in turn was paid by the head contractor. As Mr Murphy has observed in his article at p 199:

> "In the few cases where pay when paid clauses have been enforced to the letter, courts have usually respected the trial court's finding of fact that the parties truly directed their minds to the passing of the risk of the Owner's insolvency from the Contractor to the Subcontractor. Where, however, relevant testimony is either conflicting or insufficient such that no such finding may be made on this point, courts have typically been unwilling to presume that the Subcontractor intended to accept this risk."

In a summary judgment context I am not persuaded that the defendant has done sufficient to bring it to the threshold of credibility or that there is evidence from which the Courts might presume that Smith & Smith agreed to accept the risk of not being paid in the event of the failure of the head contractor or the owner.

The two principal suggested defences raised on the defendant's behalf therefore do not find favour with me. I am satisfied that the documentation adduced is sufficiently clear to show that those defences are not seriously arguable and in a summary judgment context the plaintiff discharges the burden of showing that there is no reasonably arguable defence. Accordingly it will have judgment in the amount sought of $105,770.25. In terms of the contractual arrangements the plaintiff is entitled to interest calculated at a figure of 25% per annum on the unpaid amount and I allow this calculated from the last payment made on 15 January 1990 down to the date of the delivery of this decision. In addition I allow costs to the plaintiff in the sum of $1750 and disbursements to be fixed by the Registrar.

Judgment for plaintiff.

Solicitors for the plaintiff: *Martelli McKegg Wells & Cormack* (Auckland).
Solicitors for the defendant: *Simpson Grierson Butler White* (Auckland).

Reported by: S M Harrop, *Barrister*

Lester v White

High Court Palmerston North
5, 6, 7, 8, 9, 12, 13, 14 August; 7 October 1991
Greig J

Negligence—Duty of care—Builder constructed flats on unstable land formerly a rubbish tip—Negligent design and construction of foundation system—Whether builder and/or supplier of steel for piles owed a duty of care—Scope of duty of care—Local authority granting permit—Whether local authority under obligation to ensure no defects or inadequacies in design and plan of building and foundations—Whether duty of care owed to subsequent owners of flats by builder, building engineer or local authority—Observations as to circumstances in which doctrine of res ipsa loquitur applicable.

Negligence—Duty of care—Builder constructed flats on unstable land formerly a rubbish tip—Negligent design and construction of foundation system—Whether subsequent owners' knowledge of the land being filled land and former rubbish tip contributed to damage suffered—Extent of duty to inquire as to adequacy of foundation system.

Practice and procedure—Limitation of proceedings—Time at which cause of action arises—Whether at time when damage resulting from defects reasonably discoverable—Whether time fixed in relation to discoverability by original or subsequent owner.

Damages—Assessment—Observation as to measure of damages if recoverable—Whether damages be assessed on cost of replacement of flats or remedial work or to restore flats to satisfactory standard—Whether costs of most economic remedy for damage caused was proper measure of damages.

The first and second plaintiffs were owners of adjoining flats in Marlborough Street, Feilding, having acquired them from the original owners in 1978 and 1984 respectively. The flats were built in 1973/1974 by the first defendants who were local builders. They were built on land formerly owned and used as a rubbish tip and later filled by the third defendant, the Feilding Borough Council. Both the builders and the council had full knowledge of the land's history and recognised that special provision had to be made for foundations for the building to be constructed. G N White, one of the first defendants, discussed at length with the second defendant, Blain Building Co Ltd (Blains), a foundation engineering specialist, and the third defendant's engineer, one Campbell, the need for additional and special foundations for the site and the building to be erected upon it. Blains made suggestions as to the number, diameter, length, and style of the foundation beams. These observations by Blains followed from a plan and diagram shown to White which had been used on a similar site some months earlier. White ordered the piles and the steel for the foundation beams and drafted the specifications making assumptions from his discussions with Blains and Campbell. Campbell or the third defendant council approved and accepted the foundation plans and issued

the building permit. Blains did not advise or design the foundation system. Apart from providing the steel reinforcing cages and installing the piles, it had no participation in the foundation system which was constructed. The first defendants decided to delete a central longitudinal beam placing reliance on a lateral beam alone and instructed the second defendant to make that deduction from the approved specifications. The placing of the piles was at the instruction of the builders but with the approval of the council.

The plaintiffs claimed there had been a settlement of the building resulting in uneven floors, damaged and distorted internal walls, doors, roofs, garage doors, walls and paths, with the likelihood that such damage and distortion would continue to worsen. The plaintiffs further claimed the adjoining flats were practically unsaleable and the only remedy was demolition and rebuilding anew with the additional and consequential costs of replacement, disruption and relocation, and loss of use. The plaintiffs sued the defendants in negligence on the basis that each of the defendants owed a duty to subsequent owners of the flats to use reasonable care to prevent damage to the persons whom they ought reasonably to expect to be affected by the work and that each of them was negligent and variously responsible. In particular, the first defendants were alleged to be responsible for the negligent building and construction of the units, the first and second defendants for the negligent design and construction of the piles which were an integral part of the foundations, and the third defendant for the negligent issue of the building permit and inspection of the building work.

The defendants denied negligence and a duty of care to the plaintiffs and raised defences of limitation under the Limitation Act 1950 and of contributory negligence. The first defendant builders joined its insurers as a third party seeking indemnity under public liability policies issued by the third party to cover the first defendant's liability, if any, consequent upon accidental loss or damage to any property during the period of indemnity. The sole issue between the first defendants and the third party insurer was whether, if the first defendants were liable to the plaintiffs, an exclusion clause in the relevant insurance policy applied to the circumstances of the case.

Held: 1 It was the responsibility of the builders to ensure the design and construction of a foundation system which would support the floor and the rest of the building. The builders failed to do that as they ought to have known (with the deletion of a central longitudinal beam) that there was likely to be inadequate support for a slab floor over the distances in which the support was to be the ground which was at all times known to be of doubtful solidity (see p 492 line 14).

2 It was the borough council's responsibility to ensure that there were no obvious errors or obvious inadequacies in the design and plan of the building and foundations and to ensure that the foundations were at a firm base (see p 492 line 19).

