis added.) 20 25

[161] The Building Industry Commission proposed a statutory framework involving an application for a building consent, an inspection regime to check whether construction was proceeding in accordance with the consent and a certification procedure to give a degree of assurance that the building had, in fact, been constructed in accordance with the requirements of a building code. That regime was, ultimately, incorporated within the 1991 Act. The Commission recorded that building consent functions were to be undertaken by territorial authorities but inspection and certification could be undertaken either by a private entity or a public (territorial) authority. 30 35

[162] The Commission recognised that, if fault in the construction of a dwelling rested on a (public or private) certifier's failure to undertake inspection and certification requirements with sufficient care, there was no basis to remove any liability that either of those entities might have had at common law, notwithstanding the ability of any owner of land to sue an architect, engineer or builder for breach of contract.¹¹⁷ At the time of the report, the line of cases beginning with *Mount Albert Borough Council v Johnson* was well entrenched in relation to council liability for negligent performance of duties carried out as part of its regulatory role. 40

116 At p 527.

117 “Reform of Building Controls”, para 4.92.

[163] The Commission intended that the certifier would be liable in negligence if a certificate were issued without due care:¹¹⁸

5 “4.85 Elements of a building proposal covered by an Approved Certifier which proved to be faulty could expose that person to a claim in negligence or breach of contract by the employing owner. An essential part of this alternative procedure is therefore that the Approved Certifier has to be prepared to accept liability if a certificate is given in circumstances amounting to negligence, leading to loss as a result. *The same principle must apply if an*
10 *Approved Certifier is not involved, and a construction or occupancy consent is given by the [territorial authority] in equivalent circumstances and with the same result.* However, faulty elements covered by a certificate would not lead to liability on the part of the [territorial authority], because of its obligation to accept the certificate at face value.” (Emphasis added.)
15

[164] The principle that a certifier would owe a duty of care in tort was implicitly recognised in s 90 of the 1991 Act, which provided:

20 **90. Civil proceedings against building certifiers** – Civil proceedings against a building certifier in respect of the exercise by the building certifier of the building certifier’s statutory function in issuing a building certificate or a code compliance certificate are to be brought in tort and not in contract.

[165] Richardson J considered whether the enacted provisions of the 1991 Act accorded with the policy foundations identified by the Building Industry Commission. In summary, his Honour concluded:¹¹⁹

- 25
- (a) The 1991 Act created a performance-based regime requiring construction work to be undertaken in accordance with an approved building code.¹²⁰
 - 30 (b) Territorial authorities were required to issue building consents, to inspect construction work for compliance with the Act and to issue a final code compliance certificate.¹²¹ Even if a private certifier were engaged, the territorial authority retained overriding control on issues of enforcement.¹²² While the new legislation was intended to promote greater efficiency within the building industry, territorial authorities continued to have “overriding responsibility for administering the new building control system”.¹²³
 - 35 (c) Nothing in the 1991 Act prevented any party from bringing an action seeking damages for losses arising out of the negligent exercise of building control functions. Indeed, such a right was, in effect,
40 confirmed by the imposition of a “long-stop limitation period of civil proceedings” designed to address problems with latent defects that

118 Paragraph 4.85.

119 At pp 526 – 528.

120 Section 7.

121 Sections 24, 32, 33, 76 and 43.

122 Section 57 and reg 8 of the Building Regulations.

123 At p 526.

could result in local authorities and others being declared liable many years after building work was undertaken.¹²⁴

- (d) Any alteration to the existing law in relation to local authority liability for negligence in this area would have consequences on allocation of risk where building defects occurred. Richardson J observed: 5
 “[w]hile the Building Act 1991 adopts more of a free-market approach than the preceding legislation did, it continues to reflect the premise that local authorities owe duties of care to home-owners in issuing permits and inspecting buildings”.¹²⁵

[166] On the issue of allocation of risk, Richardson J considered that the consequences of a change in risk allocation could not be determined on the “totally inadequate” material before the Court. For that reason, it was more appropriate to retain the pre-existing allocation. His Honour took the view that that was what had been intended by the Building Industry Council’s report.¹²⁶ 10

[167] Richardson J’s observations in *Hamlin* were effectively endorsed by the Court of Appeal in *Attorney-General v Body Corporate 200200*, a case involving an appeal from an unsuccessful strike-out application on a claim made against the Building Industry Authority. The Authority had been created by the 1991 Act to approve building practices, for the purpose of the building code.¹²⁷ 15 20

[168] Discussing the role of territorial authorities, William Young J (delivering the judgment of the Court of Appeal in *Body Corporate 200200*), said:¹²⁸

“[13] Territorial authorities had primary responsibility for the administration of the building code (see s 24(a) and (e)). Thus, all building works required authorisation by a building consent issued by the relevant territorial local authority (s 32). Such consent was required to be given if the local authority was satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications which were submitted (s 34(3)). Likewise, territorial authorities were responsible for issuing code compliance certificates in respect of completed building works (s 43). 25 30

[14] In all of this, the role of building certifiers was extremely important. The 1991 Act provided for a register of building certifiers who were approved as such by the [Building Industry Authority] (see s 51). Territorial authorities were required to act on certificates from building certifiers when issuing building consents and code compliance certificates (see ss 34, 43 and 50(1)(a)). So, if a building certifier certified code compliance, there was no second guessing of that by the relevant local authority.” 35 40

[169] The claim against the Building Industry Authority arose in the context of a multi-unit residential complex in which various owners had, as in this case,

124 Section 91 of the 1991 Act.

125 At p 528.

126 At p 528 and “Reform of Building Controls”, para 4.92.

127 [2007] 1 NZLR 95 (CA) at paras [7], [8], [15], [16] and [17].

128 At paras [13] and [14].

suffered severe water ingress problems. The duty of care said to have been owed by the Authority was put on the basis of one owed to “owners of homes with face-fixed monolithic cladding systems to exercise reasonable care in connection with its statutory responsibilities”.¹²⁹ The Court of Appeal considered that such a duty was untenable, allowed the appeal and struck out the claim.

[170] The analyses of the 1991 Act undertaken by Richardson and William Young JJ, in *Hamlin* and *Body Corporate 200200* respectively, are compelling so far as they go. Neither mention the Commission’s proposal for the guarantee of dwellings (of the type described in App 7 of its report). But that proposal and the extended definition of a dwelling used in the Appendix only serve to consolidate the foundation for continuation of the Council’s duty of care to home-owners as analysed by Richardson J.

[171] I reject the Council’s submission that the duty articulated in *Hamlin* no longer exists. My reasons for reaching that conclusion are summarised below.

[172] There are three fundamental expectations that a member of the public buying a home is likely to have. Each of these expectations is reflected in provisions of the building code and is related to the degree of community reliance to which Richardson J referred in *Hamlin*:¹³⁰

- (a) The first is that the building will be structurally sound and will not, for example, sink into the ground in a manner akin to what occurred in both *Bowen* and *Hamlin*. Structural requirements are set out in cl B1 of the Code. The objective of cl B1 was to safeguard people from injury caused by structural failure, to safeguard people from loss of amenity caused by structural behaviour and to protect other property from physical damage caused by structural failure.¹³¹
- (b) The second is the need for durability. Durability is addressed in cl B2 of the Code. The objective of the durability provisions was to ensure that a building would, throughout its life, continue to satisfy other objectives of the Code, for example those relating to structure and weather tightness.¹³²
- (c) The third is that the building would be rendered watertight, a topic with which cl E2 of the Code deals. The objective of cl E2 was “to safeguard people from illness or injury which could result from external moisture entering the *building*”.¹³³ In functional terms, that required all buildings to “be constructed to provide *adequate* resistance to penetration by, and the accumulation of, moisture from the outside”.¹³⁴

[173] All of those fundamental objectives accord with the purposes for which the 1991 Act was passed, as set out in s 6 of that Act. The reference in cl E2.1

129 At para [53].

130 At p 527 – 528.

131 Clause B1.1 of the Building Code.

132 Clause B2.1.

133 Clause E2.1.

134 Clause E2.2.

of the Code to possible injury or illness reflects what is addressed in s 6(2)(a) of the Act. The possibility of respiratory illnesses developing from damp houses is a good example of the type of concern.

[174] The first five propositions set out in Richardson J’s judgment in *Hamlin*¹³⁵ can be viewed as historical in nature. However, they explain the absence of a common practice for new house buyers to commission engineering, architectural or surveying reports in respect of the building, as is the case in England. That point was made by Richardson J in his sixth proposition. 5

[175] The Building Industry Commission expected that existing common law rights of action (including any action that might be taken against a council) would continue notwithstanding enactment of a new Building Act. Sections 89 – 91 of the Building Act, in various respects, provide a legislative endorsement of that expectation. 10

[176] The purposes of the Building Act did not, in my view, change significantly the issues that a council had to address in determining whether to grant a building consent, carrying out its inspection processes and determining whether code compliance could be certified by it. While it may well be right, as Ms Grant submitted, that none of the earlier cases dealt with weathertightness issues, that is readily explainable by the systemic problems that arose after the Building Act and the Code came into force, at a time when the Building Industry Authority approved the use of products such as Harditex in conjunction with the use of untreated timber. 15 20

[177] As a footnote to this discussion, I note that, notwithstanding changed socio-economic conditions, a review of figures taken from the 1996, 2001 and 2006 Censuses demonstrate that there has been a rise both in respect of separate dwellings and apartments that have been joined together.¹³⁶ 25

	1996	2001	2006	
Separate house	1,050,144	1,030,077	1,134,369	
Two or more flats, units etc joined together	209,162	210,627	252,963	30
TOTAL	1,259,306	1,240,704	1,387,332	
Percentage of units to total homes	16.6%	16.9%	18.2%	

(d) *Adapting the Council’s duty to contemporary circumstances*

[178] What is the nature and extent of the Council’s duty of care? Although Mr Heaney and Ms Grant put their plea for reconsideration of the *Hamlin* duty on the basis of a novel claim involving a multi-unit development, *Mount Albert Borough Council v Johnson*¹³⁷ was itself concerned with one of six flats comprised in a block situated at Begbie Place, Mt Albert. Likewise, *Anns*¹³⁸ 35

135 At pp 524 – 525.

136 Statistics New Zealand, “Quick Stats About Housing” (2006 Census), p 2.

137 [1979] 2 NZLR 234 (CA).

138 [1978] AC 728.

concerned a multi-unit complex. Since *Hamlin*, the duty has been held to continue to apply to a single dwelling, damage to which occurred as a result of water ingress at a time after the 1991 Act came into force.¹³⁹

5 [179] Neither Richardson J (in *Hamlin*) nor William Young J (in *Body Corporate 200200*) discussed the extent to which it might be necessary to modify the way in which the *Hamlin* duty is expressed or applied to take account of the reduced functions of territorial authorities within the building industry since enactment of the 1991 Act, any changing socio-economic dynamics and the way in which the Council's statutory functions are now expressed. The lack of discussion on those topics is perfectly understandable. In 10 *Hamlin*, the building work and inspection had been carried out well before the Building Act came into force and it was unnecessary for the Court of Appeal to consider whether exercise of Council functions, after 1991, would require any modified approach. The issue did not arise in *Body Corporate 200200* because, 15 in that case, the Court of Appeal was concerned solely with an alleged duty of care said to be owed by the Building Industry Authority to home-owners.

[180] An application for a building consent for a multi-unit development is made by a developer. At the time the consent is sought, the block of land will (usually) be registered in the name of the developer or a nominee. At this stage 20 of the development process, the proposed construction can be seen as commercial in nature.

[181] When making an application for a building consent, it was necessary for the applicant to disclose the intended use of the building or buildings to be constructed.¹⁴⁰ In fact, the prescribed form requires the intended use or uses to be set out "in detail". Seven "use classifications" are set out in the Code, 25 including multi-unit dwellings, defined as containing more than one separate household or family. Examples given were an attached dwelling, flat or multi-unit apartment.¹⁴¹ In the present case the application for the building consent described the project as "New or Relocated Building" with "20 new 30 units". No further detail was provided in the application itself.

[182] Subject to the "reasonable grounds" tests,¹⁴² the Council's functions in determining whether to grant a building consent, carrying out inspections and certifying code compliance are all directly related to the need for an independent body to assess the quality and nature of the workmanship involved and to provide a degree of assurance to members of the public that the 35 completed work complies with the Code.

[183] In carrying out its inspection role, it is plain that the Council ought not to be regarded as a clerk of works or as a project manager.¹⁴³ Even before the Building Act was passed, the Council's duty to third parties was "to exercise 40 reasonable care, not an absolute duty to ensure compliance".¹⁴⁴ The Council's

139 *Dicks v Hobson Swan Construction Ltd* at paras [108] – [118].

140 Schedule 2, Form 3 of the Building Regulations: Application for Building Consent.

141 Clause A2.0.3 of the Code. Other classifications are "communal residential", communal non-residential", "commercial", "industrial", "outbuildings" and "ancillary".

142 Sections 34(3) (building consents), 76 (reasonable steps in inspection) and 43(3) (certification) of the 1991 Act.

143 For example, *Riddell v Porteous* at pp 12 – 13 and *Sloper v WH Murray Ltd* (High Court, Dunedin, A 31/85, 22 November 1988, Hardie Boys J) at p 36.

144 *Craig v East Coast Bays City Council* at p 107 per Tompkins J, with whom Cooke P and Richardson J agreed. See also *Morton v Douglas Homes Ltd* at p 600.

role is to provide an appropriate degree of oversight for public policy reasons. Its performance must be judged against the standards of the day and knowledge of the quality (or otherwise) of particular products used in the construction process.¹⁴⁵ It does not take on any responsibility for ensuring, in fact, that all completed work complies with the Code. 5

[184] When the events discussed in *Bowen v Paramount Builders (Hamilton) Ltd*,¹⁴⁶ *Mount Albert Borough Council v Johnson*¹⁴⁷ and *Invercargill City Council v Hamlin*¹⁴⁸ occurred, the concept of a land information memorandum (LIM) was unknown.¹⁴⁹ The need for the Council to prepare a LIM did not arise until 1 December 1992.¹⁵⁰ The requirements of a LIM are set out in s 44A(2) of the Local Government Official Information and Meetings Act 1987. Section 44A(2), at the material time, provided: 10

44A. Land information memorandum –

...

- (2) The matters which shall be included in that memorandum are – 15
- (a) information identifying each (if any) special feature or characteristic of the land concerned, including but not limited to potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation, or likely presence of hazardous contaminants, being a feature or characteristic that – 20
 - (i) is known to the territorial authority; but
 - (ii) is not apparent from the district scheme under the Town and Country Planning Act 1977 or a district plan under the Resource Management Act 1991:
 - (b) information on private and public stormwater and sewerage drains as shown in the territorial authority's records: 25
 - (c) information relating to any rates owing in relation to the land:
 - (d) information concerning any consent, certificate, notice, order, or requisition affecting the land or any building on the land previously issued by the territorial authority (whether under the Building Act 1991, or any other Act): 30
 - (e) information concerning any certificate issued by a building certifier pursuant to the Building Act 1991.
 - (f) information relating to the use to which that land may be put and conditions attached to that use: 35
 - (g) information which, in terms of any other Act, has been notified to the territorial authority by any statutory organisation having the power to classify land or buildings for any purpose:
 - (h) any information which has been notified to the territorial authority by any network utility operator pursuant to the Building Act 1991. 40

145 *Askin v Knox* [1989] 1 NZLR 248 (CA) at p 252.

146 [1977] 1 NZLR 394 (CA).

147 [1979] 2 NZLR 234 (CA).

148 [1994] 3 NZLR 513 (CA) and [1996] 1 NZLR 513 (PC).

149 Issued under s 44A of the Local Government Official Information and Meetings Act 1987.

150 Section 2 of the Local Government Official Information and Meetings Amendment Act 1991 (No 2).

The references to the Building Act 1991 denote a legislative intent to link the content of a LIM to the obligations of a territorial authority under the 1991 Act. Subsequently the provisions of subs (2)(d), (e) and (h) have been amended to include a reference to the Building Act 2004.

5 [185] The territorial authority was authorised to include in the LIM, at its discretion, such other information concerning the land as it considered to be relevant.¹⁵¹ In the absence of proof to the contrary, a LIM is sufficient evidence of the correctness, *as at the date of its issue*, of any information included in it under s 44A(2).¹⁵² A council is obliged to disclose any information specified in s 44A(2); it cannot refuse to provide a LIM when requested.¹⁵³

10 [186] Once the 1991 Act came into force, the Council's duty to exercise reasonable care in carrying out its inspection role was directly affected by the way in which the consent, inspection and certification functions in issue were expressed in the statute. The existence of a mechanism by which those purchasing a property could identify what had been done by the Council suggests that Parliament contemplated that a purchaser of a dwelling would seek relevant information to protect his or her own interests. The evidence I heard from an experienced commercial and conveyancing solicitor, Mr Eades, confirmed that it was good conveyancing practice for the solicitor for an intended purchaser to obtain a LIM before the agreement was declared unconditional.

15 [187] Mr Eades drew my attention to the standard form of agreement for sale and purchase in use in the Auckland area, which provides a box to be ticked if the agreement were conditional on receipt of a LIM.¹⁵⁴ Mr Eades also deposed that none of the agreements for sale and purchase to which he had been referred provided expressly for a purchaser to obtain a building report and for the contract to be conditional upon that report being satisfactory to the purchaser.

20 [188] It is recognised that in developing the common law, particularly in the field of negligence, the court is engaging in a policy task of risk allocation. In my view, the court should exercise caution in adapting common law duties to meet changed circumstances. A court will rarely have available to it the type of empirical evidence to which a parliamentary select committee or a law reform body has access. In a case like this, the way in which the duty is expressed is likely to have a significant impact on the risks assumed by innocent purchasers of defective buildings (on the one hand) and the innocent body of general ratepayers of a territorial authority (on the other). As mentioned earlier, Lord Templeman observed in *Brown v Heathcote County Council*¹⁵⁵ that, in determining the nature of the duty owed, it was necessary to weigh "the desirability on the one hand of the Courts and not the legislature deciding to compensate anyone who suffers damage which could have been avoided, and the desirability on the other hand of not making the ratepayer or taxpayer an insurer and indemnifier against loss".

151 Section 44A(3) of the Local Government Official Information and Meetings Act.

152 Section 44A(5).

153 Section 44A(6).

154 Agreement for Sale and Purchase of Real Estate (7th ed (2), July 1999), approved by the Real Estate Institute of New Zealand and the Auckland District Law Society. As well as the box on the front page of the agreement see also cl 8 relating to conditions.

155 At p 726.

[189] Although there may be few material differences in methods of construction (depending on whether one is building a commercial motel/hotel or a multi-unit residential complex), the courts have consistently declined to impose duties of care in relation to buildings or chattels constructed or made for commercial purposes.¹⁵⁶

[190] In two recent cases,¹⁵⁷ territorial authorities were held not to owe a duty of care in respect of functions carried out by them under the 1991 Act. Each case involved a motel complex. So far as the *nature* of the building is concerned, the rooms in a hotel or a motel are similar to some types of studio units designed to be used as a home in a multi-unit complex.

[191] A motel or hotel owner or lessee operates the complex for solely commercial purposes by selling a licence to occupy a room for specified (but generally short) times. The other side of the same coin is that it is not unknown for a residential dwelling to be used as a base for an occupier's commercial activities.

[192] In *Te Mata Properties Ltd*, Williams J helpfully identified some of the problematic definitional aspects of determining on which side of the residential/commercial divide a particular case falls:

“[69] A motel complex would normally be regarded as a commercial enterprise. Is it to be any the less so because its managers are accommodated on the property? How is a commercial enterprise, say a dairy with accommodation above, to be characterised? The occupants of many blocks of apartments are a mix of owner-occupiers and tenants. Is this to affect their participation in a duty of care should the block be constructed negligently? And should the result differ according to whether the block is administered by a body corporate or each apartment has a unit title? How should the business of running a residential rest home be defined? Should a time share be regarded as residential when owners are enjoying their occupation rights but commercial for the balance of the year? And on what might be thought the other side of the divide, many residences are now large, highly sophisticated constructions of a value which can equal that of a small commercial building with owners who are at pains, and have the financial means to protect themselves against defects. What classification is to be applied to such a construction? And why should the classification of a home vary according to whether it is used solely as a residence or its owners use it in part to run their internet business? And, given the flexibility of retro fitting – commercial buildings refurbished as apartments, houses used as offices – should the availability of a duty of care alter during the life of a building?”

156 See, generally, the observations of Glazebrook J (delivering the judgment of the Court of Appeal) in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at paras [72] and [74]. See also Sir Robin Cooke, “An Impossible Distinction” (1991) 107 LQR 46, p 67, in which Sir Robin noted that it could be said “that purchasers of [commercial] buildings should be able to look after themselves”.

157 *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 and *Te Mata Properties Ltd v Hastings District Council* (High Court, Napier, CIV 2004-441-151 & CIV 2004-441-569, 17 August 2007, Williams J). In the former, Venning J dismissed the owner's claims after a substantive hearing, whereas in the latter Williams J struck out the claims made against the Council.

[70] Those examples – which could easily be multiplied – indicate strongly how unsatisfactory is the test of usage of the building in question in deciding whether a duty of care should be held to exist for defective construction and why that consideration should better be regarded as a factor in deciding on the fairness, justice and reasonableness of imposing such a duty.”

[193] The focus, in both *Three Meade Street* and *Te Mata Properties Ltd*, was on the actual use of the building and whether the duty ought to extend to owners or lessees operating a commercial concern from those premises. In dismissing the plaintiff’s substantive claim in *Three Meade Street Ltd*, Venning J accepted a sufficient degree of proximity but held that policy considerations militated against imposition of a duty of care to owners of commercial properties.¹⁵⁸

[194] In determining the nature and scope of any duty of care, some assistance can be gleaned from the type of multi-unit complexes that Parliament included and excluded from claims that could be made under the Weathertight Homes Resolution Services Acts of 2002 and 2006. Those statutes were enacted as partial responses to the systemic problems of water ingress that have manifested themselves in this and like cases.

