IN THE COURT OF APPEAL OF NEW ZEALAND

CA673/2008
[2010] NZCA 64

BETWEEN	NORTH SHORE CITY COUNCIL Appellant
AND	BODY CORPORATE 188529 First Respondent
AND	STEPHEN ROBERT DEVLIN & OTHERS Second Respondents
AND	ROBERT HENRY GRAHAM BARTON AND KAY BARTON Third Respondents
AND	R F COUGHLAN & ASSOCIATES Fourth Respondent

CA66/2009

AND BETWEEN	BODY CORPORATE 188529 First Appellant
AND	STEPHEN ROBERT DEVLIN & OTHERS Second Appellants
AND	NORTH SHORE CITY COUNCIL First Respondent
AND	ROBERT HENRY GRAHAM BARTON AND KAY BARTON Second Respondents
AND	R F COUGHLAN & ASSOCIATES Third Respondent

Hearing: 7-11 September 2009

Court: William Young P, Arnold and Baragwanath JJ

Counsel: CA673/2008
D J Goddard QC, D J Heaney SC and G R Grant for Appellant
M C Josephson and A K Hough for First and Second Respondents other than Seventh and Eighth Second Respondents
S C Price and D D Watterson for Seventh and Eighth Second Respondents
No appearance for Third Respondents
A G McLean for Fourth Respondent
CA66/2009
M C Josephson and A K Hough for First and Second Appellants other than Seventh and Eighth Second Appellants
S C Price and D D Watterson for Seventh and Eighth Second Appellants
D J Goddard QC, D J Heaney SC and G R Grant for First Respondent
No appearance for Second Respondents
A G McLean for Third Respondent

Judgment: 22 March 2010 at 10am

JUDGMENT OF THE COURT

This decision may be cited as *Sunset Terraces* [2010] NZCA 64.

CA673/2008

A The Council's appeal is dismissed.

B The cross-appeal in respect of the Blue Sky claims is allowed. If the parties are unable to agree as to the practical effect of this result they may file memoranda, the second respondents within 15 working days and the Council within a further 15 working days.

C The respondents are entitled to costs against the Council for a complex appeal on a band B basis and usual disbursements. We certify for three counsel. If any issue arises as to apportionment among respondents we should receive memoranda.

D Leave to apply to this Court for further directions or clarifications is reserved in terms of [132] of the reasons for judgment.

CA66/2009

A The appeal in respect of the claim by Mr Devlin is allowed.

B In all other respects the appeal is dismissed.

C The Council and RF Coughlan & Associates are ordered to bear equally the amount of Mr Devlin's award and interest thereon.

D We reserve costs. The appellants in CA66/2009, including Mr Devlin, may file their submissions within 15 working days and the Council and RF Coughlan & Associates may respond within a further 15 working days.

E Leave to apply to this Court for further directions or clarifications is reserved in terms of [132] of the reasons for judgment.

REASONS

BARAGWANATH J

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A Overview

[1] In the wake of the Building Act 1991 there has arisen a very large number of so-called "leaky building" claims requiring this Court to identify the principles to be applied by trial courts. Important among them are those concerning the liability of local authorities.

[2] To date litigants have accepted the authority of the decisions of this Court and the Privy Council in *Hamlin v Invercargill City Council*.[1] On this appeal from a judgment against the North Shore City Council (the Council), Mr Goddard QC for the Council appellant recognised that this Court is bound by *Hamlin* and did not directly seek to persuade us that it was wrongly decided. But he reserved the right to challenge *Hamlin* in the Supreme Court. The Council's reason for seeking to limit the scope of *Hamlin*, which this Court has described as "exceptional" (the description in *Te Mata Properties Ltd v Hastings District Council*[2]), is the overarching premise that the decision is wrong in principle. The context of that statement in *Te Mata* is provided below.[3]

[3] Although we are bound by *Hamlin* it is necessary for us to assess whether it should be confined to its facts, as Mr Goddard contends, or treated as stating principles extending beyond the modest house the subject of that case.

[4] Do owners of apartments in substantial complexes built under the Building Act 1991 have the same right to claim damages against a local authority for carelessness in the performance of their function of monitoring construction as *Hamlin* held was available to the owner of a modest house? That is the major issue on this *Sunset Terraces* appeal from the judgment of Heath J,[4] and the related *Byron Avenue* appeal in which we are also giving judgment today.[5] My answer is yes.

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1 *Hamlin v Invercargill City Council* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC).
2 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460 at [57].
3 At [24].
4 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).
5 *Byron Avenue* [2010] NZCA 65.

[5] The issues considered in this judgment are:

(a) Was *Hamlin* correctly decided and, if so, did the Building Act alter that position?

(b) Does the *Hamlin* principle extend to apartments and cases where experts (architects and engineers) have been engaged?

(c) May owners other than the initial owners sue?

(d) May investors in such properties who are not occupiers sue?

(e) May a subsequent purchaser sue when a prior owner has suffered loss?

The judgment deals also with CA66/2009. This is an appeal by the respondents in CA673/2008 against the High Court's decision that the designer of the development was not negligent in preparation of the plans and in issuing documents described as "certificates of practical completion".

[6] In the *Byron Avenue* judgment we consider in addition:

(f) May a council which has not issued a code compliance certificate be sued?

(g) What is the appropriate outcome when there is fault on the part of purchasers, and what is the effect of the attribution of knowledge of problems to purchasers?

(h) May a body corporate under the Unit Titles Act 1972 sue?

(i) What is the effect on claims of the Local Government Official Information Act and Meetings Act 1987?

[7] The present judgment and that in *Byron Avenue* deal also with the individual cases under appeal.

[8] These reasons for judgment contain my analysis concerning the *Sunset Terraces*. We agree as to the result. Separate reasons are given by the other members of the Court.

B Duty issues

(a) Was *Hamlin* correctly decided and, if so, did the Building Act alter that position?

Context

[9] The appellant in CA673/2008, the Council, was the territorial authority responsible for relevant building control functions under the Building Act 1991. Body Corporate 188529 (the Body Corporate), the first respondent, was constituted under the Unit Titles Act 1972 in respect of a 21-unit residential development in Mairangi Bay, Auckland, known as the Sunset Terraces Development. Proceedings were issued by the Body Corporate and, in respect of 17 of the units, by their owners or lessees, the second respondents, alleging negligence by the Council in connection with the performance of its functions under the Building Act.

[10] In the High Court, Heath J held that the Council was liable to owners of four of the units. The claims by the Body Corporate and the other 13 plaintiffs failed. So too did a claim against the designer of the project. The developers were held liable in respect of all claims but are without means.

[11] Heath J held that the Council owed a duty of care to anyone who acquired a 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 is 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.

CA673/2008: owner/lessee appeals

[12] In CA673/2008 the Council appeals against the findings of liability against it in favour of the four successful second respondents.

[13] Blue Sky Holdings Ltd, a second respondent which held a 182-week leasehold interest in each of 12 units as trustee of the Auckland Residential Property Trust (ARPT) and was assignee of the rights of the owner of each of those units, cross-appeals against the dismissal of its claims.

CA66/2009: the designer appeal

[14] In CA66/2009 the Body Corporate and the second respondents in CA673/2008 appeal against the decision in favour of the designer in respect of such of their claims as failed in the High Court, and also as to costs. The designer cross-appeals against the finding that he breached a duty of care to the owners and Body Corporate and against the reduced order for costs in his favour.

The Council's argument

Primary submission: no duty of care for substantial development

(i) the general law comprising common law principles and the Building Act contribution

[15] The Council's challenges to Heath J's conclusion are based in large part on the assessment of the English courts, notably in *Murphy v Brentwood District Council*,[6] that such claims are to be characterised as for merely economic loss and subjected to the common law rule that claims for such loss are generally to be rejected.

[16] The Council further submits that the *Hamlin* claim was founded essentially on a notion of so-called "general reliance" on councils and that any justification for such reliance cannot survive analysis of the language of the Building Act and accompanying legislation.

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6 *Murphy v Brentwood District Council* [1991] AC 398 (HL).

[17] To see the case in perspective it is convenient first to consider the general law, with its common law and Building Act contributions, before examining the fine detail of the statute.

[18] Mr Goddard performed a careful analysis of the *Hamlin* judgments of this Court, and of the Privy Council and of the Building Act, to which each judgment referred in some detail even though the Act had not come into force at the time the cause of action was held to arise. He submitted that neither common law principle nor the language of the Act justified the *Hamlin* decision nor, a fortiori, a cause of action in respect of all or part of a large development where experts would have been employed, which required a development of *Hamlin*.

[19] Mr Goddard relied on the principle of the common law applied in *Attorney-General v Carter* (in which this Court held that purely economic loss resulting from the negligent survey of a ship was not recoverable),[7] *Te Mata* (the same in respect of a motel),[8] and most recently *Queenstown Lakes District Council v Charterhall Trustees Ltd* (the same in respect of an upmarket lodge);[9] that a cause of action in negligence does not lie in respect of such damage. Leave to appeal to the Supreme Court has been granted in *Charterhall*.[10] He argued that such loss to a building constitutes purely economic loss (*Murphy*), and submitted that the *Hamlin* exception is anomalous and not to be developed. He contended that in *Hamlin* this Court and the Privy Council failed properly to analyse changes made by the Building Act to the previous law.

[20] He further submitted that, in any event, there could be no claim after some significant loss had been identified, even if not by an individual plaintiff, and that in the Blue Sky cases[11] the Judge was right to hold that there was no duty and to find that the plaintiff had failed to satisfy its onus of proof (Blue Sky held leasehold interests in several of the units and was assignee of the rights arising from the reversion in respect of those units).

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7 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

8 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460.

9 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374, [2009] 3 NZLR 786.

10 *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZSC 116.

11 See [102] below.

Discussion

[21] I agree with Mr Goddard that *Hamlin* is an exception to the rule applied in *Carter*, *Te Mata* and *Charterhall*. But there is good reason for the exception. That is because a claim in respect of a leaky building used as a private habitation may properly be characterised as different in kind from the interests considered in the cases on which the Council relies. In stating the common law of New Zealand our courts have in effect rejected the English "purely economic" classification of *Murphy* and emphasised the importance of habitation as a primary interest to be recognised. I see no reason to reject that assessment.

[22] *Te Mata* and *Charterhall* concerned premises which this Court characterised as commercial. In *Te Mata* we cited the definition in the Building Act of "household unit" as:[12]

> any building or group of buildings, or part of any building or group of buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but does not include a hostel or boardinghouse or other specialised accommodation:

[23] Parliament's policy of excluding specialised accommodation from the paradigm of "household unit" is reflected in the "habitation" concept underlying *Hamlin.* We referred to the fact that the distinction was maintained in the Building Act 2004, enacted after the losses in these cases and of relevance only as a general policy indicator. The definition is used to prohibit sales without production of a code compliance certificate and to preserve privacy by controlling the entry of officials. We noted in *Te Mata* that in the Weathertight Homes Resolution Services Acts 2002 and 2006 the term "dwellinghouses" was used to define the classes of property whose owners are to receive the benefit of the resolution service. In the 2006 Act, "dwellinghouse" is defined in s 8(a) as:

> ... 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.

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[12] Building Act 1991, s 2, cited in *Te Mata Properties Ltd v Hastings District Council* at [8].

We recorded the purpose stated in s 3 of the 2006 Act as:

> ... 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.

We concluded in *Te Mata*:[13]

> So Parliament has treated owners of "household units" and "dwellinghouses" as deserving special treatment: protection in respect of building quality, privacy and procedures for dealing with leaky building claims. And it has also subjected councils to onerous obligations in respect of all buildings in a context where public health is an underlying purpose.

[24] The context in which in *Te Mata* we described the *Hamlin* cause of action as exceptional was as follows:[14]

> The Judges who decided *Dutton* [*v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA)], *Bowen* [*v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA)] *and Hamlin* did not articulate just why the statutory duty of a council in relation to supervision of house construction should be treated differently from statutory duties owed in other contexts (a topic recently discussed in *Minister of Fisheries v Pranfield Holdings Ltd* [2008] 3 NZLR 649 (CA)). But it is not difficult to identify the interests of habitation and health, with which *Dutton* began at first instance, as values of such a high order as to warrant special protection. The interest in public health is axiomatic and at the forefront of the policy of the Building Acts. The right to housing is identified in art 25 of the Universal Declaration of Human Rights and art 11 of the International Covenant on Economic, Social and Cultural Rights, to each of which New Zealand is a party. The right to shelter is bound up with those of autonomy and dignity expressed in the adage "an Englishman's home is his castle", echoing Sir Edward Coke's dictum in *Semayne's Case* (1604) 5 Co Rep 91a: "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose". *Hamlin* did not turn on the issue of habitation. Its focus was rather on protection of investment in property. But it can be rationalised as an exceptional and practical response to the position of an average domestic home owner, justified by a presumed economic vulnerability. Given the *Dutton* genesis of the cause of action, both elements: that of habitation and that of presumed economic vulnerability, could be seen as underlying the decision, albeit it did not distinguish between rich and poor owners of habitations.

The rule that economic claims are not generally protected by the law of negligence results from the presumptive hierarchy of interests evolved by the courts over the years. The law has always accorded the highest protection to the physical integrity of the person, a lower protection to property rights, and still less protection to economic interests. That is why the common law has applied the eggshell skull test

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13 At [12].
14 At [57].

to claims for personal injury,[15] the simple loss of value test to damage to goods,[16] and a more exacting test for economic loss.[17]

[25] But it is the task of the judges on behalf of their community to evaluate how a new claim is to be assessed and whether changing conditions require an old evaluation to be reviewed. In doing so, careful regard will be paid to developments in states with which we share many values, including the United Kingdom, Australia and Canada. In each of those jurisdictions the courts have discerned a tension between the owner's economic interest in the value of the house as an asset and what we have called the habitation interest. In *Te Mata*, we briefly reviewed the history in England, Australia and Canada.[18] The English in *Murphy* have ended up disregarding the habitation interest, the Australians have not yet reached a settled conclusion, the Canadians have employed a test of danger as the point at which the classification changes from mere economic loss, which is irrecoverable. In New Zealand, by contrast, there is a settled jurisprudence to which both Parliament and the judges have contributed, which applies habitation as the dividing line.

Murphy *and* Hamlin

[26] In giving judgment in *Hamlin* after enactment of the Building Act, albeit on a claim predating it, this Court and the Privy Council examined the Act to a degree and found support in it for their decision that the New Zealand courts should decline to follow *Murphy*. At a time when New Zealand's final court consisted almost exclusively of members of the House of Lords, it was inevitable that this Court, before departing from expressions of opinion by the Law Lords, should pave the way by setting out in detail differences in local conditions. That was done in *Hamlin* with a detailing of what Richardson J termed "six distinctive and long-standing features of the New Zealand housing scene" immediately prior to the 1991 Act which demonstrate "the kind of society we are" and our needs.[19] Mr Goddard focused on that list in order to distinguish the present case. It consisted of:

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15 *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405 (CA).
16 *The London Corp* [1935] P 70 (CA).
17 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61.
18 At [13] – [15].
19 *Hamlin v Invercargill City Council* (CA) at 524.