3 Blains' responsibility was to construct and install piles in a proper manner in accordance with the direction of the builder, and the borough council. It was not responsible in any way for the foundations beyond the provisions of the steel sought and ordered for that purpose. Blains was not deficient in any way in the work that it did (p 492 line 27).

4 The law of New Zealand, so far as it was applicable to the duties of builders and of a borough council to derivative owners of land, had been well and long established. Builders, building engineers, and local authorities had a duty to use reasonable care to prevent damages to persons whom they should reasonably expect to be affected by their work (see p 492 line 38).

Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 (CA), *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA) and *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA) applied.

Rowling v Takaro Properties Ltd [1988] AC 473; [1988] 1 All ER 163 (PC) and *Yuen Kun-Yeu v Attorney-General of Hong Kong* [1987] 3 WLR 776; [1987] 2 All ER 705 (PC) referred to.

Murphy v Brentwood District Council [1991] 1 AC 398; [1990] 2 All ER 908 and *Department of the Environment v Thomas Bates and Son Ltd* [1991] 1 AC 449; [1990] 2 All ER 943 not followed.

5 In the circumstances, each of the defendants owed a duty of care. Both the builder and the borough council had been negligent and in breach of that duty. However, that duty was not owed to everyone or indeed to every subsequent owner. The plaintiffs' right of action depended upon proof of damage during their ownership, which damage was referable to the breach of the duty of care (see p 493 line 33, p 493 line 36).

Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 (CA) and *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) applied.

6 There was no damage referable to the complaints arising during the occupation and ownership of either of the plaintiffs. Although there had been some continuing settlement and deformation, that was insignificant and within the range of acceptable settlement. A duty of care was not owed to the plaintiffs and they were not entitled to claim for the damage which occurred before their occupation and ownership (see p 495 line 19).

7 In a negligence action the cause of action accrues when the damage occurs and is reasonably discoverable. As the proceedings were commenced on 11 August 1988 the cause of action must have occurred on or after 11 August 1982. In respect of both flats the result of the defects and damage was reasonably discoverable before 1982 and therefore the claim was barred by time (see p 495 line 26, p 496 line 27).

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

Askin v Knox [1989] 1 NZLR 248 (CA) referred to.

Judgment for defendants against plaintiffs; judgment for third party against first defendants.

Observations (on the basis that the defendants or any of them were liable to the plaintiffs and the third party liable to the first defendants): (i) The doctrine of res ipsa loquitur applied only when the cause of the damage or the incident was unknown. As it was known that the cause of the damage was the inadequacy of the foundation system as built to support the structure, there could not be any reliance on that doctrine (see p 496 line 41).

(ii) Upon making reasonable inquiry subsequent purchasers of land had taken adequate steps in protection of their interests in such land and could not be held to have contributed to any damage suffered thereafter (see p 496 line 51).

(iii) The failure to provide a design or specification was not an omission in the design or specification which required or presumed the existence of such a design or specification. There was a design and specification and there was a failure or omission in that to provide adequately for the floor slab and other foundation parts which resulted in the damage. If the first defendants had been liable, the exclusion would have applied and the third party would not have been liable (see p 497 line 55).

(iv) A successful plaintiff was not entitled to any more than the costs of the cheapest remedy for the damage caused. Remedial work was feasible and would, at a relatively lesser cost, restore the units to a satisfactory state (see p 499 line 12, p 499 line 20).

Livingstone v Raywards Coal Company (1880) 5 App Cas 25 and *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 WLR 433; [1980] 1 All ER 928 (CA) followed.

Other cases mentioned in judgment

Donoghue v Stevenson [1932] AC 562.

Dynes v Warren & Mahoney (High Court, Christchurch, A 242/84, 18 December 1987, Tipping J).

Gillespie v Mt Albert City Council (High Court, Auckland, A 1162/81, 18 June 1987, Thorp J).

Margarine Union GmbH v Cambay Price Steamship Co Ltd [1969] 1 QB 219; [1967] 3 All ER 775.

Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 2 AC 1; [1983] 1 All ER 65.

Action

This was an action in which the plaintiffs as adjoining flat owners claimed damages in negligence from the builders (the first defendants), the foundation specialist (the second defendant), and the local authority (the third defendant) based on demolition and rebuilding costs.

R M Crotty and *Joanna Holden* for the plaintiffs (B A Lester, S Hunkin and M C Hughes).

C J Walshaw for the first defendants (G N White and N W White).

J W Maassen for the second defendant (Blain Building Co Ltd).

J R Allen and *D H Jenkins* for the third defendant (Feilding Borough Council).

J O Upton QC and *G A Paine* for the third party (National Insurance Company of New Zealand Ltd).

Cur adv vult

GREIG J. The plaintiffs are the owners of two adjoining freehold properties, commonly described as own-your-own flats, situated at 1A and 1B Marlborough Street, Feilding. Number 1A was registered in the names of the first plaintiffs on 10 August 1984, they being devised it by their surviving mother who, with her late husband, had become registered as proprietors on 25 March 1976. The second plaintiff became registered as proprietor of her flat, 1B, on 3 October 1978, she having purchased it from a previous owner.

The two flats were built by the first defendants operating in partnership as builders in or about 1973 and 1974. The land had earlier been owned in fee simple by the third defendant, the Feilding Borough Council. At some earlier stage there had been quarrying operations on the land and it had then later been filled by use as a rubbish tip over a number of years. This history of the land was known to the first defendants and to the third defendant and it was realised that special provision needed to be made for the foundations. The second defendant has described itself as a foundation engineering specialist. It constructed piles installed on the site as part of the foundations to the building.

The third defendant, in terms of its building bylaws, granted a building permit after approving plans and specifications and undertook certain inspections during the course of the building. These commenced after the issue of the permit on 11 October 1973 with an inspection on that date and further inspections until a final inspection recorded by the council as taking place in June 1974.

There has been settlement of the building. The plaintiffs claim that as a result of that floors are uneven, internal walls and doors, roofs, garage doors, walls

and paths have suffered damage and have been distorted and that this is continuing and likely to worsen. It is claimed that the consequence of this settlement and the damage is that the market value of the units has decreased, that they are practically unsaleable and that the only remedy is to demolish the units and reconstruct new units with the additional and consequential costs of replacement, disruption and relocation and loss of use. Damages are claimed in respect of each unit in the sum of $102,830 being the total of the demolition and rebuilding costs plus other consequential costs and general damages.

