IN THE SUPREME COURT OF NEW ZEALAND

SC 27/2010
[2010] NZSC 158

BETWEEN	NORTH SHORE CITY COUNCIL Appellant
AND	BODY CORPORATE 188529 (SUNSET TERRACES) 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

SC 28/2010

BETWEEN	NORTH SHORE CITY COUNCIL Appellant
AND	BODY CORPORATE 189855 (BYRON AVENUE) First Respondent
AND	PAULINE LOUISE HOUGH & OTHERS Second Respondents

Hearing:	8-10 November 2010
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	D J Goddard QC, D J Heaney SC, S A Thodey and S B Mitchell for Appellant J A Farmer QC, M C Josephson and G B Lewis for Respondents S C Price and I J Stephenson for 7th and 8th Named Second Respondents in SC 27/2010
Judgment:	17 December 2010

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The respondents represented by Mr Farmer QC are awarded costs against the appellant in the sum of $40,000; those represented by Mr Price in the sum of $15,000, plus disbursements in each case to be fixed if necessary by the Registrar.

REASONS

ELIAS CJ

[1] Territorial authorities control building in New Zealand under statutory duties conferred for the protection of building users.[1] The North Shore City Council in effect invites the Court to hold that it owed no duty of care to building owners for discharge of its statutory responsibilities of inspection and approval in claims to recover loss in value of the building or the cost of repairs. The effect of such holding would be to depart from the 1996 Privy Council decision on appeal from New Zealand in *Invercargill City Council v Hamlin.*[2] It would overturn the line of authority[3] followed by New Zealand courts in respect of builders since *Bowen v Paramount Builders (Hamilton) Ltd*[4] in 1976 and in respect of the supervisory

1 Under the Building Act 1991, which applied when the events the subject of these appeals arose. This Act has since been repealed by the Building Act 2004, which introduces a different regulatory regime but with broadly similar purposes.

2 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

3 See, prior to *Hamlin*, *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA); *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA), [1987] 1 NZLR 720 (PC); *Askin v Knox* [1989] 1 NZLR 248 (CA).

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

responsibilities of territorial authorities since *Mt Albert Borough Council v Johnson*[5] in 1979, cases themselves building on the 1971 decision of the English Court of Appeal in *Dutton v Bognor Regis Urban District Council.*[6] If unsuccessful in the bolder argument, the appellant contends that any duty of care owed by territorial authorities to building owners in the discharge of statutory obligations is limited to the owner-occupiers of low-cost individual residential dwellings.

[2] The Council appeals from findings in the High Court,[7] affirmed on appeal by the Court of Appeal,[8] that it is liable to the owners of units in two residential apartment blocks, "Sunset Terraces" and "Byron Avenue", for their losses due to water damage resulting from faulty construction which would have been identified had the Council performed its statutory duties of inspection and consent with reasonable care. Some of the owners bought from the developer of the complexes. Others purchased from the original purchaser. Some are owner-occupiers. Others have let the apartments, in some cases intending to take up occupancy themselves at a later stage, in other cases because they have bought the apartments as investments for letting rather than to occupy personally. In the "Byron Avenue" appeal, there is a claim by the Body Corporate for damage to common property.

[3] I have had the advantage of reading in draft the reasons of Tipping J, which allows me to summarise my reasons for reaching the same conclusions. I, too, consider that the New Zealand authority confirmed in *Hamlin* is correct and should continue to be followed. Liability to home-owners for loss of value or repair costs in respect of faulty building work, negligently passed by Council inspectors, has been imposed on territorial authorities with statutory responsibilities to supervise building for more than thirty years. Such liability fits within the wider framework of responsibility in negligence described in *South Pacific Manufacturing Co Ltd v*

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

6 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA).

7 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC); *Body Corporate No 189855 v North Shore City Council* HC Auckland, CIV-2005-404-5561, 25 July 2008.

8 *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZCA 64, [2010] 3 NZLR 486; *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445.

New Zealand Security Consultants & Investigations Ltd[9] and applied in relation to duties arising out of a background of statutory responsibility by this Court in *Couch v Attorney-General.*[10] In addition, recognition of such liability to successive owners (whether for negligent inspection or for the negligent construction itself by the builder) is consistent with the questioning of a requirement of privity in cases where successive ownership of apparently durable constructions or products is usual.[11]

[4] The position taken in New Zealand in relation to both aspects (liability of territorial authorities and liability to successive owners) is similar to that reached in Canada.[12] It is also consistent with the approach to negligence taken by the English Court of Appeal in *Dutton* and by the House of Lords in *Anns v Merton London Borough Council.*[13] In respect of the liability to successive owners, it is comparable with the liability of builders in some jurisdictions of the United States, arrived at in part by adaptation of the law of product liability.[14]

[5] In the United Kingdom and in Australia a more restricted view of liability in negligence for loss of value or the cost of repairs has been taken in more recent decades. In the United Kingdom, liability for such loss has been rejected in relation to both builders and territorial authorities.[15] In Australia, the liability of builders for

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9 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).

10 *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] NZSC 45, [2008] 3 NZLR 725.

11 Seen, for example, in *Lempke v Dagenais* 547 A 2d 290 (NH 1988) and *Winnipeg Condominium Corporation No. 36 v Bird Construction Co Ltd* [1995] 1 SCR 85 at [35]–[36] (the Supreme Court of Canada however left open the issue as to whether liability could extend to subsequent purchasers for the cost of repairing non-dangerous defects). See also discussion by Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46.

12 See *Kamloops v Nielsen* [1984] 2 SCR 2 (affirmed by *Canadian National Railway Co Ltd v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021) which held a municipality liable for economic loss caused by the negligence of a building inspector; and *Winnipeg Condominium Corporation No. 36 v Bird Construction Co Ltd* [1995] 1 SCR 85, which held a general contractor to be liable in negligence to a subsequent purchaser for the cost of repairing dangerous defects.

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

14 Recovery of damages by a subsequent purchaser for latent defects against a builder is permitted, in certain jurisdictions, based on a claim in negligence or more commonly a claim for breach of an implied warranty of workmanship or habitability which does not require privity. See, for example, *Moxley v Laramie Builders, Inc* 600 P 2d 733 (Wyo 1979); *Terlinde v Neely* 271 SE 2d 768 (SC 1980); *Richards v Powercraft Homes, Inc.* 678 P 2d 427 (Ariz 1984); *Lempke v Dagenais* 547 A 2d 290 (NH 1988) and *Speight v Walters Development Co Ltd* 744 NW 2d 108 (Iowa 2008).