(1) the high proportion of occupier-owned housing;

(2) much of the housing construction being undertaken by small-scale cottage builders;

(3) governmental support for private home ownership;

(4) a surge in house construction in recent times;

(5) wider local government (as well as central government) support for private home building;

(6) the fact that new house buyers in New Zealand have not commonly commissioned engineering or architectural examinations.

So, according to Richardson J:[20]

> It accorded with the spirit of the times for local authorities to provide a degree of oversight rather than expect every small owner to take full responsibility and engage an expert adviser.

[27] Such analysis fitted the particular facts of the *Hamlin* case where the plaintiff bought a section from a building company and contracted with it to have built a comparatively modest one-storey suburban house, which proved to have foundations which were inadequate for the ground with an unusually low bearing strength (there had been anecdotes of bogged horses, ducks and frogs on the land). Mr Goddard submitted that it does not fit the present case where:

(1) many of the apartments are tenanted;

(2) the 21-unit Sunset Terraces complex falls outside any notion of cottage building;

(3) there is no relevant national government policy;

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[20] At 524.

(4) this is not a house;

(5) there is no relevant local government policy;

(6) in 1991 the bill which introduced the Building Act also introduced what became s 44A of the Local Government Official Information and Meetings Act 1987. It provides for the issue by a council, within 10 days of a request, of a Land Information Memorandum (LIM) which will disclose whether the council has issued a requisition under the Building Act or any other statute (which might include the Building Act 2004). Section 44A is germane to the second part of the Council's first submission and we discuss it there. It is also of particular relevance to the *Byron Avenue* case. For present purposes it is material to Mr Goddard's submission that the *Hamlin* analysis of the legislation was incomplete.

[28] Further, in this case the developer was furnished with expert advisers. In *Brown v Heathcote County Council* Cooke P acknowledged the possible argument that this factor could alter a result.[21] So did this Court in *Riddell v Porteous*.[22] I return to this point. For the moment it is relevant as a facet of the primary argument.

[29] Mr Goddard submitted that we should construe *Hamlin* narrowly and effectively confine it to its own facts. While his full argument against that decision was reserved for the Supreme Court, it included the proposition that, properly read, the Building Act and Code, which were not essential to the decision, as well as the contemporaneous s 44A of the Local Government Official Information and Meetings Act, demonstrate a statutory purpose of withdrawing from the previous New Zealand legislation.

[30] That prior legislation had been relied on by this Court in *Stieller v Porirua City Council*[23] as distinguishable from the Public Health Act 1936 (UK) considered

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21 *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA) at 82.
22 *Riddell v Porteous* [1999] 1 NZLR 1 (CA).
23 *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) at 93.

in *Anns v Merton London Borough Council*[24] and the Local Government Act 1963 (UK) discussed in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd*.[25] In *Stieller* Cooke P stated:[26]

> In New Zealand, the statutory provisions covering the issue of building permits do not relate solely to matters of health or the safety of occupiers of premises. They have their genesis in Part XLIII of the Local Government Act 1974, which confers on Councils … the power to make bylaws for many purposes including:
>
> > "(8) Conserving public health, wellbeing, safety, and convenience, and regulating drainage and sanitation:"
>
> but also:
>
> > "(21) The inspection of any land, building or premises for any purpose of this Act;
> >
> > (22) Regulating and controlling the construction, alteration, and repair of buildings…
>
> While para (8) is clearly directed at matters of public health, paras (21) and (22) are wide enough to cover the construction of soundly built houses and the resultant safeguarding of persons who may occupy those houses against the risk of acquiring a substandard residence. The construction of houses with good materials and in a workmanlike manner is a matter within the Council's control. Both it and residents in its district benefit from such regulations which make for the economic and social well-being of the community and the creation of a pleasant environment.

[31] Mr Goddard analysed the Building Act and Code.

The Building Act

[32] The 1991 Act was enacted after the New Zealand courts had endorsed the cause of action rejected by the House of Lords in *Murphy*. Parliament had the opportunity to override the common law development. But it did not do so. Instead, it legislated in a manner both contemplating and dealing with council liability for failure to exercise reasonable care in performing council functions.

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[24] *Anns v Merton London Borough Council* [1978] AC 728 (HL).

[25] *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL).

[26] *Stieller v Porirua City Council* at 93.

[33] By s 6(1) Parliament stated its purpose of the Act as to establish:

> Necessary controls relating to building work and the use of buildings and for ensuring that buildings are safe and sanitary …

and directed that:

> (2) To achieve the purposes of the Act, particular regard shall be had to the need to –
>
> > (a) Safeguard people from possible injury, illness, or loss of amenity in the course of the use of the building …

"Amenity" was defined by s2 as:

> an attribute of a building which contributes to the health, physical independence, and well being of the building's users but which is not associated with disease or a specific illness

It was the function of the Council:

> To enforce the provisions of the building code [made under s 48] (s 24(e)).

By s 34(3) it was required:

> [to] grant the consent if it is satisfied on reasonable grounds 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.

Section 76 defined inspection as the:

> ... taking of all reasonable steps to ensure–
>
> (a) That any building work is being done in accordance with a building consent; or
>
> ...
>
> (c) That buildings remain safe, sanitary…

Section 91(3) contemplated:

> Civil proceedings … brought against a [council or], a building certifier …

and that they might:

> arise out of the issue of a building consent, a building certificate, a code compliance certificate …

The ten-year limitation period for claims against a council runs from the time of its issuing a building consent or a code compliance certificate.

[34] As was discussed in *Dicks v Hobson Swan Construction Ltd*:[27]

> [69] It was unlawful to carry out any building work except in accordance with a building consent issued by the Council in accordance with the Act [s 32]. An owner intending to carry out any building work was required before the commencement of the work to apply to the Council for a building consent in respect of the work [s 33]. The application was to be accompanied by a charge fixed by the Council:
>
> > and by such plans and specifications and other information as the [Council] reasonably requires [s 33].
>
> [70] The Council was required to grant or refuse an application for a building consent within the ten day period. It might within that period require further information, in which event the timetable was suspended until the information was provided [s 24(2)]. By s 34(3):
>
> > After considering an application for building consent, the [Council] shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.
>
> Consent might be granted subject to conditions; in that event the Council was to have regard to the Building Code [s 34(4) and (5)].
>
> [71] Section 43 provided:
>
> > **Code compliance certificate**
> >
> > (1) An owner shall as soon as practicable advise the [Council], in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.
> >
> > …
> >
> > (3) … the [Council] shall issue to the applicant in the prescribed form, on payment of any charge fixed by the [Council], a code compliance certificate, if it is satisfied on reasonable grounds that–
> >
> > > (a) The building work to which the certificate relates complies with the building code; …
> >
> > …
> >
> > (5) Where … a [council] refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.

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[27] *Dicks v Hobson Swan Construction Ltd* (2006) 7 NZCPR 881 (HC).

> (6) Where a [council] considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the [Council] shall issue a notice to rectify … [a procedure provided by s 42]

[72] The Council was empowered to take all reasonable steps to ensure that any building work was being been done in accordance with a building consent and to enter to inspect any building or building work. [A procedure provided by s 42]

[73] Proportionality of response was contemplated by s 47:

> **47 Matters for consideration by [councils] in relation to exercise of powers**
>
> In the exercise of its [foregoing] powers … the [Council] shall have due regard to …
>
> (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
>
> …
>
> (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
>
> …
>
> (k) Any other matter that the [Council] considers to be relevant.

(The relevant provisions of the Building Code as to weather-proofness and durability are cited below.[28])

[74] So Parliament conferred on the Council:

> (1) The obligation within ten days to grant or refuse a building consent;
>
> (2) The power to charge for the cost of doing so;

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28 At [36].

> (3) The power to defer its decision until necessary information was provided;
>
> (4) The power to take all reasonable steps to ensure that building work was performed in accordance with the consent;
>
> (5) The duty of issuing a certificate of compliance if satisfied on reasonable grounds that the work complied with the Building Code, such compliance including conformity with its weather-proofness and durability provisions; and
>
> (6) The duty in the event of non-compliance to issue a notice to rectify.
>
> [75] In order to be able to be satisfied as to compliance in relation to work that would be covered during ... construction the Council must obviously make periodic inspections. The number and intensity of such inspections would be determined by application of the proportionality provisions of s 47.

That statutory scheme places responsibility firmly on the shoulders of councils.

[35] As Mr Goddard submitted, Parliament left the scope of the cause of action to the common law to determine. But like later parliaments it signalled to the courts that the habitation interest was of particular moment.[29]

[36] Mr Goddard further submitted that the scope of "amenity" in the Building Act is narrower than that of the bylaws considered in *Stieller*. I agree. I also note his submission that "amenity" does not appear in that part of the Building Code which deals with external moisture. That Code was brought into force by regulation concurrently with the Act. It states:

> CLAUSE B1—STRUCTURE
>
> Provisions
>
> OBJECTIVE
>
> B1.1 The objective of this provision is to:
>
> (a) Safeguard people from injury caused by structural failure,
>
> (b) Safeguard people from loss of amenity caused by structural behaviour, and
>
> (c) Protect other property from physical damage caused by structural failure.

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[29] See [23] above.

It provides as to durability:

> Clause B2—DURABILITY
>
> Provisions
>
> OBJECTIVE
>
> B2.1 The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this code.
>
> FUNCTIONAL REQUIREMENT
>
> B2.2 Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.

The building consent in respect of Sunset Terraces was granted on 11 August 1997 and the final code compliance certificate was issued on 11 September 1998. Until 8 September 1997 the Code stated:

> **PERFORMANCE**
>
> **B2.3**
>
> From the time a code compliance certificate is issued building elements shall with only normal maintenance continue to satisfy the performances of this code for the lesser of; the specified intended life of the building, if any, or:
>
> (a) For the structure, including building elements such as floors and walls which provide structural stability: the life of the building being not less than 50 years.
>
> ...
>
> (a) For linings, renewable protective coatings, fittings and other building elements to which there is ready access: 5 years.

Thereafter it stated:

> **B2.3.1** *Building elements* must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the *specified intended life* of the *building, if stated, or:*
> Performance B2.3.1 applies from the time of issue of the applicable *code compliance certificate. Building elements* are not required to satisfy a durability performance which exceeds the *specified intended life* of the *building check*
>
> (a) The life of the building, being not less than 50 years, if:
>
> (i) Those *building elements* (including floors, walls, and fixings) provide structural stability to the *building* or

(ii) Those *building elements* are difficult to access or replace or

(iii) Failure of those *building elements* to comply with the *building code would go undetected during both normal use and maintenance* of the *building*

…

(c) 5 years if:

(i) The *building elements* (including services, linings, renewable protective coatings, and *fixtures*) are easy to access and replace, and

(ii) Failure of those *building elements* to comply with the *building code* would be easily detected during normal use of the *building*.

B2.3.2 Individual *building elements* which are components of a *building* system and are difficult to access or replace must either:

(a) All have the same durability, or

(b) Be installed in a manner that permits the replacement of *building elements* of lesser durability without removing *building elements* that have greater durability and are not specifically designed for removal and replacement.

And to ensure protection against the entry of water the Code provided:

Clause E2—EXTERNAL MOISTURE

Provisions

Objective

E2.1 The objective of this provision is to safeguard people from illness or injury that could result from external moisture entering the building.

Functional requirement

E2.2 Buildings must be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.

(Emphasis added.)

[37] I repeat the definition of amenity, which appears in the Code as well as in the Act:

> an attribute of a building which contributes to the health, physical independence, and well being of the building's users but which is not associated with disease or a specific illness.

Mr Goddard emphasised the contrast between B1, which includes amenity as a standard and E2, which does not.

[38] It is therefore necessary to consider the submission that *Hamlin* misconstrued the Act, not for the purpose of refusing to follow the decision, by which for practical purposes this Court is bound, but so as to consider whether we should decline to extend an unprincipled decision.

[39] On the submission just mentioned, it is not in my opinion material that the specific "external moisture" objective of the Building Code (Clause E2) is to safeguard people from illness or injury that could result from external moisture entering the building, rather than focused on amenity values. This claim is not for breach of statutory duty but for negligence. The policy of the Code is not to encourage or permit the entry of moisture that will ultimately make the building uninhabitable. It is rather to provide generally for health and safety over a 50-year period. That is consistent with the analysis of the law of tort in New Zealand discussed in the context of the first submission. Nothing in it is incompatible with the respondents' claim.

[40] Mr Goddard took us to the two-volume report of the Building Industry Commission *Reform of Building Controls* on which the Act was based.[30] It included the following to which italics and underlining are added. The bold emphasis at [2.16] is original:

> **Public expectations:**
>
> 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.*
>
> 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*

[30] Building Industry Commission *Reform of Building Controls* (January 1990).

performance and procedures for compliance with essential user requirements to an extent that will satisfy reasonable community expectations.

2.16 **The purpose of a building control system should be to ensure that essential provisions to protect people from likely injury and illness and to safeguard their welfare, will be satisfied in the construction, alteration, maintenance 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.

2.18 The purpose of the reform is to make better use of both public and private resources to regulate building activities:

- 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.*

…

SCOPE OF BUILDING CONTROLS

…

3.4 … To satisfy the objectives of the control system as a whole, the New Zealand Building Code requires a rational and consistently applied set of principles to determine whether a user requirement should be regulated or not.

3.5 *The primary purpose of building control in New Zealand should be to preserve the health and safety of people*.

3.6 *User requirements related to amenity can also have a place, because amenity can be closely associated with health. In situations where discomfort, smell, noise or inconvenience are excessive or frequent, they can eventually have adverse mental and physical consequences.*

3.7 *Protection of the economic interests of people in getting value for money is not a justification for building controls since value and quality can be supplied through forces of the market.*

3.8 Every building control measure limits choice, and potentially increases the cost to the building owner. *Building controls should not prohibit owners from making their own economic decisions, such as accepting higher maintenance or operating costs as a trade off for lower initial building costs, providing essential requirements are not*

prejudiced. Such choices are routinely made by people in the purchase of any asset.

…

IDENTIFICATION AND ALLOCATION OF CONTROL COSTS

6.11 The present distribution of control tasks and costs is not likely to produce an effective response to the reforms in other areas of government activity based on fundamental principles of scrutiny, accountability and improved managerial performance.

6.12 An objective of building control reform is to reduce costs in the system, and to distribute the costs and benefits of control more equitably. This will come about in a number of ways by:

- Avoiding duplication by creating a single focus for building controls;
- Reducing the extent of regulatory controls to essential safeguards;
- Providing an avenue for resolution of uncertainty and disputes;
- Clarifying the interface between building controls and other controls;
- Facilitating innovation and the application of new technology;
- Introducing alternative procedures and an element of competition in the control process.

6.13 The trend towards "user pays" suggests that *there should be no expectation that the practice of providing free or subsidised advice should continue*. The commission is strongly of the view that hidden costs should become visible and that the principles of financial management reform should be applied throughout the building control system to assist in an equitable allocation of costs.

[41] The Report focused as well on the topic of liability for non-compliance. It stated:

4.76 Qualifications of the parties in a particular case, and their *liability for fault or damage in the event of non-compliance, were widely discussed* with industry and government during the first phase of the government Review. Consultation by the Commission with the Industry Liaison Group and others in the light of reforms in local government, occupational regulation and changes pending in the Limitation Act 1950, confirm *strong support for* the principles that have shaped the recommendations on alternative procedures to assure compliance with the Code, namely:

- A statement by the producer that work carried out by or under the direction of the producer (often referred to as "self certification"), is not sufficiently reliable assurance of compliance and therefore procedures for independent review by a control authority or an outside qualified party are required.