The claim is based in negligence, it being contended that each of the defendants owed a duty to subsequent owners of the units to use reasonable care to prevent damage to the persons whom they ought reasonably to expect to be affected by the work and that each of them was negligent and variously responsible for the building and construction, as far as the first defendants were concerned, for the design and construction of the piles which were an integral part of the foundation, as far as both first and second defendants are concerned, and in the issue and inspection of the building work as far as concerns the third defendant. The defendants, apart from denying the allegations, raise a defence under the Limitation Act 1950 and plead contributory negligence.

The first defendants joined the third party seeking indemnity under public liability policies said to have been issued by the third party and to cover the defendants' legal liability, if any, consequent upon accidental loss of or damage to any property during the period of indemnity. The third party relies on an exception of liability arising out of error or omission in design, or alternatively that the claims are based on damage which occurred since the period of cover which lapsed on 2 April 1984.

The first defendants became registered as the proprietors of the land in question by transfer registered on 29 October 1973. For some 13 years before that the land was owned by two other private persons but it seems that it remained vacant and unused. Before that it was owned in a title under the name of The Mayor Councillors and Citizens of the Borough of Feilding. During that corporation's tenure the land had been filled over a number of years with rubbish, levelled and grassed.

The first defendants, who traded in partnership under the name of Crusader Homes, had then been operating for more than 10 years in and about Feilding. The partnership came to an end in 1984 but the first-named first defendant has continued building since then. It was his evidence that he has been involved in the building of some 350 houses in the course of his career and that has included some nine sets of home units in the Feilding area. I accept that in 1973 they were experienced and active builders. In 1973 Mr G N White undertook the business and administrative side of the partnership while his brother oversaw the actual building work. I accept that, at that stage, a number of men were employed and that several building constructions would be taking place at the same time. Some of these, like this development in Marlborough Street, were speculations built not for any particular owner or owners but in the hope that after completion they would sell. There was no idea or suggestion that either of the partners would themselves occupy the property when completed. It was Mr G N White's evidence, therefore, that as the administrator he undertook the planning and organisation of the design, the preparation of the specifications for the building and its foundations and the obtaining of the building permit.

The design was, in essence, a common one which had been used by the partnership on previous occasions. It was known that the land was a rubbish tip and had been filled and so it was recognised that some special or suitable foundations would have to be constructed. It was Mr White's evidence that he approached the building inspector and had a discussion with the borough engineer, a Mr Campbell. From there, so he said, he went to the second defendant and spoke

to Mr Blain. He produced a plan which he claimed to have drawn up and to have shown Mr Blain, but that was just a copy of a plan which had previously been produced and it transpired that it could not be warranted that that was the plan which had actually been shown to Mr Blain or to anybody else. The lapse of time meant that there were considerable gaps in the evidential chain, absence of contemporary documentation, difficulty in recollecting precisely what had happened in 1973, and some difficulty and problems in sourcing documents that were produced or giving any adequate evidence as to their provenance or their use in the past.

Mr White said that he had a discussion with Mr Blain and that the latter proposed a design of piles with beams as foundations on the piles, supporting on top the concrete slab floor which was the usual feature of the design of these units. His evidence was that he left it then to Mr Blain to consult further with Mr Campbell and to complete a design for the foundations. In due course, so he said, a specification was added to the usual printed form which the partnership regularly used. That was supplied by Mr Blain. It was his claim, therefore, that Mr Blain had designed the whole foundation system, specifying the number and type of piles and the concrete foundations to rest upon them and had prescribed the appropriate wording for the specifications. These, then, were incorporated together and presented to the borough council for the issue of a building permit which in due course was given.

Mr White then gave detailed evidence as to the work which was done but it seemed, arising out of cross-examination, that in fact he was assuming that that was the case or was relying on what he had been told by others because his participation in the actual work was very slight. At the most he had visited the site when some holes were dug for the purpose of piles or piling and had visited the area on other occasions. It was his brother, Mr N W White, who had been in charge of the actual building operation, had attended the site and who took part in the actual building operations. It was the evidence that, at the time, the partnership then employed some four or five gangs and some 12 jobs were running concurrently.

This was, of course, an unusual job with special foundations, and it is, I think, to be understood and to be accepted that there would be more reason for a more lasting recollection of this particular job, or some of it, than would be the case with what might be a usual building without any special features. So it was Mr N W White's evidence that, because of the particular nature of the job and the challenge of it, he decided to spend more time there personally to supervise the ground work particularly. He gave evidence of the installation and erection of the profiles and how care was taken to ensure that the levels were maintained at all times. It was his recollection that there were 21 piles put in. He thought that he had determined the positions, of the piles but he cannot remember how they were arrived at. There was no plan produced which anyone could say was the actual plan used for the work itself or which could be described accurately as an "as-built" plan. He remembered the drilling taking place and was satisfied in his recollection that the borough engineer, Mr Campbell, a building inspector, and his brother Mr G White, were all there.

The recollection of both the Whites was that the drilling was done by a drill obtained or hired from the local electric power board and it was not one of Mr Blain's drilling machines that was so employed. After the holes were drilled it was his evidence that the steel reinforcing cages for the piles, prepared by Blains, were then delivered, put into the holes and the concrete was poured. The suggestion was that when the drilling was taking place Mr Campbell, the borough engineer, was the person who indicated when the drilling was sufficiently deep at the point when river metal was brought up.

Blains took no further part in the matter and it was the first defendants themselves who, with the steel reinforcing prepared and delivered by Blains, undertook the construction of the foundation beams and their joinder with the piles. Mr White was of the opinion that the levels were carefully checked and rechecked so that, at the end of the installation and creation of the foundations and the pouring of the concrete slab, all remained level within the allowances provided for in the bylaws. In essence it was the first defendants' claim that they knew the difficulties of the site, the need for special foundations and that they were not capable themselves of designing this foundation. They relied upon the advice and the design of the borough engineer and Mr Blain, an experienced and expert pile driver, who, so they said, had designed the whole of the foundation system and installed the piles at a depth which was approved, in person, by the borough engineer. There were 21 piles of sizes, dimensions and in positions chosen by Mr Blain or by Mr Campbell, or by both together, and the foundation beams were then erected and installed by them in accordance with the plans formulated by Mr Blain and approved by the borough engineer. All the while this was on the basis known to all that there was to be a concrete floor slab to be supported by these foundations and that the levels were maintained at all times.