15 See *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 (HL) and *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

such loss is recognised,[16] but not the liability of territorial authorities in relation to inspection and approvals.[17] In part, these differences turn on different legislative and social conditions.[18] And in *Hamlin*, it was recognised that the policy considerations behind the development of the common law inevitably and validly lead to different outcomes or emphasis in different jurisdictions.[19] The Privy Council was not prepared to differ from the assessment of the Court of Appeal, which stressed the reliance placed in New Zealand circumstances by purchasers of houses on Council inspection to prevent defects often otherwise very difficult to discover after completion of construction.[20]

[6] The decision in *Hamlin* itself is likely to have settled and confirmed such expectations in the fifteen years since it approved the pre-existing New Zealand case law. The liability of the Council to the plaintiffs in these appeals entails no extension of established principle. Nor do the changes to the legislation governing building provide justification for revisiting the New Zealand case law. The Building Act 1991 was considered by the Court of Appeal and the Privy Council, although not applicable to the case in issue. I agree with the assessment by those Courts that the Act is not inconsistent with continued common law liability when territorial authorities are negligent in carrying out their responsibilities of inspection and control.

[7] In agreement with Tipping J, I do not consider it would be principled to introduce restrictions on the liability of territorial authorities according to the form of ownership, the type of residence, or the value of the building. While in *Hamlin* in the Court of Appeal, Cooke P in describing the facts of the case referred to the property in issue as "a comparatively modest one-storey suburban house",[21] the reasoning in the Court of Appeal and the Privy Council does not suggest any limitation upon the principle of liability according to these circumstances. Indeed,

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16 *Bryan v Maloney* (1995) 182 CLR 609.

17 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424.

18 See, for example, the emphasis placed on the Defective Premises Act 1972 (UK) by the House of Lords in *Murphy* at 457 per Lord Mackay, at 472 per Lord Keith, at 480–481 per Lord Bridge, at 491–492 per Lord Oliver, and at 498 per Lord Jauncey.

19 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 523 per Cooke P and *Invercargill City Council v Hamlin* (PC) at 519–520.

20 *Hamlin* (PC) at 521.

21 *Hamlin* (CA) at 516.

Bowen v Paramount Builders and *Mt Albert Borough Council v Johnson* were both concerned with attached units which were part of larger buildings. A limitation of liability to owner-occupiers moreover is contrary to the policy of the legislation, which is concerned with protecting all users of buildings.[22] And if claims by non-occupier owners have not been distinctly considered in New Zealand (although their availability was assumed in *Bowen*[23]), there is no basis in the authorities for limitation of the general principle of liability.

[8] It was suggested in argument in this appeal that in larger developments it may be expected that architects, engineers, and other consultants are likely to be engaged and that purchasers are more likely to rely on such experts than on the inspection and controls under the Building Act. That there may be overlapping duties of care owed by different potential defendants, including architects and engineers, is however no answer to the Council's liability for its own negligence. Apportionment of responsibility may be sought where available. And in some cases questions of reliance may bear on whether any breach was causative of loss in fact.

[9] In relation to questions of the scope of the duty of care and the effect of earlier discoverability of physical damage on the ability of a subsequent purchaser to recover for loss, I arrive at the same conclusions as Tipping J. It is unnecessary to express a view on the scope of what is referred to by Tipping J as the "*Hamlin* principle" (an expression I prefer to avoid because it tends to obscure the wider principles which were applied in that case). It is sufficient to conclude that these claims in respect of residential premises were correctly held to be within existing authority under which the territorial authority is liable for breach of a duty of care owed by it to owners, whether or not subsequent purchasers, and whether or not occupiers themselves. Whether the general principles may require limitation in their application to different facts for reasons of policy (for example, in application to commercial premises) is not something we are called upon to consider in the present case.

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22 Building Act 1991, s 6(1)(a). Compare Building Act 2004, s 3.

23 In which one of the units was tenanted: *Bowen* at 403 per Richmond P.

[10] The conclusion in the authorities approved in *Hamlin*, that duties of care are directly owed to successive owners (by builders in respect of construction and by territorial authorities in respect of inspection and approval), makes it unnecessary to consider questions of transferred loss or duty.[24] Any adjustment called for because of overlapping claims by successive owners or contribution to the loss by an earlier owner falls to be determined as matters of causation or contributory negligence. There is no occasion for the development of an "accrual bar"[25] or "liability rule"[26] such as was urged by the appellant in this Court. Statements emphasising the point of occurrence of physical damage which, taken out of context, might suggest such refinement, are made in the different context of limitation periods.[27] (And in relation to limitation, the statutory "long-stop" provided by s 91(2) of the Building Act 1991[28] answers any floodgates arguments raising the spectre of successive limitation periods.) Liability for loss in value or for repairs arising out of breach of duties of care owed directly to successive owners is controlled by the necessity that the loss be caused by the breach of duty to the particular claimant. Any contributory negligence may also affect recoverability of the loss (the diminution of the value of the premises or the expense of remedial work). Beyond this I do not think it is necessary to go in the present case. Difficult cases of causation may arise in the future, but should be resolved in context. I prefer not to consider examples of cases that may arise or to consider the effect of an adverse notation on the Land Information Memorandum.

[11] I am in complete agreement with the reasons given by Tipping J in holding that the Body Corporate of the Byron Avenue development may claim in respect of damage to common property.[29] I agree also with his reasons for rejecting the argument that the Code Compliance Certificate overtakes any earlier duty of care.[30] I add no separate reasons of my own on these two points.

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24 As in *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1985] QB 350 (CA), [1986] 1 AC 785 (HL) and see the discussion by Lord Goff in *White v Jones* [1995] 2 AC 207 (HL) at 264–265.

25 As described by Tipping J in his reasons at [68].

26 As described by William Young J in *Sunset Terraces* at [158].

27 See Richardson J in *Johnson* at 242 and Lord Denning MR in *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] 1 QB 858 at 868, set out in the reasons of Tipping J at [64]–[65].

28 Now contained in s 393(2) of the Building Act 2004.

29 As to which see Tipping J at [55]–[59].

30 Ibid, at [60]–[62].

[12] I would dismiss the appeal.

BLANCHARD, TIPPING, McGRATH AND ANDERSON JJ

(Given by Tipping J)

Introduction

[13] These two appeals[31] involve leaky homes. The cases have become known as *Sunset Terraces* and *Byron Avenue*, after the names of the two apartment blocks involved.[32] The plaintiffs (respondents in this Court) successfully sued the appellant, the North Shore City Council, for damages as a result of their residential apartments having been damaged by moisture. The operative negligence found against the Council was that its inspectors had failed during the construction process to identify the structural problems that had allowed the moisture to damage the apartments.

[14] As will become apparent, it is not necessary to examine the facts of the two cases in any detail because the matters at issue in this Court are matters of principle, resolution of which does not depend on the particular facts of individual cases. Nor is it necessary to traverse the decisions below. They will be mentioned as and when appropriate.