- If a control authority is required by statute to accept a certificate from an outside independent party, it cannot remain potentially liable for work covered by the certificate.

- *There should be no statutory exemption from legal liability for subsequent damage or defect due to negligence*.

4.77 The Commission recommends that the procedures for TAs [territorial authorities] to check compliance with the Code and issue consents, provide three options to building owners:

1 by the TA checking the building proposal submitted by or on behalf of the owner and the actual work, using inhouse or external consultants;

2 by the owner supplying statements from independent qualified persons that they have examined work done by others in their area of expertise and certify to its compliance;

3 by a combination of these two methods for part or all of the works.

Potential liability exposure

4.78 Applying the principles adopted by the commission, *the alternative procedures for certification incorporated in the control system affect the potential legal liability for negligence in checking Code compliance by the parties involved*:

- Statements by building producers that personal work, or work carried out under the direction of the producer, complies with the Code, are voluntary. *Should the TA choose to accept such statements its potential legal liability remains intact*.

- Certification by a qualified independent person (Approved Certifier) that work by others specific to his or her identified field of expertise has been checked for compliance with the Code must be accepted by the TA. *The Approved Certifier assumes legal liability for any negligence that may occur in certifying compliance, with corresponding reduction in potential liability of the TA*.

- Transfer of all TA duties to check compliance of the work to an independent person or body (Coordinating Certifier) may be authorised by the Minister. The Coordinating Certifier certifies upon completion of the building that within the limits or professional competence, sufficient examinations and inspections have been carried out to ensure that the building complies with the Code. This certificate must be accepted by the TA. *The Coordinating Certifier would have the same legal liability in the case of negligence that the TA would have, if it had performed these control duties*.

- Accreditation certificates or products and systems issued by BIA based on a technical appraisal of their performance by an independent body, and BIA rulings on type approvals of new solutions, must be accepted by the TA. *BIA assumes legal liability for negligent type approvals and accreditation*.

[42] While in *Attorney-General v Body Corporate 200200*[31] (*Sacramento*) this Court rejected the submission that the Act in fact imposed such liability on the Building Industry Authority, it is clear that the Act did contemplate liability as providing an incentive to achieve compliance with the Code. It was consumer-focused, and consumers who were injured would be able to sue. While the certifiers idea proved misconceived, as after a short period all went out of business, there is no reason to infer that local authorities should after the Act be exempt from the liability to which they had been subject before its enactment and under which certifiers would be liable for negligent performance of the very inspection obligation imposed on councils. The overall thrust of the advice was to accept continuing liability for negligence on councils as well as certifiers.

[43] So I do not accept Mr Goddard's argument that the report assists the Council. Rather it favours the respondents. But it is only one of the pointers to be considered.

[44] Mr Goddard picked up the consumer point and argued that, if there is to be any *Hamlin* liability, it should be confined to consumers: those who buy and occupy the leaky building. He cited definitions of "consumer goods" and "consumer credit" in the Credit (Repossession) Act 1997, the Personal Property Securities Act 1999 and the Credit Contracts and Consumer Finance Act 2003 and also in international instruments, such as the United Nations Convention on the International Sale of Goods[32] as offering a suitable bright line. But for the reasons stated below such a test would be unworkable.[33]

[45] I accept that the fine detail of the cases points in various directions. It is impossible to unravel the Gordian knot and we must decide where to cut it. The starting point remains the *Hamlin* decision. There Cooke P contrasted the

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31 *Attorney-General v Body Corporate 200200 (Sacramento)* [2007] 1 NZLR 95 (CA).
32 United Nations Convention on the International Sale of Goods (1964) 834 UNTS 107.
33 At [69].

reasonably stable New Zealand jurisprudence stated in the leading decisions *Bowen v Paramount Builders*[34] and *Mount Albert Borough Council v Johnson*[35] with the variable English authority. As to the former he said:[36]

> 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 …

[46] While *Bowen* did not involve a local authority, *Johnson* did. It was a case with some similarity to the present, concerning a block of six flats for which the developer had engaged a designer. Both at first instance and on appeal the Council accepted that the duty of the builder in *Bowen* was applicable to a local authority.

[47] In *Hamlin* Cooke P said:[37]

> The upheavals in high level precedent in the United Kingdom … have had no counterpart in New Zealand.

[48] Those upheavals, outlined in *Te Mata,*[38] followed (1) an initial position of no council duty,[39] moved via (2) negligent failure to protect the public health,[40] to (3) a simple *Donoghue v Stevenson* liability for failure to protect the house,[41] to (4) a public law duty not to act ultra vires,[42] to (5) no liability in negligence,[43] reverting to the original common law.

[49] It may be noted as to the English jurisprudence that Booth and Squires state:[44]

> The current position is that policy restrictions on common law duties of care being imposed on local authorities have been largely removed …

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34 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).
35 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
36 At 522.
37 At 522.
38 *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460 at [23]ff.
39 *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL).
40 *Dutton v Bognor Regis Urban District Council* [1971] 2 All ER 1003 (HC).
41 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA).
42 *Anns v Merton London Borough Council* [1978] AC 728 (HL).
43 *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 (HL); *Murphy v Brentwood District Council* [1991] AC 398 (HL).
44 Cherie Booth and Daniel Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at 305.

Their reference is to *Phelps v Hillingdon London Borough Council*.[45] They continue:[46]

> ... the restrictions on damages claims for breach of statutory duty are based principally on policy arguments that have been rejected when applied to common law claims, yet without the courts providing an explanation of why they ought to be regarded as inapplicable to one and not the other.

Fairgrieve draws a similar message from *Phelps* and discerns:[47]

> … [a] shift to a more nuanced consideration of policy concerns, and … a sustainable change in perspective on the part of the English judiciary. First, doubt has been cast upon the exclusionary approach, whereby public policy concerns could exclude a whole category of public service activity from scrutiny in public authority liability cases … Secondly, … the House of Lords [in *Darker v Chief Constable of the West Midlands Police* [2002] 1 AC 435] has demonstrated its attachment to the basic premise that those who have suffered a wrong should have a right to a remedy. Although this tenet may in some ways be seen as somewhat circular, it might perhaps be interpreted as suggesting … a presumption in favour of the justice, fairness, and reasonableness of a duty.
>
> This does not mean that the outcome of litigation is now systematically in favour of the claimant … Instead, once countervailing public policy concerns are invoked, the courts will proceed to a fine balancing of the competing factors, with this balancing act no longer weighted heavily in favour of exclusion rather than inclusion.

[50] The courts must appraise the potential consequences of their decisions. Harlow and Rawlings state:[48]

> The *Anns* case opened a floodgate. Ganz ["Public Law and the Duty of Care" [1977] PL 306] found that the leading local authority insurer had 350 similar claims costing £1.4 million. Rising claims in negligence against local authorities were ultimately to bankrupt their main insurer. She believed this might be sufficient to inhibit local authorities from exercising important statutory powers. [Ganz's comment was "… local authorities may be left to foot the bill when development companies are wound up upon completion of the project. The Association [of Metropolitan Authorities] has suggested that developers should be charged fees to cover the cost of insuring against claims for negligent inspection. It is not self-evident that the taxpayer and ratepayer should foot the bill for failure to stop the negligence of private developers…"]. Perhaps this is partly why the House of Lords later resiled from *Anns* …

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45 *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL).

46 At 305.

47 Duncan Fairgrieve *State Liability in Tort* (Oxford University Press, Oxford, 2003) at 78 – 80.

48 Carl Harlow and Richard Rawlings *Law and Adminstration* (2nd ed, Butterworths, London, 1997) at 627.

But they add:

> Of course, there is another side of this argument. First, we must not lose sight of the Diceyan system of accountability. … Secondly, … a case which establishes a manufacturer's liability for design faults may indirectly affect the rights of consumers …, help to introduce new safety systems and change insurance practice… it is not suggested that such cases are unsuitable for resolution by adjudication. Thirdly, we must remember that government is not necessarily impartial in representing the public interest and does not always admit good claims. The intervention of the court may then be helpful.

[51] New Zealand institutions have now had fifteen years to adapt to *Hamlin*. It is preferable for the New Zealand courts to maintain their steady course, subject to whatever policy changes Parliament may choose to make, than to reaffix the shackles to the mutable English law that this Court rejected in *Hamlin* even before the Privy Council left our orbit.

[52] Indeed it is arguable that *Murphy* misapprehended the authorities it sought to apply. The main thrust of *Murphy* is the classification of the cause of action as pure economic loss and the consequential application of such cases as *Cattle v Stockton Waterworks Co*;[49] *Simpson & Co v Thomson*;[50] *Société Anonyme de Remorquage à Hélice v Bennetts*;[51] *Weller & Co v Foot and Mouth Disease Research Institute*;[52] and *The Aliakmon*.[53] These are the lineal forebears of *Carter*, *Te Mata* and *Charterhall* in New Zealand. That such an approach is not an idiosyncrasy of the common law appears from the similar approach in Austria, Germany and Portugal. Professor Christian von Bar states:[54]

> Pure economic loss, i.e. compensation for damage unrelated [to] physical injury, is [not] covered [by the codes of those three states]. These codes recognise no general duty of care towards purely economic interests.

Bar adds that:[55]

> The term 'pure economic loss', which is often difficult to distinguish from the notion of violation of property, is currently defined only in s 2 § Swedish

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49 *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453, discussed in *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180 at 133 – 136.

50 *Simpson & Co v Thomson* (1877) 3 App Cas 279 (HL).

51 *Société Anonyme de Remorquage à Hélice v Bennetts* [1911] 1 KB 243 (KBD).

52 *Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569 (QBD).

53 *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL).

54 *Christian* von Bar *The Common European Law of Torts* (Oxford University Press, Oxford, 1999) at 49.

55 At fn 158.

> Statute on damages of 2 June 1972 which reads: "pure pecuniary loss according to this Act is such economic loss as is not in any way connected to personal injury or damage to property".

[53] The judges who decided *Hamlin* were well aware of the common law authorities. Their reluctance to shoehorn into the *Murphy* constraints habitation claims involving actual damage to property poses a question as to the true classification of the cause of action. *Murphy* et al turn on the hierarchy at 0 above which confers the lowest level of protection to "merely" economic interests. That classification is described by the Law Commission of England and Wales as "quite problematic".[56] What is different about habitation claims based on loss flowing from damage to property is that the physical damage impacts to a greater or lesser extent on the right to shelter.

[54] On any measure shelter is a high-level value. Whether one takes such legal instruments as art 25(1) of the Universal Declaration of Human Rights,[57] art 11.1 of the International Covenant on Civil and Political Rights,[58] arts 30 and 31 of the Revised European Social Charter[59] or such non-legal measures as Abraham Maslow's "Hierarchy of Needs",[60] which ranks it with air, food, drink, and sleep, it has a value transcending the economic. New Zealand is no exception. On the contrary, in *Replenishing the Earth* Belich wrote:[61]

> The newlands were to provide decent lives as well as decent livings. … [S]ettler populism … is still with us in the newlands, and rears up in umbrage whenever such cherished perquisites as majority house-ownership, access to the outdoors, or egalitarianism seem threatened. Crossing settlerism can still be dangerous.

[55] The same point was made at a housing workshop at the Reserve Bank by Kay Saville-Smith:[62]

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56 Administrative *Redress: Public Bodies and the Citizen* (EWLC Consultation Paper 187 2008) at [3.169].

57 Universal Declaration of Human Rights, UNGA Resolution 217A (III) (10 December 1948) A/810.

58 International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

59 Revised European Social Charter (1996) ETS 183.

60 Abraham Maslow "A Theory of Human Motivation" (1943) 50(4) Psychological Review 370.

61 James Belich *Replenishing the Earth* (Oxford University Press, Oxford, 2009) at 556-557.

62 Kay Saville-Smith "The Prudential Lending Pathway to Decent Housing" (Reserve Bank, 9 July 2009).

> There is strong evidence to suggest that the desire for home ownership by individuals and families is a rational response to four key and inter-related issues. Those are:
>
> - The lived experience of social mobility, resource accumulation and household fluidity among New Zealand families.
> - Issues of identity, attachment and belonging.
> - The dynamics of the rental market in New Zealand.
> - The condition and liveability of New Zealand's rental stock.
>
> For New Zealanders home ownership is demonstrated to be associated with improved life chances. … [T[he egalitarianism and mobility of New Zealand society was driven largely out of inter-generational transfers associated with inheritance of housing assets. Moreover, there is considerable evidence to show that where owner occupation is both normative and the mainstream experience of housing, as it is in New Zealand, that achieving that tenure status is an important part of a sense of identity, attachment and belonging. It is notable that one of the main reasons for planned residential movement in New Zealand is a change of tenure status from tenant to owner occupier.

[56] For that reason it is simplistic to say "the occupant can simply walk away". While there are notable exceptions, as in the case of investors, in many cases there will be no material difference between owners of leaky apartments and owners of leaky houses, except that the former are likely to have fewer resources. A high proportion of their assets is likely to be locked into the premises which are leaky because of council failure to perform its obligations. That is the essential ratio of *Hamlin*. The fifty-year life span required by the Building Code[63] emphasises the expectation that their habitation will be sound and for a long time.

[57] In *Bowen* Cooke J stated:[64]

> I do not see why the law of tort should necessarily stop short of recognising a duty not to put out carelessly a defective thing, nor any reason compelling the courts to withhold relief on tort from a plaintiff misled by the appearance of the thing into paying too much for it … for the purposes of disposing of the present case it is enough to say that the damage is basically physical.

While the economist may choose to describe damage to an apartment as "economic", and that term is used in *Hamlin*, a court's task is to make the characterisation that best fits all relevant values, of which the loss of investment or price of repair is only

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63 *Dicks v Hobson Swan Construction Ltd* at [47]; *Te Mata Properties Ltd v Hastings District Council* at [76].

64 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 423.

one. Whatever may be the proper assessment in England, in New Zealand it is a misnomer to call it "pure economic loss" and an error to go on from that to apply the pure economic loss cases.

[58] The arguments in this Court did not engage with the wider debate about the future evolution of public law liability in tort, touched on in *Combined Beneficiaries Union Inc v Auckland City COGS Committee*.[65] The topic has been discussed by Sir Robert Carnwarth.[66] He concluded:[67]

> The law on this subject remains ripe for reform … In principle … where serious harm has been caused to individuals … by failure to carry out legal duties or obligations imposed upon them for the benefit of individuals, justice demands a suitable remedy for breach. For past failures the only effective remedy in most circumstances is monetary compensation. As the European Court of Justice has recognised, failure to afford such a remedy impairs the effectiveness of the law.

[59] An enthusiastic proponent of such a remedy, Tom Cornford, acknowledges in *Towards a Public Law of Tort* that,[68] where public and private law standards diverge, the private law negligence standard cannot usurp the role of public law in regulating the conduct of the authority. A reviewer doubts whether changes could properly be made judicially.[69] But here there is no divergence. *Hamlin* may be seen as just such a public law remedy. To displace it would require examination of that supplementary justification within the social context and of other perspectives. They include the French *faute de service* discussed in the authorities cited by Andenas and Fairgrieve in *Judicial Review in International Perspective*[70] and in Brown and Bell in *French Administrative Law*.[71] The topic is the subject of *Tortious Liability of Statutory Authorities: a Comparative and Economic Analysis of Five English Cases* by Markesinis, Auby, Coester-Waltjen and Deakin.[72] They are dons from Oxford

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65 *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCA 423, [2009] 2 NZLR 56.

