**IN THE HIGH COURT OF NEW ZEALAND**
**WHANGAREI REGISTRY**

**CIV-2008-488-000203**

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| BETWEEN | MICHAEL JOHN SCANDLE<br>Plaintiff |
| AND | FAR NORTH DISTRICT COUNCIL<br>First Defendant |
| | C J MULLANE AND M J MULLANE AS TRUSTEES OF THE MULLANE FAMILY TRUST<br>Second Defendant |
| | MICHAEL JAMES MULLANE<br>Third Defendant |

Hearing: 17-21 August 2009; 27-30 April, 03-05, 10-11 and 14 May 2010

Appearances: J D Turner for the Plaintiff
F Dravich (17-21 August 2009), S A Thodey and S B Mitchell for the First Defendant
M J Mullane (17-21 August 2009, and granted leave to withdraw on 27 April 2010) for the Second and Third Defendants

Judgment: 30 July 2010

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**JUDGMENT OF DUFFY J**

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This judgment was delivered by Justice Duffy
on 30 July 2010 at 4.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] The plaintiff, Michael Scandle, owns a residential property, comprising a single storey house and land, situated at 69 Doves Bay Road, Kerikeri. The property was used as a holiday home and there were plans for it to become a home for Mr Scandle and his wife on their retirement. Unfortunately, the property suffers from serious defects that have made it presently uninhabitable. Just over seven years after the house was built, the local territorial authority, the Far North District Council, issued a notice under s 124 of the Building Act 2004 deeming the land and building to be dangerous due to major slip and slope instability. The notice prohibits occupation of the property until its defects are remedied.

[2] The estimated repair costs to make the house habitable again range between $262,969 and $677,508. The higher figure exceeds the diminution in the property's value as a result of its defects. Mr Scandle has undoubtedly suffered loss. What remains to be determined is the cause of the loss, the resulting legal liability and the appropriate measure of the loss.

[3] Mr Scandle contends that the three defendants' actions and omissions caused the circumstances that led to the issue of the s 124 notice. The first defendant, the Far North District Council (the Council), is the territorial authority with regulatory responsiblity for building work in Kerikeri. The second defendants, Corrina and Michael Mullane (the Mullane trustees), as trustees of the Mullane Family Trust, owned the land at the time the house was built; they sold the property to Mr Scandle. The third defendant, Michael Mullane (Mr Mullane), built the house.

[4] The claims Mr Scandle makes against the defendants are as follows:

a) A claim against the Council for breach of statutory duties allegedly owed under the Building Act 1991 (the 1991 Act), which was the Act that was in force at the time the house was built, as well as a claim in negligence;

b) A claim against the Mullane trustees in contract on the ground that there has been a breach of the terms of the sale and purchase agreement for the property, as well as an alternative claim in

negligence based on the Mullane trustees being the developer of the property; and

c) A claim against Mr Mullane in negligence.

[5] The Council has a claim in contribution against the Mullane trustees and Mr Mullane.

**Factual overview**

[6] In September 2000, Mr Mullane, on behalf of the Mullane Family Trust, applied to the Council for a building consent and a project information memorandum (PIM) for the construction of a two-storey house at 69 Doves Bay Road. The application records that he lodged plans, specifications and engineering calculations. The engineering calculations were prepared by Mitchell Vranjes; they expressly noted that no geotechnic assessment of the intended building site had been carried out and that the calculations were based on an assumed building platform which met the requirements of NZS 3604. This is a New Zealand standard issued by Standards New Zealand for most domestic timber-framed buildings. It provides suitable methods and details for the design and construction of timber-framed buildings up to three storeys high. The building industry uses it as a design reference, and it remains a default design standard in the building code.

[7] The Council sought further information from Mr Mullane. He provided this on 25 September 2000 in the form of plans from Jacques Butendyk Architectural Design. The plans recorded that they had been amended on 21 September 2000 to provide for a timber floor to replace the original concrete floor design. The plans specified that all construction was to be in accordance with the "NZBC Hand Book, approved documents, NZS 3604:1990 (which is the particular version of NZS 3604 issued in 1990) and local territorial authority requirements". The additional information must have satisfied the Council because on 27 September 2000 it issued a building consent for the proposed building.

[8] On 6 October 2000, the Council carried out a foundation inspection. The inspector noted that there was a change in part of the floor plan from concrete slab to timber pile foundations, which is consistent with the amended plans Jacques Butendyk supplied. The inspection was recorded by ticking the "ok" box of a checklist. It is not clear from this record how far advanced the building work was at the time of this inspection.