[15] The first issue on the appeals is whether this Court should follow the decision of the Privy Council in *Invercargill City Council v Hamlin*.[33] The Council submitted that this decision should not be followed and that the duty of care there recognised should be substantially narrowed. This submission was based primarily on the proposition that a materially different legislative landscape came into force under the

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31 Heard together for convenience, as the primary issues are the same in both.

32 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC); *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZCA 64, [2010] 3 NZLR 486; and *Body Corporate No 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 25 July 2008; *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445.

33 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

Building Act 1991 which had not been enacted at the time of the events giving rise to the *Hamlin* litigation.[34]

[16] The Courts below did not have to address this issue because they were bound by the decision of the Privy Council. The point was, however, reserved for this Court. For reasons which appear below, we are satisfied that it would not be appropriate for this Court to depart from the law laid down in *Hamlin*. On that basis it becomes necessary for this Court to determine the exact scope of the *Hamlin* duty. A number of allied questions also arise.

The principle established in *Hamlin*

[17] The decision of the Court of Appeal in *Hamlin*[35] affirmed the already settled principle of New Zealand law that territorial authorities (councils) were liable to original and subsequent home owners for loss caused by the failure of building inspectors to carry out their inspection functions with reasonable skill and care. The Privy Council endorsed the decision of the Court of Appeal and added the explanation that in cases of latent structural defects which a council by negligent inspection had failed to prevent, the owner's loss was not the physical defect in the structure but loss either in the form of diminution of the market value of the property or the cost of repair, if that were reasonably possible.[36]

[18] Their Lordships held that no loss occurred until the defect was discovered or was reasonably discoverable.[37] Hence, in ordinary cases, the occurrence of the loss and its discovery would coincide. If the owner sold the house at full value before the defect was discovered no loss would be suffered.

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34 The 1991 Act was in force at the time the events in question in these appeals took place. It has since been replaced by the Building Act 2004. Prior to the 1991 Act the relevant legislation was the Local Government Act 1974.

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

36 At 526.

37 Ibid.

Departure from the decision in *Hamlin*

[19] As the essence of the Council's argument in support of a reconsideration of these statements of the law was based on changes said to have been brought about by the enactment of the Building Act 1991, it is appropriate to refer to observations made in both the Court of Appeal and the Privy Council about that legislation, even though it was enacted after the events in *Hamlin* occurred. Technically these observations might be regarded as obiter dicta, but their provenance is such that reliance will undoubtedly have been placed on them as representing a correct statement of the effect of the 1991 Act on the common law duty affirmed in the *Hamlin* litigation.

[20] In his judgment in the Court of Appeal, Richardson J examined the terms and legislative history of the 1991 Act in some detail. It is not necessary to replicate that detail here. The crucial point is that his Honour held that there was nothing in the Act or its history to justify reconsideration of the Court's previous decisions in the field.[38] Richardson J then observed:[39]

> ... After a detailed series of studies over a decade the Building Industry Commission recommended major changes in building controls but did not question the responsibility of territorial authorities to home-owners for the carelessness of their building inspectors. The Building Act 1991 contains no limitations on what has now been for over 18 years the law of New Zealand in this field embodying what is essentially a social value judgment.
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> Against this background I consider that any change in the law should come from the Parliament of New Zealand, not from the Courts. ...

[21] His Honour concluded his discussion of this aspect of the matter by observing that the cases the Court of Appeal was affirming in *Hamlin* had themselves been an important catalyst engendering public expectations regarding the role of councils in the building control process.[40] The cases had also, in his view, been the basis for legislative action. Law and social expectation had thereby enjoyed a symbiotic relationship.

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38 At 527.
39 At 528.
40 Ibid.

[22] Richardson J's views were endorsed by the Privy Council. Their Lordships stated that there was nothing in the 1991 Act to abrogate or amend the existing common law in New Zealand.[41] On the contrary, they considered a number of provisions in the Act clearly envisaged that private law claims for damages against councils would continue to be made as before. Mr Goddard QC, for the Council, challenged the proposition that the 1991 Act had had no effect on the common law principle that was affirmed in *Hamlin*. Whether the approach of the Privy Council to that question was correct is not, however, the immediate point.

[23] What matters for present purposes is that those ordering their affairs in this field were entitled to take the view that what the Court of Appeal and Privy Council had said was a correct statement of the law. Hundreds, if not thousands, of people must in the meantime have relied upon the proposition that the 1991 Act had not affected the common law position. For this Court to defeat that reliance retrospectively by holding that the true position was otherwise would represent an inappropriate use of our ability to depart from a previous decision of the Privy Council. That would be the position even if, as Mr Goddard submitted, the determination of the Privy Council was erroneous.

[24] We do not, however, consider that *Hamlin* was wrongly decided. In agreement with the Court of Appeal and the Privy Council, we consider that the enactment of the Building Act 1991 gave no basis for reconsideration of the appropriateness of the common law duty as affirmed in *Hamlin*. The most relevant change introduced by that legislation was the capacity to have independent certifiers perform the inspection and certification roles which would otherwise be performed by the council. A council could obviously not be liable for negligent inspection if it was not responsible for the inspection. But there was no reason why, following the passing of the 1991 Act, a council should not remain liable if it performed the inspection role and was negligent in doing so.

[25] Nothing in the 1991 Act signalled with the necessary clarity that the Act was intended to remove the common law duty affirmed in *Hamlin*. Mr Goddard took the Court carefully through a number of aspects of the 1991 Act in an attempt to

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[41] At 522.

demonstrate that it had removed the common law duty. It is not necessary to traverse the ground that counsel covered. What is clear is that the common law duty was not expressly removed. Nor can it be said that the duty was removed by necessary implication. If Parliament had meant to achieve the outcome for which the Council contended, it would have done so in clear and unmistakeable terms.

[26] The duty affirmed in *Hamlin* is, in any event, a soundly and firmly based principle of New Zealand law. There are good policy reasons for it. The relevant features will be the subject of more detailed examination in the course of our consideration of the basis and origins of the *Hamlin* principle.

The scope of the *Hamlin* principle

The issue

[27] Mr Goddard submitted that if the *Hamlin* principle stood, it should be confined to the circumstances of the *Hamlin* case itself. At issue in *Hamlin* was a stand alone "modest"[42] single dwellinghouse occupied by its owners. Mr Farmer QC submitted that the Court of Appeal had not expressly confined the duty in that way in *Hamlin*. He also contended that this Court should uphold the decision of the Court of Appeal in the present cases that the *Hamlin* duty applied to any building the intended use of which was residential, as shown on the plans submitted to the council. It will depend on which approach is taken, whether "investor owned" residential properties, a category of case which, with others, was given attention in argument, will or will not be within the scope of the *Hamlin* duty.