Mr L A Blain, the managing director of the second defendant, though without any academic qualifications displayed a deep and expert knowledge about foundations and foundation piles obtained over 30 years of work in the company. That company has specialised in drilled and driven piling, especially in commercial buildings, bridges and other major construction work including a number of what are known as the Think Big Projects undertaken by the Government in the 1980s. He denied firmly, and it may be noted that firmness was a feature of his opinions and his evidence, that the company was never involved or held itself out as engineer, or designer. Domestic work was a very small part of its business.

Mr Blain accepted that he had undertaken to do the work of piling for the units to be built in Marlborough Street. He knew at the time that it had been a rubbish tip and that a two-unit dwelling was to be built on it. It was his evidence that when Mr White discussed the matter with him he showed him a copy of a plan which the company had in its possession from a job of similar type which it had undertaken some months earlier in Palmerston North. It was a plan which showed details of a pile, a foundation, and flooring. He says that he showed that to Mr White, explaining to him, as he did to the Court, the piling system known as a Franki pile and that he would then have invited Mr White to take that plan away and get it designed and drawn up by someone qualified to do so.

From a diary note kept by Mr Blain he dates that first discussion at 16 July 1973. His evidence was that Mr White returned in or about mid-September and asked him to price 21 piles and 400 feet of reinforcing steel. Mr Blain produced a quotation book in which was entered a quotation for the piling system which he said he had been invited to undertake and which he then quoted. He said that at a later stage, as appeared in the quote, there was reduced or deleted from the quotation a length of reinforcing steel which was in length equivalent to the centre beam, the 400 feet originally quoted being sufficient to provide a perimeter beam and a beam down the centre. Mr Blain said that his firm completed the construction and drove and installed the Franki bulb piles to a number of 21 under the direction of the contractor, the first defendants.

Mr Blain was emphatic in cross-examination that the number of piles, 21, was specified by Mr White although he made it clear that he had earlier suggested, from the Palmerston North plan, that there had to be a spacing between the ground foundation beams of 13 feet. He said that it would have been his suggestion that the diameter of the piles be 15 inches, and the depth should be 12 feet based on experience and common sense knowing the level of the quarry depth. He denied that he had taken any part in the design or the formulation of the specification which

he suggested was amateurish and not satisfactory and that he did not know about the type of floor slab but had made suggestions based on the Palmerston North plan. He wasn't personally involved in any of the actual work, the placing of the steel or the creation and installation of the piles. In effect he accepted that his company and himself had been involved in the preliminary discussions and had undertaken the actual work but all in accordance with the requests and design and the instructions of the first defendants without any advice or design or other input beyond the actual construction and erection of the piles and the provision of the reinforcing steel for foundation beams, all in accordance with the first defendants' instructions. There was confirming evidence from Mr G H Fairbrother, who had been employed as a drilling foreman and who recalled working on the Marlborough Street site drilling the foundations using a truck-mounted crane owned by Blains but he had no personal recollection of the work.

Mr T M Campbell, who was the borough engineer in 1973, appeared under subpoena. He accepted that he had been consulted in relation to the issuing of the building permit on this construction and had approved the design that was submitted. He had a recollection of being on the site on one occasion when some digging was being done but he thought it was unlikely that there would have been any direct supervision or indication as to when the appropriate depth had been reached. He recollected one of the plans of the units which had been discovered from the borough's files in the process of discovery in these proceedings and he remembered seeing that and considering it at the relevant time. That exhibit contained, in red biro-type drawing, indications of the piles, their placing, and the foundation beams but with a notation appearing to indicate the deletion of the central longitudinal beam. He denied that he had drawn or helped in formulating the specifications and would have disapproved any other officer of the borough doing that, and he denied that he had directed the operator of the drill when to stop drilling. Although he denied that he had been involved in the supervision of the drilling he did accept that he would have assumed that the building inspector, as he put it, would have ensured that the piles would "go down to good country and be poured in an approved manner" and that "good country" meant that shingle was reached. He said that he knew that there were going to be Franki piles.

A number of other witnesses were called to give evidence about the construction of the foundations but none, I think, had a recollection which added anything of significance except one, Mr B J Naylor, a long-time employee of the Manawatu Orua Electric Power Board, who recalled using a posthole borer on the site but he had little recollection of how many holes were dug or where. He did believe that the machine would not have dug more than 9 feet 6 inches deep and it seemed that the time that he was there was relatively short.

After the complaints about the defects were made in 1985 there was a considerable amount of further investigation in and under the building. This included the digging of two excavations beside two of the piles which disclosed the piles themselves and the foundation beam formations resting upon them. No less than four consulting engineers were instructed to investigate and consider the matter and each gave evidence in the trial. In addition there were other experts in building who were able to give opinions on their observations of the building. The observations, or the evidence of them, and the opinions based upon them, did not all coincide and in the circumstances without complete excavation and possibly demolition of the building it has been impossible to say, with direct evidence, just what the foundation system was as it was built. A number of assumptions have been made based more or less strongly on the actual discoveries that have been made.

My conclusion from the evidence of recollection of the construction period and the later observation and opinion is that there were 21 piles sunk or driven into the ground to varying depths but on each occasion to what appeared to be shingle at a solid foundation. The piles are bulb piles, either Franki or a similar type, installed by the second defendant in a proper and workmanlike way. I think there is no real doubt that there were seven piles down each longitudinal side and a centre pile in each of the ends. I conclude without any substantial doubt that there were five more piles down the centre. The foundations constructed on these are based upon the steel frames manufactured by the second defendant with concrete poured and otherwise completed by the first defendants. The beams extend round the perimeter resting on the top of the piles and there are lateral beams, at least three but more likely and in all probability five, across the longitudinal sides. There is no central longitudinal beam.