[195] In the 2002 Act, the term “dwellinghouse” was defined as:¹⁵⁹

dwellinghouse –

- (a) means any building, or any apartment, flat, or unit within a building, that is intended to have, as its principal use, occupation as a private residence; and
- (b) includes any gate, garage, shed, or other structure that is an integral part of the building; but
- (c) does not include a hospital, hostel, hotel, motel, rest home, or other institution . . .

[196] In the 2006 Act, the term was defined more expansively:¹⁶⁰

dwellinghouse –

- (a) means a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence; and
- (b) in the case of a dwellinghouse that is a building, includes a gate, garage, shed, or other structure that is an integral part of the building; and
- (c) in the case of a dwellinghouse that is an apartment, flat, or unit within a building, includes a door, gate, garage, shed, or other structure that –
 - (i) is an integral part of the building; and
 - (ii) is intended for the exclusive use of an owner or occupier of the dwellinghouse; but
- (d) does not include a hospital, hostel, hotel, motel, rest home, or other institution . . .

158 *Three Meade Street Ltd v Rotorua District Council* at paras [44] – [57].

159 Section 5 of the Weathertight Homes Resolution Services Act 2002.

160 Section 8 of the Weathertight Homes Resolution Services Act 2006.

[197] Those definitions evidence a parliamentary intent that any duty should extend to units within a multi-unit complex, provided the unit has the characteristic of a domestic home. The definitions are also consistent with the type of structures that the Building Industry Commission suggested be covered by a guaranteed scheme, primarily on grounds of vulnerability and uneven access to insurance. It would be strange if a different approach were to be taken in respect of common law proceedings originating in this Court. 5

[198] The statutory definitions also confirm what is apparent from cases such as *Three Meade Street* and *Te Mata Properties Ltd*. It is the ability of a commercial developer to protect itself (by insurance, contractual warranties or the like) that differentiates its situation from the home-owner. If a developer cannot afford the cost of insurance, it is distinctly arguable that the project ought not to be undertaken. 10

[199] I am entitled to have regard to statutory developments which demonstrate a parliamentary acceptance of values that are relevant to the imposition of a duty of care. I can safely rely on the definitions in the weathertight homes legislation in determining whether to develop or adapt a common law obligation. In principle, there should be a coherent approach to ensure that, in formulating or developing a duty of care in negligence, its nature and extent is consistent with any other relevant statutes and other principles of law and equity.¹⁶¹ 15 20

[200] In *Rolls-Royce*, the Court of Appeal identified two “broad fields of inquiry” that “provide only a framework rather than a straitjacket”. The first is the degree of proximity or relationship between the parties. The second is concerned with wider policy considerations that tend to strengthen, restrict or negative the existence of a duty of care.¹⁶² 25

[201] The proximity inquiry includes consideration of the degree of analogy with cases in which duties of care have been acknowledged.¹⁶³ As Glazebrook J said in *Rolls-Royce*, that inquiry can be seen as reflecting a balancing of the plaintiff’s moral claim to compensation for avoidable harm and the defendant’s moral claim to be protected from undue restrictions on its freedom of action and from an undue burden of legal responsibility.¹⁶⁴ 30

[202] The respective ability of the parties to take precautions against their risks and whether any consequences to the defendant may be disproportionate are also factors to be taken into account on that inquiry.¹⁶⁵ Vulnerability is an aspect of the proximity inquiry.¹⁶⁶ 35

[203] In the chapter in *The Law of Torts in New Zealand*¹⁶⁷ that he authored on this topic, Professor Todd suggested that the *Hamlin* duty “rests heavily on the vulnerability of members of the public in acquiring homes” as opposed to those engaged in commercial dealing who have better means of protecting themselves. He made the point that if no duty were to be imposed in 40

161 See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at pp 297 – 298 per Cooke P. See also Todd et al, *The Law of Torts in New Zealand* (4th ed, 2005), para 5.404.

162 At para [58].

163 At para [59].

164 At para [60].

165 At para [61].

166 At paras [61] and [62].

167 Paragraph 6.4.03(4).

“commercial” cases, courts must decide where to draw the line, something, he suggests, that has posed real difficulty. By reference to *Woolcock Street Investments Pty Ltd v C D G Pty Ltd*¹⁶⁸ he expressed doubts as to whether a line is “clearly definable”. Professor Todd suggests the possibility of a general test involving foreseeability of harm to a vulnerable plaintiff, coupled with a standard of care relating to habitability or safety of a building.

[204] With respect to Professor Todd, for reasons that follow, I take the view that the duty may be formulated more simply and predictably than he suggests.

[205] The nature and scope of the duty of care imposed on a territorial authority must be principled, capable of being expressed simply and predictable in its future application, and result in a just and reasonable allocation of risk between parties who are not in any contractual relationship.

[206] Ms Grant suggested that, if a duty were imposed on the Council, its touchstone ought to be the vulnerability of the claimant. To an extent (but not completely) that submission accords with Professor Todd’s views. However, I see “vulnerability” (while a factor to be taken into account in determining whether a duty exists or ought to be created)¹⁶⁹ as being too uncertain a concept to be the ultimate test.¹⁷⁰

[207] With respect, Ms Grant does not give sufficient weight to the need for predictability. I use the word “predictability” (in preference to “certainty”) deliberately because, however the test is articulated, there will remain grey areas which will need to be determined on a case-by-case basis. Certainty is too much to expect. Predictability provides a level of assurance that is needed by the Council to determine the extent of its potential liability and to take steps to guard against risks. As any judge knows, even with legal principles that are well settled, the difficulty lies in applying them to the facts of particular cases.

[208] It is equally important that both advisers for those who are buying a home and Council officers understand clearly the category of persons to whom the duty is owed. A relatively simple articulation of the extent of the duty in a predictable manner should discourage claims by those who fall outside its ambit, particularly where it is possible for an adviser to make inquiries, yet provide an incentive for the Council to ensure its functions are performed to an acceptable standard.

[209] In the single dwelling case of *Dicks v Hobson Swan Construction Ltd*,¹⁷¹ Baragwanath J discussed the duty point:

“[100] The arguments take one back to the basics of:

- (1) What is the rationale of the New Zealand law stated in *Hamlin*;
- (2) What is to be inferred from the statutory regime; and
- (3) When does the Court intervene and reject general council standards as too low?

[101] As to (1), the Courts have laid upon councils the obligation to act with care in issuing and administering building consents. It is a non sequitur to assert that because there is a public law duty therefore there is

168 (2005) 216 CLR 515.

169 *Rolls-Royce* at para [61].

170 At para [60].

171 At paras [100] – [102].

no duty at private law. In England and Australia the cause of action against councils has been classified as merely economic. That low-level evaluation of the public law obligation may carry with it the consequence that breach of public duty carries no private law responsibility. But in *Hamlin* the New Zealand common law in relation to the public law duty of councils to safeguard the interests of home owners departed quite deliberately from what Lord Nicholls (dissenting) in *Stovin v Wise* [1996] AC 923 at p 931 called ‘th[e] unacceptable yoke’ of *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74. (The latter was not received with enthusiasm by the Court of Appeal in another context in *Johnson v Watson* [2003] 1 NZLR 626 at pp 630 – 631.)

[102] As to (2), Parliament by the Building Act has endorsed the policy stated by the courts. It has endorsed ‘performance based’ standards, meaning that the building must perform to the criteria of the Building Code. No sanctions are specifically provided for non-performance by councils; but the recognition by s 91 of the prospect of civil proceedings against councils and their exclusion from the s 89 defence accorded to their members and employees acting in good faith suggests that such liability was to provide an incentive to performance.”

[210] The Sunset Terraces development was intended to create a number of residential dwellings to be acquired by individuals. If the focus were on the intended use of the individual units, the purchasers could not be seen as in any different position to the home-owners to whom the *Hamlin* duty is owed. Nor could their position be distinguished from the occupier of the flat at Begbie Place discussed in *Mount Albert Borough Council v Johnson*.¹⁷²

[211] Whether a dwelling is a single building or a unit in a high-rise or linear development, the potential vulnerability of a prospective owner will be the same. That is reflected in the way in which the Weathertight Homes Resolution Services Acts of 2002 and 2006 have defined the term “dwellinghouse”. Such an approach is consistent with the underlying philosophy of *Hamlin* and the earlier cases. The intention is to protect those who rely on systemic safeguards when acquiring what, for most New Zealanders, is their most valuable asset.

[212] I have already referred to the problems with the residential/commercial divide to which Williams J referred in *Te Mata Properties Ltd*.¹⁷³ In my view, the *actual* end use of a particular unit is an unhelpful mechanism to determine whether a *Hamlin*-type duty of care should be imposed. Just as with the suggested touchstone of “vulnerability”, it is impossible for the Council to know, in advance, how a purchaser of a single unit might decide to use the dwelling for his or her own purposes. Subject only to the zoning and other planning control issues, the unit could be used for a variety of commercial purposes. The requisite degree of predictability needed to meet the interests of both intended purchasers and the Council is not met by a test that focuses on the purpose for which a purchaser actually uses the unit.

[213] A focus on the *intended* end use of a building provides a much more predictable base from which to start. The intended end use of the units must be

172 [1979] 2 NZLR 243 (CA).

173 See at para [192] above

disclosed as part of the plans and specifications submitted in support of the application for a building consent.¹⁷⁴ The term “plans and specifications” is defined in s 2 of the 1991 Act as follows:

- 5 **plans and specifications** means the drawings, specifications, and other documents according to which a building is proposed to be constructed, altered, demolished, or removed, including proposed procedures for inspection during construction, alteration, demolition, or removal, and also including (in respect of construction or alteration) –
- 10 (a) The intended use of the building; and
- (b) The design features or systems which the applicant considers will be required to be included in any compliance schedule issued in terms of section 44 of this Act; and
- 15 (c) The proposed procedures for inspection and routine maintenance for the purposes of that compliance schedule in respect of those design features or systems . . .

If the application or plans were ambiguous about intended end use, the Council has an ability to seek further information to clarify the developer’s intentions.¹⁷⁵

20 [214] If a duty of care were premised on *intended* end use of a building, there are advantages both in simplicity of expression and predictability of the circumstances in which a duty may arise. For example, it would enable both the Council and intended home purchasers to take reasonable steps to protect their own positions.

25 [215] From the Council’s perspective, once it were disclosed that the units were being built for residential purposes, it would be aware that its duty of care to a prospective purchaser was triggered. It could then put in place appropriate processes to manage the risks of the statutory obligations cast upon it: in particular, the tasks of issuing a building consent, inspecting the building work and determining whether to certify compliance with the Code. If it were in

30 doubt as to the intended end use, it would be on inquiry and ought to use its powers to obtain further information to clarify the position.

[216] From a potential purchaser’s perspective, it would be relatively easy for a legal adviser to obtain from the territorial authority a copy of the application for building consent and the consent itself to determine the intended purpose of

35 the structure. Both documents should be on the LIM.¹⁷⁶ If it had been disclosed to the Council that the units were for residential purposes, an adviser could safely inform a client that a *Hamlin*-type duty would attach to the Council. If the application or the consent itself disclosed that the units were for non-residential use, the adviser could seek instructions from his or her client on

40 whether he or she wished to pursue the purchase (or to obtain expert advice on relevant construction issues) on the basis that a duty may not exist.

174 Section 34(3) of the 1991 Act and definition of “plans and specifications” in s 2. The latter refers specifically to disclosure of “the intended use of the building”. See also Schedule 2, Form 3 of the Code, which includes this requirement in the consent application form.

175 Section 33(2).

176 Section 44A(2)(d) of the Local Government Official Information and Meetings Act.

[217] I am conscious of the many appellate warnings against articulating a duty of care in too rigid a fashion. However, in this case I see the need to retain the integrity of the original basis of the *Hamlin* duty, coupled with an emphasis on simplicity of expression and predictability in outcome, as justifying my approach. From a policy perspective, in this very narrow part of the law of negligence, a greater degree of precision is required. That approach is consistent with the way in which *Hamlin* limited the Council's duty to home-owners. 5

[218] I do not exclude the possibility that there may be some circumstances in which a territorial authority assumes a duty of care to a particular purchaser as a result of proved conduct. My approach is not intended to limit the ability of the Court to find an assumption of a duty of care of a type akin to that discussed by the Privy Council in *Brown v Heathcote County Council*.¹⁷⁷ Nor do I intend to exclude circumstances in which, despite what is disclosed on an application for a building consent or in the plans, it is so obvious that units are being constructed for residential purposes that a duty must attach. In both types of cases, however, there would need to be a clear focus on the facts said to give rise to the alleged duty. 10 15

[219] It is unnecessary, in the circumstances of this case, to consider the troublesome possibility of a mixed-use development. Designs of mixed-use developments can vary significantly. As the issue does not arise directly in this case, I deliberately leave the issue open. 20

[220] In my judgment, a territorial authority owes a duty of care to anyone who acquires a unit, the intended use of which has been disclosed as residential in the plans and specifications submitted with the building consent application or is known to the council to be for that end purpose. The duty is to take reasonable care in performing the three regulatory functions in issue: deciding whether to grant or refuse a building consent application, inspecting the premises to ensure compliance with the building consent issued and certification of compliance with the Code. The existence of such a duty reflects the need to balance a home-owner's moral claim for compensation for avoidable harm against the Council's moral claim to be protected from an "undue burden" of legal responsibility.¹⁷⁸ Put in that way, the duty takes account of the changed statutory framework and avoids tying the duty to the practices of a bygone era.¹⁷⁹ 25 30 35

[221] The obligation of the Council can be no higher than expressed in the statute itself: namely, to be satisfied on reasonable grounds that a building consent should issue; to take reasonable steps in carrying out inspections and to be satisfied on reasonable grounds that code compliance should be certified.

177 [1987] 2 NZLR 720 (PC).

178 *Rolls-Royce* at para [60].

179 For example, see the references to the bylaws in force when *Stieller v Porirua City Council* was decided. See also the critique of *Craig v East Coast Bays City Council* in *Bella Vista Resort Ltd v Western Bay of Plenty District Council*, particularly at paras [70] – [71] per William Young P and [88] – [89] per Chambers J.

[222] That articulation of the duty is deliberately restricted to potential home-owners. I deal separately with the discrete issue of whether any duty is owed to lessees or assignees of a home-owner's cause of action when I consider the Blue Sky claims.¹⁸⁰

5 (e) *The effect on the duty of manifested damage*

[223] Ms Grant argued that any cause of action against the Council for negligence had accrued by March 2000, at the latest, when damage to the units manifested itself. She submitted that, because all of the individual unit owners (other than Mr Halford in respect of unit N, who purchased in October 1999) acquired their units after that date, they had no cause of action against the Council. Ms Grant relied on the Privy Council judgment in *Hamlin*¹⁸¹ and the Supreme Court's decision in *Murray v Morel & Co Ltd*¹⁸² to support the proposition advanced.

10 [224] The Council does not contend that the claims are barred under s 4 of the Limitation Act 1950 or s 91 of the 1991 Act. Rather, it argues that, damage being an essential element of the cause of action in negligence, no cause of action accrued in favour of those who purchased units after the date on which damage manifested itself.

15 [225] The passage in the Privy Council decision in *Hamlin* on which the Council relies states:¹⁸³

20 " . . . the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable home-owner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118."

25 [226] The relevant passage appears in the "limitation" section of the Privy Council's advice. It was not an issue raised on the argument dealing with duty of care. *Murray v Morel & Co Ltd* was also a limitation case. The issue was whether the "reasonable discoverability" test could apply to all causes of action. Ms Grant submitted that her approach had been adopted in *Pullar v Secretary for Education*.¹⁸⁴

30 [227] With respect to Ms Grant's argument, it misconceives the bases on which *Hamlin*, *Murray v Morel & Co* and *Pullar* were decided. The issue in this case is not whether the claim is statute-barred, but whether a duty of care is owed to a purchaser who, at the time of acquisition, purchases a unit that shows manifest evidence of damage.

35 [228] Provided the cause of action in respect of latent damage accrued in time, there is no reason why any duty to a subsequent purchaser should be excluded.

180 See paras [346] – [377] below.

181 At p 526.

182 [2007] 3 NZLR 721 (SCNZ).

183 At p 526.

184 [2007] NZCA 389 at paras [13] – [16].

Time will not begin to run each time a new person acquired an interest in the unit.¹⁸⁵ Therefore, the Council cannot be prejudiced through what would, otherwise, be an inappropriate extension of the limitation period.

[229] While the *Hamlin* duty has been held to extend to subsequent purchasers, the basis for holding that the duty is not actionable once damage has manifested itself lies in knowledge of the existence of the manifestation, not the mere fact of its occurrence.¹⁸⁶ 5

[230] In short, the problem identified by the Council is met by one of more of the following propositions:

- (a) A subsequent purchaser may not be in sufficient proximity to the Council to justify imposition of a duty of care in his or her favour because that person has had an adequate opportunity of intermediate examination which would, if undertaken, likely have disclosed the damage then manifest.¹⁸⁷ 10
- (b) Any negligence on the part of the Council may not have caused loss to the subsequent purchaser. Any loss might have resulted from his or her own failure to take adequate steps to make inquiries about the nature and extent of visible damage before settling the purchase of the unit. In the context of causation, the real issue appears to be whether any act or omission on the part of the individual home owner amounts to an intervening act breaking the chain of causation.¹⁸⁸ 15 20
- (c) The possible use of contributory negligence to lessen any burden on the Council that has been partly caused through the fault of the purchaser.¹⁸⁹ 20

[231] For present purposes, it is sufficient to hold that a purchaser (or subsequent purchaser) of a dwelling unit is not removed from the scope of the Council's duty, or barred from suing on it, merely because he or she acquires the unit after damage has manifested itself. 25

(7) Causation principles

(a) How is causation established? 30

[232] In *Accident Compensation Corporation v Ambros*,¹⁹⁰ the Court of Appeal reviewed authorities on causation, in the context of an accident compensation claim based on medical error. Delivering the judgment of the

185 Section 91(2) of the 1991 Act: civil proceedings cannot be brought more than ten years after the *act or omission on which they are based*.

186 *Bowen v Paramount Builders (Hamilton) Ltd* at pp 413 per Richmond P, 418 – 419 per Woodhouse J and 424 per Cooke J. Although *Bowen* was a builder liability case, the subsequent decision in *Mount Albert Borough Council v Johnson* suggests that no valid distinction can be drawn, dependent upon the role of the particular defendant. In particular, see the joint judgment of Cooke and Somers JJ, dealing with issues of causation and contribution, at pp 241 – 242 and 243 – 244 per Richardson J.

187 *Bowen*.

188 See *Mount Albert Borough Council v Johnson* at p 241 per Cooke and Somers JJ.

189 Section 3 of the Contributory Negligence Act 1947.

190 [2008] 1 NZLR 340 (CA).

Court, Glazebrook J referred to the need to make two separate inquiries in determining whether an act or omission caused compensatable loss. She described the first as “causation in fact” and the second as “causation in law”.¹⁹¹

5 [233] No person who breaches a duty of care can be held liable for loss suffered by another unless his or her own conduct was a cause of that loss. Yet that basic proposition has “a deceptive simplicity”.¹⁹² Ultimately, a judicial value judgment is required to determine whether a factual finding of a nexus between act or omission and loss translates into a legal responsibility for a defendant to compensate a plaintiff. In *Johnson v Watson*,¹⁹³ the Court of Appeal held that a causal nexus was required between substantial and material cause and the loss suffered (see also *Price Waterhouse v Kwan*).¹⁹⁴ In that context, “substantial” means more than trivial or de minimis. “Material” means that the alleged cause “must have had a real influence on the occurrence of the loss or damage” in issue.¹⁹⁵

10 [234] In *Ambros*, Glazebrook J saw the “factual” question as turning on application of the “but for” test. That inquiry is into whether loss would have occurred but for a negligent act or omission. Her Honour saw the “legal” phase of the inquiry as governed by an assessment of “the appropriate scope of liability for the conduct”, followed by an inquiry into the “proximity (remoteness) between the cause and the damage”.¹⁹⁶ Both aspects can be seen as relevant to the allocation of risk in non-contractual cases.

15 [235] Glazebrook J also drew attention to the differences between legal and scientific approaches to causation. In *March v E and M H Stramare Pty Ltd*¹⁹⁷
 20 Mason CJ differentiated between the two concepts. Glazebrook J summarised his observations as follows:

30 “. . . Mason CJ . . . explained that the scientific concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences, whereas in law problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence.”

[236] Sometimes, particularly when a negligence claim is based on an omission, it will be necessary for a Court to draw a “robust” inference of causation. Nevertheless, as Glazebrook J observed in *Ambros*:

35 “It must, however, always be borne in mind that there must be sufficient material pointing to proof of causation on the balance of probabilities for a court to draw even a robust inference on causation. Risk of causation does not suffice.”

40 [237] In a recent article about the *Ambros* decision, Associate Professor Joanna Manning has emphasised the nature of a claim when the

191 At para [24]. See also Todd et al, paras 21.2 and 21.3 respectively and Hart and Honoré, *Causation in the Law* (2nd ed, 1985), pp 109 – 110.

192 Todd et al, para 21.1.

193 [2003] 1 NZLR 626 (CA).

194 [2000] 3 NZLR 39 (CA) at para [28].

195 *Johnson v Watson* at para [18].

196 *Accident Compensation Corporation v Ambros* at para [25].