The origins of the Hamlin principle

[28] In order to address the question at issue it is desirable to trace the development of the line of cases which *Hamlin* affirmed. An appreciation can

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[42] Or, as Cooke P put it, "comparatively modest" (at 516).

thereby be gained of the factors that have contributed to the establishment of the duty and which are relevant to its appropriate scope. The primary cases, all decisions of the Court of Appeal, are *Bowen v Paramount Builders* (1976),[43] *Mount Albert Borough Council v Johnson* (1979),[44] and *Hamlin* (1994). It is also appropriate to examine the decision of the Court of Appeal in England in *Dutton v Bognor Regis Urban District Council* (1971).[45] It was that decision which gave the impetus to the New Zealand developments and provided much of their conceptual and policy basis.

[29] *Bowen* concerned two flats built with inadequate foundations. The builder was held liable to a subsequent purchaser[46] for various economic losses including the cost of repairing the foundations, following substantial subsidence. The Court held that the builder owed a duty of care to the subsequent purchaser and was in breach of that duty. The rationale for the imposition of the duty was that the builder ought reasonably to have foreseen that a subsequent purchaser might suffer damage from a hidden defect in what was intended to be a permanent structure which was likely to pass through several hands during its lifetime.[47] If the hidden defect caused damage to the structure, the owner could sue for the economic consequences of that physical damage, and could also sue for any residual loss of value after all necessary repairs had been effected. This was despite the fact that such losses might be categorised as economic.

[30] This is an early example of the general approach of the New Zealand courts to a question which has vexed some jurisdictions: that is, the difference between physical damage and economic loss. Our jurisprudence has never treated this distinction as critical in determining whether a duty of care is owed. The nature of the damage or loss in suit is relevant to whether a duty is owed to take reasonable care to prevent it; but classification per se does not determine the issue.[48] In their

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

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

45 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA).

46 The subsequent purchasers had bought their flat from the people who had commissioned the building of the flats by Paramount. They did so when the building was almost completed.

47 At 418.

48 See *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 296; *Mainguard Packaging Ltd v Hilton Haulage Ltd* [1990] 1 NZLR 360 (HC) at 376; and *Chase v de Groot* [1994] 1 NZLR 613 (HC) at 622.

separate judgments all three Judges in *Bowen* placed substantial reliance on the decision in *Dutton*. They each cited passages from the judgments in that case. This was to be expected because both *Bowen* and *Dutton* involved negligently constructed foundations and what liability the negligent builder had to a subsequent purchaser with whom the builder had no contractual relationship. As we will be examining the judgments in *Dutton* in detail below, it is not necessary to cite here the passages from the judgments in that case which influenced the reasoning in *Bowen*. It is fair to say that the Judges of the Court of Appeal in *Bowen* effectively adopted the *Dutton* reasoning as their own. Hence *Dutton*'s case provided the underpinning of the line of cases commencing with *Bowen* and culminating in *Hamlin*.

[31] *Bowen*'s case was, of course, a claim by a subsequent purchaser against the builder, not against a local body. That development came in *Johnson*'s case, where the Council was held liable to a subsequent purchaser for negligence in inspecting foundations inadequately constructed by a builder of six flats. The plaintiff had purchased one of the flats from its original owner. The case was concerned primarily with matters of limitation, but the Court accepted, without difficulty, the conclusion of the trial Judge that the Council owed a duty of care to subsequent purchasers.[49] This was based on a logical extension of the principle in *Bowen*'s case in the light of the decision of the Court of Appeal in England in *Dutton*'s case.

[32] *Dutton*'s case held that councils owed a duty to both original and subsequent owners carefully to inspect building work so as to avoid the consequences of the creation of hidden defects. In holding that the Council owed such a duty, Lord Denning MR said the significant thing was that the legislature had given councils a great deal of control over building work and the way it was done.[50] The degree of control carried with it a duty to exercise that control properly and with reasonable care.

[33] Lord Denning then considered to whom the duty was owed. He held that in the same way as a manufacturer of goods could be liable to a party with whom the

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[49] See 237.
[50] At 392.

manufacturer had no contractual relationship,[51] so too could the builder of a structure.[52] It was then but a short step to say that a council should also be liable, not just to the owner at the time of negligent inspection, but also to a later owner.[53] All of this, of course, was subject to limitation questions. That applies to the *Hamlin* duty generally and need not be repeated.

[34] Lord Denning examined his proposed approach against policy considerations. In the first place the plaintiff was not at fault and was in no position herself to bear the loss. His Lordship was of the view that those responsible should bear it.[54] The builder was responsible. The Council's inspector was also responsible. The Council ought to answer for his failure because it had been entrusted by Parliament with the task of seeing that houses were properly built. The very object of that task was to protect purchasers and occupiers of houses.

[35] Lord Denning next considered the consequences of imposing liability on the Council and, in particular, whether doing so would have an adverse effect on its work.[55] Would it mean that the Council would not inspect at all, rather than risk liability for inspecting badly? His Lordship saw no danger in this respect. He considered that if liability was imposed on councils it would tend to make them do their work better rather than worse.

[36] As a further point, his Lordship considered whether liability should not be imposed on the Council because the loss was economic. He saw no reason for limiting damages on that account.[56] He concluded by considering the familiar floodgates argument and asked whether holding the Council liable would lead to a flood of cases which neither the Council nor the courts would be able to handle. His Lordship indicated, perhaps optimistically, that he saw no need to reject a claim on

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51 *Donoghue v Stevenson* [1932] AC 562 (HL).

52 At 393, overruling *Bottomley v Bannister* [1932] 1 KB 458 (CA).

53 Speaking of subsequent purchasers, Lord Denning indicated that intermediate inspection, or opportunity of inspection, may break what he called "the proximity". It would certainly do so when it ought to disclose the damage. His Lordship treated foundations as in a class by themselves because once covered up they would not be seen again until the damage appears. The inspector must, or should, know this (at 396). The same applies to other hidden defects. I will revert below to the question of intermediate examination.

54 At 397–398.

55 At 398.

56 At 396.

this ground because the plaintiff would rarely allege and be able to prove a case against the Council. Even though that forecast, at least in New Zealand, has not been borne out in practice, we do not consider, for reasons to which we will come, that the floodgates argument should lead to the *Hamlin* duty being confined to the circumstances of the *Hamlin* case itself.

[37] In his judgment in *Dutton* Sachs LJ considered that the object of giving councils the power to inspect buildings in the course of construction was to ensure that "each dwelling erected in the council's area should have a standard of sanitation and soundness of construction that would be satisfactory for the health and well-being of those who might live in it".[57] Clearly this health and wellbeing focus was not, for his Lordship, any reason to deny a cause of action sounding in economic loss as opposed to physical injury.