[9] Then, on 10 November 2000, there was another inspection by another inspector from the Council, Mark Christiansen. He was concerned that very few things had been done correctly. His notes record:

1. Pile out of plumb.
2. Packers on piles.
3. Subfloor bracing wrong.
4. Excavation different from plan.
5. Banks and loose fill need retaining.
6. Substandard timber used.
7. Not much concrete around piles.
8. Very few things are right.

That same day, the Council issued a notice to rectify the building work, pursuant to s 42 of the 1991 Act.

[10] The notice to rectify specified that contrary to s 80(1)(a) of the 1991 Act, building work had been undertaken otherwise than in accordance with the current building consent, and demanded that all work stop until the Council's requirements were met. Those requirements were set out in a schedule annexed to the notice to rectify, which said:

> Schedule:
>
> Council requirements before building work can be resumed:
>
> (1) Please demonstrate to Council's satisfaction that the building work already carried out other than in accordance with the building consent, complies with the New Zealand building code 1992. The Council requires a report from an independent appropriately

qualified person (consulting engineer) confirming that the work already undertaken complies with the New Zealand building code 1992. Specifically the subfloor construction, pile materials, substandard framing timber, non-complying subfloor bracing and fixings, pile packing, stability of loose fill on site and retaining walls and additionally the reinstatement of the reserve land adjoining the ROW. This report will include a detailed report on the required remedial work and stage progress of that necessary remedial work.

(2) After a satisfactory report has been provided an amended application will be required showing the new building work elevations accompanied by a fee of $33.75.

(3) The fine for not complying with this notice is as per section 80(2)(a). In the case of an offence against subsection (1)(a) of this section, to a fine not exceeding $100,000 and in the case of a continuing offence, to a further fine not exceeding $10,000 for every day or part of a day during which the offence has continued.

(4) The report referred to in (1) and amended application (2) above are required within 21 days of the date of this notice or (3) will apply and Council will start legal proceedings. If the applications do not proceed in due time legal action will proceed. No work or remedial work can be undertaken until the amended application is approved.

[11] Mr Mullane engaged the services of a local firm of consulting engineers, PK Engineering Limited (PK Engineering). On 24 November 2000, PK Engineering inspected the property and building works. They prepared an undated preliminary site inspection report that appears to have been faxed to the Council by Mr Mullane on 4 December 2000. The report listed a number of items that needed to be looked at more closely, including:

i) The various subfloor connections;

ii) Connection of bearers to piles;

iii) Joist splices;

iv) Pile splices;

v) Effective raking piles on structural stability; and

vi) Stability of steep northern edge of the building platform with the additional surcharge loads placed in the area and the

setback requirements as recommended by the Hawthorn Geddes stability report of 14 August 1989.

[12] Following PK Engineering's preliminary site inspection report, a number of documents regarding the notice to rectify and the building's compliance with NZS 3604 related issues were prepared. They were:

i) An undated report on structural issues for remedial work prepared by Mr Kumar of PK Engineering, together with bore hole logs dated 15 December 2000, and engineering calculations dated 20 and 21 December 2000; and

ii) A report dated 21 December 2000 by Total Design Limited (a company providing building and landscape design services), together with plans by Total Design dated November 2000, December 2000 and January 2001.

[13] The outcome of the work carried out by PK Engineering and Total Design was a new design for the building which reduced it to a single storey and used a cantilever system, rather than piles, to support the deck on the northern side of the building. The reports also included specific design details and recommendations which were intended to ensure that the building work complied with the requirements of the 1991 Act and the building code.

[14] On 12 January 2001, Total Design wrote to the Council. Enclosed with this letter were:

i) The notice to rectify;

ii) Three copies of amended plans;

iii) Three copies of bracing and engineer's calculations;

iv) Two copies of Total Design's report on compliance with NZS 3604:1990;

v) Two copies of the engineer's report relating to items requiring specific design; and

vi) Three copies of plans detailing work required to rectify defects in the subfloor.

The letter concluded with a statement to the Council that Mr Mullane had engaged a private certifier to inspect and certify the rest of the building work.

[15] Under the 1991 Act, the inspection and certification of building work for compliance with the building code and the 1991 Act could be done by either a council building inspector, or a private certifier. They were each authorised to issue a code compliance certificate under the 1991 Act, which certified that the building work had been done in accordance with the building consent.