197 (1991) 171 CLR 506 at p 509.

alleged wrong was an omission to do something, rather than a negligent act. The Associate Professor rightly remarked that a factual inquiry into causation, in the context of a claim based on omission, will always be “in the realms of hypothesis”.¹⁹⁸

[238] In this case, save for claims against the developer, all allegations are based on omissions on the part either of the Council or the designer. I adopt the *Ambros* approach to issues of causation. 5

(b) Mitigation and intervening acts

[239] The difference between intervening acts (breaking the chain of causation) and failure to mitigate loss is something that arises, particularly, in the context of the “targeted repairs” issue.¹⁹⁹ However, the issue of intervening acts is also relevant to questions of causation of loss in cases where a particular plaintiff can establish a breach of duty on the part of the defendant which, in the absence of an intervening act, would found in damages. What follows is a short summary of the principles to be applied in differentiating between the two concepts, any issues of mitigation largely being left for any quantum trial if liability on the part of one or more defendants were established. 10 15

[240] In *Wilson v United Counties Bank Ltd*,²⁰⁰ Lord Atkinson considered the concept of mitigation of loss. The context of his Lordship’s comments were steps taken by Major Wilson, “to ward off, if possible, the financial ruin about to be brought upon him by the negligence of the respondents”.²⁰¹ Lord Atkinson continued:²⁰² 20

“[Major Wilson’s] efforts proved in the result abortive; but the fact that they were made affords no defence to those whose negligence made the disaster imminent. If one man inflicts an injury upon another the resort by the sufferer to reasonable expedients for the bona fide purpose of counteracting, curing or lessening the evil effects of the injury done him, does not necessarily absolve the wrongdoer, even though the sufferer’s efforts should, in the result, undesignedly aggravate the result of injury.” 25

To support that statement of principle, Lord Atkinson relied on *Leyland Shipping Co v Norwich Union Fire Insurance Society*²⁰³ and *Reischer v Borwick*.²⁰⁴ 30

[241] A simple example of the principle of mitigation is *Jones v Watney Coomb Reid & Co*.²⁰⁵ That was a proceeding brought in negligence, for personal injury suffered by a plaintiff. The alleged tortfeasor contended that it was not liable in damages for aggravation of an injury to the claimant’s foot. The aggravated injury arose because she had walked on the foot too soon after the original mishap. Lush J directed the jury that it should:²⁰⁶ 35

198 Associate Professor Joanna Manning, “Factual Causation in Medical Negligence” (2007) 15 JLM 337, p 338.

199 See the discussion in Part 16 of this judgment [omitted from this report].

200 [1920] AC 102.

201 At p 125.

202 At p 125.

203 [1918] AC 350.

204 [1894] 2 QB 548.

205 (1912) 28 TLR 399.

206 At p 400.

“ . . . look at all the circumstances of the case, the medical advice received, the need for action, the usual or extraordinary character of what is actually done and the precautions taken during the doing of it. The injured person need not act with perfect knowledge and ideal wisdom, but upon the other hand cannot claim damages for such injuries as are really due to wanton, needless or careless conduct on his or her own part. If what is done reasonably and carefully augments the injuries, that may be regarded as a natural consequence of the accident.”

[242] Ms Grant submitted that the duty to mitigate went no further than for the plaintiffs to respond “reasonably” to stem losses flowing from the alleged negligence. She accepted the general principle: whether reasonable steps to mitigate loss have been taken is a question of fact to be determined in light of all circumstances of the case.

[243] In contrast, the chain of causation on which a plaintiff may rely to establish that a negligent act or omission caused loss to him or her is treated differently. The notion is of an intervening cause, also known by the Latin term “novus actus interveniens”.

[244] In *Johnson v Watson*,²⁰⁷ the Court of Appeal considered whether it ought to follow a majority of the House of Lords in *East Suffolk Rivers Catchment Board v Kent*.²⁰⁸ The Court of Appeal decided that, as a result of “major developments in the areas which appear to have influenced”²⁰⁹ the majority in *East Suffolk*, the dissenting approach of Lord Atkin ought to be followed.

[245] In *Johnson v Watson* defective building work had been carried out in 1990. The damage was latent and was discovered later. Remedial work was attempted between 1991 and 1998. The question was whether the cost of mitigation could be recovered. Tipping J, delivering the judgment of the Court of Appeal, adopted the following passage from Lord Atkin’s opinion in *East Suffolk*, observing that no difference existed because an action was brought in tort rather than in contract:²¹⁰

“May I introduce a hypothetical case of a contractual duty, assuming as I do, that the causation of damage is the same in contract and tort. Assume that a shopkeeper had his roof injured in rainy weather so that the rain came in upon his goods: and that he contracted with a builder to repair it with an express term that work should proceed without unreasonable delay. If the builder were guilty of unreasonable delay whereby the rain beat upon the shopkeeper’s goods for say fourteen days instead of four, would not the shopkeeper be able to recover such damages as he could show resulted from the excess exposure showing possibly that his goods could stand four days’ exposure with little damage but could not stand the extra ten. I think that this would be a plain case: and it would not depend upon an obligation to complete the work. The builder might be protected from an obligation to complete by subsequent conditions, death, strikes, war and the like, but for such damage as would be shown to be due to delay in the work while it

207 [2003] 1 NZLR 626.

208 [1941] AC 74.

209 *Johnson v Watson* at para [16].

210 *East Suffolk* at pp 93 – 94.

was being performed I conceive he would clearly be liable. Such damage would be caused by the delay in repair, notwithstanding that the original cause of damage, the rain, and its continuance were in no way caused by the builder. I suggest therefore that if the plaintiffs could prove the case indicated above they should succeed.”

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[246] Tipping J concluded:²¹¹

“[19] Here negligence in carrying out the prevention work, be it act or omission, if established, is a concurrent cause of the damage which it failed to prevent. Its purpose was to prevent such damage and it would be unrealistic to take the view that it was not a substantial and material cause of that damage. In such circumstances as these it is not the law that because the further damage could not have occurred without (but for) the originally faulty workmanship, such workmanship must be regarded as the sole cause of that damage. A concurrent cause, such as the ineffective prevention work, is in a sense the opposite of a *novus actus interveniens*. It is in reality a *novus actus causans*, or in other words a new default which runs with the earlier default so as to cause, or at least materially contribute to, the further damage which it was its purpose to prevent.”

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[247] Tipping J added:²¹²

“[20] If, as in Lord Atkin’s example, the Johnsons had engaged a builder other than Mr Watson to carry out the prevention work, and that builder had been negligent, he could hardly rely on Mr Watson’s originally faulty work (assuming such to be established) as the sole cause of the damage suffered by the Johnsons as a result of his failure to perform the prevention work properly. In causation terms the position cannot logically be different when it is Mr Watson himself who is said to have been negligent in his performance of the prevention work.”

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(c) *Economic loss claims*

[248] The Council contended that a particular owner could not sue for (“pure”) economic loss. Although that principle continues to play a significant role in English jurisprudence,²¹³ New Zealand law has departed from it.

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[249] In *Hamlin*, Cooke P said:²¹⁴

“The upheavals in high level precedent in the United Kingdom which I have outlined have had no counterpart in New Zealand. The case law has been at least reasonably constant. Since *Bowen* in 1976 it has been accepted that a duty of reasonable care actionable in tort falls on house builders and controlling local authorities, and in that case one member of the Court ventured to question the value in this field of an attempted distinction between pure economic loss and damage to the building, at pp 422 – 423. *Bowen* has been followed in many High Court cases without as far as is known any sense that it does other than justice. Similarly in *Johnson* in 1979 the view was expressed that a cause of action

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211 *Johnson v Watson* at para [19].

212 At para [20].

213 For example, see *Murphy v Brentwood District Council* [1991] 1 AC 398.

214 At p 522. See also Sir Robin Cooke, pp 57 – 58.

arises when the defect becomes apparent or manifest, at pp 239 – 240. The defect under consideration in *Johnson* was likewise in the foundations; the discovery of minor damage earlier was seen as relevant only to the issues of possible successive actions, causation and intermediate examination. And similarly what was said in *Johnson* has been followed in [the] High Court. Williamson J mentions some unreported cases in the judgment now under appeal and there may now be added [*G v S*] (High Court, Auckland, CP 576/93; 22 June 1994, Blanchard J), a proceeding for inter alia breach of fiduciary duty or duty of care against a medical practitioner, arising out of abuse of a professional relationship.

In the latter case, in an extensive review of authorities Blanchard J referred to the New Zealand building cases by analogy; to the leading Canadian decision on local authority liability for building permit negligence, *City of Kamloops v Nielson* (1984) 10 DLR (4th) 641 (where *Pirelli* was not accepted); to other leading Canadian cases holding that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence (*Central Trust Co v Rafuse* (1986) 31 DLR (4th) 481; *M(K) v M(H)* (1992) 96 DLR (4th) 289, 305); and to the opinion of Deane J with the concurrence of Mason CJ and Wilson J in *Hawkins v Clayton* (1988) 164 CLR 559, 590, that the relevant statutory reference to the cause of action first accruing should be construed as excluding any period during which the wrongful act itself effectively precluded the institution of proceedings. Applying those authorities in preference to *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (the foundation of *Pirelli* but related to personal injury), Blanchard J held in the case before him that the plaintiff's cause of action in negligence did not accrue until she herself appreciated the causal connection between her psychological damage and the sexual relationship.

As Miss French argued, in a house-building case where the basic defect is in the foundations, classifying the damage as economic assists the conclusion that time runs from the date when a significant defect in the foundations is or ought to have been discovered. Until then the defect is latent and the market value of the property has not been diminished by it. Some of the decisions already cited point to a wider scope for the test of date of discovery or reasonable discoverability. An opinion on any wider question is not called for in this case. I would prefer to proceed step by step.”

[250] Those observations were not criticised when *Hamlin* reached the Privy Council. Indeed, they were implicitly adopted. The Privy Council made it clear that time begins to run from “the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs”, observing also that the “measure of the loss will then be the cost of

repairs, if it is reasonable to repair, or the depreciation in the market value if it is not”.²¹⁵ An ability to sue for the diminution in value of capital assets seems to be inconsistent with the principle that “pure” economic loss is not recoverable.

[251] Mr Heaney and Ms Grant sought to argue that the only damages that could be regarded as “caused” by negligence on the part of the Council was damage to the property itself. With respect, I disagree. The path taken by New Zealand law encompasses economic as well as property damage.²¹⁶ It is too late (certainly at High Court level) to turn the clock back. 5

(8) *The nature of the Council’s functions* 10

(a) *Issue of the building consent*

[252] The Council’s statutory obligation was to consider the developer’s application for a building consent and to grant it, if it were “satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application”.²¹⁷ Therefore, in exercising its “building consent” function, the Council was entitled to assume that the construction work would be undertaken in conformity with the consent. Importantly, the assessment is predictive in nature. Greater leeway ought to be given to decision makers who are required to predict what might happen, as opposed to those who determine, with the benefit of hindsight, what did, in fact, happen. 15 20

[253] The applicant for a building consent was required to pay the charge fixed by the Council on making the application and to provide “such plans and specifications and other information” as the Council “reasonably” required.²¹⁸ The Council, subject to an ability to seek further information, was required to grant or refuse the consent within a period of 20 days from the date on which it was made.²¹⁹ Without a building consent, it was unlawful for any building work to be carried out.²²⁰ 25

(b) *The inspection process* 30

[254] Section 76 of the 1991 Act defines the purposes for which territorial authority inspections are to be undertaken. The term “inspection” means “the taking of all reasonable steps to ensure” (among other things) “that any building work is being done in accordance with a building consent” or “that buildings remain safe, sanitary, and have means of escape from fire”.²²¹ 35

[255] The statute implies a condition into every building consent that the authorised officers of a territorial authority “shall be entitled, at all times during normal working hours or while building work is being done” to inspect the land on which the building work is being undertaken, any building work that has

215 At p 526.

216 See also *Riddell v Porteous* at p 10.

217 Section 34(3) of the 1991 Act.

218 Section 33.

219 Section 34(1). See also reg 6(1)(b) of the Building Regulations.

220 Section 32.

221 Section 76(1)(a) and (c).

been or is being done on or off the building site and any building.²²² All inspectors are authorised to enter premises for any of those purposes, or for the purpose of determining whether the building is dangerous or insanitary.²²³ Every owner and occupier of any building and every person engaged in any building work is required to “give every reasonable facility to enable the territorial authority’s authorised officers to inspect all or any part of the building or the building work”.²²⁴

[256] While a decision to grant a building consent is predictive in nature, the inspection function can be seen as contemporary in its execution. Council inspectors are required to take all reasonable steps to ensure that work that is being done on site complies with the requirements of the building consent. The inspection process is not, now, an end in itself. The legislative scheme contemplates the use of contemporary inspections as a means of gathering information to determine, when building work is said to be completed, whether to certify compliance with the Code.²²⁵

[257] I accept that it is impossible to lay down a rule to define the number and nature of inspections required on any particular construction project. They will be informed by the type of structure being built, whether the design is well known or original in nature, the difficulty of any aspect of the construction process and any particular problems caused by the physical environment in which the work is being undertaken. Those considerations demonstrate the importance of designing an inspection regime to meet the needs of a particular development in order to ensure that all aspects of the Code have been complied with.

[258] That process involves identifying what needs to be checked to ensure compliance with each Part of the Code and to plan inspections at a time which permits visible examination of work undertaken on critical compliance issues. Having said that, I emphasise that the inspection regime could, reasonably, in the context of a multi-unit development, identify sample units to which the inspector refers, as opposed to the need for a full inspection of every unit to ensure compliance. If work were undertaken satisfactorily on sample units chosen at random by an inspector, an inference could reasonably be drawn that the same standard of workmanship had been carried out throughout the development.

[259] Those examples are not intended to be exhaustive. They do, however, identify the need for individual judgments to be made in each case, as opposed to following a rigid rule which may or may not achieve the objectives of an inspection. The need for some sort of road map for the inspection process, once the building consent is granted and before construction begins, is clear. However, if there were evidence that an inspector (or inspectors) had reached an informed decision on the number and nature of inspections required, the Court should be slow to review that decision, particularly given the dangers inherent in the benefit of hindsight.

222 Section 76(3)(a).

223 Section 76(3)(b).

224 Section 76(4).

225 Section 43(1) and (3).

(c) Code compliance certification

[260] Section 43(1) of the 1991 Act puts an obligation on an owner to advise a territorial authority “as soon as practicable” that the building work has been completed to the extent required by the consent under which it has been undertaken.²²⁶ The owner must include, with that advice, any code compliance certificate issued by a private certifier.²²⁷ If no code compliance certificate has been obtained from a private certifier, the territorial authority must “issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate”.²²⁸ No private certifier was engaged for the Sunset Terraces project. Therefore, the certification function devolved on the Council, by default.

[261] The Council’s certification function was triggered by advice from the owner that building work has been completed in accordance with the consent granted. At that stage, the Council’s obligation was to certify only if it were satisfied, “on reasonable grounds”, that the certified work complies with the Code.²²⁹

[262] An interim code compliance certificate may be issued in respect of part of the building work.²³⁰ However, if an interim certificate were issued, it must be replaced by a single code compliance certificate, for the whole of the building work, at the time all work is completed.²³¹

[263] In the event that a territorial authority decides not to issue a code compliance certificate, it must notify the applicant in writing and specify the reasons for that decision.²³² Where it considers, “on reasonable grounds”, that it is unable to issue a code compliance certificate in respect of particular building work, the territorial authority is required to issue a notice to rectify in accordance with s 42 of the Act.²³³

[264] A notice to rectify must be issued in a prescribed form²³⁴ and may direct that all or any building work cease forthwith until the territorial authority is satisfied that the people concerned are able and willing to resume operations in compliance with the Act and the regulations.²³⁵ A notice to rectify applies only to building work required during the period in which a building consent was operative,²³⁶ in respect of building work for which a building consent should have been obtained²³⁷ and in respect of building work for which a building consent was not required but there was a requirement that the work meet the Code.²³⁸

[265] In contrast to the predictive decision required on a building consent application and the contemporary nature of the inspection process, the

226 Section 43(1).

227 Section 43(2)(b).

228 Section 43(3).

229 Section 43(3)(a), or complies with the Code to the extent authorised in terms of any approved waiver or modification relating to that work (s 43(3)(b)).

230 Section 43(4).

231 Section 43(4).

232 Section 43(5).

233 Section 43(6).

234 Section 42(1).

235 Section 42(2).

236 Section 42(3)(a).

237 Section 42(3)(b).

238 Section 42(3)(c).

certification process requires an historical judgment to be formed: does the completed work comply with the Code? Among other things, a decision on certification will be made on the basis of information provided in the course of inspections, answers to specific queries to third parties (such as professionals and tradespeople engaged in the construction work) and the inspectors' own assessment of the quality of the work undertaken.

(d) *Proportionality in compliance with regulatory obligations*

[266] As Baragwanath J pointed out in *Dicks v Hobson Swan Construction Ltd*,²³⁹ the Council ought not to be required to meet absolute standards when performing its regulatory functions. I agree with Baragwanath J that the Council's duty is to respond proportionately to the obligations cast on it. For example, s 47 of the 1991 Act provided:

47. Matters for consideration by territorial authorities in relation to exercise of powers – In the exercise of its powers under sections 30 to 46 and 64 to 71 of, and Schedule 3 to, this Act *the territorial authority shall have due regard to the following matters:*

- (a) The size of the building; and
- (b) The complexity of the building; and
- (c) The location of the building in relation to other buildings, public places, and natural hazards; and
- (d) *The intended life of the building;* and
- (e) *How often people visit the building;* and
- (f) *How many people spend time in or in the vicinity of the building;* and
- (g) *The intended use of the building,* including any special traditional and cultural aspects of the intended use; and
- (h) *The expected useful life of the building and any prolongation of that life;* and
- (i) The reasonable practicality of any work concerned; and
- (j) In the case of an existing building, any special historical or cultural value of that building; and
- (k) Any other matter that the territorial authority considers to be relevant. (Emphasis added.)

[267] The provisions of s 47 of the Act apply to both the building consent and certification provisions. However, s 76 of the Act, dealing with inspections, does not fall within the purview of s 47. That is understandable because the inspection function is contemporary in nature and relates to the component parts of the construction process, as opposed to a predictive or historical assessment of whether construction work is likely to, or does in fact, comply with the Code.

239 At paras [73] and [74].

*(e) The individual claims**(i) Introductory comments*

[268] The elements of a cause of action in negligence are uncontroversial. They are.²⁴⁰

- (a) The defendant must owe a duty of care to the plaintiff. 5
- (b) The plaintiff must prove that the defendant either committed an act or omitted to do something necessary to comply with the standard of care expected of it; in other words that it was careless in the way in which it performed obligations imposed by the duty of care.
- (c) The careless conduct of the defendant caused compensatable loss to the plaintiff. 10
- (d) Actual loss caused by the breach of duty can be proved.

[269] For present purposes, I have assumed that all plaintiffs can establish some loss, if it were held that one or more of the defendants breached a duty owed to a plaintiff. Whether any loss proved may be diminished or extinguished through failure on the part of a successful plaintiff to mitigate loss or contributory negligence are discrete issues. 15

[270] There is little or no evidence as to the state of the building work at the time the final code compliance certificate was issued on 11 September 1998. In particular, there was no contemporary photographic evidence. Photographic evidence has been produced of destructive work undertaken in the course of some remedial work. Those photographs were taken by Mr Blaiklock in late November 2004 and early 2005. In addition, photographs were produced by representatives of Mr Grigg's firm and Mr Jordan, both in 2007. 20

[271] The photographic evidence was the subject of criticism on behalf of the Council. The concern was that they did not demonstrate damage to all of the units which were the subject of the claim. In fact, damage shown as a result of targeted repairs on unit C involved a dwelling that is not the subject-matter of the present proceeding. 25

[272] As I observed earlier,²⁴¹ the photographic evidence demonstrates systemic failure. I have no difficulty in drawing an inference that the damage shown to have occurred in respect of those units which were opened up and repaired (in whole or in part) is representative of the type of damage remaining units have suffered. Subject to evidence that certain defects applied only in particular types of units, there is nothing to suggest any reason why other units might have been constructed differently. I deal with individual claims on that basis. 30 35

[273] I have already assessed the three major causes of damage.²⁴² It is unnecessary for me to discuss individual claims in respect of alleged defects going beyond the two major causes to which I have referred. 40

[274] In the fifth amended statement of claim (the live pleading for the purpose of trial) the same allegations of defects and negligence are made in respect of each individual plaintiff. Because the nature of the damage was systemic throughout the development, it is possible to consider (in relation to the claims

240 Todd et al, para 5.1.

241 See para [41] above.

242 See para [61] above.

against the Council) the allegations of negligence under three headings (the grant of the application for a building consent, the inspection process and code certification) without the need to discuss factual issues relating to particular units independently.

5 [275] In analysing individual claims, I adopt the following methodology. First, I outline the essential factual background pertaining to each individual plaintiff. If, in the course of that discussion, it becomes clear that the claim can be determined on some preliminary basis, I deal with that issue in that section of this judgment. I then go on, separately, to deal with the various claims of
10 negligence against the Council under the consent, inspection and certification headings by reference to the conduct of Council officers in those processes.

(ii) Mr and Mrs Sangha

[276] On returning from the United Kingdom in May 2004, Mr and Mrs Sangha decided to settle in New Zealand. After initial research, they saw
15 an advertisement for unit D of Sunset Terraces and, in May 2004, visited the property with an agent from Harcourts' Real Estate. The marketing material made available to Mr and Mrs Sangha highlighted location, the need for little maintenance, shared facilities (such as a swimming pool and tennis court), good security and off-street parking. The idea that the body corporate would take
20 responsibility for maintaining the grounds of the development appealed to Mr and Mrs Sangha.

[277] After viewing the unit, Mr and Mrs Sangha were informed of some problems with the deck. The agent told them that the body corporate had instructed a building company to assess all units for weathertightness. The
25 Sanghas were advised that a report was available detailing the work required to remedy problems with the deck. Further, Mr and Mrs Sangha were told that an independent engineer had been engaged to oversee the work.

[278] On leaving the property, Mr and Mrs Sangha were under the impression that the existing owners of unit D would complete any remedial work before settlement of any sale or, if that were not possible, would meet the
30 quoted cost of repairs by way of abatement on settlement.

[279] The unit had been offered for sale by auction. The auction was scheduled for 27 June 2004. Mr and Mrs Sangha spoke to their lawyer and, after obtaining advice, asked the real estate agent to obtain a copy of the report
35 commissioned by the body corporate, a copy of the quote to repair the unit, the contact details of the body corporate secretary and a copy of the body corporate's most recent annual general meeting. That information was obtained.

[280] Mrs Sangha also went to the Council's offices and inspected the Council's property file for the unit. She obtained confirmation that the code compliance certificate for the unit was valid and obtained a copy of it. She
40 requested and paid for a LIM for the unit.

[281] Mrs Sangha's evidence is that she and her husband would not have proceeded with the purchase of the unit had the Council information disclosed that there was a problem with the building.