[38] In that respect Sachs LJ addressed the argument that the nature of the loss suffered in such cases was economic and no duty should on that account be recognised.[58] He cited a passage from the judgment of Salmon LJ in *Ministry of Housing and Local Government v Sharp* where his Lordship had said:[59]

> ... So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends on whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take such care.

Sachs LJ observed that this appeared to accord with the views expressed in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[60] The nature of the loss should no longer, in his view, be regarded as dictating whether a duty of care should be owed.[61] Rather it was a factor to be taken into account in that determination. This, of course, is the position consistently adopted in New Zealand.

[39] In any event, as Sachs LJ observed, there was clearly evidence of physical damage in the case with which the Court was concerned. In rejecting the submission

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57 At 400.
58 At 403–404.
59 *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223 (CA) at 278.
60 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) per Lord Devlin at 517 and per Lord Pearce at 538–539.
61 At 404.

that the Council owed no duty, Sachs LJ was substantially influenced by the fact that the relevant legislation was passed to protect those who might come to own or occupy premises of the kind in issue, that is people's homes, against hidden defects.[62] The legislation was intended to benefit such persons.

[40] We interpolate here that although the cause of action in *Dutton*'s case was not for breach of statutory duty, it is apparent that the broad purposes of the relevant legislation were regarded as a highly material factor in determining whether and to what extent a duty of care should be owed at common law. That approach has become conventional in New Zealand jurisprudence.[63]

[41] In addressing the argument that the owner's right of action against the builder was a sufficient remedy and that no similar right should be available against the Council, Sachs LJ observed that this seemed a poor point for many reasons.[64] One of those reasons was that the common law does not normally limit a person who suffers damage to a remedy against one of two culpable persons. His Lordship was of the view that in the type of case with which the Court was concerned, it was particularly important that what he termed a dual liability should exist. He observed that it was a commonplace that a development project involving the building of a group of houses by a site owner was often arranged so that everything was done by a specially formed company which might be dissolved when the project was completed. In that situation, and, we would add, in others, the right of action against the builder could well prove illusory. Sachs LJ was of the view that those for whose benefit the Act was passed, needed and should have the benefit of dual liability at common law because the loss suffered would not have come about if the council had done what it ought to have done.

[42] Dealing with a point to which we will make further reference below, Sachs LJ observed that the case in hand was concerned with negligence against which normal intermediate examination would not generally afford protection.[65] The significance of this observation, as we shall later see, is that if the defect that is

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62 At 406.
63 See, for example, *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).
64 At 407.
65 Ibid.

otherwise hidden might have come to light by reason of appropriate intermediate examination, questions of causation and contributory negligence are likely to arise.

[43] The third Judge in *Dutton*, Stamp LJ, also dealt with the question whether the Council had caused the plaintiff's loss, it having been argued that the loss was caused solely by the builder and not by the Council. As to that his Lordship observed that the Council had power either to give or refuse its approval to the foundations; to show the green light or the red, as his Lordship put it.[66] His Lordship was of the view that in these circumstances, if the Council had shown the green light negligently, it had caused the consequential injury.

[44] Analysing the matter in terms of the neighbourhood principle adopted by Lord Atkin in *Donoghue v Stevenson*, Stamp LJ was of the view that persons who might become the purchaser of a house built upon an insecure foundation were so closely and directly affected by the conduct of a local authority in approving or refusing to approve the foundations that the authority ought reasonably to have them in contemplation as being affected when the local authority applied its mind to the question whether it should or should not approve the foundations.[67]

[45] We have referred to the three judgments in *Dutton*[68] in some detail because, as we have said earlier, they formed the conceptual and policy basis of the New Zealand line of cases to similar effect. In England *Murphy*'s[69] case, which effectively overruled *Anns*, substantially changed the legal landscape; but as the Privy Council expressly held in *Hamlin* the New Zealand courts were entitled to forge their own common law approach so as to reflect local conditions.

Scope of Hamlin

[46] Against that background we will now consider the scope of the *Hamlin* principle and, in particular, whether it should be confined to the facts of the *Hamlin*

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66 At 409–410.

67 At 411.

68 Approved by the House of Lords in *Anns v Merton London Borough Council* [1978] AC 728 (HL), albeit on slightly different grounds. The decision and reasoning in *Anns* substantially influenced the development of New Zealand negligence law.

69 *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

case or should extend to all residential premises, that is all premises that are designed for residential use, as the Court of Appeal found to be the right solution in these present cases.

[47] The judgments in *Hamlin* were, of course, written with the facts of that case in mind. As we have already mentioned, Mr Goddard argued that the duty recognised in *Hamlin* should apply only to single stand-alone modest dwellings whose owners personally occupied them. But that, in our view, would be an unpersuasive restriction on the duty, quite apart from the difficulty of having to decide when a dwelling was more than modest. Both *Bowen*'s case and *Johnson*'s case involved more than one unit or flat in a single complex. In *Bowen* there were two units and in *Johnson* six.

[48] There is no principled basis for making the *Hamlin* duty dependent on whether the dwelling in question is stand-alone or part of a block of dwellings, or on how many dwelling units there are in the block. Any such limitation would, in any event, be inconsistent with the rationale for the duty. That rationale is based on the control which councils have over building projects and on the general reliance which people acquiring premises to be used as a home place on the council to have exercised its independent powers of control and inspection with reasonable skill and care and, in particular, to have exercised with reasonable skill and care its powers of inspection of features that will be covered up.[70]

[49] The duty affirmed in *Hamlin* is designed to protect the interests citizens have in their homes.[71] As a matter of principle and logic that duty should extend to all homes, whatever form the home takes. Distinctions based on the ownership structure, size, configuration, value or other facets of premises intended to be used as a home are apt to produce arbitrary consequences. Furthermore, the *Hamlin* duty must be capable of reasonably clear and consistent administration.

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[70] As Cooke P said in *Hamlin*, "[t]he linked concepts of reliance and control have underlain New Zealand case law in this field from *Bowen* onwards" (at 519). The Privy Council confirmed the importance of these "twin concepts of assumption of responsibility and reliance by the subsequent purchaser" (at 521).

[71] In the Court of Appeal Baragwanath J spoke of the duty being designed to recognise what he called the habitation interest (at [21]).

[50] Nor do we find persuasive the Council's argument that councils should not owe a duty of care in cases where professionals such as engineers and architects have been involved. This is not a viable proposition for several reasons. Purchasers are unlikely to know the extent of the instructions upon which the other professionals were engaged. Their involvement may have been limited and may have been irrelevant or marginally relevant to the problems giving rise to the loss in question. Fundamentally, the proposed distinction is not consistent with the rationale for the duty which councils owe, being essentially their power of control and the general reliance which is placed on their independent inspection role. The part played by other professionals should not absolve councils from liability; the proper way to reflect their involvement is to require them, if negligent in a relevant way, to bear an appropriate share of the responsibility for the ultimate loss.