66 Sir Robert Carnwarth "The *Thornton* Heresy Exposed" [1998] PL 407.

67 At 422.

68 Tom Cornford *Towards a Public Law of Tort* (Ashgate, Surrey, 2008) at 145.

69 SH Bailey [2009] PL 869 at 873.

70 Mads Andenas and Duncan Fairgrieve *Judicial Review in International Perspective* (2000) volume II at 336.

71 Neville L Brown and John S Bell *French Administrative Law* (5th ed, Oxford University Press, Oxford, 1998) at 190.

72 Basil Markesinis, Jean-Bernard Auby, Dagmar Coester-Waltjen and Simon Deakin *Tortious Liability of Statutory Authorities: a Comparative and Economic Analysis of Five English Cases* (Hart, Oxford, 1999).

and Cambridge, a professor at Paris II and a professor at the Ludwig-Maximilians University of Munich. They answer Lord Hoffmann's suggestion in *Stovin v Wise*,[73] that after *Anns*, local inspectors insisted on "stronger foundations than was necessary", with what they call:[74]

> … a counter-hunch, namely, that while it is possible that the post-*Anns* regime led to unnecessarily strong and expensive foundation, the post-*Murphy* situation may be encouraging sloppy verification of building calculations…

They recount the evidence from Germany:[75]

> … of elaborate and long-standing discussions concerning the economic consequences of [its more demanding] liability rule, *some of it empirical in nature*

and that:[76]

> these German debates … have, in essence, preceded the current English discussions by about one hundred years

and that:[77]

> many of the policy arguments advanced in England against the imposition of liability had, again, been considered in Germany and had been rejected, in some cases many years ago … If Lord Hoffmann's reasoning [in *Murphy*] were right, the German liability rules would have brought in their wake considerable economic difficulties for all German statutory authorities subject to them. Yet nothing of the sort has happened … [O]ne is forced to doubt the validity of the English fears or, at the very least, set them aside *until some figures can be produced to support them*.
>
> (Italics in original.)

[60] Such reasoning applies with stronger force where:

(a) the onus must rest on the council to show cause why the settled law should be departed from;

(b) the experience of the 1991 Act is notorious.

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73 *Stovin v Wise* [1996] AC 923 (HL) at 958.
74 Markesinis et al at 79.
75 At 112 – 113.
76 At 113.
77 At 113.

[61] Each warrants elaboration. In *Baigent's Case*[78] this Court recognised the need for a remedy for breach of the public law obligations contained in the New Zealand Bill of Rights Act 1990. What has largely escaped attention is that essentially all of the "rights" stated in that measure already existed as interests recognised by the common law. They could and perhaps should long since have given rise to a similar judge-made remedy. But in this sphere, as in others, the control by English law precedent upon the common law of New Zealand inhibited its distinctive development. The establishment of the Permanent Court of Appeal opened the way to change, beginning with *Corbett v Social Security Commission*.[79] The history is recounted by Jim Evans.[80] Great changes followed. Inevitably a combination of respect for English authority, habit and above all the looming authority of the Privy Council constrained the process. Nevertheless New Zealand jurisprudence has steadily matured and become responsive to our particular conditions, driven by judges with the experience and confidence to strike out in more relevant directions. *Hamlin* is an outstanding example of that process. It has been accepted by the New Zealand community and is a feature of our law so distinctive that any change to it should be for Parliament and not the courts. Rather than being seen as anomalous, *Hamlin* should be seen to point the way to a more developed jurisprudence in public law.

[62] It may be thought that any contemplated departure from the current common law of New Zealand should not repeat the English error of disregarding other experience. In *Public Law and Democracy in the United Kingdom and the United States of America* Paul Craig wrote:[81]

> A way of considering problems may develop in which the agency perceives the issues through blinkers; in which the advantages and disadvantages of certain action are unconsciously thought of in terms of the major client groups; and into which it becomes increasingly difficult to inject new data.

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78 *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

79 *Corbett v Social Security Commission* [1962] NZLR 878 (CA).

80 Jim Evans in "Precedent in New Zealand's Permanent Court of Appeal" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart, Oxford, 2009).

81 Paul Craig *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon, Oxford, 1990) at 120 – 121.

That may explain the failure of the English courts to move past the protection of public sector interests to a more nuanced appreciation of other issues at stake. In New Zealand it was argued in a paper published by the Law Commission:[82]

> the role of the State, represented by the Crown, is to safeguard and promote the interests of its citizens – as individuals and as social groups. It has no other justification … save to the extent that in serving its citizens' needs the Crown requires to have superior powers or immunities, the status of citizens before the courts should be no less than that of the Crown as executive.

A footnote in the Commission's paper adds:[83]

> It may be argued that since the function of all state agents is to provide a public service to the community and its members, subject to such exceptions, the Crown as executive should be subordinate to the citizen.

Dicey put the same point another way:[84]

> … the principles of private law have been with us so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

Since the Crown's relevant functions are performed at local level by councils the principle is the same.[85] There is no reason why they should be immune, because of their status, from the responsibility that attached to certifiers performing the same function.

[63] The argument based on "economic" arguments is demolished by the 1991 Act's lamentable lesson of what happens if the market is left untrammelled by law. The underlying neo-liberal theory has been influenced by one part of Adam Smith's economic theories without regard to the important social and moral context on which *The Wealth of Nations* of 1776 was premised. It is set out in his 1759 essay *The Theory of Moral Sentiments*.[86] His keen concern for the disadvantaged is a leitmotiv which includes:[87]

> ... as we sympathise with the sorrow of our fellow-creature whenever we see his distress, so we likewise enter into his abhorrence and aversion for

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82 New Zealand Law Commission *Mandatory Orders Against the Crown and Tidying Judicial Review* (NZLC Study Paper 10 2001) at [23].

83 Footnote 23.

84 AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915) at 199.

85 See *Ngati Maru Ki Hauraki Inc v Kruithof* [2005] NZRMA 1 (HC) at [57].

86 Adam Smith *The Theory of Moral Sentiments* (Penguin, London, 2002).

87 At 82.

> whatever has given occasion to it. Our heart, as it adapts and beats time to his grief, so is it likewise animated with the spirit by which he endeavours to drive away or destroy the cause of it.

[64] The *Hamlin* judgments were undoubtedly actuated by a human perception of what is right for New Zealand. As a response to human distress they receive support from the research publication by Howden-Chapman, Bennett and Siebers.[88] It records an assessment that 80,000 houses built with monolithic cladding in the 1990s had leaked or would leak.[89] It advises that leaky buildings that develop mould are a major social and economic problem that remains in need of attention and that there has been a slow pace of policy progress over the past decade.[90] Associate Professor Douwes reports:[91]

> There is an increasing body of evidence demonstrating a highly consistent association between home dampness and respiratory symptoms and asthma. Indoor dampness may not only aggravate pre-existing respiratory conditions, but there is (limited) evidence that it may cause new onset symptoms and asthma. Problems of dampness also occur in school buildings, daycare centres, offices and other buildings. The health risks associated with dampness-related exposures in those buildings are likely to be similar to those reported from damp houses.

[65] The evidence in this case and in *Byron Avenue* provides individual examples of the distressing effect on the lives of those subjected to the phenomenon described by Professor Howden-Chapman and her colleagues. It is not evident why councils which have breached the duty placed firmly upon them by Parliament should be exempt from liability to the victims of their negligence.

[66] It is to be noted as to social context that in England the sharp edge of *Murphy* is blunted by legislation of which Lord Mackay LC stated:[92]

> … I am of the opinion that it is relevant to take into account that [the United Kingdom] Parliament has made provisions in the Defective Premises Act 1972 imposing on builders and others undertaking work in the provision of dwellings obligations relating to the quality of their work and the fitness for habitation of the dwelling. For this House in its judicial capacity to create a large new area of responsibility on local authorities in respect of defective

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88 Philippa Howden-Chapman, Julie Bennett and Rob Siebers (eds) *Do Damp and Mould Matter? Health Impacts of Leaky Homes* (December 2009).

89 At 8.

90 At 16.

91 At 33.

92 *Murphy v Brentwood District Council* at 457.

> buildings would in my opinion not be a proper exercise of the judicial power.

That legislation does not apply where there is an "approved scheme in place". The vast majority of new dwellings built in the United Kingdom are accompanied by an insurance-backed warranty lasting for up to ten years.[93] That period coincides approximately with the limitation under the Building Act for claims against councils from the time of issuing a building consent or a code compliance certificate.[94]

[67] It is true that in the case of a rentier who sees his tenants as commercial opportunities there is little difference from the investor in a turbine.[95] We have placed an upmarket lodge and a motel in the same class. But the rentier does provide a building which Parliament has classified as:

> hav[ing] as its principal use occupation as a private residence

[68] When one looks at the individual claimants in this case and *Byron Avenue*, the policy behind *Hamlin* applies *a fortiori* to those who own and occupy a relatively modest apartment who may not be able to pay the higher price for a *Hamlin* house. They must be covered by its principle.

[69] Those who own but do not occupy are not precisely covered by *Hamlin*. But having considered a broad spectrum of cases I am satisfied that it would be wholly impracticable to have the duty come and go as the owner moves in and out of the apartment for shorter and longer periods. I can see no principled basis not to adopt the bright line selected by Heath J and permit claims by owners, whether or not they are in occupation, provided the intended use of the building was stated 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.

[70] We have heard no argument concerning the recent judgment of Potter J in the "Spencer on Byron" case,[96] which has been provided to us by counsel. For that

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93 Auckland District Law Society *Law News* Issue 34 (18 September 2008) at 3.
94 Building Act 1991, s 91.
95 See *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).
96 *Body Corporate No 207624 v North Shore City Council* HC Auckland CIV 2007-404-4037 11 November 2009.

reason and also in case it comes before this Court I make no comment upon its correctness. I note that the Judge characterised the development as:[97]

> … a major multi-storied hotel, clearly a commercial building, developed and operated as such …

and, despite some residential element, applied the *Te Mata* and *Charterhall* decisions rather than *Hamlin*. The decision evidences the fact that, as so commonly in the law, the courts will be called upon to perform the characterising task, discussed by Mance LJ in the conflict of laws case *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*,[98] of deciding which side of the line a case falls. Commenting on that decision the authors of *Dicey, Morris and Collins on Conflict of Laws* (14ed 2007) conclude:[99]

> ... the way lies open for courts to see common-sense solutions based on practical considerations.

A similar approach will no doubt be required in the present class of case.

[71] It would follow, subject to the second limb of the primary submission, that the Council's primary argument fails.

[72] That conclusion would lead me to allow the appeals by the reversionary owner in the Blue Sky case.[100] It sued both in its own right under the 182-week lease and as assignee of the rights of the owners who may or may not be occupiers. The whole of the relevant bundle of rights as owner being with Blue Sky, its case cannot be distinguished from that of any other owner and, subject to the Council's further arguments, its appeal should succeed.

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97 At [95].

98 *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] QB 825 (CA) at [27].

99 Lawrence Collins (ed) *Dicey, Morris and Collins on Conflict of Laws* (14th ed, Sweet & Maxwell, London, 2007) at [2-045].

100 [102] below.

Primary submission: no duty of care for substantial development

(b) the Building Act and s 44A of the Local Government Official Information and Meetings Act 1987

[73] The Council argued that the courts in Hamlin overlooked the effect, not only of the narrowing of the scope of the former bylaws by the terms of the Building Code but also of the enactment of s 44A of the Local Government Official Information and Meetings Act 1987. By giving a prospective purchaser access within 10 days of a request to a Land Information Memorandum (LIM) disclosing material information, it allows a decision to be made on the merits of a property without need for there to be the "general reliance" previously adopted by the common law. So that common law should be discarded and with it the duty of care of a council to a buyer.

[74] The concept of "general reliance" appears in the cases as meaning that a plaintiff does not have to show that there was any actual communication from the council which contributed to the decision to buy. Because it uses the same noun as that of specific reliance it is potentially misleading. In *Stovin v Wise* Lord Hoffmann stated:[101]

> This ground for imposing a duty of care has been called "general reliance." It has little in common with the ordinary doctrine of reliance; the plaintiff does not need to have relied upon the expectation that the power would be used or even known that it existed. It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared. A widespread assumption that a statutory power will be exercised may affect the general pattern of economic and social behaviour. For example, insurance premiums may take into account the expectation that statutory powers of inspection or accident prevention will ordinarily prevent certain kinds of risk from materialising. Thus the doctrine of general reliance requires an inquiry into the role of a given statutory power in the behaviour of members of the general public, of which an outstanding example is the judgment of Richardson J. in *Invercargill City Council v. Hamlin* [1994] 3 N.Z.L.R. 513, 526.

[75] The availability of a LIM may bear on whether a buyer was careless in failing to secure the information it would have provided. But it can have no relevance to the

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[101] *Stovin v Wise* [1996] AC 923 (HL) at 924.

case where, because of the Council's breach of its statutory obligations, the LIM would not have disclosed the relevant facts.

[76] Where, as here, the council fails to intervene and issue a notice to rectify non-complying work which is then covered up and says nothing of the matter in its files which could have been recorded in a LIM, I see no reason why it can be said that there is no "general reliance" and thus the council should be relieved of liability. The LIM regime has made no difference to the buyer's vulnerability.

Conclusion on primary submission

[77] At bottom, the Council is seeking to escape liability for failing to carry out the duties imposed on it by Parliament, for which it was empowered to charge such fees as were required to enable it to do so, when successive owners had no rational choice but to make decisions on the basis that it had properly inspected (or had inspected) the work which was covered up by the construction process. This has had the predictable consequence that the work would be performed shoddily in defiance of the Building Code, with an overall injurious effect on the consumers: the owners and occupiers. There is in my opinion no policy reason that would justify relieving the Council of consequential liability.

(2) Does the *Hamlin* principle extend to apartments and cases where experts (architects and engineers) have been engaged?

[78] The authorities cited at [28] did not discuss the case where the buyer has no reason to know whether there were experts or who any experts may have been. I appreciate the argument that a major building is likely to have had engineers and architects involved in its construction. This argument is in my view the strongest advanced by the Council. It does have the line drawing problem: how is a case such as this to be classified?

[79] In the end however I consider that the habitation test should cover all buildings. That is because of the considerations listed at [51]-[63].

(c) May owners other than the initial owners sue?

[80] Mr Goddard submits that, because the Privy Council in *Hamlin* determined that the cause of action accrues when the latent defect is discovered or is reasonably discoverable, once that occurs the accrual is complete and it cannot recur. The market value is then affected. So once the cause of action has accrued while the property is in the ownership of one owner, it cannot accrue again in favour of a later owner. He cites the statement by Lord Denning MR in *Sparham-Souter v Town & Country Development (Essex) Ltd*:[102]

> One more word. The only owner who has a cause of action is the owner in whose time the damage appears. He alone can sue for it unless, of course, he sells the house with its defects and assigns the cause of action to his purchaser.