45 [282] Having contacted the body corporate secretary, Mrs Sangha was advised that building work for the development would begin in late 2004. Gunac had been commissioned to complete those repairs. Mrs Sangha spoke to Mr Sheppard, from Gunac, and received an assurance that work would begin in

the spring. In the meantime, Mrs Sangha received the body corporate building report, the Gunac report and quotation on unit D, the LIM and the minutes of the annual general meeting of the body corporate held on 26 April 2004.

[283] A pre-auction agreement for sale and purchase was negotiated. Two special conditions were agreed. First, that the existing owners of unit D would carry out the work to remedy the property in accordance with Gunac's recommendations but, if the work was not done by settlement date, then an allowance of \$15,806 plus GST would be retained in the Sanghas' solicitors' trust account to meet payment of the repair work. That figure was, at the time, Gunac's quotation for repair work.

[284] Mr and Mrs Sangha purchased the property in late June 2004 for \$361,000 on that basis. Settlement was effected on 30 July 2004, after Mr and Mrs Sangha's solicitors had received from the body corporate secretary a certificate under s 36 of the Act dated 8 July 2004.

[285] In cross-examining Mrs Sangha, Mr Heaney focused on the question of reliance. Did Mr and Mrs Sangha, in fact, rely on the Council's code compliance certificate to enter into the agreement for sale and purchase?

[286] Mrs Sangha accepted that, at the time she and her husband entered into the agreement to buy unit D, they knew of water ingress problems. They believed that those problems would be remedied by work to be carried out by Gunac and they were protected through the agreement with the vendor to abate the purchase price. Mrs Sangha did not accept Mr Heaney's proposition that any loss she and her husband had suffered was occasioned more by the gamble they took on the cost of repairs being of or in the vicinity of the agreed credit, rather than any reliance on the code compliance certificate.

[287] Mr and Mrs Sangha are in a different position from other individual plaintiffs. They bought the property in 2004. They knew of the existence of the Prendos report commissioned by the body corporate and had a copy of the minutes of the body corporate's most recent annual general meeting, which referred to the work being undertaken. Although Mrs Sangha went to the Council's offices and inspected its file, the information she obtained in relation to the code compliance certificate was, effectively, spent. Mr and Mrs Sangha were aware of ingress problems unknown to the Council in 1998. The certificate spoke as at September 1998. Mr and Mrs Sangha's decision to purchase was made in 2004.

[288] The contract for sale and purchase of the unit was entered into before the intended auction. The abatement in purchase price negotiated to permit recovery of expected costs of repair is significant. At that stage, Mr and Mrs Sangha knew of the water ingress problems and believed they would be remedied by work to be carried out by Gunac and that they were protected through their agreement with the vendor to abate the purchase price. They agreed to buy the unit based on their judgment of the value of the abatement, not on the basis of the Council's code compliance certificate.

[289] Although the issue may be analysed in different ways, I take the view that Mr and Mrs Sangha's reliance on the abated purchase price was an intervening act which broke the chain of causation. For that reason, their claim against the Council must fail.

(iii) Mr Devlin

[290] Mr Devlin became interested in acquiring a unit at Sunset Terraces at the time of its development. In 1997, he worked for Westpac Banking Corporation. One of the developers, Mr Barton, was a Westpac customer. Mr Devlin was his accounts manager.

[291] Mr Barton represented to Mr Devlin that Sunset Terraces was a superior development of high quality. Construction had not yet begun. However, Mr Barton provided Mr Devlin with a brochure outlining the nature of the development.

[292] On 14 June 1997, Mr Devlin and his wife entered into an agreement to buy unit F for \$300,000. The agreement was subject to solicitor's approval. Before the due date for settlement (but while the agreement was unconditional) Mr Devlin's solicitor received a copy of the Council's code compliance certificate and a certificate of practical completion. The developers' solicitors' letter was dated 19 May 1998. Mr Coughlan's first letter to those solicitors certifying practical completion was dated on the same day. I infer that the certificate of practical completion forwarded to Mr Devlin was the one signed by Mr Coughlan on 19 May 1998.

[293] Mr Devlin received those documents by facsimile from his solicitor on 4 June 1998. That was the intended settlement date to which the developers' solicitors referred in their letter of 19 May 1998. Mr Devlin gave instructions to proceed with settlement. Settlement was effected the same day.

[294] Subsequently, Mr and Mrs Devlin parted. During the period of separation, Mrs Devlin resided in the unit with their two children. Not long after, Mrs Devlin died. Mr Devlin continued to reside in the unit after his wife's death.

[295] Mr Devlin accepts that (during the time he owned the unit) he learnt, from talking to other owners, that water ingress problems were present, particularly when there was rain. But there were no leaks in unit F and Mr Devlin paid little attention to what was said to him.

[296] Mr Devlin became aware that, in December 2002, the body corporate had instructed Prendos to provide a preliminary report on the weathertightness issues at Sunset Terraces. He read the Prendos report in January 2003. That was the first occasion on which he appreciated that unit F had serious problems and would require repair.

[297] Because of the stress of separation and his late wife's untimely death, it is understandable that Mr Devlin has little recollection of what discussions took place around the time the Prendos report was received and a quotation for remedial work obtained from Gunac.

[298] In May 2004, Mr Devlin began a relationship with his new partner. She had three children. It was necessary for Mr Devlin and his children to move out of the unit at that time so all could live together.

[299] In order to obtain legitimate tax advantages, Mr Devlin was advised to incorporate a company to acquire the unit and to provide some credit (\$40,000) on the purchase price to cover the cost of expected repairs. Mr Devlin assumed that he would be able to recover the \$40,000 from any liable party, as well as any additional losses suffered.

[300] Mr Heaney's primary attack on Mr Devlin's case was to question whether Mr Devlin personally had suffered loss. Mr Heaney contends that the

loss is that of Devlin Properties and that Mr Devlin has no basis on which to seek relief personally from the Council. Both Mr Heaney and Mr Maclean, for the designer, suggested that any personal loss arising from alleged reliance on the code compliance certificate and the certificate of practical completion ended when Mr Devlin transferred the property in 2004, to Devlin Properties. 5

[301] At the end of his evidence, I asked Mr Devlin about the company arrangement. The following exchange occurred:

“The arrangements with the company. Now first of all was there an agreement for sale and purchase signed between you personally and the company? – To the best of my recollection no. I would have signed a transfer document of some description with the solicitor. 10

So the transfer is likely to be the only document evidencing the property going into the name of the company. Is that right? – Correct yes. 15

And that document seems to have been lost by your solicitors. Is that right? – It has yes.

Did you obtain a valuation for the purchase price? – The property was transferred based on the Government valuation. I didn’t obtain a registered valuation. 20

Am I right that the company pays you the purchase price fixed by reference to the Government valuation less \$40,000? – The actual transfer was for level of the Government valuation and [the] following business day I transferred \$40,000 to the company. It may be same day, or the following day. 25

The funds required to complete that settlement were they borrowed by the company or did they come from your personal borrowings? – The company borrowed 80% of the value of the property. I gifted if that’s the right [word] the balance of the deposit to the company. 30

So immediately after settlement the company’s books look something like this asset property worth Government valuation? – Yes. 35

Asset to \$40,000 received from Mr Devlin? – Correct.

Liability 80% of Government valuation on loan from financial institution? – Yes. 40

Possibility liability depending on precise structure, debt to you for balance of purchase price? – Correct.

I take it that the borrowings to fund that purchase were secured against the unit? – Correct yes, no collateral security apart from my personal guarantee its purely secured against the unit. 45

Was there any actual change to the level of indebtedness secured by mortgage against the property before and after settlement of that transfer?
– Yes I did increase the mortgage from memory, increased enough for that \$40,000 transfer and maybe a bit more for incidentals.

5

So in essence Westpac mortgage? – Yes at the time.

So effectively the Westpac mortgage over the unit simply acquired another covenantor namely the company? – Correct yes the previous mortgage was to Westpac in my personal name.

10

Now I don't want to put this in absolute terms it may be an issue I have to determine. Your analysis of the situation as I understand it is this. The \$40,000 represented what you believed at the time was the likely cost of rectifying the defects that had been identified? – Including the associated legal costs.

15

That you regard yourself effectively as an indemnifier for the company in respect of any further costs that may be incurred? – I had not thought of myself anything different. I was still personally liable if the costs were more or less etc.

20

In practical terms leaving aside the legal consequences if you have to borrow to complete the work that would be secured against the property to the extent possible and the bank would be left with covenants from yourself and the company? – Correct.

25

The transaction as we've unpacked it was one that you on both sides of the transaction company and individually, believed would take effect in that form but there is no documentation to provide a trail to? – There is no documentation at all.

30

Apart from the transfer? – I did the transfer in good faith and it seemed to me logical to take advantage of legitimate tax advantages. I was certainly not aware at the time it would have any impact on proceedings and my subsequent right to sue the Council and the developer.

35

Looking at it from your personal position your personal loss would be measured to the extent to which you would otherwise be required to advance funds to the company to meet litigation and repair costs or your liability to a third party financier for borrowings? – My understanding of that question is I am liable for my personal loss would be whatever I need to write a cheque out for the legal and repair costs."

40

[302] Mr Devlin and his late wife acquired title to unit F well before damage manifested itself in March 2000. His solicitor had obtained a copy of the code compliance certificate. Mr Devlin was someone to whom the Council owed a duty of care.

45

[303] Unfortunately, Mr Devlin chose to transfer the unit into the name of his company in 2004, at a time when he was aware of water ingress problems that

had manifested themselves and of the remedial work that Gunac was to complete. At that point, the company (being a distinct legal entity from Mr Devlin)²⁴³ obtained title with knowledge of those defects. For reasons similar to those given in respect of Mr and Mrs Sangha's claim, the company could not have sued the Council successfully.

5

[304] The claim has been brought in Mr Devlin's name alone. I infer that, at the time of the transfer of the property into the name of Devlin Properties, Mr Devlin held the property both in his own right and as successor to the property of his late wife. It is clear that a loss of \$40,000 was occasioned to Mr Devlin as a result of advances made to the company, being the anticipated repair costs. Those costs arose from a time that preceded the manifestation of damage and was contemporary with Mr Devlin's ownership of the property. In those circumstances, I find that loss was suffered by Mr Devlin personally, but that loss could be no more than the \$40,000 advanced. Whether, in fact, any loss is recoverable may need to be determined at a quantum trial, where the extent of Mr Devlin's personal loss can be explored more fully.

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(iv) *Michelle and Lisa Turner*

[305] Michelle and Lisa Turner are sisters. They own unit G. They are young, in their early 20s, and purchased the unit to give them a start in life at the same time they began to work. They mortgaged heavily to acquire the unit. They presently live in the unit, though initially it was leased to tenants.

20

[306] The Turner sisters acquired the unit at the suggestion of their father, who (not unreasonably) saw the acquisition as a means for them to start a property portfolio at an early age. Their father's company acquired the unit from Mr and Mrs Barton in consideration for a debt owed to their parents. The two sisters decided to acquire the unit from their father's company in April 2002.

25

[307] On 15 April 2002, an agreement for sale and purchase was signed. A copy of the Council's code compliance certificate was obtained by their solicitor. On 30 April 2002, finance was approved. The solicitors were instructed to declare the agreement unconditional. A s 36 certificate from the body corporate's secretary was received on 1 May 2002. Settlement took place on 6 May 2002.

30

[308] During the course of two separate views of the development undertaken during the course of the trial, I was able to observe damage to unit G. I am grateful to the Turner sisters for making their unit available for the Court, counsel and the experts to inspect on those occasions.

35

[309] The inspections revealed considerable damage caused by water ingress; particularly in the areas of the deck and wing walls, soakage from which has led to rotting of the wooden framing. Further, in their bathroom, directly under the upper roof line, there was a large hole which had developed through constant ingress of water from that source. Visually, the condition of the unit demonstrates starkly the poor quality of the building work undertaken during the course of the project.

40

243 *Salomon v Salomon & Co Ltd* [1897] AC 22 and *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

[310] In November 2002, there was minor flooding on the ground floor kitchen and dining area. The Turners thought this was a “one-off occurrence” and made a claim on contents insurance. However, in late December 2002 or early January 2003, the unit was flooded again.

5 [311] A company called Drain Surgeons Contracting Ltd inspected the unit and advised that excavation work was necessary to establish the cause of the problem. That was done on 24 January 2003 and the Turners were invoiced for \$14,665 plus GST for that work. The Turners did not learn of water ingress problems for the entire development until 27 February 2003, when the body
10 corporate’s annual general meeting was held.

[312] After the January drainage work was completed, unhappy differences emerged between the Turners and the body corporate. They had received advice from Drain Surgeons that the problem was on common ground. Yet the body corporate declined to meet the costs of the Drain Surgeons’ bill for repairs.

15 Ultimately, the body corporate contracted another company to undertake the repairs.

[313] About six weeks after the work was done, in March 2003, further flooding occurred. Understandably, the Turners’ tenants became annoyed. The Turner sisters were advised, on a later inspection, that the repair work had not
20 been completed adequately. More drainage work was undertaken, but the Turners were required to meet that bill themselves. That cost \$10,341, which they had to borrow.

[314] Mr Heaney questioned the Turners about the degree of maintenance they carried out on the unit. They accepted they had not carried out much
25 maintenance, but said that when they acquired the property it was almost new. Some gutter cleaning had been carried out by one of the sister’s boyfriend.

[315] Ms Lisa Turner confirmed that they had not seen the Prendos report until they began to prepare for trial.

[316] I am satisfied that, at the time damage manifested itself, Michelle and
30 Lisa Turner owned unit G. They had made inquiries prior to settlement, including obtaining a copy of the code compliance certificate issued by the Council. Based on that specific reliance and the type of community reliance to which *Hamlin*²⁴⁴ refers, a duty of care was owed to them by the Council.

(v) *Mr Halford*

35 [317] Mr Halford acquired unit N. His attention was first drawn to the unit in mid-1999. Mr Halford had advertised an intention to trade a house he owned in Taupo for something closer to Auckland, where he lived. The property was purchased at a time prior to manifestation of damage.

[318] Mr and Mrs Barton answered that advertisement. As a result,
40 Mr Halford was taken to see the Sunset Terraces development. Mr Halford was impressed by its layout and facilities. Although he inspected the unit twice, he saw nothing of concern. He realised that monolithic cladding had been used in construction but thought nothing of that because his home in Remuera was also built using that cladding and, in 13 years, no problems had evidenced
45 themselves.

244 [1994] 3 NZLR 513 (CA).

[319] Prior to settlement, Mr Halford's solicitor provided to him a copy of the body corporate rules, the certificate of title and the deposited plan. On or about 1 September 1999, his solicitor received a s 36 certificate for the unit, setting out the contributions required. Settlement was effected on 8 October 1999.

[320] Mr Heaney questioned Mr Halford about the timing of his knowledge of water ingress and cracking problems. He said those were first drawn to his attention by tenants in 2002 and 2003, before he moved into the property. 5

[321] Mr Halford accepted that he was induced to enter into the agreement for sale and purchase by what Mr and Mrs Barton said to him and did not make it a condition of purchase that a LIM was required. 10

[322] Mr Halford accepted that no maintenance programme was in place for the unit and that no work had been carried out on unit N until unit C was opened up as part of investigatory work. The cladding had covered all defects. Mr Halford explained that he did not consider maintenance was necessary for a unit that was only 18 months old. Mr Halford has seen no sign of leaking since the targeted repairs were undertaken. 15

[323] As someone who purchased his unit in 1999, before manifestation of the damage, Mr Halford is a person to whom the Council owes a duty of care.

(vi) Mr and Mrs Parkinson

[324] Mr and Mrs Parkinson first viewed unit L in about July 2001. They were already living on the North Shore but wanted to move to a home from which they could travel more conveniently to their workplace. Mr and Mrs Parkinson were looking for "a more modern home that would be low maintenance and easy to look after" when they retired. 20

[325] Mr and Mrs Parkinson were impressed with the modern design and materials used in the Sunset Terraces development generally. Because it was relatively new, they did not consider a building inspection to be necessary. They looked at the unit three times before deciding whether to buy. 25

[326] Mr Parkinson was aware that the Council had an obligation to certify construction of building work during the course of the development. The Parkinsons' solicitor received a copy of the Council's code compliance certificate on or about 7 June 2001 from Mr and Mrs Parkinson. 30

[327] On 3 August 2001, an agreement for sale and purchase of unit L was executed by Mr and Mrs Parkinson. It was conditional on both finance and the unconditional sale of their existing property in Birkenhead. 35

[328] On 10 August 2001, the solicitor for Mr and Mrs Parkinson advised the vendors' solicitor that both conditions had been satisfied. The agreement was declared unconditional. Settlement was scheduled for 7 September 2001.

[329] Mr and Mrs Parkinson's solicitor received a settlement statement from the vendors' solicitor together with a s 36 certificate. They were received by facsimile on 4 September 2001, after the agreement had been declared unconditional. Settlement occurred, as envisaged, on 7 September 2001. 40

[330] The s 36 certificate provided to the Parkinsons' solicitor contains a "disclosure", by referring to reports received from Prendos in relation to the building. The disclosure must refer to the first Prendos report, received by the body corporate in 2000. Mr Parkinson accepts that no further inquiries were made after the s 36 certificate was received by his solicitor. He says that he never saw the s 36 certificate until preparing evidence for this trial. 45

[331] Mr Heaney made something of this point by suggesting that the Parkinsons had been remiss in failing to make further inquiries on receipt of the s 36 certificate. I see no merit in that suggestion because the certificate was not received until shortly before settlement at a time that the agreement was unconditional. At that point, the Parkinsons were committed to buying the property and any inquiries they may have conducted after receipt of the s 36 certificate could not have contributed to any loss they suffered.

[332] Mr Parkinson and his wife moved into unit L in early September 2001. They lived in the unit. The first indication they had of any problems within the development was when Mr Parkinson saw repairs being carried out to the gable end wall of unit C, in about February 2002. In December 2002, the body corporate secretary had instructed Prendos to provide a report on the entire development.

[333] At the time that work was being carried out, Mr and Mrs Parkinson were living in the unit. They moved to England in May 2006 and have rented the property since that time.

[334] I am satisfied that Mr and Mrs Parkinson committed themselves to the unit at a time preceding their knowledge of the manifestation of damage. However, at the time of settlement they were on notice that there were water ingress issues. Mr and Mrs Parkinson can point specifically to obtaining a copy of the code compliance certificate before the agreement for sale and purchase was declared unconditional. The conditional nature of the agreement was unrelated to building issues.

[335] I hold that they fall within the category of persons to whom the Council owed a duty of care based on the community expectations described in *Hamlin*.

(9) *The Blue Sky claims*

(a) *Background*

[336] Blue Sky sue the Council in negligence and on the basis of negligent misrepresentation, arising out of an alleged false statement made in a LIM. In this part of my judgment, I consider the claims in negligence only.²⁴⁵

[337] Mr Bryers, a former principal in Blue Sky, explained the process by which Blue Sky acquired an interest in units A, B, E, I, J, K, M, O, P, Q, R and S. The explanation is best put in his own words:

“7. The ARPT system is marketed to them on the basis that it is a ‘hassle free investment’, with all the benefits of owning residential properties but without the owners having to put in the time and energy that is needed to manage most rental properties.

8. Instead, the owners contract with ARPT, through the lease and the property management agreement, for it to take on the role of landlord. Nevertheless, the clients are essentially ordinary New Zealanders wishing to secure their savings in residential property.

9. The system worked in the following way. Porchester Limited generally purchased a number of dwellings within a particular Body Corporate. In the case of Sunset Terraces, Porchester Limited purchased 12 units from Setsun Properties Limited. Those units were

245 The negligent misrepresentation claim is addressed in Part 11 of this judgment.

- A, B, E, I, J, K, M, O, P, Q, R and S. I shall refer to these units collectively in my evidence as 'the ARPT units' . . .
10. Blue Chip [Blue Sky's parent company] and ARPT have no link with, or interest in, Setsun Properties Limited. Neither does Porchester Limited. 5
 11. Setsun properties Limited entered into agreements with the trustee of the Werribee Trust for the purchase of the ARPT units. As an example, a copy of the agreement between Setsun Properties Limited and the Werribee Trust for unit S is in the agreement bundle of documents.
 12. Porchester Limited was nominated as purchaser by letter dated 5 November 2002 . . . 10
 13. Under the ARPT system each sale to the investors followed the same procedure, which I set out below, using Unit E/270 Sunset Road as an example.
 - (a) Generally, a valuation report was obtained from a registered valuer, in this case, from Davies Valuations Ltd, dated 19 September 2002. 15
 - (b) A Land Information Memorandum dated 1 October 2002 was obtained from the North Shore City Council by Porchester's and ARPT's solicitors, Walters Williams & Co. The Land Information Memorandum for Unit E, and the other units, were provided to the ARPT by its solicitors under cover of a letter dated 3 October 2002. 20
 - (c) Porchester entered into a lease agreement with ARPT dated 18 October 2002. 25
 - (d) Porchester then entered into an agreement with Mr and Mrs Haggie or their nominee to purchase the unit dated 21 October 2002.
 - (e) At the same time as the sale and purchase agreement was entered into, ARPT entered into a property management agreement with Mr and Mrs Haggie. The property management agreement set out the terms under which ARPT would manage the property for the duration of the lease. 30
 - (f) The settlement date for the transaction was 20 December 2002.
 14. The key features of the leases at that time, and referring to unit E as an example, were: 35
 - (a) The term of the lease was 182 weeks and could be extended for a further year (clause 1.1);
 - (b) The lease was to be interpreted within the terms and provisions of the Residential Tenancies Act 1988 (clause 1.2); 40
 - (c) ARPT paid rent of \$470.00 per week to the owners (clause 2.1);
 - (d) ARPT was obliged to ensure that the unit was rented to a tenant for principally private residential purposes (clause 3.2);
 - (e) ARPT paid the outgoings on the property (clause 3.4). Although not stated in the lease, it was agreed between the contracting parties that this included an obligation to pay the Body Corporate Levies. 45
 - (f) Under clause 3.5, ARPT had an obligation to:
 - 'Maintain the property (both exterior and interior) and

chattels in a good state of repair during the term and return the property and the chattels to the owner when the term ends in the same state of repair as they were at the commencement date, provided however that the owner shall permit alterations and improvements and improvements to be carried out to the property by the lessee/tenant shall under the provisions of 2.1 above and the Schedule pay the owner alterations compensation for reinstatement of the property.’