[51] For these reasons we agree with the Court of Appeal that a building's intended use, in accordance with the plans lodged with the council, is the most appropriate determinant of the scope of the *Hamlin* duty. Councils owe a duty of care, in their inspection role, to owners, both original and subsequent, of premises designed to be used as homes. This is as far as the Court needs to go for the purpose of deciding the present appeals. Whether, and if so to what extent, a council may owe the same duties of care in relation to other premises should be left to a case in which the issue directly arises.

[52] In reaching our conclusion, we have not seen any advantage in accepting Mr Goddard's invitation to examine the precise language used by each of the five members of the Court of Appeal in *Hamlin*, that is, their references to houses, homes, dwellinghouses and so on. In a number of instances different language appears to have been used interchangeably.

[53] The consequence of the *Hamlin* duty being formulated in this way is that the Council's contention that "investor" owners of residential property should not be within the scope of the duty must be rejected. By parity of reasoning the so-called Blue Sky units in *Sunset Terraces* are not excluded from the duty. The focus is on the use of the premises, not on what relationship their owners have to the premises. The cases of *Bowen* and *Johnson* are inconsistent with the exclusion from the

Hamlin duty of those who have residential premises built for commercial reasons or who purchase them for such reasons. The proposed exclusion would not be consistent with the policy reasons for the duty. Protection of a non-owner occupant, such as a tenant, can be achieved only through a duty owed to the owner, as it is only the owner whose pocket is damaged as a result of the negligence of the building inspector. It is only the owner who can undertake the necessary remedial action.

[54] Nor would the proposed distinction be straightforward to administer in cases where the owner was building or buying for both personal residential purposes and to let or sell other units. As Professor Stephen Todd acknowledges in the *Law of Torts in New Zealand*,[72] the intended use of a building provides a reasonably workable test, at least for most cases. We would add that this criterion best satisfies the purpose of the duty and the need for clarity of application.

The body corporate issue

[55] The point raised under this head arises only in the *Byron Avenue* case. It concerns the ability of a body corporate to sue for damage suffered by the common property in a multi-unit building. The common property is not owned by the body corporate; it is owned by the unit owners as tenants in common. The trial Judge held that the Council did not owe a duty of care to the body corporate. But both the trial Judge and the Court of Appeal held that the body corporate could pursue a claim in respect of the common property on behalf of the unit owners, and could recover damages on behalf of unit owners who were not themselves parties to the proceeding. That ability was subject to all defences available to the Council against the unit owners themselves.

[56] The essence of the argument presented on behalf of the Council in opposition to the conclusion reached below was that as the nature of the loss, in cases of this kind, is economic and because the body corporate itself had suffered no economic

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[72] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers Ltd, Wellington, 2009) at [6.4.03(4)].

loss, it cannot sue. Various practical and conceptual difficulties were also raised against the conclusion of the Court of Appeal.

[57] The foundation for a body corporate's ability to sue in circumstances such as the present is s 13 of the Unit Titles Act 1972.[73] Section 13(1) provides that a body corporate shall be capable of suing and being sued in its corporate name and of doing and suffering all that bodies corporate may do or suffer. Section 13(2) provides that, without restricting the generality of subs (1), the body corporate may sue for and in respect of damage or injury to the common property caused by any person, whether that person is a unit proprietor or not.

[58] With respect to the arguments advanced by the Council on this part of the case, it is hard to see why the body corporate cannot do what, on the plain words of s 13(2), it is empowered to do. The subsection is obviously intended to enable bodies corporate to sue on behalf of unit holders who, as tenants in common, own the common property. How the body corporate deploys the fruits of any successful proceeding pursuant to s 13(2) is not an issue that arises on the appeals, nor is it an issue which should lead to any reading down of the plain terms of s 13(2). While the loss caused by damage to common property may be suffered by the unit owners rather than by the body corporate itself, s 13(2) allows the body corporate to sue for that loss on behalf of the unit owners.

[59] Although in some cases there may be complexities, for example where some of the unit owners do not have valid independent claims, these should not be allowed to detract from the general premise contained in s 13(2) that the body corporate may sue for damage and injury to the common property. The decision of the Court of Appeal on this issue was therefore correct.

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[73] Which was in force at all material times: see now the Unit Titles Act 2010.

Absence of code compliance certificate

[60] This point also arises only in the *Byron Avenue* case. The Council submits, in effect, that home owners should be taken to rely on the Code Compliance Certificate (CCC) and not independently on the Council's inspection process. In the *Byron Avenue* case no CCC was issued; hence the Council's argument is that there was nothing for the home owners to rely on and therefore no duty was owed by the Council. This point was not a ground of appeal in the Court of Appeal. Whether it fairly arises within the scope of the appeal to this Court need not be addressed because we consider the point to be unsound in any event.

[61] The reason is that it is fundamental to the *Hamlin* principle that homeowners are entitled to place general reliance on councils to inspect residential premises with appropriate skill and care. The absence of a CCC does not mean that the duty of care otherwise resting on an inspecting council is somehow retrospectively abrogated. The duty is owed and (if such be the case) breached at the time of the relevant inspection or its absence. What loss the homeowner may be able to claim on account of the breach may be influenced by the absence of a CCC and whether the owner should have been aware of that fact. The point may go to causation or it may go to contributory negligence.

[62] What the absence of a CCC cannot do is to overtake the earlier duty and any breach of it. It is worth pointing out that under the 1991 Act the term "inspection" meant "the taking of all reasonable steps to ensure that any building work is being done in accordance with the building consent".[74] The same connotation of "inspection" applies to the *Hamlin* duty.

The accrual point

[63] In the *Sunset Terraces* case the Council relies on the fact that a number of the plaintiff owners purchased their units after a cause of action against the Council had

[74] Section 76(1)(a).

accrued to their predecessors in title. It is common ground that the unit owners who sold to the plaintiffs after 3 March 2000 were or ought to have been aware of the defects in the *Sunset Terraces* complex. None of these previous owners assigned their cause of action to the plaintiffs.

[64] The Council contends that in these circumstances the plaintiffs cannot sue because the previous owners had causes of action against the Council. As Mr Goddard put it, the plaintiffs were unable to sue for a loss which occurred during the ownership of a predecessor in title. As authority for this proposition the council relied first on the statement of Lord Denning MR in *Sparham-Souter v Town and Country Developments (Essex) Ltd*:[75]

> One word more: the only owner who has a cause of action is the owner in whose time the damage appears [is discovered or discoverable]. 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.