Mr Goddard also cited *Johnson*,[103] cited by Greig J in *Lester v White*[104] for the proposition that:

> [The council's] duty of care is not owed to everyone or, indeed, to each subsequent owner... the plaintiffs' right of action depends upon proof of damage during their ownership which is referable to breach of the duty of care.

Neither New Zealand decision supports Lord Denning's statement, made without reasons or citation of authority.

[81] I respectfully decline to follow Lord Denning. Mr Goddard's argument and Lord Denning's assertion do not meet the point that the earlier owner, who may be the entrepreneur who had the leaky building erected, may fail to disclose the fact of its character to the market and may even cover it up. As noted in *Commerce Commission v Carter Holt Harvey Ltd*,[105] New Zealand law has declined to follow the decision of the House of Lords in *Cartledge v E Jopling & Sons Ltd*[106] that a cause of action may accrue and a case become statute-barred although the plaintiff had no reason to know of it: see the series of decisions of this Court from *McKenzie*

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102 *Sparham-Souter v Town & Country Development (Essex) Ltd* [1976] QB 858 (CA) at 868.
103 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) at 238, 242.
104 *Lester v White* [1992] 2 NZLR 483 (HC) at 493.
105 *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZCA 40; [2009] 3 NZLR 573 at [95].
106 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL).

v Attorney-General[107] to *G D Searle & Co v Gunn*.[108] The Privy Council in *Hamlin* cited *Cartledge* but did not apply it. It stated:[109]

> The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.
>
> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council* [[1983] QB 409], a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:
>
> > "... if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority."
>
> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. 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* [[1996] AC 334].

[82] Purchasers generally must be able to claim against those responsible for the condition of the leaky building unless they have such knowledge, or means of knowledge, as entails acceptance of its condition. The Council's submission that any liability could only be to the original owner is untenable. It is commonly the case that the original owner knows or should know that there is deficiency in the workmanship. But that says nothing about the position of later buyers who are to be judged on what they know or should know. They may be caught by the ten year limitation under s 91. But there is no good reason to visit them with matters of which they are unaware.

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107 *McKenzie v Attorney-General* [1992] 2 NZLR 14 (CA) at 16.
108 *G D Searle & Co v Gunn* [1996] 2 NZLR 129 (CA) at 132.
109 *Hamlin v Invercargill City Council* [1996] 1 NZLR 513 (PC) at 526.

(d) May investors in such properties who are not occupiers sue?

[83] I have dealt at [69] with the Council's submission that only those who buy the building as their home may claim.

(e) May a subsequent purchaser sue when a prior owner has suffered loss?

[84] The submission is met by the analysis at [80] – [82].

(f) The Local Government and Official Information and Meetings Act 1987

[85] The Council issued to Blue Sky LIMs which correctly stated that a code compliance certificate had been issued. Blue Sky asserted that the LIMs were issued negligently because the code compliance certificates should never have been issued.

[86] Heath J held that the LIMs were accurate: they stated what was the case and cannot give rise to liability. I agree. The question whether s 41 of the Local Government Official Information and Meetings Act excludes liability for LIMs issued under s 44A, to be discussed in the forthcoming decision of this Court in *Marlborough District Council v Altimarloch Joint Venture Limited*,[110] does not require determination here.

C This case

CA673/2008 summary: the owner/lessee appeals

[87] I have rejected all of the Council's arguments of law. The first is its primary contention is that it does not owe a duty of care to the initial owner of a multi-unit development or to subsequent owners or lessees of units in that development where:

(a) the development was a substantial one constructed for investment or commercial purposes and not a stand-alone private house of the kind considered in *Hamlin;*

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[110] *Marlborough District Council v Altimarloch Joint Venture Limited* CA448/2008.

(b) the original owner-developer was not personally an original owner-occupier of such a house;

(c) the original owner-developer employed, or could reasonably have been expected to employ, expert advisers in connection with the design and construction of the development.

So I reject its argument that the judgments against the Council in favour of the four successful respondents should be set aside and the cross-appeals should be dismissed.

[88] I have also rejected the further arguments that:

(a) any liability could be only to the original owner. If no duty was owed to that owner no purchaser could be owed any duty.

(b) if a subsequent owner could claim that would only be where it could be expected that no experts had been retained; otherwise any reliance would be on the experts rather than the Council.

(c) only those who buy the dwelling *as their home* can possibly claim.

(d) if a cause of action has accrued in favour of one owner, a subsequent purchaser has no right to sue.

[89] On its cross-appeal Blue Sky argues that the Judge ought to have found that the leases and rights assigned to it by the owners gave it standing to sue. Applying the principles already discussed I have concluded that the claims both of the four successful second respondents and also the Blue Sky claims in respect of the 12 units all fall within the *Hamlin* principle and should be disposed of accordingly.

The successful respondents in CA673/2008:

Mr Devlin/Devlin Properties Ltd

[90] On 14 June 1997 Mr and Mrs Devlin contracted to buy Unit F from the developers' company for $300,000, subject to solicitor's approval. The solicitors required provision of a code compliance certificate or withholding of part of the sale price until it became available. An interim code compliance certificate was issued by the Council and supplied to Mr Devlin on 4 June 1998. He thereupon gave authority to his solicitor to proceed with settlement which took place the same day. It was not suggested that Mr Devlin was aware at that stage of any defects in the unit. The first Prendos report was not until March 2000.

[91] In January 2004, Mr Devlin read the second Prendos report which alerted him to the existence in his unit of serious problems which would require repair. He was later advised for legitimate tax reasons to incorporate a company to acquire the unit and provide a $40,000 credit on the purchase price to cover the expected cost of repairs. The property was transferred to Devlin Properties Ltd and rented to tenants from mid-2004.

[92] Heath J found held that Devlin Properties Ltd could not have sued the Council successfully because of its knowledge at the time of acquisition of the problems. He gave judgment in favour of Mr Devlin against the developers for the $40,000 plus $25,000 for general damages. He further gave judgment by consent, but without prejudice to the Council's rights of appeal, in favour of the four successful parties – Mr Devlin, the Misses Turner, Mr Halford and Mr and Mrs Parkinson – for a collective sum of $485,000 on the basis that they would resolve its distribution. Each was awarded $25,000 general damages against the developers. In the case of Mr Devlin the grounds on which the judgment in his favour was challenged have been rejected. I would therefore dismiss the appeal against the judgment in his favour.

The Misses Turner

[93] Michelle and Lisa Turner agreed to buy Unit G under agreement for sale and purchase dated 15 April 2002. This was 25 months after the first Prendos report of 3 March 2000, of which they had no knowledge, and before the second report. Following receipt of a copy of the Council's code compliance certificate the agreement was settled on 6 May 2002. The Turners initially let the property and later occupied it themselves. They were unaware of problems until flooding occurred between November 2002 and January 2003. At the Body Corporate's Annual General Meeting on 27 February 2003 they learnt that water ingress problems affected the entire development.

[94] The Judge found that they had acquired their unit before they were aware of any damage, and he included them in the collective award against the Council.

[95] Mr Goddard submitted that a simple enquiry of the Body Corporate would have alerted the Turners to the existence of the first Prendos report and their failure to do so should bar their claim. Certainly that would have been best practice. But the cause of action in the Turners' case is actual reliance on the Council. Its code compliance certificate provided a reasonable basis for belief that further enquiry was unnecessary. I would dismiss the appeal against the judgment in their favour.

Mr Halford

[96] Mr Halford settled the purchase of Unit N in 1999 at a stage when the cladding covered all defects. He inspected the unit twice and did not contemplate problems with a building only 18 months old.

[97] Heath J held that he was entitled to participate in the collective award against the Council. His purchase preceded the first Prendos report. Mr Goddard's challenge to his claim was limited to the general arguments already dismissed. The appeal against his claim should fail.

Mr and Mrs Parkinson

[98] Mr and Mrs Parkinson viewed Unit L in about June 2001. Although they were living on the North Shore they wanted to live closer to work and in "a more modern home that would be low maintenance and easy to look after when they retired". Because it was relatively new, they did not consider that a professional inspection was required. And having received a Council code compliance certificate, they entered into an agreement for sale and purchase. After the agreement was declared unconditional they received a certificate under s 36 of the Unit Titles Act alluding to the first Prendos report.

[99] Heath J held that the s 36 certificate was immaterial, having been received after the Parkinsons were committed to buying the property. They too participated in the collective award against the Council.

[100] Mr Goddard's submission of duty to make enquiry of the Body Corporate receives the same answer as at [95] above. The appeal against this claim should also fail.

Decision

[101] For the reasons already developed none of the various challenges to the Judge's decision succeed. The appeal by the Council should fail and be dismissed.

The unsuccessful Blue Sky claims

[102] Blue Sky's claim against the Council in respect of 12 units has been mentioned. It is both in negligence ([72] above) and on the basis of an alleged false statement contained in a LIM.

[103] It marketed the ARPT system to prospective customers as a "hassle free investment" having the benefits of owning residential property but without the need for personal time and energy required to manage most rental properties.

[104] Blue Sky arranged for a related company, Porchester Ltd, to buy the 12 units from the developers. Porchester leased each unit to ARPT for the 182-week term. ARPT undertook to pay rent of $470 per week plus outgoings, to secure a tenant for principally residential purposes, and to maintain the property. ARPT had an option to buy the property at the expiration of the term. Its reversion was then marketed to members of the public. Agreements for purchase relating to units A, B, E, I, J, K, M, O, P, Q, R and S were entered into in September and October 2002 and settled on or about 7 November 2002 following the extraordinary meeting of the Body Corporate on 17 October 2002, at which the owners resolved to instruct Prendos to report on apparent defects.

[105] Blue Sky secured from each reversionary owner an assignment of his or her cause of action which it pleaded as well as its own leasehold interest.

[106] Heath J held that Blue Sky was not owed a duty of care: its 182-week term was insufficient to trigger a *Hamlin* cause of action and the reversioners were held to have relied not on the Council but on Blue Sky. Blue Sky called no evidence from them to recount enquiries made before they purchased and failed to discharge the onus of proving loss caused by negligence. Its claims were dismissed.

[107] Mr Goddard submitted that Blue Sky's limited interest in the units is a far cry from the enduring ownership and habitation interests of the owner-occupiers of modest homes for whose benefit the *Hamlin* duty was established. Its short term commercial interest was the result of what Heath J described as:[111]

> ... a deliberate decision, contrary to the norm, to take responsibility for maintenance and repair costs even though its interest was as short-term lessee with an option to purchase. No doubt that decision was made to provide an incentive for purchasers to enter into the [scheme it was marketing and from which it intended to make a profit].

[108] He further supported Heath J's opinion that, while Blue Sky could sue as assignee of the rights of individual owners, the claim must fail on causation grounds because there was no evidence that such owners relied on the Council's actions to acquire the units. Rather they bought them as part of the ARPT package.

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[111] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [326].

Decision

[109] I am however satisfied that, for the reasons already developed, there is no difference in principle between the claims by Blue Sky and those of other plaintiffs. In terms of *Hamlin* general reliance by the owners on the Council is to be assumed. From their standpoint it does not follow that, because they relied on Blue Sky, they did not concurrently share the general public reliance on the Council. Certainly the Blue Sky cases take the *Hamlin* principle a significant distance beyond the paradigm recounted by Mr Goddard. But I agree with the President that in defining the legal categories we must employ bright lines. That means that some cases will fall outside which might plausibly be included and vice versa: see [69] above. The cross-appeal by Blue Sky should succeed. It is unnecessary to consider the cause of action based on the LIM which will be the subject of the forthcoming decision in *Altimarloch Joint Venture*.

[110] If the parties are unable to agree as to the practical effect of this result they may file memoranda, the second respondents within 15 working days and the Council within a further 15 working days.

CA66/2009: Designer appeal

[111] The respondents in CA673/2008 challenged Heath J's dismissal of their claim against R F Coughlan & Associates, which had prepared plans and specifications and issued certificates of practical completion. The pleading alleged negligence in the preparation of the plans and negligent issue of "certificates of practical completion".

[112] The respondents in CA673/2008 submitted that the Judge erred in acquitting the designer of liability. I agree.

[113] Sunset Terraces is a linear unit title development of two story townhouses built in 1997 and 1998 using untreated timber framing and monolithic cladding. When completed the units were not watertight. Water entered and rotted the framing. Repair will require recladding of the whole development, with a ventilated cavity, to comply with current Building Code requirements.

[114] The owners and developers of the land, Mr and Mrs Barton, retained the firm R F Coughlan & Associates and Mr Coughlan to prepare plans and also a design engineer, Mr McLintock. Mr McLintock was never a party to the litigation but signed the plans and, with others, issued to the Council "producer statements" (under s 2 of the Building Act) that certain work had been or would be carried out in accordance with certain specifications.

[115] The Council issued its building consent on 11 August 1997. On 19 May 1998 Mr Coughlan signed a certificate of practical completion for 12 units.

[116] On 3 March 2000 Prendos Ltd, experts engaged by the Body Corporate to investigate water ingress into the building, reported in writing to the Body Corporate that there were cracks to the jointing of fibrecement sheets which would be drawing moisture in by capillary action, entailing danger of raising moisture levels in the supporting timber frame. That left the timber susceptible to fungal decay which can occur rapidly, even in buildings only two years old. Flashings above the garage doors were inadequate and, instead of carrying moisture in the cladding back to the outside, would direct it back to the timber framing, thus inducing decay. There were also roof leak problems which were allowing considerable moisture into the roof structure and which, if left unrepaired, would result in fungal decay. The report concluded that the problems were more than cosmetic and, if left unrepaired, would affect the structural integrity of the units.

[117] Although these defects were known to the Body Corporate and owners who attended its meetings, it was not until an extraordinary meeting on 17 October 2002 that Prendos was instructed to provide a further report. Minutes of that meeting record an agreement to instruct Prendos to prepare a report in relation to Unit J as well as three non-Blue Sky units and to obtain estimates from counsel of legal fees. Each unit was to be levied $8000.

[118] A second Prendos report of 21 January 2003 to the Body Corporate noted that certain cladding repairs had been made. It found evidence of possible stachybotrys atra mould, which can affect the health of occupants. It also recorded that there was such evidence of leaks that final repair recommendations were likely to include

removal of most, if not all, of the exterior cladding. The report expressed concern that the exterior wall framing might be untreated timber which, with water entry, would decay rapidly.

[119] From November 2004 so-called "targeted repairs" were performed by a company Gunac. The repairs were ineffective. Heath J found a consistent pattern of defects across all units, for which a complete reclad of each unit was required.

Negligent preparation of the plans

[120] Heath J pointed to certain flaws in the plans and specifications. But he found that a reasonable builder would have access to the manufacturer's specifications and would not require greater detail to achieve a workmanlike result.

[121] I agree with the Judge. No purpose would be served by requiring a designer to incur the cost of providing detail not reasonably necessary for the task. There being no carelessness it is unnecessary to discuss the leading authorities *Voli v Inglewood Shire Council*[112] and *Bowen*[113] which impose liability on a negligent designer whose carelessness causes loss.