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(g) ARPT was obliged to comply with all Territorial Local Authority by-laws and/or regulations that applied to the property from time to time (clause 3.10);

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(h) ARPT had an option to purchase the property back under clause 9 at the end of the lease at a set price, which in the case of Unit E was \$462,000.00 (clause 9.1);

15. The transaction for unit E was basically the same as happened for all the ARPT units.”

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[338] There is no satisfactory documentary evidence about the terms on which Porchester acquired units from the developers’ company Setsun Properties Ltd, whether on behalf of the Werribee Trust or otherwise. Mr Heaney submitted that the absence of evidence was fatal to Blue Sky’s claims because the property was acquired by a different legal entity and there was no evidence to suggest that entity was induced to enter into an agreement to buy a unit on anything other than its own judgment.

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[339] I endeavoured to obtain further clarification from Mr Bryers on the transactional trail. Once again, it is preferable for Mr Bryers’ evidence to be recorded in his own words. My questions and his answers are set out below:

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“Was it usual practice for the Setsun Porchester agreement to be brought into existence before or at the same time as the sale agreement was signed?
– You mean the nomination from Werribee to Porchester. Werribee would enter into the initial agreement as a bare trustee at a time when we had obtained our normal independent information[, which] normally consisted of three primary pieces of information which would be an inspection and a valuation required by normal banks, and a LIM report and then place that stock item on our ledger available for resale to a potential owner. At [the] time we saw a potential owner and given them the documentation and gone over documentation of financial analysis and financial structures they sign an authority to proceed, we would then complete on their behalf loan finance, once finance was available from funders, we would then proceed with nomination to Porchester then proceed with our suite of documents being sale to Mr and Mrs Haggie, the lease. It’s a matter of policy clients are not permitted to purchase without that procedure occurring.

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Was there a normal practice, and if so, what was it, as to the existence of the initial agreement between Werribee and Setsun before the agreement with the subsequent purchaser was signed? – Always and to clarify we would always try and have an agreement conditional as long as possible

provided it was for the purchaser's benefit only to give us the time to complete all of our work and make it available to our process prior to making it unconditional.

Is the other side of that same coin you wouldn't sign up between Werribee and Setsun before you had negotiated an on-sale to the proposed subsequent purchaser? – No if we had no purchaser we would simply settle. 5

At what point in the series of transactions we are speaking about would you expect Werribee, Porchester, whoever, to obtain the LIM report? – In this particular one or as a matter of practice? 10

A matter of practice? – Try and get all due diligence done including LIM prior to going to contract and if we couldn't it would be immediately thereafter. 15

So in cases where it could be established that the LIM was obtained first there would be no need to tick the yes box for the LIM in the agreement? – Correct it was normally I think if I go back to the 2002 environment we were a fledgling company. I recall, haven't got the agreement in front of me, but normally cheeky in not having to pay a deposit so normal absence of conditions was an important tool in negotiating purchase. Invariably at that time we virtually had most of our documentation in place before we went to contract. 20 25

In cases where you had the LIM report before signing up with Setsun there was no need to tick the yes box in the agreement to get a LIM but in cases where you didn't have the LIM at the time of signing up with Setsun it would have been desirable to have that box ticked to ensure that there was an ability to check the LIM before the contract went unconditional? – Normal practice in the event of that occurring we needed a wide due diligence clause which enabled us to exit and the only reason you see it different in this one our only prevention to clear title was the vendor's ability to excuse themselves from a prior contract. 30 35

Look at document D 136. Page 2 special conditions in which the vendor warrants cancellation of an existing contract is that the sort of thing you refer to? – That is highly unusual if ever a condition due diligence clause and if we had a wide due diligence clause it would be specifically for one aspect only. 40

As I look at [the] first page of D 136 neither [the] yes or [the] no box [is] ticked by the LIM is that the same on copy you have? – Yes it is.”

[340] Mr Bryers' explanation revealed a corporate laxity in preparation of important documents required to protect the owner of the unit. It also demonstrated an unfortunate lack of attention to detail. 45

[341] It appears that agreements were entered into between individual purchasers and Porchester to acquire particular units in September and

October 2002. Certificates under s 36 of the Unit Titles Act were issued by the body corporate secretary and received by the solicitor for Porchester on or about 5 November 2002. The purchases were settled on or about 7 November 2002. At the time of these transactions, damage had manifested itself.

5 [342] In the period between the agreements being executed and settled, an extraordinary general meeting of the body corporate was held on 17 October 2002. It was at that meeting that the owners comprising the body corporate resolved to instruct Prendos to report on apparent defects. The minutes of that meeting also record an authorisation to the secretary to obtain an estimate of likely legal costs. The minutes demonstrate that the assembled owners were satisfied that testing was required on units C, F, H and J and they were encouraged to ascertain whether there was specific evidence of water ingress in individual units.

10 [343] The evidence of Mr Leishman (a representative of the present secretary of the body corporate) was that those minutes were forwarded to owners by letter dated 21 November 2002. A “levy statement” was forwarded to owners under cover of the letter enclosing the minutes.

(b) The residential/commercial divide

20 [344] Ms Grant submitted that no duty of care was owed by the Council because the units were acquired for commercial rather than residential purposes. She relied on *Three Meade Street Ltd v Rotorua District Council*²⁴⁶ and *Te Mata Properties Ltd v Hastings District Council*.²⁴⁷

25 [345] I reject that submission. I have held that the Council’s duty attaches in cases where the unit is intended to be used for residential purposes.²⁴⁸

(c) Does the Council owe a duty to a lessee?

30 [346] Secondly, the Council contends that any duty which it might owe to home-owners does not extend to a lessee, such as Blue Sky. Mr Josephson submits that a lessee is not precluded from recovering in these circumstances, relying on *Anns*.²⁴⁹

[347] *Anns* was a case involving long-term leases, but Mr Josephson submits that is insufficient to justify a distinction being drawn between the tenants in that case and the Blue Sky claims. The relevant factor, he submits, is that Blue Sky was obliged contractually to carry out repairs.

35 [348] In the event that I were to hold that Blue Sky was precluded from recovering under the “home-owner” duty, Mr Josephson submits that I should extend the duty to ensure “a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it”.²⁵⁰

246 [2005] 1 NZLR 504.

247 (High Court Napier, CIV 2004-441-151 & CIV 2004-441-569, 17 August 2007, Williams J).

248 See para [220] above.

249 [1978] AC 728.

250 *The Albazero* [1976] 3 All ER 129 at p 137 per Lord Diplock. See also *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895.

[349] Mr Josephson’s first point was based on the definition of “owner” in s 2 of the 1991 Act. He submits that it is sufficiently wide to encompass a “lessee” such as Blue Sky.

[350] The first part of call is that definition. It is true, as Mr Josephson submitted, that the definition gives a wider meaning to the term. In addition to the ordinary and natural meaning of the term, it includes any person who, for the time being, is entitled to the rack rent for the property or who would be so entitled if the land were let to a tenant at a rack rent. The “rack rent”²⁵¹ is one which represents the full annual value of the land.²⁵² There is no evidence that is so in this case.

[351] The term “owner” also includes any person who has agreed in writing, whether conditionally or unconditionally, to purchase the land or any leasehold estate or interest in the land, or to take a lease of the land, while the agreement remains in force.²⁵³ That definition is applicable for the purposes of provisions dealing both with building consents and code compliance certification.²⁵⁴

[352] Mr Bryers’ evidence establishes that Porchester sold the units to various individual purchasers in September and October 2002. On assuming ownership of the units, those purchasers entered into a lease with Blue Sky under which it had responsibility to sublease to tenants. As part of the consideration for taking a lease, Blue Sky agreed to meet any maintenance and repair costs for the units (see cl 3.5 of the lease). Clause 3.5 required Blue Sky to:

“Maintain the property (both exterior and interior) and chattels in a good state of repair during the term and return the property and the chattels to the owner when the term ends in the same state of repair as they were at the commencement date, provided however that the owner shall permit alterations and improvements and improvements to be carried out to the property by the lessee/tenant shall under the provisions of 2.1 above and the Schedule pay the owner alterations compensation for reinstatement of the property.”

[353] That type of transaction does not fall within the extended definition of “owner” because Blue Sky had not agreed in writing to purchase the land or any leasehold interest in it. The reference, in the extended definition, to taking “a lease of the land, while the agreement remains in force” contemplates a transaction in which a person has agreed to acquire a relevant interest in the land and has taken a lease of it, from the vendor, pending settlement.

[354] Blue Sky does not own the fee simple of the land. The individual purchasers who acquired the units from Porchester hold a stratum estate in freehold, comprising the types of fee simple estates to which s 4(2) of the Unit Titles Act refers.

[355] I find that, as a result of its position as a lessee, Blue Sky is not also an “owner” to whom a duty is owed under *Hamlin* principles.

[356] On the second point, Mr Josephson was right to submit that *Anns* recognised a duty in favour of a lessee. In *Anns*, the plaintiffs were lessees,

251 Section 2 of the 1991 Act, definition of “owner”.

252 *Re Sawyer and Withall, Solicitors* [1919] 2 Ch 333 at p 336.

253 Section 2 of the 1991 Act, definition of “owner”, para (b).

254 Section 2 of the 1991 Act.

under long-term leases, of seven flats (described as maisonettes) in a two-storey block at Wimbledon, in London. The use of the term “maisonettes” gives some insight into the nature of the claim in *Anns*. The term, in England, seems to embrace ownership of a unit which is separated vertically from adjoining units, rather than horizontally.

[357] The technique of conveyancing used in respect of maisonettes appears remarkably similar to a unit title development in New Zealand. In *Liverpool City Council v Irwin*,²⁵⁵ a local corporation owed a tower block containing some 70 dwelling units. Access to the various units was provided by a common staircase, together with two electrically operated lifts. The tenants were provided with an internal chute into which they could discharge rubbish and garbage. The individual occupants of each unit had leases and the issue before the House of Lords concerned the obligations of landlord and tenant to be implied into the lease, having regard to the need for tenants to use common areas. Accordingly, the type of situation with which *Anns* was concerned is more nearly analogous to owners of strata titles than their tenants.

[358] In my view, questions of degree are involved in assessing whether a duty of care is owed to a lessee. If, for example, a unit was leased for 99 or 999 years, one could readily infer that anyone acquiring that type of non-commercial leasehold interest was using the premises as a dwelling or subletting it to tenants. On either view, they would have a good reason to protect their long-term investment in the property.

[359] Blue Sky’s interest was both as a lessee (providing it with an opportunity of subleasing the unit for residential purposes) and as manager, for which it was paid a management fee by the owners, although Blue Sky promised to pay a rental of \$470 per week to each owner and undertook responsibility to meet outgoing and attend to repairs. Its real interest was in making a profit from the management agreement. The lease was not intended to provide a long-term investment for Blue Sky.

[360] In my view, the nature of the leasehold interest of Blue Sky was insufficient to place *that company* into the category of a home-owner of the type to whom the Council owes a duty of care based on *Hamlin* principles. In my view, the type of interest acquired by Blue Sky was insufficiently proximate to the Council’s obligations in relation to consent, inspection and certification to justify imposition of a duty of care.²⁵⁶

[361] The alternative argument advanced by Mr Josephson under this head was that I should devise some basis on which Blue Sky could sue as lessee to avoid the possibility of denying a remedy to that company in circumstances in which a rational legal system ought to permit compensation to be claimed.²⁵⁷

[362] I reject that submission. Blue Sky was part of a commercial enterprise well able to take advice on the structure of systems it marketed to individuals and from which it intended to make a profit, including any protections it required. It made a deliberate decision, contrary to the norm, to take responsibility for maintenance and repair costs even though its interest was as

255 [1977] AC 239.

256 See also Master Venning’s observations about the scope of the duty in *De Nagy v Wellington City Council* (High Court, Wellington, CP 141/00, 16 September 2002) at para [36].

257 See para [348] above.

a short-term lessee with an option to purchase. No doubt that decision was made to provide an incentive for purchasers to enter into the ARPT system, as described by Mr Bryers.²⁵⁸ None of those circumstances suggest that Blue Sky ought, for policy reasons, to have an actionable claim against the Council in respect of the interest in the land it elected to acquire.

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(d) Does the Council owe a duty to an assignee?

[363] The individual proprietors of the ARPT units assigned their causes of action to Blue Sky so that it could prosecute the present claim. The assignments were made in or about November 2005. This litigation was commenced in 2004.

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[364] Hickey Properties Ltd was the owner of one of the units at the time of the assignment. All assignments are in the same terms. I use the Hickey Properties' assignment documentation to explain what was agreed.

[365] The deed of assignment recites that Hickey Properties Ltd is the owner of the relevant unit. It also recites that Blue Sky is the lessee, under the terms of the lease agreement into which both parties had entered.

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[366] The deed records that Blue Sky has a contractual obligation under the lease to undertake repairs and maintenance of the unit and that Blue Sky has an option to purchase the property on the terms set out in the lease.

[367] The preamble of the deed referred to the present proceedings and continued:

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"D. The Proceedings were issued on the basis that the Property is defective as it is not watertight and various third parties named in the Proceedings have been negligent in failing to act reasonably to ensure that the Property was watertight.

25

E. The Assignor and Assignee agree that in consideration for the Assignee arranging and paying to rectify the defects in the Property and any consequential damage to the Property the Assignee will take an assignment of all the Assignor's rights, obligations and interests in the Proceedings.

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F. The Assignor and Assignee wish to record their agreement to assign the Assignor's rights in the Proceedings to the Assignee in this deed."

[368] Clause 1 of the operative part of the deed states:

"The Assignor assigns to the Assignee absolutely all the Assignor's rights, obligations and interest in the Proceedings."

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[369] Clause 3 of the deed gave sole responsibility for conduct of the litigation to Blue Sky, including the defence of any counterclaim or allegation of contributory negligence. From the date of commencement of the proceeding Blue Sky was responsible for all costs relating to the proceeding.

[370] Clause 4 dealt with the application of any proceeds recovered as a result of the proceeding:

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"4.1 Any fruits of the Proceeding whether resulting from a judgment or settlement in the Assignee or Assignor's favour, shall be applied;

(a) First, to reimburse the Assignee for all costs paid under clause 2.2(b) of this deed, and

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258 See para 7 of Mr Bryers' brief, set out at para [337] above.

(b) Second, to the Assignee as reimbursement for the loss in market value of the Property due to the water tightness defects and consequential damage, or the costs incurred in remedying the defects and consequential damage to the Property, whichever the case may be.

5

4.2 The Assignor acknowledges that it relinquishes any rights it may have had to the fruits of the Proceeding, but for this deed.”

[371] The individual unit proprietors, by entering into the deed of assignment, relied upon their contractual obligation with Blue Sky to repair the units.

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Assuming solvency on the part of Blue Sky, the owners were protected against any loss they might incur. In the event of intervening insolvency, absent re-assignment of the cause of action, it is doubtful that the individual owners could launch fresh proceedings because any cause of action in their favour has been transferred to Blue Sky.

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[372] The problematic issue on the claim qua assignee is that, ordinarily, an assignee will only be entitled to sue for those losses suffered by the assignor.²⁵⁹

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While some cases appear to have blurred the distinction between assignment of the assignor’s cause of action for damages and an assignment of the benefit of the assignor’s cause of action,²⁶⁰ the better view seems to be that the assignee may sue only for losses that could have been recovered by the assignor.²⁶¹ In *Offer-Hoar v Larkstore Ltd*²⁶² Rix LJ said:

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“The courts have to work with the analytical tools which are to hand. But the essence of the matter is that the general principles which have been developed to ensure that claims are confined to victims (the rule that a party may only claim in respect of his own loss; the rule in favour of privity of contract) and that a wrongdoer should not be made to pay compensation which goes beyond his breach (the rule that an assignee may not recover more than his assignor could have recovered), rules which as far as they go are necessary and fundamental to good order and fairness in the litigation of claims, are not, if at all possible, to be allowed to become instruments of maladjustment and injustice.”

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[373] The assignment permitted Blue Sky to sue as if it were standing in the shoes of each individual unit proprietor. As such there is no compelling policy reason to decline Blue Sky standing to sue as assignee. A duty was owed to it, qua assignee, in substitution for the duty owed to the assignor.²⁶³

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[374] But Blue Sky’s claim must fail on causation principles. Only the loss of the true owners can be claimed. There is no evidence that any of the original owners relied on the Council’s actions to acquire the units. Rather, they seem to have bought them as part and parcel of the ARPT system described by

259 See the discussion of this issue by Professor Coote, “Black Holes, Assignment and the Compensatory Principle” (2008) 14 NZBLQ 12. Professor Coote identifies the expression “black hole” as having sprung from the opinion of Lord Keith of Kinkel in *GUS Property Management Ltd v Littlewoods Mail Order Stores Ltd* 1982 SLT 533 at p 538.

260 For example, *Offer-Hoar v Larkstore Ltd* [2006] 1 WLR 2926.

261 At p 2946.

262 At p 2946.

263 Compare *Riddell v Porteous* at pp 9 – 10.

Mr Bryers.²⁶⁴ Nor is there any evidence of the inquiries undertaken by the assignors before they purchased, including their knowledge of the state of the building at the time of acquisition.

[375] In those circumstances, Blue Sky cannot discharge the onus of proving any loss caused by any negligence on the Council's part. 5

[376] On that basis, I find that irrespective of whether a duty of care extends to Blue Sky in these circumstances (because such a duty is likely to have been owed to the assignors) there is no causal link between Blue Sky's claimed losses and any negligence that might be found on behalf of the Council or the designer. 10

[377] It follows that Blue Sky's claims, qua assignee, fail.

(10) Analysis of individual proprietors' claims against the Council

(a) The successful claimants

[378] I have held that the Council owed an actionable duty of care to Mr Devlin, Michelle and Lisa Turner, Mr Halford and Mr and Mrs Parkinson. I have also held that the defects in respect of which each claim was made were common to all. I now consider their claims by reference to the three Council functions in issue and the two relevant causes of loss. 15

(b) Building consent issues

[379] Each of the relevant claimants alleges that the Council was negligent in issuing a building consent for the Sunset Terraces development. The allegation is that the Council acted negligently because, on the basis of the information supplied in the plans and specifications, it could not have been satisfied, on reasonable grounds, that the building work, if carried out in accordance with the plans and specifications, would comply with the Code. 20 25

[380] Six specific particulars of negligence are pleaded:

- (a) There was a lack of detail in the plans for the location of downpipes or, if they were to discharge to a lower level roof, a spreader.
- (b) There was an absence of detail relating to the installation of an edge/verge tile and weatherproofing of the verges. 30
- (c) No method for waterproofing the tops of the wing walls and parapet walls was disclosed in the plans.
- (d) The plans provided an inadequate waterproofing detail for the decks; although Butynol was specified, the outer edge detail did not conform to the manufacturer's technical information. 35
- (e) There was no detail in the plans for retaining the ground between adjacent units at the intertenancy walls.
- (f) There were no spot-finished surface levels or provision for drainage shown on the plans.

[381] Primary evidence on building consent allegations against the Council was given by Mr Flay, currently employed by the Council as a technical adviser responsible for investigating and representing the Council in building defect claims. Mr Bayley gave some expert evidence on the topic also. 40

[382] Mr Flay has extensive experience in local government, beginning his career as a building inspector with the Rodney District Council in 45

264 See para [337] above.

November 1996. Both as an inspector and in a building consultancy business of which he was a principal during 2001, Mr Flay has been engaged in the processing of building consents, undertaking inspections and the certification process.

5 [383] Although Mr Flay was not involved personally in any of the processes undertaken by Council officials in respect of Sunset Terraces, I am satisfied that he is sufficiently familiar with documentary evidence, relevant practices at material times and the alleged defects to give reliable evidence on the topics raised. The following summary, in relation to building consent issues, is largely
10 uncontested and is taken from Mr Flay's evidence-in-chief.

[384] The designer, Mr Coughlan, was known to the Council before the Sunset Terraces development. One of his designs, on a previous project, had been reviewed by the Building Industry Authority as part of its audit of the Council in 1995. The Authority had approved Mr Coughlan's design of a
15 three-townhouse development in Birkenhead, all of which were to be clad in Harditex and terraced.

[385] There were 13 sheets of plans prepared by Mr Coughlan. The plans were also signed by a design engineer, Mr McLintock. After the Council had reviewed the plans, Mr McLintock provided two producer statements to the
20 Council at its request; one was for the design of beams, lintels, cantilevered columns and retaining walls and the other was for the design of joists, lintels, beams and columns for type C units.

[386] The term "producer statement" is defined by s 2 of the 1991 Act to mean:

25 . . . any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications . . .

[387] The only producer statements provided to the Council before the building consent was granted were those supplied by Mr McLintock. Others
30 (for example, from a firm of plumbers, a drainlayer, a registered surveyor, a sealant supply company, Mr McLintock, the developers, a landscape architect and a tiler/waterproofer, Mr Joo) were supplied during the inspection phase. The preconsent statements are known as PS1 statements and are specifically
35 provided so that the Council can rely upon them to issue the building consent.

[388] Producer statements (known as a PS4) obtained during the inspection phase were provided by professionals who had monitored and observed building work during the construction process. Those statements were provided to assist the Council to determine whether to issue a code compliance
40 certificate. The producer statement from Mr Joo was a PS3, a statement provided by a contractor designed to assure the Council that particular work has been done satisfactorily before code compliance was certified.