From the evidence of the levels which have been taken internally there is no real dispute that there are substantial differences in the levels which show that the top of the beams and the surface of the concrete floor slab are well out of level with a variety of differences and discrepancies overall. The greatest variation is in the floor slab in the lounge area of each unit which is situated at each end of the building. The common opinion, which I accept, is that these floors have collapsed or subsided in or near the centre because they have been insufficiently supported. There is therefore no foundation beam support at sufficiently close centres to provide any adequate support and the ground has, in itself, collapsed, being of insufficient strength to support the floors. This in turn has caused, by rotation or leverage at the outside, some damage. As the floor has collapsed in the centre it has lifted the outside.

As well as that there is some difference in levels in the surface of the beams and at least in part this has been caused by some unequal settlement. That in turn has been caused by some settlement of the piles, or some of the piles, but in my conclusion this settlement, both as to piles and to foundation beams, though greater than it ought to have been, has not caused any structural damage or any deformation which would be noticeable or of any significance to an occupier. From the evidence of infill and other correcting steps taken, it seems, by the bricklayer and other construction workers, to level up before doing their work this settlement took place at a very early stage and before the upper frame and outer cladding was constructed. This is supported by the observations of general true wall levels and little, if any, cracking or other damage on the vertical exterior surfaces of the building.

I have come to the conclusion that it is more probable than not that there were discrepancies in the original levels of the foundations as poured and the slab floor as poured beyond the allowances permitted under the standard specifications and the local bylaws. That, I think, is reinforced by the fact that the contractors and subcontractors were required to take additional steps to provide levels suitable for the further work on the frames and cladding. The evidence that the foundations are in all significant respects adequate is, I think, apparent from the lack of any significant deformation in the beams and floors where these are properly completed and supported and by the lack of any apparent cracking in the foundation beams which would have been visible if there had been any substantial difference in levels and settlement of the piles.

As to the participation in and responsibility for the various parts of the foundation, installation and construction, I accept that the first defendants through Mr G N White discussed with Blains, Mr Blain at some length, and Mr Campbell the proposals and the necessity of additional and special foundations for the site and the building to be erected upon it. Mr Blain admittedly made a number of suggestions and I think, either explicitly or implicitly, nominated the number, diameter, length and style or form of the piles. I think he also proposed, at least tacitly, the style of the foundation beam. This all followed from the furnishing of the plan and diagram which he had at his disposal and which he had used in the previous months on a somewhat similar site in Palmerston North.

Mr White ordered the piles and the steel for the foundation beams and drafted the specification. He did not seek any outside help but made an assumption or assumptions from his discussions with Mr Blain and Mr Campbell. Mr Campbell or the borough council approved and accepted the foundation plans. Mr Blain I am satisfied did not advise upon or design any piles, foundations or beams. The second defendants installed the piles but had no further participation in the foundations beyond the furnishing of the steel for them.

It was Mr White who, either on his own or on the advice of some unknown person, decided to delete the central longitudinal foundation beam and decided to rely on the lateral beam alone. I am satisfied that he and he alone instructed Blains to delete that and to make the deduction therefrom. The placing of the piles was done and completed under the instruction of the builders but with the approval of the borough council.

In a general sense it was, I think, the responsibility of the builders to ensure the design and construction of a foundation system which would support the floor and the rest of the building. I think they failed to do that in circumstances where they at least ought to have known that there was likely to be inadequate support for a slab floor over the distances in which the support was to be the ground which was at all times known to be of doubtful solidity. It was the borough's responsibility to ensure that there were no obvious errors or obvious inadequacies in the design and plan of the building and the foundations. It well knew that special foundations were required and it had all the more responsibility to ensure that that was done. It had to assume, as did the builder, that the ground was not adequate to support normal loads. That was the whole point of the foundation system. It was also the borough's obligation to ensure that foundations were placed to solid ground and thus to ensure that piles were at a firm base and generally the whole system worked.

Blains' responsibility was to construct and install piles in a proper manner in accordance with the directions of the builder and the borough council. It was not responsible in any way for the foundations beyond the provision of the steel sought and ordered for that purpose. Blains was not deficient in any way in the work that it did. There has never been any complaint about the steel. The piles themselves are in accordance with its instructions and were installed in a proper way and, I find, at or to solid ground except in one or two cases where there is no significant settlement or other error.

I turn now to the question of the duty of care if any owed to the plaintiffs in this case.

As was to be expected the defendants invited the Court to follow the House of Lords lead in this area in *Murphy v Brentwood District Council* [1990] 2 All ER 908 and *Department of the Environment v Thomas Bates and Son Ltd* [1990] 2 All ER 943. It was submitted that that was now the law which ought to be applied in New Zealand and that this was not to depart from the ordinary rule that a decision of the House of Lords on an English appeal was not a binding but a persuasive precedent but because of the observations made in the Privy Council in such cases as *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 and *Yuen Kun-Yeu v Attorney-General of Hong Kong* [1987] 2 All ER 705 these recent decisions by their Lordships represented the law of New Zealand. But there can be no doubt that in the High Court, at first instance, the law to be applied must be that which has been declared by the Court of Appeal in New Zealand in this particular area until that is changed by a change of view of the Court of Appeal or by a pronouncement of the Privy Council. The law here, so far as it is applicable to the duty of builders and of a borough council to derivative owners of land, has been well and long established and has been re-affirmed. Reference needs only to be made to *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, *Brown v Heathcote County Council* [1986] 1 NZLR 76 and *Stieller v Porirua City Council* [1986] 1 NZLR 84 to show that this is a reasoned maintained approach. It has been applied

in a number of cases and no doubt has governed the approach of local authorities, builders and others who have been involved in claims which have been settled and in conduct which has anticipated and perhaps prevented the damage which this kind of case examples.

In the absence of evidence to the contrary it must be assumed that there is no apparent difficulty in applying that duty of care and ordering the business and industry of building and contracting and the local authority supervision of that without any great problems. The policy considerations which may affect the legal principles and which seem to follow from a perception of the dangers of opening up an exceedingly wide field of claims, noted for instance by Lord Keith of Kinkel in *Murphy* at p 921, are not apparent in New Zealand in the last decade and a half during which the liability for the duty has been recognised.