Negligent issue of "certificates of practical completion"

[122] The second basis of the claim against R F Coughlan & Associates was the issue of so called "certificates of practical completion" sent by Mr Coughlan to the developer's solicitors on 19 May and 9 September 1998 for the purpose of releasing moneys from financiers to meet costs incurred in the course of the development. Clause 6.1 of the schedule to Mr Devlin's agreement to purchase required the vendors, Mr and Mrs Barton, to complete the Development including his Unit "in a proper and workmanlike manner and to a high standard ...". Clause 6.3 required the vendors to use their best endeavours "to ensure Practical Completion of the Unit by 30 April 1998". "Date of Practical Completion" was defined as "the date at which the Unit is at a stage of Practical Completion as certified by the Vendor's Architect". "Practical Completion" was defined as meaning being substantially complete so as to

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112 *Voli v Inglewood Shire Council* (1963) 110 CLR 74.
113 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).

be capable of being used by the purchaser for the purposes for which the Unit was intended. The "Vendor's Architect" was defined as the firm of persons employed by the vendors to provide relevant services.

[123] The two certificates were in the following terms:

> Attention Mark Hornabrook
> Barton Sunset Terraces
> Consent No. A 12258
> 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 withstanding that there may be items of a comparatively minor nature which may require finishing, alteration or remedial action.
>
> Yours faithfully
>
> R F Coughlan

> Attention 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

[124] The only owner who received a copy of such a certificate was Mr Devlin whose solicitors received the former document on the date it was issued. The certificates were negligently prepared. Mr Devlin's unit had not been completed to a point where it could be used without material inconvenience.

[125] Heath J stated:[114]

> Mr Devlin does not say, in explicit terms, that he relied upon the practical completion certificate to complete his acquisition of the unit ... [I]t is necessary to prove actual reliance in order to establish that any loss has been suffered as a result of negligence of the designer.

[126] Mr Devlin said in his brief:

> 45 I relied on Mr Barton's representation that he was building a superior development when I entered into the agreement to purchase the Unit. *I also thought I had protected myself by ensuring a Practical Completion Certificate* and a Code Compliance Certificate *had been issued for the Unit before settling the purchase.*

[127] He was cross-examined:

> Once the agreement had become unconditional you were committed to buying the unit? *Subject to a practical completion certificate* and a Code Compliance Certificate *being issued* yes that was my understanding
>
> ...
>
> In para 45 you refer both the practical completion certificate and the Code Compliance Certificates would it be fair to say that you really looked to the Code Compliance Certificate for comfort ... I certainly look to the Code Compliance Certificate for principal comfort *the practical completion certificate is of some comfort.*
>
> Your previous experience related to Code Compliance Certificates ... I had had a personal experience that we didn't have Code Compliance Certificate for remedial work completed at some stage so I knew the need for a code compliance and certainly the mortgagor required the code compliance.

The emphasised passages do in my opinion establish that the practical completion certificate was a material factor in Mr Devlin's decision to settle. I therefore respectfully differ from Heath J and would allow the appeal against R F Coughlan & Associates in relation to Mr Devlin's claim.

Decision

[128] The appeal in CA66/2009 should be allowed in relation to the claim by Mr Devlin but dismissed in other respects.

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[114] At [552] – [553].

Contribution

[129] The liability of R F Coughlan & Associates being confined to Mr Devlin's losses there is no basis for a contribution order against him in favour of the Council save possibly in relation to that. The designer's breach of duty was however one distinct cause of Mr Devlin's loss fixed by the Judge at $65,000, the Council's being another. I see no basis in terms of moral blameworthiness/departure from proper standards[115] or causative potency for distinguishing between them and would order that each bear 50 per cent of Mr Devlin's award and interest thereon.

Costs

[130] I consider that in CA673/08 the respondents are entitled to costs against the Council for a complex appeal on a band B basis and usual disbursements. I would certify for three counsel. If any issue arises as to apportionment among respondents we should receive memoranda.

[131] I would reserve costs in CA66/2009. R F Coughlan & Associates succeeded in resisting the appeal alleging negligence in design which could have entailed liability to all appellants. In the event they lost only against Mr Devlin on a distinct issue. Both quantum of costs and their allocation in both Courts raise questions on which I would seek further assistance. I propose that the appellants in CA66/2009, including Mr Devlin, file and serve their submissions within 15 working days and that the Council and R F Coughlan & Associates respond within a further 15 working days.

Leave to apply in both appeals

[132] The complexity of this litigation in my view makes it desirable that the parties have the opportunity to advise the Court of any material error or omission. I would reserve leave to the parties to apply further to this Court by memorandum filed by the appellants in CA673/08 within 15 working days and by the Council or by R F Coughlan & Associates within a further 15 working days.

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[115] See *Byron Avenue* at [67].

Postscript

[133] These are only the latest of the large number of difficult and, for the parties, burdensome cases requiring resolution. I share the concern expressed by other members of the Court as to the systemic problem presented to the community by the leaky building phenomenon. I believe it requires initiatives beyond those to which the courts can contribute.

WILLIAM YOUNG P

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Overview

[134] I agree with Baragwanath J as to outcomes of the appeals but my reasons are not in all respects the same as those given by Baragwanath J. Accordingly, I have decided to write separately.

[135] I agree with the comments made by Arnold J in [206] – [215] as to the provenance of the leaky homes problem and the inadequacy of litigation as a mechanism for addressing that problem in a systematic, logical and fair way. As Arnold J points out at [212](b), litigation outcomes will often turn on factors which, from the point of view of home owners, must seem to be little more than the random play of chance in action. That said, for the moment the only way in which those who own leaky homes can obtain redress is through litigation (or threats of litigation). In this context, I see it as the duty of the courts to apply (and if necessary develop) legal principles in a way so as to best facilitate outcomes which are as orderly, predictable and cost effective as possible.

[136] With those comments in mind, I now turn to discuss the present appeals first by reference to the overarching issues which they raise and secondly by way of resolution of the particular questions which must be addressed to determine the litigation.

The overarching issues

Identification of the issues

[137] There are seven overarching issues which I propose to address:

(a) The continuing applicability of *Hamlin* under the Building Act 1991 – general considerations.

(b) Line-drawing – the general principles.

(c) Does the duty arise in relation to a substantial development?

(d) Is the duty owed only to the original owner?

(e) Can a second or subsequent owner sue when some damage had crystallised at the time of purchase and if so when?

(f) The significance of opportunities for intermediate inspection.

(g) Is the duty limited to those who buy for personal residential purposes?

(a) The continuing applicability of Hamlin under the Building Act 1991 – general considerations

[138] As Baragwanath J has noted, Mr Goddard QC reserved the right to challenge *Hamlin* in the Supreme Court but, recognising that this Court is bound by the Privy Council decision, did not directly seek to persuade us not to follow it. It is fair to say however that his attempts to limit the effect of *Hamlin* to its facts were premised on arguments which, if correct, substantially impugn its continuing applicability.

[139] At the heart of his arguments is what he maintained was a sharp dichotomy between:

(a) The regulatory regime of the 1970s and 1980s which informed the pre-*Hamlin* common law developments; and

(b) The regime which resulted from the enactment of the Building Act 1991 including s 44A of the Local Government Official Information and Meetings Act 1987 (which provides for issue of land information memoranda, or LIMs).

[140] The former regime was, in part, aimed at protecting the economic investments made by home owners, a proposition which is illustrated by *Stieller v Porirua City Council*.[116] Mr Goddard's argument is that no such purpose can be discerned in the Building Act and the Building Code and their precursor, the Building Industry Commission's report, *Reform of Building Controls*.[117] He also relied on s 44A of the Local Government Official Information and Meetings Act (inserted as part of the same statutory package as the 1991 Act), which provides for the issue (under a tight time-frame) of LIMs and gives a potential purchaser of property access to much property-specific information and thus facilitates the making of informed purchasing decisions.

[141] Baragwanath J has surveyed at some length the Building Act, the Building Code and the 1990 report and there is no point in me replicating that exercise. It is

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116 *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) at 93 – 94.

117 Building Industry Commission *Reform of Building Controls* (January 1990).

sufficient for me to say that I accept the force of much of what Mr Goddard said in argument. In particular, I agree with him that the thinking which underpinned the new regime was at least partly captured in the following passage from the 1990 report:

> 3.7 Protection of the economic interests of people in getting value for money is not a justification for building controls since value and quality can be supplied through forces of the market.

I consider that this was reflected in the health and safety focus of the Building Code and the absence of any direct statutory indication that the new regime was designed to protect the economic interests of house (and apartment) buyers. In this respect the legislative scheme is materially different from the previous regime.

[142] I thus accept that there is a dichotomy between the regime which was introduced in 1991 and the earlier regime. However, I do not see this dichotomy as quite as sharp as Mr Goddard contended.

[143] The logical corollary of a "forces of the market" approach would have been the abolition of the *Hamlin* duty. Interestingly – and importantly – however, the legislature did not do so explicitly. Indeed, as Baragwanath J has demonstrated, the 1991 Act contemplates claims in tort against, inter alia, negligent local authorities associated with badly constructed dwellings.

[144] Mr Goddard's response is that the legislature left it to the courts to determine the proper metes and bounds of negligence claims and that it is the function of the courts to do so in a principled way and with the recognition that the statutory scheme has changed. Although that response is logical, it does not, to me, justify an abandonment, or indeed a writing down, of the *Hamlin* duty:

(a) Mr Goddard's argument as to the significance of the 1991 changes to the regulatory regimes is, despite its cogency, not entirely obvious. It requires a careful analysis of the 1991 Act, the Building Code and the 1990 report. And the very distinguished judges who decided *Hamlin* in the Court of Appeal and Privy Council plainly thought that the

1991 Act had preserved the common law duty of care of local authorities.

(b) Prior to widespread recognition of the leaky building problem around six years ago, there was no occasion to re-consider the continuing applicability of *Hamlin* in light of the 1991 Act. In this context, the working assumption of local authorities and lawyers and probably others engaged in the residential property market presumably was that local authorities owed a *Hamlin* duty of care.

(c) This working assumption must have affected the behaviour of local authorities and home purchasers. The awareness of potential liability in tort presumably incentivised local authorities to develop robust systems for ensuring code compliance and, as a back-stop, to obtain appropriate insurance. The availability of such claims must have likewise served to discourage home purchasers from commissioning building surveys before purchasing.

(d) For us to proceed on the basis that the *Hamlin* duty did not survive the 1991 Act would be a major departure from the working assumption I have described and in this way involve a retrospective change in the relevant rules.

(e) If the argument of Mr Goddard is accepted, the 1991 Act abrogated the *Hamlin* duty and did so with such stealth that this abrogation was not detected by the Court of Appeal and Privy Council in *Hamlin* itself. I am not be prepared to construe the Act on the basis that this is what happened – that the legislature changed the rules but did not tell the public.

[145] So I propose to approach the case on the basis that the *Hamlin* duty survived the 1991 Act. Further, I am not prepared to read down the extent of the *Hamlin* duty in way which proceeds, directly or indirectly, on the premise that *Hamlin* is confined to its own facts.

(b) Line-drawing – the general principles

[146] As the judgment of Baragwanath J indicates, applying *Hamlin* in the context of the 1991 Act requires a number of line-drawing exercises. The resulting lines will necessarily produce scope for argument as to which side a particular case falls and thus scope for arbitrary distinctions. Given this, it is sensible for the courts to seek to draw lines which are as "bright" as possible and in a way that limits the potential for arbitrariness.

[147] Associated with this is the need for simplicity. The leaky building cases, particularly in the context of apartment complexes, have thrown up an extraordinarily diverse range of fact situations. The more refined and detailed the legal test becomes, the greater the scope for argument and the more expensive and slow litigation becomes. I see this as particularly relevant in relation to some of the limiting factors advanced by Mr Goddard, which I will discuss shortly.

(c) Does the duty arise in relation to a substantial development?

[148] Mr Goddard contended that *Hamlin* is not applicable in the present context because it concerned a small cottage-like house as opposed to a large apartment development.

[149] In part this contention rested on the argument that *Hamlin* is anomalous and should be confined to its own facts, an argument which I do not accept. More significantly, the argument was advanced on the basis that a development such as Sunset Terraces will almost always be professionally designed, and its construction supervised, by an architect or an engineer. In such a context, a purchaser might arguably be thought to rely on the architect and/or engineer rather than the local authority.

[150] I accept that the employment of an architect and/or engineer by a building owner may be relevant to whether the local authority or builder owes **that** building

owner a duty of care, cf the comment in *Riddell v Porteous*.[118] It is important to recognise, however, that Mr Goddard's argument turns on the engagement of an architect or engineer not by the building owner/plaintiff, but rather by a developer and the impact of such engagement on the duty owed by the local authority not to the developer but rather to an end-purchaser.

[151] Mr Goddard's argument is inconsistent with the decision of this Court in *Mount Albert Borough Council v Johnson*, a case which involved a development of six flats which had been designed by an "architectural and industrial designer" and where the local authority was held to be liable. On my general approach (which is to apply the *Hamlin* duty in situations where it was recognised prior to the 1991 Act), *Johnson* is, in itself, an answer to the argument advanced by Mr Goddard. But, in any event, I do not see his argument as sustainable as a matter of policy.

[152] An architect or engineer can only fairly be expected to provide services as contracted for by the developer. The actual involvement of the architect or engineer might be quite limited. The scope of the contract is, of course, highly relevant where tortious liability of architects or engineers is alleged because there are problems in imposing a duty of care which is more exacting than the contractual duty. The scope of the contract is also logically material to whether the involvement of an architect or engineer displaces what would otherwise be the local authority's *Hamlin* duty. There is no logical reason why there should be such a displacement where the relevant defect lies outside of the scope of the retainer of the architect or engineer. And since the home purchaser will usually not necessarily know whether an architect or engineer was retained and, if so, the extent of the retainer, it is far from obvious why the involvement of an architect or engineer should displace liability even in relation to defects which lie within the scope of retainer. A complicating and related consideration is that in many leaky building cases there are a number of causal problems some of which may be within, and others outside, the relevant retainer.

[153] There would be capricious results if the courts concluded that the *Hamlin* duty is displaced wherever an architect or engineer was involved, irrespective of the relevance of that involvement to the loss. The alternative (of allowing such

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[118] *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 12.

displacement where such involvement was material to the loss) would mean that whether the local authority was subject to the *Hamlin* duty would turn on whether the architect or engineer was responsible for the loss. I see the negligence or otherwise of the architect or engineer as collateral to the liability of the local authority. To treat such negligence as excluding the duty of the local authority is not logical and would be inconsistent with the usual common law approach to concurrent liability. Further, on this approach, the threshold question whether the local authority was subject to the *Hamlin* duty would often enough not be able to be resolved without there being a full determination of the question whether the engineer or architect was liable, something which would add another layer of complexity to what are already difficult cases to manage and try.

[154] Some of the practical problems with the displacement rule contended for by Mr Goddard are illustrated in this case in relation to the arguments as to the liability of the designer of the complex, a point to which I will revert later.

[155] So, for policy reasons, as well as following *Johnson*, I conclude that the *Hamlin* duty is not displaced where an architect or engineer has been involved. As a corollary of this conclusion, I see no sound reason why the *Hamlin* duty should not apply in relation to apartment developments.

(d) Is the duty owed only to the original owner?

[156] The judgment of this Court in *Johnson* is authority for concluding that the duty is not owed only to original owners. In *Hamlin* in the Court of Appeal, Gault J noted that the duty was owed to subsequent purchasers.[119]

[157] I see no reason for taking a different approach in this case.

(e) Can a second or subsequent owner sue when some damage had crystallised at the time of purchase and if so when?