[389] The Council charged the developers approximately \$10,000 (including GST) for building consent procedures to be undertaken. Of that \$3300 was payable to the BIA and the Building Research Association of New Zealand.
45 While Mr Flay suggested that the balance, \$6700, meant that it was "simply

not possible for the Council to economically carry out more inspections than were done”, that overlooks the fact that the Council had power to set its own fees at a level commensurate with the risks it assumed as part of the building control process.²⁶⁵

[390] One of the reasons the 1991 Act was enacted was to promote innovation and competition within the relevant markets. In pursuing that goal, Parliament cannot have intended that Council ratepayers would subsidise uneconomic developments. The Building Act provided that if any charge fixed was inadequate, in any given case, to enable a territorial authority to recover its actual and reasonable costs, the territorial authority was authorised to require the relevant person to pay “an appropriate additional charge to the territorial authority”.²⁶⁶ Free market principles dictate that, if the developer cannot pay fixed charges, it should not proceed with its project. 5 10

[391] Mr Flay’s unchallenged evidence was that the degree of knowledge of weathertightness issues in 1997 was “minimal” compared to what it is today. That is a factor to be taken into account in determining whether the Council was negligent in performing its functions under the 1991 Act. However, the need to weatherproof a building is a basic tenet of building. Any allowance could only be made in respect of specific weathertightness issues related to particular products used to construct the dwellings. 15 20

[392] Mr Flay sought to minimise the extent to which the Council was likely to have concerned itself with weathertightness issues as part of the three processes in issue. For example, he suggested that it would not have occurred to him, some ten years ago, that people purchasing units might rely on a territorial authority to protect themselves from economic losses due to leakages. I have no doubt that Mr Flay honestly believed that. But the proposition does not withstand analysis. 25

[393] It was the Council’s obligation in the building consent phase to predict whether the building work would comply with the Code. Part E of the Code dealt specifically with external moisture issues.²⁶⁷ At the building consent stage, the Council was obliged to consider whether those provisions would be complied with. 30

[394] Mr Flay’s opinion, based on his experience, was that the plans for this particular development were typical of the level of detail required at the relevant time. He took the view that a “certain degree of reliance must inevitably be placed on the skills and competence of the builder, and other sub-trades, to construct the buildings according to all Code requirements and applicable manufacturer’s specifications” because it was “simply not practicable” to specify the level of detail otherwise required. 35

[395] As a matter of law, that must be so.²⁶⁸ Section 34(3) of the 1991 Act requires, as a prerequisite to the grant of a building consent, that the Council is “satisfied on reasonable grounds that the provisions of the Code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application”. Nevertheless, questions of 40

265 Section 28(1) of the 1991 Act.

266 Section 28(2).

267 In particular, see cl E2 of the Code.

268 For example, *Morton v Douglas Homes Ltd* at p 601.

degree will remain as to the extent as to which it is proper to leave detail to a tradesperson to complete, particularly when there is no evidence that a full-time project manager will be on site.

5 [396] Of the allegations raised by the individual proprietors, only those relating to the waterproofing of the parapet/wing walls and the decks are directly relevant to the major causes of water ingress I have found to exist.

[397] I can deal briefly with the remaining allegations to which I have already referred.²⁶⁹ The allegations are based, primarily, on the absence of sufficient detail in the plans to alert a builder or tradesperson to what was actually required to comply with the plans and specifications. An allied issue is that the specifications were designed for the prescriptive era, as opposed to the new performance-based regime.

10 [398] The essential difference between the respective experts was that those who gave evidence for the Council and the designer premised their opinions on the ability of a designer or Council official to assume a competent tradesperson would carry out the work, while those who gave evidence for the individual proprietors were less inclined to accept that assumption. On reflection, I consider the better view is that expressed by the Council's and the designer's experts.

15 [399] I base that conclusion on s 34(3) of the 1991 Act. The Council must predict whether there are reasonable grounds to conclude that the work could be carried out in a manner that complied with the Code. To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly coordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a building consent had been reached.

20 [400] The allegations with regard to the wing and parapet walls are based on the absence of a detail which, at the time, could be found readily in the relevant James Hardie technical information booklet. Figure 68 made it clear what detail was required. Both Mr Bayley and Mr Pratt opined that there was sufficient information in the manufacturer's technical information to communicate the relevant methodology to the builder or tradesperson involved. Mr Grigg tended to confirm evidence given by Mr Bayley and Mr Pratt on this topic.

25 [401] Mr Grigg accepted that he had previously submitted designs with a consent application without enclosing the whole of the Harditex technical information. Under cross-examination, he accepted that a territorial authority had never asked for the Harditex manual to be made available to it with the plans and specifications. Further, Mr Grigg accepted that, once a Council officer had turned his or her mind to the application of figure 68, work done in accordance with that detail would comply with building code requirements for waterproofing, particularly E1 and E2.

30 [402] Mr Jordan also accepted that it would be "pretty easy" at the "plan processing stage" for an official to check the current technical information and to be satisfied that work done in accordance with it would comply with the Code.

269 See para [380] above.

[403] In my view, it was open for the Council to be satisfied, on reasonable grounds, that the lack of detail was unimportant. I infer that the relevant Council official dealing with this issue at the time concluded that the waterproofing detail was adequately disclosed in the James Hardie technical information and had reasonable grounds to be satisfied that a competent tradesperson, following that detail, would have completed the work in accordance with the Code. 5

[404] The final allegation relates to inadequate waterproofing detail for the decks. The complaint is that the outer edge detail as drawn by Mr Coughlan did not conform to technical information for a Butyl rubber membrane. 10

[405] The specifications made it clear that Butynol was to be used. Mr Jordan accepted that, in 1997, many territorial authorities accepted plans and specifications and granted building consents without the need for all Butynol technical information to be included. Both Mr Grigg and Mr Pratt confirmed that any reference to Butynol in plans or specifications would lead to the inevitable conclusion that it was the trademark product being used. Technical information was then available to achieve compliance with the Code. 15

[406] For the same reasons that relate to the James Hardie technical information, I find that it was unnecessary for the Council to require additional detail for the Butynol product. In making its predictive assessment, the Council was entitled to assume a competent tradesperson would follow the instructions in the technical manual. The Council, at this stage of the process, was also entitled to assume that the product named in the specifications would, in fact, be used. In my view, the Council had reasonable grounds on which it could be satisfied that the Butynol would be applied in a manner that complied with the Code. 20 25

[407] I find that relevant claimants have not discharged the onus of proving negligence, at the building consent stage, on the part of the Council.

(c) The inspection process

[408] The allegation of failing to exercise due skill and care in inspecting the building work are based on assertions that: 30

- (a) an inadequate number of inspections were carried out;
- (b) there was a failure to inspect with sufficient thoroughness to identify the alleged defects;
- (c) there was a failure to put in place a system of inspection to ensure that “key weathertightness details came under scrutiny”; and 35
- (d) defects were identified but there was a failure to address them adequately before issuing a code compliance certificate.

[409] The Council’s inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council’s obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard. 40

[410] The processes by which inspections were carried out by the Council were described by Mr Flay as pre-line, post-line and final inspections. 45

[411] At the pre-line inspection, the Council was concerned with issues such as:

- 5 (a) bracing and nailing off of the braces
- (b) insulation, if this was in place
- (c) moisture content in framing (18% to 24% – acceptable solution)
- (d) stud and nog spacing, building paper
- (e) timber sizes and grade
- (f) roof framing, including bracing and roofing underlay
- (g) lintels, steel beams, truss layout and fixings
- 10 (h) fixing of wall frames to the flooring structure.”

[412] Post-line inspections typically involved “the bracing sheet nail-off” and occurred when internal sheet linings formed part of those bracing elements of the building. The Council’s concern was to see the bracing sheet nailing before internal linings were plastered.

15 [413] On final inspections, the issues to be addressed were:

- (a) Overall completion of the building
- (b) Ventilation
- (c) Fire rating issues, if applicable
- (d) Handrails
- 20 (e) Window flashings
- (f) Paved/ground levels/inside floor level heights
- (g) Finishing of wet areas
- (h) That all required inspections have taken place
- (i) Completion of documentation including any producer statements
- 25 required.”

[414] None of the elements identified by Mr Flay, in his description of the three inspection stages, deal directly with weathertightness issues contemplated by cl E of the Code.

30 [415] Mr Flay accepted that the Council did not undertake any direct inspection of the cladding system in relation to the Sunset Terraces development. Nor did it carry out roof inspections.

[416] Mr Flay detailed the inspections actually undertaken, as best he could, from Council records. He was able to identify 77 inspections, including four site meetings with Mr Barton and Mr Coughlan. Of the remaining

35 73 inspections, 39 related to structure and 34 to plumbing and drainage.

[417] Mr Flay deposed that the Council was “entirely reliant” on Mr and Mrs Barton and the builder to contact the Council to arrange an inspection. With respect, that is not so. It was for the Council to formulate its own inspection programme and to liaise with Mr Barton about appropriate

40 inspection times.

[418] Two aspects of the inspection process stand out.

[419] The first concerns an inspection carried out by a Mr Cummins on 20 May 1998. This was only nine days before the Council issued an interim code compliance certificate in respect of units C, D, F, G, H, I, J, K and L.

45 Mr Cummins recorded on an “Inspectors’ Field Inspection Sheet” that he began to inspect the six front left-hand side units with Mr Barton. He noted

that, after an hour or so, Mr Barton told him that “he was being too pedantic over handrails and barriers etc”. Mr Cummins recorded that he had been requested to “leave the job”, which he did.

[420] Mr Jordan said that he had not encountered a situation in which an inspector had been told to leave a site. He regarded that as a serious issue that would require resolution by a senior inspector before the inspection process proceeded further. 5

[421] The second involved a “producer statement” requested from the tiler, Mr Joo. The statement is undated. The use of emboldened type (in a form distinctly similar to the style of correspondence produced by Mr Coughlan) in parts of the statement suggest it may have been drafted by Mr Coughlan, though I make no finding on that as the issue was not put directly to him. 10

[422] After referring to the units at 270 Sunset Road, Albany (apparently to all and not just some) the statement continues:

“Producer Statement PS 3. 15

The tiles were laid on fibreglass with Dexx sealer on slate and turned 75 mm up walls.

This gives a complete waterproof seal between tiles and flooring.”

[423] Mr Joo was called to give evidence on behalf of the Council. He told me that he was engaged, in early 1998, to undertake waterproofing and tiling work at Sunset Terraces. Part of his job was to apply waterproofing agents to the outside decks, at first floor level. He does not recall whether he was told to use a particular waterproofing membrane. However, he recalls using a liquid applied membrane with a fibreglass mat reinforcing. 20

[424] Mr Joo rendered an invoice for his work in the sum of \$5132. The invoice is undated but he was paid by a cheque signed by Mr Barton on 20 April 1998. That suggests the work was completed by that time. 25

[425] Mr Joo said that, after he had been paid, Mr Barton came to see him and told him that he needed a “producer statement” in respect of the waterproofing. Mr Joo identified the document set out at para [422] above as the letter he signed. The document had been prepared when shown to Mr Joo. Mr Joo did not know what Mr Barton did with the letter after he had signed it. 30

[426] Although Mr Joo, in evidence, said that he had carried out waterproofing of the decks in accordance with his letter, no other witness suggested that adequate waterproofing had been done. Indeed, all experts (in rare agreement) concluded that waterproofing had not been undertaken adequately. 35

[427] After Mr Joo had signed his producer statement there is a handwritten notation stating:

“28.5.98 — Oked by Les Blanc as being acceptable.” 40

There is no reliable evidence about the identity of the author of that note. There is other evidence, however, in the form of a “Final Inspection” memorandum which, under the heading “awaiting paperwork” states:

“Confirmation that the particle board flooring in the wet areas have been sealed under tiles.” 45

In what appears to be the same hand as the notation on Mr Joo's letter, someone has written that the "paperwork" was received on "27-5-98" and "Ok by Les Blanc".

5 [428] The letter signed by Mr Joo was obtained immediately before the interim code compliance certificate was issued on 29 May 1998. In evidence, Mr Joo confirmed that he had completed all work of that nature on site before that date. However, it was not until the final code compliance certificate was issued on 11 September 1998 that the Council signed off on the balance of the units.

10 [429] It is clear that, before the final code compliance certificate was issued, Mr Blanc continued to have concerns about aspects of the waterproofing on site. For example, from a letter he wrote on 13 August 1998, it is apparent that he was aware of an issue involving waterproofing of the cladding on the parapets.

15 [430] In an introductory portion of his letter of 13 August 1998 to Mr and Mrs Barton, Mr Blanc stated that, following a site inspection on 7 August 1998, certain identified items had "not been carried out in accordance with" the 1991 Act. The item dealing with parapets stated:

"D. All units with parapets.

20 The cladding of the parapet with 'Harditex' is to be certified by the [manufacturer] as complying with their details and specifications in the form of a Producer Statement – Construction. Review all flashings to be made weatherproof."

Mr Blanc continued to make inquiries about those aspects before a final code compliance certificate was issued.

25 [431] With the time that has passed since the inspections were undertaken, the quality of available evidence has diminished. Not only were there understandable difficulties in identifying relevant documents and (more importantly) in interpreting them, but also Mr Blanc has since died and is unable to explain what was done and why. Although the ability to produce documentation relating to the inspection fell on the Council, I intend to take a cautious approach to findings on the inspection issues because Mr Blanc is no longer alive and cannot answer the criticisms levelled against him. Nothing that I say should impact adversely on Mr Blanc's reputation. I can only decide the issues before me on the basis of inferences to be drawn from the evidence actually adduced.

30 [432] There are two distinct aspects of the inspection process with which I need to deal. The first concerns the adequacy of inspections of the decks at a time in close proximity to receipt of Mr Joo's letter. Once the tiling had been completed, no visible evidence was available for the Council to determine whether work undertaken did, in fact, comply with the Code. The second aspect has systemic ramifications. It concerns the question whether adequate planning occurred, particularly in the absence of any specific inspection identified by Mr Flay to check whether the moisture provisions of the Code had been complied with. I deal with the two issues separately.

45 [433] I find that the relevant claimants have not discharged the burden of proving that the Council was negligent in its inspection of the decks.

[434] I infer that whatever work was undertaken by Mr Joo was done at a time when inspectors were not present. That being so, it was necessary for the Council to obtain a producer statement from the tiler to determine what had been done so it could make its assessment, for certification purposes, on whether there were reasonable grounds to conclude that the work had been done in compliance with the Code. 5

[435] Obtaining a producer statement was a “reasonable step” to take to gather information. The question whether it was reasonable for the Council to rely on Mr Joo’s letter to certify Code compliance is a distinct issue and not one to be confused with allegations of negligence during the inspection phase. 10

[436] Next, I deal with the systemic complaint involving the inspection phase. Mr Jordan gave evidence of what he regarded as systemic failures in the way in which the Council approached its inspection functions. Mr Jordan’s opinion was that these failures contributed significantly to the Council’s apparent inability to identify water ingress problems inherent in the construction of the building. 15

[437] The first step in Mr Jordan’s analysis was to identify what could have been seen by an inspector who was considering whether waterproofing had been carried out to the standard required by the Code. Mr Jordan identified five aspects that he considered would have been visible had a proper inspection plan been prepared: 20

- (a) the presence or otherwise of a waterproofing membrane on the intertenancy wing walls and parapets;
- (b) the presence or otherwise of Butynol (or a similar product) used for waterproofing purposes; 25
- (c) whether Harditex was embedded in the balcony tiles, the existence of gaps at the end of joinery head flashings;
- (d) the adequacy of draining due to unlevel pavement; and
- (e) whether junctions were properly waterproofed, as evidenced by slopes near the garage and the absence of a “Z-flashing”. 30

[438] Mr Jordan then considered the times at which the Council ought to have inspected to ensure visible defects of the type to which he referred were identified:

- (a) when waterproofing was undertaken to retaining walls between units;
- (b) when exterior wall cladding was fixed in place and before it was texture coated and jointed; 35
- (c) at the time the waterproofing membrane had been applied to the deck, but before wall cladding and tiling had occurred; and
- (d) at the time roofing was laid, together with its associated accessories.

[439] The second and third of those additional inspection stages are relevant to the two primary causes of damage, failure to waterproof the decks and parapets at the wing walls respectively. 40

[440] Mr Jordan’s evidence was that the Council would have been unable to determine whether work had been undertaken to the standard required by the Code once texture coating and painting had occurred. Mr Jordan expressed 45

concern about the inability of the Council inspectors to determine that the parapets had been formed and weatherproofed correctly (or an alternative provision made) in accordance with figure 68 of the Harditex technical information.

5 [441] Mr Jordan considered that inspection of the completed deck waterproofing membrane was required *before* wall cladding and tiling to ensure that:

- (a) the membrane was of the type specified;
- (b) 45-degree fillets had been fitted at the transition between the
10 horizontal and vertical planes of the membrane;
- (c) the membrane extended to an adequate height up the walls and over the front edge of the deck; and
- (d) appropriate provision had been made to weatherproof the doors to the membrane.

15 [442] In relation to the parapet and intertenancy wing walls, Mr Jordan considered that the lack of a cross-fall would have been visible on final inspection, as would the lack of a suitable waterproofing membrane at the pretecture-coating inspection. Further, if an inspection of the decks had occurred before wall cladding and tiling was effected, substitution of a less
20 reliable membrane would have been identified and tests could have been carried out to assess the adequacy of what had, in fact, been applied.

[443] Mr Jordan's views were contested by Mr Bayley. Mr Bayley placed emphasis on the schedule of inspections prepared by the Council in relation to residential work generally, though he was unable to refer me to that document
25 within the exhibits produced. There was no specific schedule of proposed inspections prepared for the Sunset Terraces development.

[444] Mr Bayley was firm that the 120 inspections that he calculated had been carried out dealt with all necessary aspects of the Council's functions. He also pointed to the need to inspect in a manner consistent with progress of the
30 works, something beyond the control of Council inspectors. He suggested that the Council "acted appropriately . . . and was rather dependent on the notification at appropriate times by the contractor and developer". In particular, Mr Bayley saw no need for a pretecture-coating inspection, opining that the inspections undertaken were adequate.

35 [445] Mr Flay confirmed that fewer inspections were undertaken in multi-unit residential developments than would have been undertaken had the subject-matter been a single dwelling. Under cross-examination by Mr Josephson, Mr Flay expanded on that observation. First, he said that the standard of inspection was no different but that a number of units would have
40 been inspected at a single time. Secondly, he confirmed that the average number of inspections was likely to be less than for a single dwelling.

[446] I prefer the evidence of Mr Jordan on this topic. The Council's statutory obligation, when it came to certify compliance with the Code, was to be satisfied, on reasonable grounds, that the building work complied with Code
45 requirements. The inspection process, leading up to that certification, is designed to enable the Council to express that final conclusion and to incorporate it into the code compliance certificate required by the legislation.

[447] Waterproofing of a building is a critical issue with which the Code deals. I have already referred to relevant parts of the Code contained, particularly, in cls E1 and E2. The Council ought, in my view, to have prepared a schedule of inspections for this particular construction project and to ensure that inspections would, in fact, cover each of the aspects of the Code which required certification. If waterproofing of the decks and the tops of intertenancy and parapet walls could not be adequately checked in any other fashion, a pre-coating inspection was necessary. 5

[448] A similar finding was made for similar reasons by Baragwanath J in *Dicks v Hobson Swan Construction Ltd.*²⁷⁰ The Judge said: 10

“[113] As to risk, the need for the exclusion of water was well-known. Under the previous regime it had required the substantial precautions of cavities and/or side flashings.

[114] Nothing apart from inadequate foundations could be as insidious as entry into a house of water, which will ultimately have the same effect as inadequate foundations. 15

[115] What of dealing with that risk? The council suggested that whether the presence of seals was detectable or not by the inspector depended on the fortuity of whether they had been painted when the inspector happened to arrive. 20

[116] While ‘proprietary seals’ was accepted as an alternative to cavities and/or side flashings, it would have occurred to a reasonable council officer considering in a quiet office the significance of abandoning cavities and flashings that they could not simply be regarded as the equivalent of a coat of paint. It was the task of the council to establish and enforce a system that would give effect to the building code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present. That was the standard required by Hardie Boys J in *Morton v Douglas Homes* [1984] 2 NZLR 548 in relation to foundations. The council accepts that flashings warranted specific precaution to check to ensure their presence; so too must their substitute. 25 30

[117] I have concluded that the absence in this case of both any instructions and of any system to discern whether seals were in place infringes Turner P’s test. There has been a simple abdication of responsibility by the council. If there is need to apply an *Amis* operational test I accept Mr Jordan’s explanation that it would be easy to do so simply by the use of a key to probe the joint. But while it is unnecessary for the decision of the present case, I am of opinion that like the respondent in *Wilsons and Clyde Coal Company Ltd v English* [1938] AC 57 the Council should in addition be held liable at the organisational level.” 35 40

[449] I do not accept Mr Bayley’s evidence that the Council was reliant on what the developer was doing on site, at any given time, in carrying out its inspection function. The Council’s obligation was to establish *its* inspection regime and to advise the developer of the stages at which its inspectors wanted to be present to ensure proper code compliance. The obligation would then pass 45

270 At paras [112] – [117].

to the developer to advise the inspectors before each phase began and, if advice were not given, the developer could not have complained if the inspectors had required the work to be deconstructed and repeated; particularly, for example, if there were no other means of determining whether (by sampling or otherwise) waterproofing had been carried out to the required standard.

5 [450] Much was made by Mr Bayley of the need to avoid judging the inspections by today's standards, rather than the standards of the time. In reaching the conclusion that the Council was negligent in failing to put in place an adequate inspection regime, I am not focusing on whether a reasonable
10 Council knew or ought to have known, in 1997 or 1998, of the pitfalls with the method of construction employed, particularly the use of monolithic cladding on untreated timber. My point is more substantive. It is that a reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had
15 been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent. The Council's negligence was a substantial and material cause of loss suffered by those plaintiffs entitled to claim against it. "But for" that negligence the losses would not have been suffered. There are no policy
20 reasons to deny recovery.

(d) Code compliance certification

[451] Code compliance certification is the end result of information gathered by the Council through its inspections, as well as additional information provided through producer statements and other sources. Section 43(3)(a) of
25 the 1991 Act required the Council to be satisfied, on reasonable grounds, that the building work complied with the Code before it issued a certificate. The issue is whether, having regard to the information the Council had, the certificate ought to have been issued.

[452] My starting point is that, at the time the Council was advised that construction work had been completed, it had not carried out an inspection to confirm that those provisions of the Code that dealt with weathertightness had
30 been complied with. Despite that deficiency, it remained open for the Council to certify compliance with those aspects of the Code, if adequate inquiries, independent of its inspections, provided "reasonable grounds" to be satisfied
35 that those provisions had been met. If such inquiries had been made and adequately answered, a reasonable decision to certify would have overcome any deficiencies in the inspection process.