[65] Second, the Council invoked the statement of Richardson J in *Johnson*:[76]

> The premise on which this aspect of the case is to be considered is that each appellant breached the duty of care it owed to prospective purchasers of the property and so to the respondent. But, it is well settled that a breach of the duty of care does not in itself entitle the person to whom the duty is owed, to sue. Damage is an essential ingredient. And, except where an existing right of action is assigned to a purchaser, he can sue only in respect of damage which occurs during the period of his ownership or occupation. It is that limitation which Lord Wilberforce pointed to in *Anns v Merton London Borough Council* [1978] AC 728, 758; [1977] 2 All ER 492, 504 as disposing of the possible objection that an endless, indeterminate class of potential plaintiffs might be called into existence.

[66] These passages, and especially that from Richardson J, highlight the question of when damage arises in cases of this kind. Both Lord Denning and Richardson J made their statements in a limitation context. Damage in that respect was regarded as arising when the defect was discovered or was reasonably discoverable. That approach was based on the premise, as the Privy Council said in *Hamlin*, that the loss in cases of this kind lies not in the existence of the formerly hidden defect but rather in the diminution in the market value of the property which the actual or constructive discovery of the defect brings about. But it must be borne in mind that

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[75] *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858 (CA) at 868.
[76] At 242.

the discovery or reasonable discoverability of a latent defect which will start time running for limitation purposes will not necessarily give rise to actual as opposed to potential loss to the owner's pocket.

[67] In that respect it is helpful to consider the following situations:

(1) Owner No 1 sells for full market value without the defect being discovered or discoverable. Owner No 1 thereby suffers no loss. The defect is present but, as it is unknown, Owner No 1's financial position is not damaged. This situation does not involve the accrual of any cause of action to Owner No 1, but it is mentioned for completeness. The purchaser, Owner No 2, cannot in these circumstances be caught by the posited accrual bar because there has been no accrual.

(2) Owner No 1 discovers the defect and sells to Owner No 2, disclosing the defect and factoring it into the price. Owner No 1 suffers loss by diminution of the price; but, ex hypothesi, Owner No 2 suffers no loss, at least vis-à-vis a negligent council, because Owner No 2 knows of the defect and either has or ought to have factored adequate financial recognition of the defect into the price paid. As Owner No 2 has no cause of action there is no risk of double jeopardy for the council.

(3) Owner No 1 discovers the defect and sells for full market value without disclosing the defect to the purchaser. Owner No 1 thereby suffers no loss and hence the cause of action he had on discovery of the defect is no longer enforceable for want of damage. In this situation the purchaser should not be barred from bringing proceedings because a cause of action once vested in Owner No 1.

(4) Owner No 1 discovers the defect and claims for the costs of repair. Owner No 1 can recover from the council, if it has been negligent, his actual or prospective costs of repair. If Owner No 1 sells to Owner

> No 2 (with or without disclosure), Owner No 2 will not suffer loss unless the repairs are ineffective or unless Owner No 1 does not apply the money recovered from the council to the necessary repairs. In either event the council can note the circumstances on the Land Information Memorandum (LIM) pertaining to the property. This aspect of the matter will be referred to again in a later section of these reasons.

[68] In the light of the foregoing analysis it is questionable whether the suggested accrual bar is likely to have much practical effect, even if it were sound in law. The risk to councils of double jeopardy must be small and notification on LIMs should reduce it further, as we discuss below.

[69] In his judgment in *Sunset Terraces* William Young P referred to what we are calling the accrual bar as the "liability rule".[77] He mentioned that Heath J had approached the case in the High Court on the basis that there was no liability rule and that cases where damage had become manifest before purchase fell to be determined simply by reference to the relevant limitation rules, and the general principles which apply to causation, contributory negligence and opportunities for intermediate inspection. The President indicated he had reached the same conclusion but had found the issue rather more difficult than Heath J.

[70] He then analysed several cases and mentioned, as a difficulty, the circumstance that but for the liability rule a new limitation period might commence on every sale. His Honour then discussed a variety of problems that might arise in the discoverability context and referred to certain observations of the Privy Council in *Hamlin* on that topic. Having reviewed these matters his Honour expressed a preference for simply abandoning the liability rule, giving the following reasons for that conclusion:[78]

> (a) As the facts of this case and the *Byron Avenue* appeal show, the full implications of building defects may take some time to be appreciated. A liability rule, particularly if strictly applied and not

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77 At [158].
78 At [163].

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 (that is, Limitation Act) limitation period on resale 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. (footnotes omitted)

Arnold J agreed with the President's assessment of the matter and so do we. We add the following points, some of them by way of emphasis.

[71] The so-called accrual bar to an action by a subsequent purchaser in this kind of case seems to have been born out of limitation concerns. Now that there is a longstop 10-year bar from the occurrence of the act or omission giving rise to the cause of action,[79] the potential for successive extensions of the ordinary limitation period as a result of sales following discovery or discoverability of the defect is much reduced.

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

[73] This approach is supported by the reasoning of the Court of Appeal in *Riddell v Porteous*.[80] In that case the Court considered it made no difference to the duty of care owed by a council to an original owner that title had passed to a purchaser

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79 See s 91(2) of the 1991 Act and *Johnson v Watson* [2003] 1 NZLR 626 (CA).

80 *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 9.

before the damage was discoverable and thus no loss had been directly suffered by the original owner.[81] Loss was suffered by whoever was the current owner of the house. This underlines the point made in the previous paragraph that the duty is owed independently to each owner. And, as the Court of Appeal pointed out, there is no possibility in cases of the present kind of indeterminate liability to those who may have a contractual interest in the damaged subject-matter.[82] The loss can be suffered only by the owner of the property.

[74] What then is the justification for denying the second owner the ability to sue, if a cause of action has already accrued to the first owner? If there is a causation or contributory negligence factor affecting the viability or extent of the second owner's claim it can be brought to account in the ordinary way. We can see no reason to absolve a negligent council from its liability to a subsequent owner simply because that owner's predecessor was also able to sue the council. A complete bar as a result of the first owner having an accrued cause of action is too draconian and blunt an approach to what is now a much reduced problem on the limitation front.

[75] We would therefore confirm that a subsequent owner who has suffered loss as a result of the negligence of the council can sue, notwithstanding the fact that a previous owner may also have been able to sue. As will be addressed further below, the council is able to guard itself to a substantial extent against the risk of double recovery by appropriate notations on LIMs. Hence those unit owners in *Sunset Terraces* who bought after 3 March 2000, when their vendors acquired causes of action against the Council, are not thereby barred from recovering their losses.

Reasonable possibility of intermediate examination

[76] It is appropriate to address this topic in order to signal an issue which does not arise for determination on these appeals but to which both parties referred in the course of their submissions. In *Donoghue v Stevenson* Lord Atkin used the words

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[81] The original owners indirectly suffered loss through having given a contractual warranty of soundness to the purchaser.

[82] At 11–12.