[158] This issue has been seen as relevant to both liability and limitation.

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[119] *Hamlin v Invercargill City Council* [1994] 3 NZLR 513 (CA) at 533.

(a) There is authority which suggests that a claim by a second or subsequent purchaser is excluded if the cause of action arose prior to that purchaser acquiring the property. I will call this the "liability rule".

(b) In limitation cases, essentially the same issue can arise where some damage had materialised outside the six-year limitation period provided by the Limitation Act 1950.

[159] In the High Court, Heath J approached the case on the basis that there is no liability rule and that cases where damage has become manifest before purchase fall to be determined simply by reference to the relevant limitation rules and the general principles of law which apply to opportunities for intermediate inspection, causation and contributory negligence.[120] As will become apparent, I have reached the same conclusion, but I have found it rather more difficult to do so than Heath J.

[160] The most specific statement of the liability rule is that of Lord Denning MR in *Sparham-Souter v Town & Country Development (Essex) Ltd*.[121] It is possible, however, to extract some perhaps diffuse support for what may be an attenuated version of the rule from what was said in this Court in *Mount Albert Borough Council v Johnson*,[122] in terms of the discussion whether the damage which occurred after Miss Johnson acquired the property was a continuation of the damage which had materialised prior to her ownership.[123] There is, however, undoubted ambiguity in the way in which the issue has been discussed in the New Zealand cases which can be read as treating what I have called the liability rule as simply a subset of more general common law principles of causation. This in fact is very much the basis upon which the discussion in *Bowen v Paramount Builders (Hamilton) Ltd* proceeded.[124] The point I have just made is perhaps illustrated by what Cooke P, speaking for this Court said in *Askin v Knox*,[125] albeit primarily by reference to

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120 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [223]-[231].
121 *Sparham-Souter v Town & Country Development (Essex) Ltd* [1976] QB 858 (CA) at 868.
122 *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
123 See the remarks of Cooke and Somers JJ at 243 and of Richardson J at 244.
124 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 413 (per Richmond P) at 418 (per Woodhouse J).
125 *Askin v Knox* [1989] 1 NZLR 248 (CA).

limitation. After discussing the difficult House of Lords decision in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*,[126] he observed:[127]

> It might still be possible to maintain the approach that a cause of action arises when the defect becomes apparent or ought to have been discovered, that being the time when the effect of the negligence (whether classified as physical or economic) is suffered or experienced by the owner of the building. Distinct damage occurring later could give rise to a separate cause of action, as recognised in *Johnson* ... at pp 239-240 and 243-244; but a reasonable expectation of adequate intermediate inspection would be a defence, as also recognised in those passages and in *Bowen* ... at pp 412-413, 421 and 424-426, *and in practice this would protect a negligent builder or local authority from an unfair series of claims.*
>
> (Emphasis added.)

[161] The best reason for a liability rule operating independently of causation principles is that, in the absence of such a rule, there is potential for the limitation period to be restarted on every sale. On this basis, the liability rule would presumably have to be the same as the cause of action accrual rules for the purposes of the Limitation Act. These were discussed in *Hamlin*, where the Privy Council observed:[128]

> Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.
>
> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council*, a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:
>
> "... if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority."
>
> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an

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126 *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 (HL).
127 At 255.
128 At 526.

> 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.
>
> This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of *Pirelli* by the Supreme Court of Canada in *Kamloops*. The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action.

[162] The Privy Council assumed that there would be an impact on market value at the point when:[129]

> ... when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert.

But in this case, although the Body Corporate called in an expert (Prendos Ltd) who reported on the defects first in March 2000, there was no discernible adverse impact of the prices at which the units were sold until much later. The first sale at a price which obviously reflected the defective state of the complex was not until June 2004. So if this Court proceeds on the basis that there remains a liability rule which follows the formulation adopted in the Privy Council, we must resolve a nice point as to whether the cut-off should be when expert advice was obtained on the defects (March 2000) or at some later time, calculated either by reference to how manifest the defects became or when the market value of the units came to be affected.

[163] In the limitation context some reworking of the *Hamlin* formulation will thus be required, if only to accommodate the problem which this case has thrown up. And, on the argument advanced by Mr Goddard, the same must be true of the liability rule. My preference, however, is simply to abandon the liability rule. This is for the following reasons:

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[129] At 526.

(a) As the facts of this case and the *Byron Avenue*[130] appeal show, the full implications of building defects may take some time to be appreciated. A liability rule, particularly if strictly applied and not directly addressed to the culpability of the purchaser/plaintiff, has the potential to produce arbitrary outcomes.

(b) The potential for arbitrary extension of the six-year (ie Limitation Act) limitation period on re-sale is now so heavily constrained by the operation of the ten-year long-stop period as not to justify a liability rule.

(c) Insistence on a liability rule would in fact introduce a de facto limitation period (expiring on the date the first sale after damage becomes manifest) which may be far shorter than that prescribed by Parliament.

(d) Principles of causation reinforced by the ability to reduce awards to take account of contributory negligence seem to me to provide far more nuanced and just mechanisms for adjusting rights.

(f) The significance of opportunities for intermediate inspection

[164] In his judgment in the *Byron Avenue* case, Venning J dealt with the significance of opportunities for intermediate inspection in the following way:[131]

> [36] There are two ways in which the question of intermediate inspection may be relevant to the imposition of a duty of care. The first relates to the consideration of whether a plaintiff is in sufficient proximity to the negligent act of the defendant to bring them within the ambit of the defendant's duty of care. The duty of care imposed on a council (and builder) extends to subsequent purchasers: *Bowen & Anor v Paramount Builders (Hamilton) Ltd & Another* [1977] 1 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Proprietors Units Plan v Jiniess Pty Limited & Ors* [2000] NTSC 89, 116-123; *Bryan v Maloney* (1995) 182 CLR 609, 630, 665. But the duty does not extend to anyone who purchases with actual knowledge of the defect or in circumstances where he or she ought to have

130 *Byron Avenue* [2010] NZCA 65.

131 *Body Corporate 189855 v North Shore City Council* HC Auckland CIV 2007-404-005561 25 July 2008.

used their opportunity of inspection in a way which would have given warning of the defect: *Bowen v Paramount Homes* at 413 (per Richmond P); *Mt Albert Borough Council v Johnson*, 241-242 (per Cooke J).

[37] A defendant who otherwise owes a duty of care to the plaintiff and seeks to avoid liability on the grounds of lack of reliance based on the possibility of intermediate examination by the plaintiff has a significant hurdle to overcome. In *Jull v Wilson and Horton* [1968] NZLR 88 Richmond J, after an extensive review of the authorities, concluded that:

> such a person cannot shelter behind a reasonable expectation of intermediate inspection unless the expectation was strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm.

[38] At first instance in *Bowen* Speight J had found that Mr McKay, the vendor, had actual knowledge of the nature of the foundations and suspect nature of the ground and the Bowens could have acquired that knowledge by an inspection of the building permit and associated plans. In delivering the decision of the Court of Appeal Richmond P rejected that finding and concluded that Paramount could not have had any reasonable expectation that the Bowens would use their opportunity of inspection in such a way as to obtain warning of a risk which was not then reasonably apparent to them. Richmond P confirmed what is required is an act on the part of the plaintiffs exhibiting such disregard for their own interests as to make their own conduct the sole cause of damage. That is a much higher threshold than even an allegation of contributory negligence.

[39] The difficulty a defendant seeking to rely on the principle of intermediate inspection faces was confirmed in *Stieller v Porirua City Council* [1986] 1 NZLR 84. The Court of Appeal rejected a submission for the defendant Council that the defective weatherboards were available for inspection and the plaintiffs had an opportunity to examine them before purchasing, concluding at p 95:

> There is no reason why the Stiellers should have been expected to subject the weather-boards to a critical examination before buying the house. … it looked attractive and there was nothing about the whole structure which alerted him to the real problems which were later experienced. … as a matter of law, a person who creates a dangerous situation cannot escape liability on the ground of expectation of intermediate examination unless the expectation is strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm: *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394; *Jull v Wilson & Horton* [1968] NZLR 88.

[40] The second way in which the question of intermediate inspection may be relevant is in relation to causation. If a plaintiff acted with such disregard to his or her own interests as to make their conduct the sole cause of damage which they suffered then there may be a break in the chain of causation: *Bowen v Paramount Homes* at pp 412, 413.

[165] On the basis of that survey of the authorities, an opportunity for intermediate inspection may be relevant to liability for a particular loss in two ways: first as to whether a duty was owed and secondly as to causation. As well, the opportunity may form part of a contributory negligence argument.

[166] In leaky building cases, the opportunity for intermediate inspection that a purchaser has is very limited compared to the rights of inspection which building inspectors have during the course of construction. So I see the former opportunity as irrelevant to whether the local authority owes a duty of care. To put this another way, the opportunity for a purchaser to inspect a completed residential unit does not warrant any lack of care by building inspectors in the course of their inspections. And I also think, it will be a rare case indeed where the significance of the opportunity for intermediate inspection breaks the chain of causation.

(g) Is the duty limited to those who buy for personal residential purposes?

[167] This issue is not controlled directly by authority.

[168] In favour of a restriction, as contended for by Mr Goddard, is the consideration that those who buy to lease are well removed from the scope of the health and safety focus of the 1991 Act. As well, it is a limited extension to the willingness of this Court to reject the *Hamlin* duty in commercial cases.[132]

[169] On the other hand, the reality, as the facts of the present case show, is that such a restriction would produce very arbitrary results. When a local authority carries out its statutory responsibilities under the building regime, it will not know whether any particular dwelling or unit will be acquired by an owner-occupier or by someone who is buying to lease. The way in which purchasers behave (in terms of the sort of checks which might be carried out) are unlikely to depend on whether the purchaser is an individual owner-occupier, a family trust or company which will make the dwelling available (whether for rent or otherwise) to someone connected with the trust or company, or a landlord. Further, the way in which dwellings are

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[132] See *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460 and *Queenstown Lakes District Council v Charterhall Trustees Ltd* [2009] NZCA 374 (since the hearing the Supreme Court has granted leave to appeal: [2009] NZSC 116).

used may vary over time. A dwelling which is initially rented out, perhaps while the purchaser sells an existing home, may shortly afterwards be occupied by the owner.

[170] In those circumstances, I favour a simple bright line approach: the *Hamlin* duty applies in relation to residential developments.

Resolution of the particular questions thrown up by the appeals

Identification of the issues

[171] I see the issues on appeal as being as follows:

(a) Whether the Council owed a duty of care in relation to the development.

(b) Whether the duty extended to investor and second and subsequent purchasers.

(c) Whether on the facts of the individual cases, the damage which materialised in some cases before purchase excludes liability in relation to the particular purchasers.

(d) The Blue Sky claims.

(e) The position of the designer.

(f) Costs.

Some of these issues are, in substance, answered by what I have said already in this judgment.

(a) Whether the Council owed a duty of care in relation to the development

[172] For the reasons already given, I am of the view that the Council owed a duty of care in relation to the development.

(b) Whether the duty extended to investor and second and subsequent purchasers

[173] Likewise, for the reasons given, I am satisfied that the duty owed by the Council extended to investor and second and subsequent purchasers.

(c) Whether on the facts of the individual cases, the damage which materialised in some cases before purchase excludes liability in relation to the particular purchasers

[174] On the evidence before the Judge the first time that the sale price of a unit was affected by building defects was in June 2004. On the other hand, by either October 2002 (when the second Prendos report was commissioned) and/or January 2003 when it was received, it was clear that there were substantial problems with the development. Further, the first and preliminary Prendos report of March 2000 indicated that, at least the very least, there were problems that were "more than cosmetic and if left unrepaired will affect the structural integrity of the units".

[175] The successful plaintiffs acquired their units before October 2002. As well, in each case, the Judge was able to conclude that relevant damage to the units they were acquiring was not manifest (at least to them). On his approach this meant that no issues of causation, intermediate inspection or contributory negligence arose.

[176] Before us, Mr Goddard noted that inquiry of the Body Corporate after March 2000 would have revealed the existence and terms of the first Prendos report. This in turn would have alerted a potential purchaser to the existence of problems which had the potential to affect the structural integrity of the units.

[177] For reasons already given, I am of the view that there is no absolute liability rule which is fatal to the claims of the purchaser/plaintiffs. Likewise, for reasons already explained, their opportunities for intermediate inspection did not serve to displace the *Hamlin* duty owed by the Council and are insufficient to break the chain of causation between the Council's negligence and their losses.

[178] In reality I see Mr Goddard's argument as being in substance a complaint that the purchasers were guilty of contributory negligence. But although contributory negligence was relied on in the High Court, the allegations did not (at least on the basis of what the Judge said) encompass the specific complaint about not seeking information from the Body Corporate and, in any event, the Judge's rejection of contributory negligence was not challenged in argument before us.

(d) The Blue Sky claims

[179] Blue Sky (which acquired 12 units) sued the Council for negligent misrepresentation based on the LIMs which confirmed that code compliance certificates had been issued. The Judge rejected that claim on the basis that the LIMs were accurate and I agree with that conclusion.

[180] Blue Sky's *Hamlin* duty claim raised more difficult issues. This claim was dismissed by the Judge for the following reasons:

(a) Blue Sky's status in relation to the units was as a lessee and it was not within the category of homeowners to whom a *Hamlin* duty was owed;[133]

(b) In the case of the assigned claims of the Blue Sky investors, there was no evidence of reliance or as to inquiries undertaken by them before they purchased or their knowledge of the state of the building and accordingly causation had not been established.[134]

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133 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [346] – [362].
134 At [363] – [377].

[181] There was also an issue which the Judge touched on as to whether Blue Sky, as the assignee of the investors, could only recover losses actually suffered by the investors. This is a potentially important point but not an easy one for us to resolve in what is a comparative vacuum as to factual findings of loss.

[182] On the first point, the Judge's reasoning appears in the following passage of his judgment (footnotes omitted):

> [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 sub-letting 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 outgoings 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 homeowner 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.
>
> [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.
>
> [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 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. 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.

[183] On the second point, the Judge concluded (again with footnotes omitted):

> [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 Mr Bryers. 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.

[184] Collectively Blue Sky and the investors held what could fairly be regarded as full ownership interest in the 12 Blue Sky units. And, although their investment ambitions and strategies were different in degree from those of the investor plaintiffs who succeeded, they were not necessarily really different in kind (at least if analysed at sufficiently high level of generality). All investors were seeking to obtain economic advantages from residential property investment deriving from intermediate rental income and eventual anticipated capital appreciation. Given the importance I place on a bright line, I am not attracted to an approach to duty which depends on a nuanced (and necessarily unpredictable) assessment of the precise nature of the commercial ambitions of investor purchasers. Indeed, there is no logical reason why the Council's duty which encompassed inspections made before Blue Sky purchased, should be retrospectively negated because of what later happened (in terms of sales of units to a purchaser with a complex business model).

[185] I am also of the view that there was no need for the Blue Sky investors to give evidence of personal reliance, this because the *Hamlin* duty rests on notions of general rather than particular reliance.

[186] I would accordingly allow the Blue Sky appeals.

(e) The position of the designer

[187] The claim against the designer provides a practical context for my unwillingness to accept that a local authority's *Hamlin* duty is displaced where a professional designer is involved and/or liable.