For my part, and with the greatest respect, I do not categorise a claim for pure economic loss as such an unruly beast as seems to be the view of their Lordships, nor do I think that, as may appear implicit in these decisions, it is always necessary or desirable to postulate some contractual or other association giving rise to a reliance on one's "neighbour" as one of the attributes of the necessary proximity for the creation of the duty. After all it was, I believe, understood that such cases as *Donoghue v Stevenson* [1932] AC 562 finally destroyed the myth that only those in contractual relationships were entitled to sue in negligence. It was those cases and the reliance on "neighbourhood" principles that finally freed the tort of negligence from the confines of contract, and without an ensuing and overwhelming flood as the gates opened.

It is not, I hope, impertinent to comment that while there were some dissenting voices there was acceptance of the soundness of the reasoning in the dicta of Lord Atkin and later Lord Wilberforce and others, and so the principles were accepted and modified and followed in a number of common law jurisdictions. Now with, if I may say so, equally sound reasoning those principles or some of them have been controverted and the earlier judgments overruled. One has to ask whether those principles will not change again and after a period of constriction there will be further and renewed development which, in England, may restore the earlier view.

I hold that there was a duty of care in the circumstances which obtained on each of the defendants. As I have indicated, both the builder and the borough council were negligent and in breach of their duty of care.

That duty of care is not owed to everyone or, indeed, to every subsequent owner. Apart altogether from the Limitation Act the plaintiffs' right of action depends upon proof of damage during their ownership which is referable to the breach of the duty of care: see *Mount Albert Borough Council v Johnson* per Richardson J at p 242 and also Cooke and Somers JJ at p 238; see also Richmond P in *Bowen v Paramount Builders (Hamilton) Ltd* at p 414 when, citing *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 QB 219, he said:

> "The general principle of English law is that he only can sue for negligent damage to property who had a proprietary interest in that property at the time when the damage occurred:".

The first plaintiffs became registered proprietors on 15 March 1988 but I think their ownership and the commencement of the time during which their right of action could arise must date back to the death of their mother in August 1984 from which their title to the property derives by inheritance. It was Mrs Lester's evidence that she had never noticed any problems in the place, no indications of difficulties in door opening, window opening, damage to wallpaper or any other matter. Nor was there any indication from her mother, or her father while he was alive, of any problems. It was in December 1984 that they became aware of the problems when a prospective purchaser had looked at the property and raised the

question as to the possibility of movement in the house. There is no evidence then, on the part of the first plaintiffs, of any damage occurring at all during their ownership. There is no evidence of anything significant occurring during the ownership of the first plaintiffs' parents which went back to 1976.

The second plaintiff became registered as the proprietor on 3 October 1978. She may have entered into an agreement earlier and may have taken possession before that but only within a matter of a month or two at the outside. Her evidence was that she saw nothing wrong with the property. It was not until 1985 or thereabouts that she found out that there was something wrong when, after Mrs Lester had made an approach to the local authority when she was alerted to a possible problem, an officer from the local authority called on Mrs Hughes, made an inspection and suggested, as she put it, that there might be an impediment to the sale of Mrs Lester's property. She did refer to a difficulty with the bathroom door. Since 1985 she has noticed some signs of settlement in the garden and there was, at an earlier stage but not identified, some drainage problem to which a plumber had to give some attention. She mentioned problems with the bathroom door and a door between bedroom and garage but these were insignificant.

Both the first and second plaintiffs were aware at all relevant times that this had been a rubbish tip but were given assurances which allayed any concerns that they might have had at the time of purchase. This applies to Mrs Lester's parents in 1976 and Mrs Hughes in 1978. It might imply, however, that they could be more alert to any signs of damage or alteration to the state and condition of the building, internally or externally, than might otherwise be the case.

There was some direct evidence about the signs of earlier damage relating to Mrs Hughes' unit. Mr G H Laudon gave evidence under subpoena. His evidence was that in or about 1978, while he was waiting for his unit to sell, he looked at the flat now occupied by Mrs Hughes as it was for sale. He did not go further with the possible purchase because of the faults which he saw. He noticed the skirting board up off the floor in the kitchen and a tear in the wallpaper. He thought that the floor was obviously subsiding. On the exterior he noticed that the concrete path, somewhere round the perimeter of the building, had pulled away from the base leaving a gap, and elsewhere in the garden he noticed a concrete block wall which he thought was opening up. Mr Laudon was not a tradesman in or around the building industry but had undertaken an amount of home maintenance and had no difficulty in seeing these faults that he recollected. Clearly his inspection had taken place at or about the same time that Mrs Hughes must have inspected and before she signed a contract and became the owner.

That evidence was to some extent confirmed by a Mr Philps who was a son of the registered proprietor of the unit before Mrs Hughes. He and his sister took title to the property as executors and put it up for sale. He gave evidence about a telephone conversation, the only one that he had, with Mrs Hughes which was tendered as evidence that she was knowledgeable about the property and accepted the risks, but it seemed to me that that evidence was too vague to bear any such implication. It was his evidence, however, that he had noticed, after his parents had purchased the property in early 1976, that some of the paths had moved away from the foundation. But he also had noticed, when he had the property on sale, that there was a crack above a door and a sliding door that did not shut too well. His evidence was that he had papered over the crack because he thought that that was one of the reasons that the unit was not selling.

There was some other evidence which bears on this particular topic. Mr Catley, one of the consulting engineers, stated that the main part of any settlement occurs in the one to two-year period after construction and that would amount to about 50% of the total that might ever occur. He referred, further, to the levels taken between 1985 and 1987 which showed an average settlement in that two-year period of about 3 millimetres and that a similar settlement would have taken place in

the two-year period before that. By 1985 it was his opinion that something like 75% of the total settlement that will ever occur had then occurred. Moreover, he thought that there could have been substantial settlement of the piles even before the erection of the brick veneer on the outside of the walls and it was his opinion that the degree of settlement, as a continuing settlement, is commonplace.

Another consulting engineer, Mr A L Ives, stated that 90% of the settlement could be expected to occur in the first few months or year or so after construction but that the rate of settlement would taper off to a negligible rate over a period of say five to 10 years from that time. It was his opinion that it was more than probable that the first owners of the units were experiencing problems with movement throughout the houses, even if they were not aware of the cause.