"reasonable possibility of intermediate examination"[83] to describe a situation in which the manufacturer of a harmful product could avoid liability for negligence in its production. The duty recognised by the House of Lords in that case arose only if there was no reasonable possibility of intermediate examination. The concept of intermediate examination has subsequently been employed in defective building cases, particularly when a subsequent purchaser is involved.[84] This is because the defect is customarily hidden.

[77] In *Jull v Wilson and Horton*[85] Richmond J held that the negligent party could not shelter behind what he aptly described as a reasonable expectation of intermediate inspection, unless the expectation was strong enough to enable the negligent party to regard the possibility of inspection as an adequate safeguard to persons who might otherwise suffer harm.[86] On that basis both Richmond P and Woodhouse J examined the intermediate inspection issue in *Bowen* largely from the point of view of causation.[87]

[78] The point raised in the present cases concerns the ability of councils to alert prospective purchasers to the presence or potential presence of moisture problems in the home they are interested in buying. Councils can do this by means of a LIM which prospective purchasers can obtain before becoming committed to the purchase. A council can thereby warn prospective purchasers of these issues. On that basis it was suggested in argument that a council should no longer be held responsible for any negligence in the inspection process because the warning had the same effect as an examination of the structure which brought the defect to light.

[79] If a prospective purchaser obtains a LIM which discloses a moisture problem before becoming committed to the purchase, it is unlikely that any proceedings could ever be taken against the council. A prospective purchaser may, however, fail to request a LIM in circumstances where the LIM, if requested, would probably have given notice of actual or potential problems. If, as is likely to be the case, the

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83 At 599.
84 See for example *Bowen* and *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).
85 *Jull v Wilson and Horton* [1968] NZLR 88 (HC).
86 At 97.
87 At 407–408, 413 and 418.

purchaser's failure amounts to negligence, a question may arise as to whether that negligence amounts only to contributory negligence, albeit probably at a high level, or whether the prospective purchaser's negligent omission amounts to a new and independent cause of the loss which removes all causal potency from the council's original negligence at the inspection stage.

[80] The legal background pertaining to LIMs is that under s 44A of the Local Government Official Information and Meetings Act 1987, councils must issue, on request, a Land Information Memorandum about the property concerned. The memorandum is designed to advise of "matters affecting any land [in the Council's area]". The section specifies (in subs (2)) matters which must be included in the memorandum and then says (in subs (3)) that a Council may provide in the memorandum "such other information concerning the land as the [Council] considers, at its discretion, to be relevant".

[81] Relevance must include what is relevant to an intending purchaser and, in context, land must include buildings on the land. Hence s 44A authorises councils to include in a LIM such information as the council has concerning the presence or possible presence of leaky buildings on the land. This is effectively the only way councils can warn intending purchasers and thereby seek to absolve themselves from any earlier negligence on their part. By means of a LIM the council is metaphorically saying to potential purchasers who choose to look that they should be careful, because there is (or may be) a snail in this bottle. That is how, in causal potency terms, failure to request a LIM may differ from failing to inspect the building itself.

[82] It is important to recall that at the time *Donoghue v Stevenson* introduced the intermediate examination doctrine the relationship between contributory negligence and causation was very little developed. This was largely because contributory negligence of any amount was then still a complete defence. Following legislative

intervention in the contributory negligence field in the 1940s,[88] the relationship between contributory negligence and causation has come into sharper focus.[89]

[83] It is clear that the plaintiff's own conduct may go beyond contributory negligence and become the real cause of the damage.[90] This is simply a plaintiff-based example of what was traditionally called a novus actus interveniens. That was a convenient label to describe a new cause which intervenes and removes all causal potency from the original negligence. The intervening cause can arise from the conduct of a third party or from the conduct of the plaintiff himself.[91]

[84] In a case in which the issue arises, the Court will have to examine how to treat a failure by a prospective purchaser to request a LIM before becoming committed to the purchase. That failure may amount to contributory negligence or, depending on the circumstances, it may be the only real and effective cause of the purchaser's ultimate loss.

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88 Whereby contributory negligence ceased to be a complete defence and apportionment came to be measured by the conventional twin indicators of causal potency and comparative blameworthiness. See *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 534; *Stapley v Gypsum Mines Ltd* [1953] AC 663 (HL) at 682 per Lord Reid; and *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] AC 884 at [44] per Lord Walker. Causal potency in this respect requires a comparison between the influence of the plaintiff's negligence as against that of the defendant on the occurrence of the plaintiff's loss. In contributory negligence cases there are, in effect, concurrent causes of the plaintiff's loss, one attributable to the plaintiff and the other to the defendant.

89 Glanville Williams *Joint Torts and Contributory Negligence* (Stevens and Sons Ltd, London, 1951) at Ch 12. As regards contributory negligence and voluntary assumption of risk, see particularly §74–75. As regards the need to refine the *Donoghue v Stevenson* rule see §78.

90 See Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers Ltd, Wellington, 2009) at [20.3.02(4)] and, for a very recent discussion of what conduct of the plaintiff may amount to a new and intervening cause, see *Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd)* [2009] EWCA Civ 1404 (the plaintiff, whose right leg was amputated due to the defendant's negligence, injured his left leg in a fall partly due to the amputation and partly his own carelessness. The Court held his carelessness to be contributory negligence, not a novus actus interveniens.).

91 See Michael A Jones (ed) *Clerk & Lindsell on Torts* (20th ed, Thomson Reuters (Legal) Ltd, London, 2010) at [2–119]. In *Pitts v Hunt* [1991] 1 QB 24 (CA) at 51 Balcombe LJ said that the somewhat illogical finding of 100 per cent contributory negligence must imply that the plaintiff was solely responsible for the damage suffered.

Summary of principal conclusions

[85] It may be helpful to summarise here the principal conclusions to which we have come:

1. We have declined to review the law as confirmed by the Privy Council in the *Hamlin* case, and have decided that *Hamlin* was, in any event, correctly decided.

2. Councils owe a duty of care in their inspection role to owners, both original and subsequent, of premises designed to be used as homes.

3. Subsequent purchasers of such premises are not barred from suing for breach of the duty owed to them by reason of a cause of action having accrued to a predecessor in title.

Formal orders

[86] As the Council has failed to persuade this Court to review the decision of the Privy Council in *Hamlin*, and has failed to show that the decisions of the Court of Appeal were erroneous, the appeals must be dismissed. The respondents represented by Mr Farmer should have costs against the appellant in the sum of $40,000; those represented by Mr Price in the sum of $15,000, plus disbursements in each case to be fixed if necessary by the Registrar.

Solicitors:
Heaney & Co, Auckland for Appellant
Grimshaw & Co, Auckland for Respondents
Minter Ellison Rudd Watts, Auckland for 7th and 8th Named Second Respondents in SC 27/2010