[188] The designer's retainer was limited and the resulting design was undoubtedly skinny in terms of detail. This is in part because it rested on the assumptions that the builder would conform to manufacturers' specifications and construct the building in a workmanlike manner. Also material was that the developer was only prepared to

pay for the level of detail actually provided (in effect what would be required to secure a building consent). I agree with both Heath and Baragwanath JJ that the designer was not relevantly negligent. In the circumstances of this case, I regard the limited scope of the contract as an answer to any claim in negligence.

[189] I just note, however, that this finding and the factual basis which underpins it are entirely collateral to the merits of the dispute between the end-purchasers and the Council. Those end-purchasers could have had no idea of the extent of the retainer between the developer and the designer in relation to the design. Nor could they have known whether that retainer extended to supervision of construction and, if so, how much supervision. On the other hand, those end-purchasers might be thought to have at least a general awareness of the Council's regulatory responsibilities which in this case, because a building certifier was not involved, extended to compliance inspections.

[190] I have had rather more difficulty about the second aspect of the alleged liability of the designer, that is the certificate of practical completion which he provided in relation to the unit acquired by Mr Devlin.

[191] Under the agreement for sale and purchase in relation to the unit, the vendors were contractually required to complete the unit:

> in a proper and workmanlike manner and to a high standard substantially in accordance with the Plans and Specifications and the provisions of the Building Act 1991 ... .

The settlement date was defined by reference to "the date of Practical Completion". That expression was defined in this way:

> "Practical Completion" means the stage in the construction of the Development when the Unit and the Common Facilities are substantially complete so that they are capable of being used by the Purchaser for the purposes for which they were intended without material inconvenience notwithstanding that there may be items of a comparatively minor nature which may require finishing, alteration or remedial action and notwithstanding the fact that any other unit or part of the Development may not have achieved Practical Completion at that time."

[192] Also of contextual materiality are the contractual provisions as to settlement:

> 16.2 At least five days prior to the Settlement Date the Vendor shall invite the Purchaser to carry out an inspection of the Unit. Following such inspection, the Purchaser shall confirm to the Vendor in writing that either:
>
> > (a) The Unit is completed in accordance with the Plans and Specifications; or
> >
> > (b) There are specific outstanding matters to be completed in accordance with the Plans and Specifications (such notice to specify such outstanding matters).
>
> 16.3 In the event of any outstanding matters in terms of clause 16.2(b), the Vendor shall use its best endeavours to complete such matters prior to the Settlement Date. In the event that such matters are not completed on or before the settlement date the Vendor warrants to complete such matters as soon as reasonably practicable after the settlement dat. A certificate of completion by the Vendor's architect will be conclusive evidence of completion of any outstanding matters.

[193] Drawing these threads together:

(a) The vendors were required to complete the unit in a workmanlike manner and in conformity with the Building Act.

(b) The obligation on the purchaser to settle was subject to Practical Completion of the unit in the sense that unless and until the unit was practically complete, the purchaser did not have to settle.

(c) This concept was defined by reference to the stage of construction rather than a formal certificate.

(d) An assertion of Practical Completion in the context of this contract extended to an assertion that the unit could be occupied without "material inconvenience" and that any outstanding items were of no more than a "comparatively minor nature".

(e) The cls 16.2 and 16.3 processes arose post-Practical Completion and was thus intended to address only deficiencies of a kind which would not be inconsistent with Practical Completion.

[194] The certificate of practical completion was sent to Mr Devlin's solicitors on 19 May 1998 and this in turn set in train the ultimate settlement of the transaction. In relation to this there was something of a hiccup over the state of completion of the tennis court and swimming pool but Mr Coughlan provided a further certificate of practical completion in relation to the court and pool. On 4 June 1998, Mr Devlin's solicitor faxed to him the two certificates of practical completion and an interim code compliance certificate and he instructed him to proceed to settlement.

[195] In the High Court, Heath J dismissed Mr Devlin's claim against the designer:

> [551] The only evidence of receipt of a copy of a certificate of practical completion by any of the owners whom I have held can sue is Mr Devlin. He deposes that on 19 May 1998, his solicitor received a facsimile, from the 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. 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.
>
> [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.
>
> [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.

[196] I do not agree with this reasoning.

[197] Mr Coughlan's 19 May 1998 certificate of practical completion certified a state of affairs which did not exist. The unit had not been completed to the point where it could be used without "material inconvenience" and the items which required "finishing, alteration or remedial action" were distinctly not of "a comparatively minor nature".

[198] Mr Coughlan in fact was not in a position to give conscientiously this certificate because he had had no supervisory involvement with the construction phase of the development. He was thus giving a certificate as to something he did not know.

[199] Mr Coughlan claimed in his brief of evidence that he thought that the certificates were required for the purposes of the developer's finance company and denied knowing that they were to be shown to purchasers. The certificates he provided were in a form which had been dictated to him by the developer (who, I interpolate, had taken it from the definition of Practical Completion in the contract). Given that the certificate is thus written in form which is referable particularly to the interests of purchasers, Mr Coughlan's assertion as to his awareness (or unawareness) of its intended use is not particularly plausible. In this regard, I note that in cross-examination he was less emphatic than in his written brief as to his contemporary understanding of the parties who would be shown the certificates. In any event, from my point of view, the critical point is that the certificates were to be shown to (and presumably relied on by) third parties and he knew that.

[200] I have no difficulty concluding that:

(a) The designer owed a duty of care to the third parties to whom the certificates were to be shown (in this case Mr Devlin);

(b) The certificates were false; and

(c) They were given negligently.

There is, however, rather more difficulty with reliance.

[201] In his evidence, Mr Devlin placed rather more significance on the Council's code compliance certificate rather than the designer's certificates of practical completion. In the narrative part of his written brief he simply referred to receipt of the 19 May 1998 certificate as part of the chain of events which resulted in settlement. Later, however, he referred to the sequence of events which occurred on 4 June 1998 in terms of his solicitor faxing him the two certificates of practical

completion and the code compliance certificate which resulted in him instructing him to proceed with settlement. As well, he said:

> I relied on Mr Barton's representation that he was building a superior development when I entered into the agreement to purchase the Unit. I also thought that I had protected myself by ensuring a Practical Completion Certificate and a Code Compliance Certificate had been issued for the Unit before settling the purchase.

There is also the evidence which Mr Devlin gave in cross-examination which is referred to by Baragwanath J at [127].

[202] I am left with the impression that the Judge overlooked the significance of context provided by the settlement arrangements both as contemplated by the contract and as implemented by the solicitors. He also, on my impression, overlooked the admittedly general assertions of reliance made by Mr Devlin in his evidence.

[203] In my view there was reliance and accordingly I am of the view that the designer is liable to Mr Devlin.

(e) Costs between the plaintiffs as a whole and the Council

[204] We heard argument as to the orders for costs made in the High Court. Those arguments, however, have been substantially overtaken by the respects in which we have differed from Heath J. Issues as to costs in the High Court must therefore be reserved for further consideration.

ARNOLD J

[205] I have read the judgments of William Young P and Baragwanath J in draft. I agree with the conclusions they have reached as to the outcome of the appeals, for the reasons given by William Young P. I will make only four brief additional comments.

[206] First, the present appeals are concerned with one residential development in Auckland that is afflicted by leaky home syndrome. While important to those involved, they represent a small part of a very large problem. Taken with the *Byron Avenue* appeal, they show why a problem of the size and nature of that resulting from leaky home syndrome is unsuitable for resolution by means of litigation but requires some other, more comprehensive solution.

[207] Although the full impact of leaky home syndrome is not yet clear, there is no doubt that a great many residential properties in New Zealand are or will be seriously affected by it. The majority are in Auckland but there appear to be many in other locations as well.

[208] It is also plain that the leaky home problem is the result of what can fairly be described as systemic failure, occurring at all levels within the building industry, in both the public and private sectors. As has been detailed in my colleagues' judgments, the Building Industry Commission's report, *Reform of Building Controls*,[135] recommended an approach to building controls which moved away from the existing highly prescriptive code to a performance-based code which focused on the preservation of the health and safety of occupants and protection of neighbouring properties rather than on the protection of property owners' economic interests in the properties being built. The focus on performance would, it was thought, allow for greater innovation in building methods. Market forces would operate to ensure that owners received value for money, and owners could protect their interests in their properties through insurance arrangements if they chose. Territorial authorities would be subjected to the discipline of competition from private sector building certifiers, who would be required to hold public liability insurance to protect the interests of homeowners. These recommendations were made after a lengthy and highly consultative process.

[209] In the Building Act 1991 Parliament accepted the philosophy underlying the Report and largely adopted its recommendations. However, the Act did not produce the outcomes anticipated. Market forces, compliance regimes and insurance arrangements did not in fact operate to protect the interests of homeowners and

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135 Building Industry Commission *Reform of Building Controls* (January 1990).

prevent the construction, on a large scale, of residential properties that are not weather-tight. The sheer size of the problem points to systemic failure rather than simply failures by individual players within the industry.

[210] In this context, litigation, which looks to impose responsibility on particular actors for particular consequences on the basis of legal principles, cannot offer a sufficient solution. Systemic failure of the type that has occurred will not necessarily result in legal liability being imposed on all the entities which have had some part to play in the failure, even though they bear some responsibility (in a moral sense) for what has occurred. By way of illustration, although this Court held in *Sacramento*[136] that the Building Industry Authority (BIA) owed no duty of care to purchasers of residential properties, it nevertheless accepted that the BIA had the power to intervene to eliminate or reduce practices that produced leaky home syndrome and said that it was at least arguable that the BIA had been negligent in the performance of its role.[137] The policy factors which led the Court to say that the BIA should not be legally liable to home owners may, from a legal perspective, be compelling, but they do not purport to answer the larger question, namely whether the BIA bears some general responsibility for what has occurred.

[211] If it is accepted first, that a very large number of homeowners are or will be affected by leaky home syndrome and second, that it results from systemic failure across public and private sector elements of the building industry, it becomes clear that this problem has at least some of the characteristics of what Professor Fuller[138] described as a polycentric problem, unsuitable for resolution by adjudication.[139] Professor Fuller's theory has proved controversial[140] but one does not need to accept it in its entirety to accept that it has force in the present context.

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

137 At [58] – [59].

138 Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.

139 By a polycentric problem, Fuller meant a problem that involved "many affected parties and a somewhat fluid state of affairs". Where there are many "interacting centres", a change to one will communicate itself to others in a complex pattern and this renders the dispute unsuitable for adjudication: at 397.

140 For a useful discussion see John Allison "Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication" (1994) 53 Camb L J 367.

[212] There is little doubt that litigation is a poor instrument to provide appropriate remedies to people affected by large-scale systemic failure of the type that has occurred. For example:

(a) Generally speaking, courts are confined to determining the specific issues that particular proceedings raise, certainly where private law claims are made. They are unable to undertake a holistic or comprehensive assessment of the underlying problem, much less to impose a comprehensive solution on all involved. In this context, litigation is piecemeal and ill-directed.

(b) Whether individual purchasers will be able to obtain relief depends on factors which have nothing to do with their individual merits. For example, whatever legal remedies may theoretically be available, an innocent purchaser whose property was inspected negligently by a private sector building certifier is likely to be in a far worse position than a similar purchaser whose property was inspected negligently by a territorial authority. It is clear that most building certifiers against whom claims might have been made have gone out of business and their insurance arrangements provided wholly inadequate protection for homeowners. (The same observation applies to most developers, builders, architects and designers.) By way of further example, William Young P has referred to the ten-year long-stop limitation period.[141] Whether a particular purchaser whose property suffers from leaky home syndrome falls within or without the period may well be a matter of chance. In other words, relief through legal proceedings will be available on a haphazard basis, not reflective of underlying merits. It is surely unacceptable that access to relief should be determined by happenstance rather than by merit.

[141] See [163] above.

[213] Against this background the only realistic solution is one which is comprehensive in its coverage and to which all who bear some responsibility for what has happened contribute. Given that many from the private sector have gone out of business, the burden may ultimately fall substantially on central and local government, but each has played a contributing part. This may be the price that we are all, as taxpayers and ratepayers, obliged to pay for remedying the results of a regulatory construct that simply did not work as envisaged.

[214] Second, one of the recommendations from the BIA's Report that was not implemented concerned the establishment of a Building Guarantee Scheme for newly-built residential accommodation.[142] This was intended to provide indemnification to owners of residential accommodation for building defects, up to a prescribed limit, without the need for recourse to the courts. Had such a scheme been implemented it may have limited the extent of the leaky homes problem (by placing an additional discipline on builders/developers) and would have gone some way to meeting leaky homes problems as they arose by providing prompt indemnification for remedial work, rather than allowing moisture ingress problems to run on and cause further damage, as has occurred.

[215] With hindsight, the BIA's faith in market forces to ensure that owners received value for money seems to have been misplaced for a number of reasons, one being the ability of builders/developers to operate through single project companies that could be wound up on completion of the project and another the failure of insurance arrangements to protect homeowners. But the establishment of a Building Guarantee Scheme would have ameliorated that, at least to some extent. This illustrates, perhaps, the dangers of adopting part only of an integrated set of recommendations for reform.

[216] Third, I agree with William Young P that the Court should endeavour to adopt an approach in this area which is relatively simple and straightforward to apply. Complexity resulting from refined distinctions (based, for example, on purchasers' intentions) are undesirable and should be avoided if possible. This is of

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142 See Appendix 7 to the Report.

particular importance in relation to the Blue Sky claims. In assessing whether a territorial authority should as a matter of principle be liable for a negligent failure to perform its inspection or other functions in respect of residential properties, it makes little sense to distinguish between different purchasers in the same residential complex.

[217] This brings me to the Blue Sky claims. Heath J held that Blue Sky was not an "owner" within the meaning of s 2 of the Building Act[143] and did not have standing to sue based on its leasehold interest in the units at issue.[144] However, the Judge accepted that Blue Sky had standing to sue as the assignee of the owners' rights, although he dismissed Blue Sky's claims on the basis that the owners had not established that they had sustained any recoverable loss. This was because there was no evidence that they had relied on the Council's actions when acquiring the units.[145] I agree with Heath J that Blue Sky's standing to sue arises from its position as assignee, rather than from the nature of the leasehold interests that it held or from its being an "owner", for the reasons he gives. However, like William Young P and Baragwanath J, I consider that the Council is liable to the owners and therefore to Blue Sky.

[218] Finally, an issue which we address in the related *Byron Avenue*[146] appeal concerns whether any reduction should be made on account of contributory negligence where a purchaser sells an apartment to a related party after damage from moisture ingress has manifested itself. This occurred in the present case when Mr Devlin sold his apartment to Devlin Properties Ltd after he had become aware of the leaky building issues, and discounted the price by $40,000 to take account of the likely cost of repairs. However, only Mr Devlin sued the Council – Devlin Properties Ltd was not a party to the claim. Accordingly, the particular issue that arises in the *Byron Avenue* case is not squarely raised in the present case.

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143 At [355].
144 At [360].
145 At [374] – [377].
146 *Byron Avenue* [2010] NZCA 65.

[219] Accordingly I too would dismiss the Council's appeal and allow the Blue Sky appeal in CA673/2008. I would allow the appeal by Mr Devlin against the designer based on the certificate of practical completion in CA66/2009.

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CA66/2009
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