On the other hand Mr Malloch, the engineer instructed by the plaintiffs, in cross-examination accepted that between the date of his first inspection in or before June 1985 and more recent inspection, he had not noticed any significant variations or changes in the units but had not taken any levels himself. He did mention, however, on the eastern side of Mrs Hughes' lounge, a crack where the floor had separated from the beam which he thought was new, as he had not recollected seeing it before. No other witness mentioned that particular cracking or defect.

My conclusion is that there was no damage referable to the complaints arising during the occupation and ownership of either of the plaintiffs, although there has been some continuing settlement and deformation that is insignificant and I believe within the range of acceptable settlement. In the result, then, the duty of care in this case was not owed to the plaintiffs and they are not entitled to make a claim for the damage which has occurred before their occupation and ownership.

I turn then to the question of limitation.

The proceedings were commenced on 11 August 1988 so that the cause of action must have accrued on or after that date in 1982. In a negligence action the cause of action accrues when the damage occurs. As was said in *Bowen v Paramount Builders* at p 414:

> ". . . the damage does not occur at the time when a builder negligently erects a house on inadequate foundations and subfoundations. It occurs when the negligence of the builder results in actual structural damage to the building which is more than minimal."

In *Askin v Knox* [1989] 1 NZLR 248 Cooke P, giving the judgment of the Court of five Judges, made a number of observations obiter on the question of limitation of actions. It was not necessary for the Court to hear any argument on that point of the appeal but a lengthy passage nevertheless discussed what the learned President described as an unsatisfactory disharmony existing between New Zealand law and English law. That disharmony is reflected, on the one hand, in New Zealand in the judgments in *Mount Albert Borough Council v Johnson* in which two members of the Court favoured the view that a cause of action arises when the defect becomes apparent or manifest and comparing that with the decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1 which re-affirmed for England the principle that the cause of action for negligence accrues on the occurrence of damage whether or not the damage could have been discovered. The competing or conflicting principles each give rise to their own set of problems and apparent injustices and so, in the end, it is a matter of policy or impression either by the legislature or by the Court of Appeal or the Privy Council. With that in mind it is, I think, plain enough that the *Pirelli* rule creates hardship in circumstances which must seem unjust to a party suffering damage to a house, the principal piece of property owned by most people, when that party could not have discovered the damage at all. It seems to allow the wrong-doer to escape liability by concealment though there is no suggestion of any deliberate concealment or fraud in this case.

A rule about reasonable discoverability will in most cases, I believe, prevent the other difficulties and injustice by which a builder or local authority may be held liable for events which occurred in the distant past beyond the reasonable recall of ordinary human beings. On that topic I adopt, with respect, the expressions of Thorp J in *Gillespie v Mt Albert City Council* (Auckland, A 1162/81, 18 June 1987) when he said:

> "In that process I have assumed that the word 'reasonable' in the term 'reasonable discoverability' should be given its usual significance, and that that term contemplates discoverability by an ordinary prudent home owner, resident in the particular locality, and having the knowledge such a person would normally have about local hazards. It does not in my view mean discoverable by a civil engineer having a wide experience in the examination of damage from differential settlement, nor by a man whose special interest in brick work and masonry makes it second nature for him to run his eye over the jointing and pointing of bricks and masonry to measure its symmetry. At the same time, it cannot be a purely subjective test in which the fact that an occupant of premises has suffered from illness or had other troubles which have caused him or her to give rather less attention to local developments or the condition of the property than would otherwise have been the case can be taken into account."

The rule does not mean that the cause of action occurs on discovery. It is not enough, in this case, for the plaintiffs to say that they discovered the damage in 1984 or 1985 and were ignorant of it beforehand. It may not be the same to say that they were reasonably ignorant and say that that is equivalent to the defect being reasonably discoverable.

On the evidence which I have already mentioned it is clear that, as far as Mrs Hughes' unit is concerned, defects had been discovered in 1978 and not by any trained expert but by ordinary home owners. I believe that the majority of the deformation had occurred by 1978. There is apparently or discernibly continued settlement at a decreasing rate and with decreasing significance. I believe that in respect of both flats the result of the defects and the damage was reasonably discoverable before 1982. In the absence of evidence of any further significant damage the claim must be barred by time.

In the circumstances it becomes unnecessary to deal with other matters but it may be appropriate that I should give my views on other issues that arose in this case, including the insurance claim which involved the joinder of the third party and the quantum claim. Before I do that, however, it is appropriate that I should mention the allegation made by the plaintiffs that this was a case of res ipsa loquitur.

That doctrine can only be of use when the cause of the damage or the incident is unknown. When all the facts are known then it is no longer a case of the result speaking for itself but a requirement that the facts should be weighed to see whether they are causative and whether there is a duty, and a breach of that duty, occurring. At the end of the day it is known that the real cause of this damage is the inadequate foundation and fill and the inadequacy of the foundation system, as built, to support the structure and in particular the slab floor. There may be a complex of events and incidents which combine to result in the settlement and the damage but there is no longer any need for reliance on res ipsa loquitur. That cannot help the plaintiffs in this case.

Likewise there were pleas of contributory negligence brought by the defendants. That, as I understood it, was to be considered apart from the questions of discoverability or time of the damage but centred on the allegation, at least implicit, that the plaintiffs well knew that this was filled land, formerly a rubbish tip, and that they failed to take adequate steps in protection of their own interests

before entering into the purchase of the land. That, of course, could hardly apply to the first plaintiffs. Mrs Lester had given a warning, so she says in her evidence, to her parents but they received some reassurance about that. She as an inheritor of the land can hardly be held partly to blame because her parents failed to take account of her warning. Mrs Hughes also was advised that it was a rubbish tip but her evidence is that occurred after she had entered into a contract to buy and so at a time when she was bound to buy. She, too, received reassurance after what I consider to be a reasonably proper inquiry to her solicitor. After all this was a unit which had been built some four years before, occupied apparently by another family. It could not possibly be incumbent upon the purchaser of a domestic dwelling in circumstances such as that to make some further expert inquiries to ascertain the adequacy of the foundations. I would not have held that any of the plaintiffs had contributed relevantly to the damage suffered.