[453] On 29 May 1998, the Council had issued an interim certificate for ten of the units. The final code compliance certificate was issued on
40 11 September 1998. Section 43(4) of the 1991 Act makes it clear that the final certificate is designed to apply to all construction works covered by the consent. The Council's decision to certify must be considered in two stages. The first is whether the Council was negligent to issue the interim code certificate. The second is to determine whether anything was done by the
45 Council between the issue of the interim and final certificates to justify a conclusion that the Council had remedied any negligence involved in issuing the interim certificate. The need to certify on a final basis provided an

opportunity for the Council to identify any new problems with the ten units to which the interim certificate referred and to consider whether a final certificate should issue in respect of them.

[454] In determining whether there were reasonable grounds to issue a code compliance certificate, it is necessary to review what was known by Council inspectors at the time the relevant decisions were made. There is no evidence as to who, in fact, made the decisions to certify. I approach the issue on the basis that it was a collective decision made by Mr Blanc and his team. 5

[455] As at 29 May 1998 the responsible officers knew:

- (a) On 20 May 1998 one of the inspectors, Mr Cummins, had been asked to leave the site by Mr Barton on the basis of an allegation that he was being too pedantic about handrails and barriers. I am satisfied from the evidence that the handrails and barriers in issue were those relating to the decks. 10
- (b) About a week later (probably on 27 May 1998) a letter had been received from Mr Joo on the topic of waterproofing and tiling. The letter was undated. It was prepared by someone other than Mr Joo and delivered to him by Mr Barton, at the Council's request. There is no evidence of any steps having been taken by a responsible Council official to speak to Mr Joo or, otherwise, to confirm what he had written. There was no evidence of any inquiry of Mr Barton to ascertain the circumstances in which Mr Joo's letter came to be signed. The letter confirms that Butynol was not used for weatherproofing purposes, contrary to Mr Coughlan's specifications. 15 20
- (c) No inspection was undertaken that would have enabled the inspectors to check visually whether there was compliance with the waterproofing requirements of the Code, particularly in relation to the wing and parapet walls and the decks. 25

[456] Both Mr Jordan and Mr Bayley were asked to comment on how they would expect the Council to act in a situation where there was reason to regard the developer (at best) as unreliable or (at worst) untrustworthy. They were also asked to assume that there were a number of relatively minor defects that had been identified during the course of inspections. 30

[457] Mr Jordan said that he would expect the Council to be inquiring of the developer as to the level of oversight or coordination that was being exercised on site. His view was that bad construction practices, albeit of a relatively minor nature, could be indicative of a "likely larger potential problem". For that reason, he would want a discussion among the developer, relevant tradespeople and Council officers to lay down clearly the Council's expectations. Mr Jordan added that he would not necessarily place much reliance on statements made by the developer (or tradespeople) as to the standard of works or materials used if there had been some earlier identification of those aspects as "inappropriate". 35 40

[458] Mr Bayley expressed concern about the possibility of the developer "covering up" deliberately certain work to avoid Council inspections. He disagreed with evidence from Mr Jordan that it would have been appropriate for the Council to require uncovering of uninspected work. Mr Bayley and Mr Jordan agreed that inspectors ought to be alert to ways in which developers might try to cut costs in the construction process. 45

[459] In those circumstances, at the time the interim code certificate was issued, did the Council have reasonable grounds to believe that waterproofing had been carried out to the standard required by the building code?

5 [460] Mr Jordan, whose evidence on this issue I accept, was adamant that an inspector being requested to leave the site by a developer was a major issue and one which would require careful resolution between the developer and the senior inspector. He described a request for an inspector to leave the site as
10 “an extreme step by a developer and should immediately have been reported to that inspector’s supervisor who should have taken appropriate steps to ensure the works were able to be inspected without the Council officer being inhibited by fear of being asked to leave the site and would be further reason to become very concerned as a Council as to the standard of the work being undertaken”.

15 [461] Mr Bayley disagreed with that assessment. I did not find his explanation convincing. Indeed, it was a good example of what I thought was his tendency to move into the advocate’s arena by attempting to minimise any responsibility the Council might have, as opposed to providing the Court with the independent assessment to which it is entitled from an expert. The following exchange occurred between myself and Mr Bayley:

20 “THE COURT: Am I right that a reference to handrails and barriers could only refer to balustrades around the deck ie is there any other part of a unit to which that could refer? – Yes there is and that is the stairs.

Would that ordinarily be called a barrier? – Handrails yes barrier no.

25 So barrier likely to refer to balustrades? – More than likely yes.

Now being more specific in terms of time the occasion when Mr Cummins is asked to leave is 20 May 1998 and we know that Mr Joo was asked for his producer statement around 27 May 1998 give or take a day or two.
30 Given the reaction of the developer to the specific Cummins inspection we have been discussing what is your view about reliance on the Joo producer statement obtained from the developer without further inquiry? – Your Honour I think that the requirement for a producer statement in relation to waterproofing was already requested or had already been raised in the minds of the Council because in the field officer’s memorandum dated
35 11 May (page 172 under tab G 146) the request for confirmation in relation to the sealing under tiles was dated 11.5 in respect of units 3 – 7 so some of the units appeared to be at a more advanced stage than others.

40 But whenever it was requested we know that it was provided probably by Mr Barton to whom Mr Joo gave it to the Council close to 28, 29 May 1998 by which time the incident with Mr Cummins had occurred? – Yes.

45 So that on receipt of that the Council inspectors had knowledge of that problem? – Yes.

In those circumstances in your opinion was it reasonable to rely on the Joo letter without further inquiry and if so why? – Yes I do because I think that

the inquiry had been raised before that time and in a truly objective way to require provision of that information after point in time despite circumstances that occurred I think would be objective.

So in your view taking that to its logical conclusion if you had a reason to distrust the person who gave you information requested before that basis for distrust arose you would regard it as reasonable to accept information from that person after the distrust arose without further inquiry. That has to be the effect of your evidence? – Yes that is correct.” 5

[462] I start from the proposition that, on review of the inspection process, those responsible for issuing the interim code compliance certificate would have been aware that they had not seen visible evidence of waterproofing having been undertaken in accordance with the Code. They would also have been aware that Mr Cummins had been inspecting the decks at the time he was requested to remove himself from the site. The suggestion that he was being “too pedantic” should, in my view, have caused the inspectors some concern about Mr Barton’s reliability or trustworthiness with regard to information sought about the general nature and quality of the work undertaken. In the absence of any evidence to suggest that confidence could, objectively, have been restored, I infer that it was not. 10 15 20

[463] In those circumstances, there was no rational basis on which the Council could rely on Mr Joo’s letter, given that the Council knew Mr Barton had supplied it to him to sign. There is no evidence to suggest Mr Joo was known personally to the inspectors or that there was any contemporary evidence of the general quality of work he had performed on other projects. 25

[464] I find that the Council did not, as at 29 May 1998, have reasonable grounds to rely on Mr Joo’s letter to issue interim code compliance. No steps were taken before the final certificate was issued to revisit the adequacy of the waterproofing of the decks, even though, on or about 13 August 1998, the Council was expressing concern about the cladding of the parapet with Harditex. The Council’s letter, of that date, also identified some more minor issues relating to low-level ponding and the need to keep the bottom of the Harditex cladding sheets clear of the ground. In those circumstances, I find that the Council was also negligent in issuing the final code compliance certificate. 30

[465] I find that the Council breached its duty to take reasonable care in issuing the two code compliance certificates. Those breaches were a substantial and material cause of the loss suffered by those plaintiffs whom I have held can sue the Council. “But for” the Council’s negligence the losses would not have been suffered. There are no policy reasons to deny recovery. 35

(11) *Blue Sky’s misrepresentation claims against the Council* 40

[466] Since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,²⁷¹ a false statement made by one person to another on which the recipient relies to his or her detriment will be actionable at the suit of the recipient, if the person making the statement was negligent in making it.

271 [1964] AC 465.

[467] The *Hedley Byrne* principle has been adopted as part of New Zealand law (see, generally, *Scott Group Ltd v McFarlane*²⁷² and *Kendall Wilson Securities Ltd v Barraclough*).²⁷³ The elements of the cause of action are:

- 5 (a) A statement (amounting, in law, to a representation) was made by one person to another.
- (b) The maker of the statement was (or reasonably ought to have been) aware that the statement would be made available to and relied upon by a particular person (or class of person) for the purpose of a particular transaction or type of transaction.²⁷⁴
- 10 (c) The statement was false.
- (d) The statement was made negligently.
- (e) The recipient of the statement did, in fact, rely on it, to his or her detriment, to enter into a transaction of the type contemplated.

15 [468] Blue Sky sue on the basis that the LIMs prepared by Council officials, in respect of units falling under its claim, negligently advised that a code compliance certificate had, in fact, issued. The evidence from Mr Bryers was that Blue Sky (through its solicitor) relied on the LIMs when the units were bought.

20 [469] Some support for the proposition that a cause of action in negligent misrepresentation may lie in these circumstances can be found in *The Law of Torts in New Zealand*.²⁷⁵ The learned authors use, as an example, the possibility of an owner relying on a code compliance certificate issued by a consent authority under the 2004 Act.

25 [470] In so far as the relevant LIM disclosed that a code compliance certificate had been issued, it was true. Indeed, in the absence of proof to the contrary, a LIM is sufficient evidence of the correctness, as at the date of its issue, of any certificate issued by the territorial authority under the 1991 Act.²⁷⁶

30 [471] Section 43 of the 1991 Act provides that the Council shall issue a code compliance certificate if satisfied on reasonable grounds that the building work to which the certificate relates complies with the building code. All that the code compliance certificate does is to advise the person reading it that the Council believed there were reasonable grounds to certify compliance with the code. That does not remove the possibility of a cause of action in negligence directed at the negligent issue of the certificate. But a cause of action in
35 negligent misrepresentation cannot lie, because the essential element of falsity is absent.

[472] The negligent misrepresentation claim must fail.

272 [1978] 1 NZLR 553 (CA).

273 [1986] 1 NZLR 576 (CA).

274 *Scott Group Ltd v McFarlane* at p 566 per Richmond P.

275 Paragraph 6.4.03(v).

276 Section 44A(5) and (2)(d) of the Local Government Official Information and Meetings Act.

(12) Claims in negligence against the developers

[473] The nature of the developers' duty was explained in *Mount Albert Borough Council v Johnson*.²⁷⁷ Cooke and Somers JJ, with whom Richardson J concurred, said:²⁷⁸

“In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially – as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in *Anns*²⁷⁹ may prove of guidance on questions of nondelegable duty also. There appears to be no authority directly in point on the duty of such a development company. *We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.*” (Emphasis added.)

[474] Although the Court of Appeal in *Mount Albert Borough Council v Johnson* recognised that it was “not easy to state clear principles about when an employer will be held liable in tort for the negligence of an independent contractor”, it was satisfied that that obligation arose on the facts of that case.²⁸⁰

[475] The circumstances in which Mr and Mrs Barton undertook the Sunset Terraces development are almost identical to those described in *Mount Albert Borough Council v Johnson*. The only differences (and in my view they are immaterial) are that the land was converted into strata titles through deposit of a plan under the Unit Titles Act and the individual units were sold to members of the public for use as homes. There is no doubt that Mr and Mrs Barton's interest in the project was purely commercial.

[476] Mr and Mrs Barton elected not to participate in the trial of this proceeding. Mr Barton attended at the commencement of the hearing and I made it clear to him that if no steps were taken he took the risk that I might find the claims proved. Mr and Mrs Barton's counsel, Mr Bogiatto, was then given leave to withdraw.

[477] At the conclusion of all submissions, I entered judgment for liability against Mr and Mrs Barton in favour of Mr Halford, with costs on a 3C basis together with reasonable disbursements, including certification for two counsel. I reserved judgment on remaining claims simply because I did not wish to compromise defences raised by the Council and the designer which, if successful, would have been equally available to the developers.

[478] It is unnecessary for detailed factual findings to be made. I am satisfied from the evidence that:

277 [1979] 2 NZLR 234 (CA).

278 At pp 240 – 241.

279 [1978] AC 728.

280 At pp 240 – 241.

- (a) Mr and Mrs Barton were responsible for supervising and coordinating construction work on site. In terms of the duty explained in *Mount Albert Borough Council v Johnson*,²⁸¹ they are liable to the plaintiffs for losses caused by their negligence.
- 5 (b) Much of the building work on site was carried out to a standard significantly below what would ordinarily be inspected. Some of the work was shoddy (at best) and appalling (at worst). In performing their non-delegable duty, Mr and Mrs Barton fell well below the standard of care owed to individual plaintiffs.
- 10 **[479]** All of the experts agree on defects in the construction work carried out at the direction of the developers:
- (a) the intertenancy wing walls and parapet walls not having been waterproofed in accordance with the Harditex technical information. The lack of a waterproofing membrane allowed water entry into the
 - 15 (b) the failure to apply either Butynol or an adequate liquid-applied membrane substitute to the decks, combined with the absence of a drip edge to the decks;
 - (c) gaps at the ends of the joinery head flashings;
 - 20 (d) installation of Harditex cladding without the required clearances to exterior ground levels, pavement levels and concrete floor slabs;
 - (e) the use of wing walls and intertenancy walls framed in untreated timber and clad with Harditex to retain ground;
 - (f) lack of waterproofing to concrete block retaining walls;
 - 25 (g) back filling of retaining walls with clay and rubbish;
 - (h) inadequately waterproofed junctions between, first, the timber-framed and concrete masonry wall and, secondly, the left-hand side of the garage doors where the Harditex joins the block work; and
 - (i) a bow to the timber garage door lintels.
- 30 I find the extent of the defects to be as described in Schedule 1 to the closing submissions filed on behalf of the plaintiffs.
- [480]** I accept Mr Griggs' evidence as to the defects in the driveway and hold that they too were caused by negligent construction work.
- 35 **[481]** There are other disputed defects on which I need not rule. The defects which have been agreed or, in the case of the driveway, found by me together contribute to the full extent of the losses suffered by the plaintiffs. So far as the driveway is concerned, the successful plaintiff is the body corporate, as this is common property.
- 40 **[482]** Although there are impediments to certain individual proprietors recovering against the Council, there is no basis to prevent recovery by all individual proprietors against the developers, in respect of the losses they have suffered. However, the same qualification, with regard to the maximum amount to which Mr Devlin may claim, applies equally to the developer.
- 45 **[483]** I am prepared to hold that Mr and Mrs Sangha are entitled to claim against the developers because they purchased in reliance on an assessment of

281 At pp 240 – 241.

the likely cost of repairing defects. The standard of workmanship supervised by the developers was much lower than the Sanghas were entitled to expect. I am satisfied that had they known the true extent of the defects they would not have entered into a contract to acquire the unit. On that basis, they are entitled to claim against the developers.

[484] More difficult issues arise in relation to Blue Sky's claims against the developers. But, overall, I am satisfied that economic losses to be suffered by someone entering into arrangements with an owner of a dwelling for commercial purposes were reasonably foreseeable to the developers and there are no reasons of policy to exclude such a duty. Accordingly, economic losses actually suffered by Blue Sky are recoverable from the developers.

[485] I decline to enter judgment for liability in favour of the individual proprietors (apart from Mr Halford, in whose favour judgment has already been entered) at this stage. I will enter judgment after determination of questions of quantum.

[486] Leave is reserved to individual proprietors to apply to have a liability judgment entered earlier, should counsel consider there is good reason for that course to be taken.

(13) Claims in negligence against the designer

(a) The legal basis for the claims

[487] The designer is sued on the basis that he was negligent in preparing the plans and specifications and in issuing practical completion certificates which Mr Coughlan says were signed to release funds to the developer.

[488] The liability of a person in the position of a designer was discussed in *Bowen v Paramount Builders (Hamilton) Ltd.*²⁸² The Court of Appeal considered that contractors, architects and engineers were all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.²⁸³ All three Judges drew on English authority to support that proposition, in particular *A C Billings & Sons Ltd v Riden*²⁸⁴ and *Dutton v Bognor Regis Urban District Council.*²⁸⁵

[489] In *Bowen*, both Richmond P and Woodhouse J referred to *Voli v Inglewood Shire Council*²⁸⁶ to support the proposition that the scope of any duty of care to third parties was not limited to the scope of any contractual retainer. In that case, Windeyer J said:²⁸⁷

“ . . . neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered. If, for example, it was to design a stage to bear only

282 [1977] 1 NZLR 394 (CA).

283 At pp 406 per Richmond P, 417 per Woodhouse J and 422 per Cooke J.

284 [1958] AC 240.

285 At pp 393 – 394 per Lord Denning MR.

286 (1963) 110 CLR 74.

287 At p 85.

some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it.”

5 [490] *Young v Tomlinson*²⁸⁸ is illustrative of a situation in which both architect and Council were held liable for respective negligence contributing to the need to repair damage to a dwelling as a result of a failure to excavate to correct levels and ensure foundations were built on solid ground. Quilliam J observed that an architect owes a duty of care in tort, not only to an original purchaser but also to subsequent purchasers.²⁸⁹

10 [491] Notwithstanding those authorities, Mr Maclean submitted that it remained necessary, before a duty could attach to the designer in favour of the plaintiffs, to establish an “assumption of responsibility” to a claimant.²⁹⁰ Mr Maclean submitted that “assumption of responsibility was the ‘conventional touchstone’ against which proximity was measured for duty purposes”.

15 [492] With respect, I consider Mr Maclean is confusing two different concepts. There are cases in which the court will *impose* a duty of care on a designer in favour of a party with whom he or she has not contracted: *Bowen v Paramount Builders (Hamilton) Ltd* is an example. There are other cases in which duties might not be imposed as a matter of law but have been *assumed* by a defendant, as a matter of fact: the Privy Council judgment in *Brown v Heathcote County Council*²⁹¹ is an illustration. Factual assumption of a tortious responsibility is not a prerequisite to legal imposition of a duty of care.

20 [493] Mr Maclean relied on *Body Corporate 114424 v Glossop Chan Partnership Ltd*²⁹² to support a submission that the scope of any duty of care owed by an architect to a third party is limited to the task they contract to perform. He submitted that the designer had no obligation to be “pro-active” beyond those terms.²⁹³

25 [494] *Glossop Chan Partnership* involved a claim made by owners of 15 apartments in the Shangri-La development in Auckland, for damages in excess of \$2.5m, being the estimated cost of removing and replacing an entire suite of windows and sliding doors, together with associated spandrel cladding, within the complex. Glossop Chan Partnership was alleged to have been negligent in designing those parts of the building. At the relevant time the old prescriptive regime was in place, so no issues arose in relation to the 1991 Act.

30 [495] Potter J, no doubt on the basis of submissions made to her, considered that the architect’s duty to the apartment owners was founded on *Hedley Byrne*

288 [1979] 2 NZLR 441.

289 At p 449, citing *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) at pp 115 – 116 per Richmond J, with whom Turner P and White J concurred.

290 Citing *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA) at p 328 per Tipping J in support.

291 [1987] 1 NZLR 720 (PC).

292 (High Court, Auckland, CP 612/93, 22 September 1997, Potter J).

293 At pp 6 – 7.

& Co Ltd v Heller & Partners Ltd.²⁹⁴ She referred to the need for an assumption of responsibility by the architect and reliance by a plaintiff on what it had done. Her Honour took the view that:²⁹⁵

“ . . . [Glossop Chan Partnership] assumed responsibility for the professional services it provided to Kiwicorp [the developer of the Shangri-La apartments]. A consequent duty of care to the subsequent owners exists, but the duty of care is circumscribed. As was recognised in [an unreported English decision to which the Judge had previously referred] it cannot be suggested that [Glossop Chan Partnership] had a duty of pro-activity that went beyond its contractual obligations to Kiwicorp. This is not to say that [Glossop Chan Partnership] does not have a duty of care in respect of omissions as well as commissions, but that its duty of care is confined by the contractual obligations it assumed.”

[496] The Judge also referred to *Bowen v Paramount Builders (Hamilton) Ltd.*²⁹⁶ Having referred to that decision, Potter J took the view that the architect’s duty to the apartment owners was “a limited duty, circumscribed by the task it was contracted to perform”.

[497] With respect, Potter J’s analysis of the nature of the duty of care is at odds with other observations made in *Bowen v Paramount Builders (Hamilton) Ltd.*, particularly those of Richmond P and Woodhouse J. I am bound to apply the Court of Appeal decision in *Bowen*. To the extent that *Glossop Chan Partnership* is inconsistent with *Bowen*, I decline to follow it.

[498] In *Bowen*, Richmond P made a plain statement that:²⁹⁷

“ . . . a builder or architect cannot defend a claim in negligence made against him by a third party by saying that he was working under a contract for the owner of the land . . . Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties.” (Emphasis added.)

[499] Richmond P also made the obvious point that “a builder who agreed to build a house in a manner which he knows or ought to know will prove a source of danger to third parties cannot say, in answer to a claim by third parties, that he did all that the owner of the land required him to do”.²⁹⁸

[500] Woodhouse J put the point more bluntly. He observed that the Court need not “be astute to protect those prepared to undertake jerry-building or shoddy work against the reasonable claims of innocent third parties merely because their bad work was done to a deliberate pattern or by arrangement”.²⁹⁹

[501] Although Cooke J did not comment specifically on this issue he said nothing to suggest that he dissented from what, with respect, are commonsense views.

[502] It follows, in my view, that if a designer were to submit plans and specifications which he or she knew or ought to have known were inadequate

294 [1964] AC 465.

295 At p 7.

296 [1977] 1 NZLR 394 (CA).

297 At p 407.

298 At p 407.

299 At p 419.

to meet the requirements of the Code, notwithstanding any limitation on the scope of contractual duties owed by the designer to the owner, the designer will be liable in negligence if loss were caused to a third party.

5 [503] Mr Maclean submitted that the question whether a tortious duty ought to be imposed on the designer was to be determined by reference to: (a) the scope of his engagement by the developer; (b) the arrangements made for the construction of the units; and (c) the statutory context (the 1991 Act) in which those obligations were to be performed.³⁰⁰

10 [504] Mr Maclean emphasised, by reference to *Bellefield Computer Services v E Turner & Sons Ltd (No 2)*³⁰¹ that there is a “blurred borderline between architectural design and the construction details needed to put it into effect” and such borderline responsibilities “cannot be defined in the abstract”.³⁰²

15 [505] Those points have some force. However, as May LJ observed, in *Bellefield*, the question will always be one of fact and degree. The difficulty lies in the application of the law to particular facts and the need to determine whether any errors on the part of the designer were causative of loss to the claimant.

20 [506] Mr Maclean also submitted that the designer’s duties should be judged by reference to the standards of the day and the ability of the Council, under s 34(3) of the 1991 Act, to obtain further information if not satisfied that the plans and specifications were sufficient to grant a building consent. That submission was contested by both Mr Josephson and Ms Grant on the basis that the designer’s duty was independent of the Council’s.

25 [507] The second ground on which the designer is alleged to have been negligent involves alleged certification of practical completion. Mr Maclean submits that none of the plaintiffs relied on certificates issued on 19 May and 9 September 1998. Further, he submits that there was no assumption of responsibility by Mr Coughlan in respect of those aspects; nor was any reliance placed on the relevant certificates by potential purchasers.

30 [508] Mr Josephson submitted that the designer did owe a duty of care to the owners, in respect of the plans and specifications he prepared, on the principles set out in *Bowen v Paramount Builders (Hamilton) Ltd*³⁰³ and *Young v Tomlinson*.³⁰⁴ He also submitted that a designer who negligently prepares a certificate of practical completion will be liable to a potential owner for any
35 losses suffered, irrespective of whether the owner does or does not rely on the certificate.

(b) The factual background to the claim against the designer

40 [509] Mr Coughlan gave evidence about his involvement in the project. Mr Coughlan told me that he practises as an “architectural designer”. Mr Pratt, an architectural designer based in Warkworth, gave evidence on behalf of Mr Coughlan. He explained differences in the roles of registered architects,

300 See also *H N Machin v Adams* (1997) 84 BLR 79 (CA), *Jackson and Powell on Professional Liability* (6th ed, 2007), para 2-110 and Kennedy-Grant, *Construction Law in New Zealand* (1999), para 5.46.

301 [2003] TCLR 159.

302 At p 182 per May LJ.

303 [1977] 1 NZLR 394 (CA).

304 [1979] 2 NZLR 441.

architectural designers and draughtspersons. His evidence was that each person within those groupings has different qualifications and performs different functions within the construction industry.

[510] Mr Pratt described a registered architect as one who was qualified through a tertiary degree during which he or she is educated in the theory of design and contract work. He described a draughtsperson as someone who provided documentation to enable others to prepare designs. 5

[511] In contrast, an architectural designer is a trained architectural draughtsperson who, through his or her working experience, has learnt the art of design. Having done that, they practise as designers in their own right. A separate professional body exists to meet their needs, Architectural Designers New Zealand Inc. 10

[512] Mr Pratt's evidence was that an architectural designer was generally engaged to provide a level of detail sufficient to satisfy a territorial authority that a building consent ought to issue. With reference to projects akin to Sunset Terraces, Mr Pratt said they: 15

“ . . . were budget-driven and developers were reluctant to pay for more detail than the Council required with fees pitched accordingly. It was unusual in this type of commission for the level of detail provided to be greater than that required by the Council.” 20

[513] Mr Coughlan has practised as an architectural designer since 1964, having begun practice on his own account in 1970. He has worked, throughout his practising life, on the North Shore. His experience includes a wide range of light commercial and residential work, including the design of new dwellings. Over time, he has been commissioned to do work on a number of occasions by various property developers. Mr Barton is someone with whom he has worked often. 25

[514] Mr Barton had previously commissioned Mr Coughlan to undertake architectural design work for residential (and some light commercial) developments on more than 20 occasions since 1990. All of the development work involving Mr Barton took place on the North Shore. The commission Mr Coughlan received in respect of the Sunset Terraces project was the penultimate instruction he received through Mr Barton. 30

[515] Generally, Mr Barton would engage specialist town planners and surveyors in order to procure resource consents. Mr Coughlan would prepare the basic design of the building and take responsibility for obtaining a building consent from the Council. 35

[516] Once the building consent had been issued, Mr Barton was the project manager responsible for coordinating the consultants and tradesmen involved. Labour only carpenters were engaged to carry out construction work, with plumbers, electricians and other specialist trades being engaged on subcontract from Mr Barton. 40

[517] Mr Coughlan's position is that his involvement with Mr Barton's projects ended on obtaining building consent. He says he was not involved in either supervision of the construction nor in the building process itself. There is material in the Council inspection reports to suggest otherwise, but not to any material extent. 45

[518] Mr Coughlan said that, on occasion, Mr Barton might ask him to provide a construction detail, and such work was undertaken when sought. It is

evident from Mr Coughlan's evidence that he regarded his duty to his client and did not perceive any wider duty arising in favour of those who might acquire a dwelling that he had been involved in designing. For the reasons I have already given, he was wrong in that respect.

5 [519] Mr Coughlan was approached to prepare a design for the Sunset Terraces development in late 1996. By that time, a surveyor had prepared a plan of the site and a consultant town planner had been engaged to seek resource consents. The overall design concept was discussed between Mr Barton and Mr Coughlan for several months before a sketch plan was prepared for submission with the application for a resource consent.

10 [520] A distinction was drawn between architectural design services and civil engineering work. Mr McLintock was engaged by Mr Barton as the civil engineer for the project. Mr McLintock provided "structural engineering input and designed the driveway and drainage".

15 [521] Mr Coughlan prepared a letter recording his terms of engagement and forwarded it to Mr Barton. It showed that a fee of something in the order of \$12,000 was being charged for preparation of the plans and specifications, as well as attending to other matters to obtain a building consent: not a significant sum in the context of a development of this size.

20 [522] The resource consent was obtained on 5 May 1997. Mr Coughlan set about preparation of the design. He regarded the project as requiring "a simple design and structure for ease of construction and economy". He was aware that the exterior cladding consisted of Harditex with a spray-on finish to be selected by Mr Barton.

25 [523] In terms of the perceived wisdom of 1997, Mr Coughlan regarded Harditex as a "well known product that had been around for about 10 years" and had been "approved as complying with the requirements of the New Zealand Building Code". Mr Coughlan was aware that a comprehensive manual was available from the manufacturer containing "detailed technical information about the product and its installation".

30 [524] At the time the plans for Sunset Terraces were drawn up, the February 1996 version of the Harditex manual was current. Mr Coughlan deposed that he had designed about 400 houses using Harditex, both before and after 1997. In his opinion Harditex "was a standard product that provided a satisfactory result if used in accordance with the manufacturer's directions". No difficulties had arisen with any of the dwellings he had designed to incorporate Harditex prior to the Sunset Terraces project.

35 [525] Mr Coughlan's records indicate that his drawings were prepared between 13 April and 12 June 1997. His evidence was that his documentation was in "a standard format that [he] had used many times previously and was in a form that was acceptable to the Council". The specification was to be read in conjunction with the drawings.

40 [526] Mr Coughlan's evidence was that the level of detail to be included in the building consent drawings was largely dictated by the requirements of the Council, as the territorial authority responsible for administering the 1991 Act on the North Shore.

45 [527] Mr Coughlan placed some emphasis on the need to comply with a particular territorial authority's requirements, as opposed to meeting an objective standard. Mr Coughlan deposed that "the Council determined what

information was required to be provided with an application for building consent". The Council rejects that suggestion, at least to the extent that it suggests the designer had no responsibility for what was submitted with the building consent application.

[528] Mr Coughlan explained the differences in practice between 1997 and 2007 by producing checklists provided by the Council for submission on a building consent application. The level of detail required by the Council now is much higher than it was in 1997. The problems arising out of what has been (generically) called "leaky building syndrome" and the consequent passage of the 2004 Act have increased regulatory requirements.

[529] In terms of waterproofing, Mr Coughlan worked on the basis that standard solutions provided by manufacturers of the various products would be applied. He expected the builders to ensure cladding was waterproofed in accordance with the relevant Harditex manual. That manual included "details relating to the ground clearances between the bottom of the cladding and the surrounding ground, details of junctions between the cladding and the roof or other walls and details relating to the windows".

[530] Mr Coughlan said that the window and roofing manufacturers provided "proprietary flashings" and those details would depend upon the manufacturer selected by Mr Barton. Hence, he did not incorporate those details into his drawings.

[531] Mr Coughlan's evidence is that there was sufficient detail in the drawings to allow a competent builder to complete the work satisfactorily. He was confident, based on prior experience, that the design, if built by competent tradesmen, would comply with both durability and weathertightness provisions of the Code. His experience of having worked previously with Mr Barton provided him with a degree of assurance that Mr Barton had the ability to supervise the construction and to ensure compliance with relevant manufacturers' specifications.

[532] As part of his evidence in chief, Mr Coughlan detailed the steps he took in seeking a building consent from the Council:

43. The application for building consent was lodged with North Shore City Council on 23 June 1997. I lodged the application on behalf of Robert Barton and designated myself as the contact person for inquiries for further details.

44. Following lodgement there were a number of requests for further information which is usual for such applications.

45. On 30 June 1997 there was a request for geo-technical information and details of the hot and cold water supply and ventilation . . . The civil engineer John McLintock provided the geo-technical information and I provided the other information by way of a letter of 8 July 1997 . . .

46. On 30 June 1997 there was also a request for details of the proposed silt control measures, the design of the street crossing and details of the amalgamation of the underlying titles . . . Information relating to the first two queries was provided by John McLintock and I provided a copy of a letter from Robert Barton's solicitor concerning amalgamation of the titles to the properties . . .

47. On 3 July 1997 the Council requested that John McLintock provide a producer statement construction review certifying that he had observed and monitored the construction of the retaining wall . . .

5 48. On 3 July 1997 the Council required a detailed design of the water supply system for Sunset Terraces . . . This information was provided by John McLintock.

49. On 5 August 1997 John McLintock provided a report confirming that the plans complied with the New Zealand Building Code requirements in relation to the spread of fire and related matters . . .

10 50. There were no other requests for information from the Council and a building consent was issued on 11 August 1997. At that point I had completed my brief to obtaining building consent for the project. I was paid on 26 September 1997 . . .”

15 [533] In February 1998, Mr Coughlan was asked to make changes to the plans for a gazebo that was incorporated as part of the swimming pool complex. He was also asked to prepare a plan for the basement of an existing house on the site. Mr Barton provided those instructions. The changes were sufficiently extensive to require a variation to the building consent. In due course, an amendment was granted. Nothing turns on that aspect of the consent process.

20 [534] In May 1998, Mr Coughlan was told by Mr Barton that units 3 – 7 and 12 had been finished. Mr Barton asked Mr Coughlan to provide to him a letter which, in effect, was designed to certify practical completion of those units. Mr Coughlan understood that this letter was required for funding purposes.

25 [535] After some exchanges with Mr Barton’s solicitor, Mr Coughlan provided to the effect that those units were “substantially complete”, so that they were capable of being used notwithstanding minor work still required. In a letter forwarded on 19 May 1998, Mr Coughlan referred also to other units which accord with the units for which the Council issued an interim code compliance certificate on 29 May 1998.

30 [536] The terms of Mr Coughlan’s letter to Mr Barton’s solicitor of 19 May 1998 were:

“Attention Mark Hornabrook
Barton Sunset Terraces
Consent No A 12258
35 Certificate of Practical Completion

I hereby certify that the Units 3 to 7 8 to 12 20 & 21 in the Sunset Terraces Development (270 & 1274 Sunset Road Albany) are substantially complete so that they are capable of being used by the Purchasers for the purposes for which they were intended without material inconvenience not
40 withstanding that there may be items of a comparatively minor nature which may require finishing, alteration or remedial action.

Yours faithfully

R F Coughlan”

45 [537] In August 1998, an issue arose about the head flashings to the garage doors. I have referred to that issue in the context of the Council’s certification

procedures.³⁰⁵ Mr Coughlan received a copy of a letter from Mr McLintock dated 13 August 1998 advising that the Council had requested a head flashing to be fitted to the garage doors and asking if they had been specified or, if not, whether they were required. Mr Coughlan, after consulting with a technical adviser to James Hardie (the Harditex manufacturer) and another person at a company which worked with the product, sent information to Mr McLintock about the use of a Silaflex MS sealant for that process. Mr Coughlan says he took no further part in the communications that ensued between the Council and Mr McLintock on that issue.

[538] In September 1998, Mr Barton again asked Mr Coughlan to certify practical completion of the balance of the units. Mr Coughlan sent a further letter to Mr Barton's solicitor on 3 September 1998. The letter was forwarded on 9 September 1998 in the following terms:

“Attention Mr Mark Hornabrook
Barton Sunset Terraces
Consent No A 12258
270 Sunset Road Albany

I hereby certify that all the outstanding work on Unit 3 / Unit 4 / Unit 6 / Unit 20 has now been completed.

Also [Les Blanc] of North Shore City Council is in the process of finalising all paper work for Pool Drives and minor items.

Yours faithfully

R F Coughlan”

(c) *Analysis: plans and specifications*

[539] The first limb of the claim alleges that the plans and specifications submitted as part of the application for a building consent were not created by Mr Coughlan, exercising reasonable skill and care. The specific allegations made are:

- (a) The absence of detail in the plans for the location of downpipes and/or spreaders.
- (b) The absence of any adequate detail in the plans for the installation of edge/verge tile and weatherproofing of the verges for type A and B units.
- (c) The lack of any detail in the plans dealing with the installation of control joints in the Harditex. Those allegations are based both on the absence of a detail reflecting the (then) current James Hardie technical information specifying the intervals at which control joints were to be installed and differing elevations in the plans relating to type A, B and C units.
- (d) The absence of any detail in the plans demonstrating how the tops of the wing and parapet walls were to be waterproofed; in particular the absence of any detail reflecting the James Hardie 1996 technical information or any incorporation of that information by reference.

305 See paras [75] and [479](h) above.

- (e) The plans provided an inadequate waterproofing detail for the decks.
- (f) No spot-finished surface levels or provision for drainage was shown on the plans; in particular, it is alleged that site plan 3470/1 was inadequate to comply with NZS 3604.
- 5 (g) The plans did not identify the need to prevent external cladding going down to ground level; this allegation relates to elevations shown on differing site plans relating to type A, B and C units respectively.
- (h) The absence of any detail in the plans for type C units identifying levels inside and outside the units.
- 10 (i) The absence of detail in the plans for retaining the ground between adjacent units at the intertenancy walls.
- (j) The absence of any detail in the plans of any junctions of materials, including overlaps of flashings, fixings and slopes. This allegation extends to the absence of thickness in respect of waterproofing membranes and the thickness of exterior cladding. The plaintiffs plead that there “is a general lack of construction details”.
- 15

[540] The drawings submitted by Mr Coughlan to the Council can fairly be described as skeletal in nature. They do not contain references to detail that a builder or tradesperson may need to get from manufacturers’ specifications. Nor do they provide direction on the placement of items that all involved in the construction project would know needed installation. A good example of the latter is the absence of any detail providing for the location of downpipes and spreaders.

20 [541] The designs are, in my view, indicative of the type of project described by Mr Coughlan in his evidence and confirmed by Mr Pratt. I would term it a “budget-driven” project in respect of which the developers wished to limit (significantly) their compliance costs. In this case, that desire manifested itself in the level of fees paid to Mr Coughlan for his involvement and whatever discussions took place between Council officials and Mr Barton that caused the Council not to charge for more than 77 inspections.

30 [542] The specifications submitted to the Council were poorly prepared. It is plain from their terms that they were designed for the old prescriptive regime and had not been updated and adapted to meet the needs of the performance-based regime created by the 1991 Act.

35 [543] Two examples of the outmoded nature of the specifications can be found in the “General Clauses”:

- (a) First, cl 2 requires all work to be carried out in conformity with “the local By Laws”.
- (b) Secondly, cl 3 makes the specifications subject to the Wages Protection and Contractors Liens Act 1939, a statute that was repealed as long ago as 1987.
- 40

[544] The nature of the various obligations to be undertaken by particular trades were also expressed in very general terms. For example, the specification dealing with waterproofing was set out in a section headed “Plumber”. The relevant provision stated:

45

“**WATERPROOF:**

Leave the building absolutely waterproof in every respect and to the entire satisfaction of the owner. Any part or parts omitted from the specification which are useful or necessary to complete this work in a proper manner shall be taken as those specially mentioned.” 5

[545] Despite the faults inherent in the plans and specifications, I am satisfied, for the same reasons given in respect of the Council’s obligations in relation to the grant of building consents,³⁰⁶ that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications. That would have required builders to refer to known manufacturers’ specifications. I have held that to be an appropriate assumption for Council officials to make. The same tolerance ought also to be given to the designer. In other respects, the deficiencies in the plans were not so fundamental, in relation to either of the two material causes of damage, that any of them could have caused the serious loss that resulted to the owners. 10 15

[546] In particular, the allegation in relation to inadequate waterproofing detail for the decks and the absence of any detail in the plans demonstrating how the tops of the wing and parapet walls were to be waterproofed are answered fully by the reasons given for rejecting the negligence claim against the Council based on its decision to grant a building consent.³⁰⁷ 20

[547] Although I hold that the designer did owe a duty of care to the owners and subsequent owners of the units which extended beyond his contractual obligations to the developer, I find that no material losses were caused to the plaintiffs by any alleged deficiency. Therefore, they are not actionable. The designer succeeds on this aspect of the claim. 25

(d) Analysis: Certificate of practical completion

[548] The second limb of the claim alleges that the designer failed to exercise reasonable skill and care in inspecting the building work and certifying practical completion. Reference is made to four specific inspections: on 19 and 22 May, 3 June and 3 September 1998. It is alleged that the designer failed to carry out inspections with reasonable skill and care because he “failed to identify and correct” deficiencies in the plans and specifications and workmanship and construction methods employed on behalf of the developers. 30

[549] As a result, it is alleged that the certification of practical completion as at 3 September 1998 for units 1 – 21 was undertaken negligently. Mr Coughlan denies that he owed a duty of care to the individual proprietors in respect of his certificate of practical completion. If he did, he says that he did not breach it or any breach was not causative of loss. 35

[550] The evidence establishes that the letters sent by Mr Coughlan to the developers’ solicitors on 19 May and 9 September 1998 were for the purpose of releasing moneys from financiers to meet costs incurred in the course of the development. 40

[551] The only evidence of receipt of a copy of a certificate of practical completion by any of the owners who I have held can sue is that of Mr Devlin. He deposes that on 19 May 1998, his solicitor received a facsimile from the 45

306 See paras [252] and [253] above.

307 See paras [252] and [253] above.

developers' solicitors enclosing a copy of the certificate. Mr Devlin's solicitor took issue with the certificate because some common facilities were not completed. On 26 May 1998 Mr Devlin was invited, by the solicitors representing the developer, to undertake a pre-settlement inspection of the unit.

5 He appears to have received a copy of the May 1998 certificate.

[552] Mr Devlin does not say, in explicit terms, that he relied upon the practical completion certificate to complete his acquisition of the unit. I hold that the proximity between Mr Devlin and the designer was insufficient to give rise to a duty and, in any event, that any loss suffered would be too remote to be claimable.

10 [553] Unlike the Council's obligations to inspect and to certify code compliance, there can be no community expectation on a designer to certify practical completion. Thus, it is necessary to prove actual reliance in order to establish that any loss has been suffered as a result of negligence of the designer in these circumstances.

15 [554] Accordingly, the claims against the designer based on negligent preparation of certificates of practical completion fail. It is unnecessary for me to determine whether the certificates were or were not prepared and signed negligently.

20 (14) *Contributory negligence issues*

[His Honour considered and dismissed the claims of contributory negligence.]

(17) *Costs*

[600] Costs were awarded against the developer on a 3C basis, together with reasonable disbursements, when judgment was entered for liability against Mr and Mrs Barton on 5 December 2007.

25 [601] All other questions of costs are reserved.

(18) *Remaining issues*

[602] I do not propose, at this stage, to enter judgment in favour of the designer against the plaintiffs. I will hear from counsel on whether it is appropriate to enter judgment at this stage at the next conference. I defer entry of judgment so that, if possible, appeal times can all run together. I will hear also from Mr Maclean on issues of costs at the case management conference.

30 [603] The Registrar is directed to allocate a case management conference before me on the first available date after 1 June 2008. At least two hours should be allocated for the conference, which will be convened in Court for chambers.

[604] Counsel should exchange memoranda as to orders sought at that conference, whether timetabling or otherwise. Those memoranda shall be filed and served no later than five working days before the allocated conference date.

40 [605] The successful plaintiffs and the Council will need to consider whether to seek leave to join those allegedly responsible for defective targeted repairs, either as additional defendants or as third parties.

(19) *A summary of determined claims*

[606] I summarise below the outcome of this judgment:

45 (a) The Council is liable for any losses caused by its negligence that can be established by the Turners, Mr Halford, Mr Devlin (up to a

- maximum of \$40,000) and Mr and Mrs Parkinson. The claims against the Council made by Mr and Mrs Sangha and Blue Sky fail.
- (b) The developers are liable to pay damages to all of the second plaintiffs for their negligence in failing to supervise the project adequately.
 - (c) The developers are liable to pay damages to the body corporate for any loss suffered by it in relation to their failure to supervise adequately construction of the driveway. 5
 - (d) The designer is not liable for any losses claimed against him.
 - (e) As between the developers and the Council contribution is fixed at 85 per cent (for the developers) and 15 per cent (for the Council). 10
 - (f) The Registrar is directed to arrange a case management conference to address remaining issues (see paras [603] – [605] above).

[607] For the same reasons given in respect of the claim against the designer, I decline to enter judgment at this stage, in favour of any successful plaintiff, as to liability. 15

[608] I wish to express my appreciation to all counsel for their considerable assistance in what has been proved to be a difficult and challenging proceeding.

Judgment against the Council on liability to identified plaintiffs. Judgment on liability against the developers to identified plaintiffs. Judgment in favour of the defendant designer. Judgment against the body corporate in respect of claims concerning non-common areas. Judgment against the plaintiff lessee. 20

Solicitors for the plaintiffs: *Grimshaw & Co* (Auckland).
 Solicitors for the Council: *Heaney & Co* (Auckland).
 Solicitors for the Bartons: *George Boggiato* (Auckland). 25
 Solicitors for R F Coughlan and Associates: *Kidd Tattersfield Maclean* (Auckland).

Reported by: Duncan Webb, Barrister