The insurance issue was presented and argued on the assumption that if the damage was caused before 11 August 1982 the Limitation Act applied and so there was no need to call on insurance or any indemnity from the insurer. Thus the point in issue depended upon the damage occurring between 11 August 1982 or being discovered or being properly discoverable thereafter and before 2 April 1984 when the policy terminated. There were two separate policies, one which covered the period 11 August 1982 to 18 August 1983. That was in fact a policy which was in force from 18 August 1981 and was renewed in 1982 until 18 August 1983. The sole issue is whether the exclusion clause in the policy applies to the circumstances of this case. The exclusion clause reads as follows:

> "Exceptions
>
> . . . "The indemnity expressed in this Policy shall not apply to or include: –
>
> "(4) Liability in respect of death or bodily injury including illness of any person or loss of or damage to property caused by or in connection with or arising from: –
>
> . . .
>
> "(f) Error or omission in design specification or advice remedial or other treatment given administered or prepared by the Insured or by any person acting on behalf of the Insured but the words advice remedial or other treatment shall have no application in respect of any employee of the Insured acting in the capacity of Industrial Nurse on behalf of the Insured."

That was an exception in a standard public liability policy issued at that time.

The policy covering the period 11 August 1982 to 2 April 1984, when it was cancelled, was described as a Business Protection Plan Policy and it provided, on a plain English basis, a number of insurances in respect of assets, loss of profit and legal liability. The exclusion clause in this case, in s 3 of the legal liability protection, is as follows:

> "General exclusions
>
> "The Company shall not be liable for
>
> . . .
>
> "(3) Loss, damage or liability caused by or arising from or contributed to by:
>
> . . .
>
> "(f) Defect error or omission in design plan specification or formula."

There is no significant difference between the two policy exclusions and none was contended for.

There was a design or specification for the building and with some special provision for the piles and foundations. There was no specification expressly for the floor slab although it seems to have been recognised that that was the form of floor structure that was to take place. It had commonly been applied earlier in the building of this kind of unit by the defendants.

Because of failures or omissions in that design and specification there was inadequate support for the floor slab and possibly for the beams which resulted

in damage and deformation to the building. It was argued that, because of the absence of design or specification of the floor slab, the exclusion could not apply because, by its very wording, it assumed and required that there should be a design or a specification. The *failure* to provide a design or specification was not an *omission* in the design or specification which required and presumed the existence of such a design or specification. That, I think, is too refined an argument to avoid the clear intention and the express words of the exclusion. There was a design and a specification and there was a failure or omission in that to provide adequately for the floor slab and the other foundation parts which resulted in the damage. The exclusion would be applicable if the first defendants were liable and so the third party could not in any event have been liable in this case.

I turn then to the question of damages if they had been recoverable. The general principles are plain enough. In *Dynes v Warren & Mahoney* (Christchurch, A 242/84, 18 December 1987, Tipping J) the Judge undertook an extensive survey of the authorities in point. Among those referred to I would make two quotations.

Livingstone v Raywards Coal Company (1880) 5 App Cas 25, 39 states that the measure of damage is:

> ". . . that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong . . .".

In *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, 938, Donaldson LJ said:

> "In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage . . . . The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure."

Counsel for the plaintiffs in final submissions put the claim in this way:

> "The plaintiffs seek the difference in market value between the current market value of their properties as they are now and the market value of the properties had they suffered no settlement. Remedial work would be ineffective and therefore a claim for compensation to cover remedial repairs is not appropriate."

The plaintiffs' evidence as to value was given by Mr G J Blackmore a registered valuer of Palmerston North. He assessed the value of 1A, the first-named plaintiffs', at $105,000 without damage and at $41,000 in its present condition. The unit 1B was assessed at $107,000 and $41,000 on the same basis. Mr D P Roxburgh, a registered valuer of Feilding, gave evidence for the defendants. He assessed both units at $94,500 without damage and at $56,500 in their present condition.

Both valuers gave additional evidence about what was described as stigma which because of knowledge of the defects would continue to affect the values even after any remedial work restored them and was warranted to prevent any further defects. Mr Blackmore put this at 40% of the value while Mr Roxburgh put this in the range of 10% to 20%. This factor must have affected the assessment of the current value of the units in their present state. I find that Mr Roxburgh has more correctly estimated this factor on a better understanding of the property in Palmerston North used as a base for this. As he put it Mr Blackmore was too savage on this. As a result I prefer the former's higher valuation of the current state.

The difference in the other value depends I think on the use and interpretation of the comparative sales used in the assessment. Mr Roxburgh referred to a number of those which he had relied on as well as his particular knowledge of Feilding. In the end I prefer his assessment on that too but I think he failed to give any allowance for the particular features of 1B so I would fix its value at $96,500.

The plaintiffs in their statement of claim as amended claimed in the alternative the cost of replacement of the units as the only satisfactory method of actual remedy. The evidence satisfied me however that remedial work was feasible and would at relatively lesser cost restore the units to a satisfactory state. The engineers on proper design and supervision would be prepared to certify the work which would be available to reassure any owner or prospective purchaser. This would, I believe, remove the effects of stigma. Indeed it may be said that there are few houses which carry with them a certificate of an engineer as to the adequacy of foundations. The cost of this was estimated to be in the region of $25,000 for both units and took account of relocation while the work was done and the cost of redecorating.

A plaintiff can be entitled to no more than the costs of the cheapest remedy for the damage caused. Therefore I would have awarded no more than the estimated cost of the remedial work namely the sum of $25,000. I would not have awarded any further relocation expenses to the second-named plaintiff. I would have awarded a sum of $1000 to each set of plaintiffs as general damage for the disturbance, inconvenience and general stress caused to them. Costs of expert evidence would have fallen to be fixed as part of the costs. I would not have awarded any further amount for alleged diminution in value after remedial work ie stigma.

In accordance with the reasons given I give judgment for the defendants against the plaintiffs and give judgment for the third party against the first defendants. Costs should follow the event but I will reserve leave to the parties to make any submissions that may be required on costs.

Judgment accordingly.

Solicitors for the plaintiffs: *Chapman Tripp Sheffield Young* (Wellington).
Solicitors for the first defendants: *John W Key* (Feilding).
Solicitors for the second defendant: *Cooper Rapley* (Palmerston North).
Solicitors for the third defendant: *Rudd Watts & Stone* (Wellington).
Solicitors for the third party: *Fitzherbert Rowe* (Palmerston North).

Reported by: R S Wood, *Barrister*