[16] On 16 January 2001, the Council approved the new subfloor framing plan. On 31 January 2001, the Council approved the new design of the proposed building. On 13 February 2001, the Council received formal notification from Nationwide Building Certifiers (Nationwide) that it had been engaged to provide inspection services, and to certify the building work. From then on, Nationwide assumed responsibility for all inspections of the building work on the property.

[17] Despite Nationwide's involvement, and for reasons that remain unexplained, Mr Mullane proceeded to build a house that barely conformed to the new design. It was a single storey house, but in other material respects the construction of the house deviated from the plans and recommendations of PK Engineering and Total Design. Thus their solutions for the defects stated in the notice to rectify were not implemented. Ordinarily, this would result in no code compliance certificate being issued. But in this case, on 3 April 2002, Nationwide issued a code compliance certificate for the building work. Why it did so is unexplained. Nationwide is now a liquidated company and was not involved in the trial.

[18] On 14 February 2004, Mr Scandle entered into a sale and purchase agreement to buy the property and the purchase was settled on 29 March 2004. Over time,

defects in the building's foundations and its weathertightness began to appear. These defects led to Mr Scandle commencing the proceedings in April 2008. He alleges the property suffers from the following defects:

i) Large tension cracks up to 20 centimetres wide and 30 centimetres deep at the northern end of the footprint underneath the dwelling-house;

ii) Slippage or movement of fill beneath the dwelling-house;

iii) Deformed subfloor foundation system;

iv) Deformed and cracked exterior cladding;

v) Inadequate or shallow piles and footings;

vi) Decay of structural timber;

vii) Damaged tile floor in the kitchen;

viii) Sagging of the north east corner of the balcony;

ix) Warped balcony railing structure;

x) Flimsy or inadequate railing;

xi) Warped roofline;

xii) Depression in the mid-balcony deck area;

xiii) Collapsed ceiling in the garage, and sagging or warped ceiling generally throughout the dwelling-house;

xiv) Distorted, warped walls in the lounge, and in the south eastern corner bedroom;

xv) Internal column being out of plumb;

xvi) Tight doors in eastern bedrooms; and

xvii) Separation of fence wall from the dwelling-house adjacent to the garage.

[19] Whilst the extent and the cause of the defects may be open to dispute, the issue of a s 124 notice approximately seven years after the house was built shows that in its present condition, the house is so seriously defective that it is too dangerous to occupy. The defects cannot be attributed to some event that has occurred since the code compliance certificate was issued. The defects are due to the way in which the house has been built. The damage which has been caused has undoubtedly meant that Mr Scandle has suffered significant loss.

**The claims against the defendants**

[20] The essence of Mr Scandle's claims against the Council is that in discharging its regulatory role under the 1991 Act, as it related to the building work on the property, the Council has breached statutory duties and was negligent. The essence of the claims against the Mullane trustees is that the condition of the house and land that they sold did not conform to the warranties in the sale and purchase agreement regarding the property's compliance with the requirements of the 1991 Act. Mr Scandle also alleges that the Mullane trustees acted as the developer of the building project and are, therefore, liable in negligence for the defects from which the property now suffers. The essence of the claim against Mr Mullane is that as the builder of the house, he is liable in negligence for its defects.

[21] Although Mr Scandle has brought a claim for the tort of breach of statutory duty, the strict liability that usually is part of this cause of action is not available here: see *Byron Avenue* [2010] NZCA 65; *Sunset Terraces* [2010] NZCA 64; [2010] ANZ Conv R 10-020; *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Invercargill City Council v Hamlin City* [1994] 3 NZLR 513 (CA); *Askin v Knox*

[1989] 1 NZLR 248 (CA). Those cases establish that proof of negligence is essential for Mr Scandle to succeed in a claim of this type against the Council.

[22] I do not at this stage propose to go over the details of the claims in depth. Causation of loss is an essential element of claims in negligence and for breach of contract. Furthermore, the legal principles regarding causation are the same in contract and in tort: see *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360; which was approved in *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA). In this case, causation is the decisive factor factor. I consider, therefore, that this topic should be dealt with first. Where specific details of a claim are relevant to this consideration, I will refer to them.

[23] The answers to some of the causation issues are so obvious that there is no need for any close analysis in terms of the relevant legal principles. I consider this to be the case when it comes to the primary causes of the damage to this property.

**Primary causes of loss**

[24] No one disputes that the house was built in a way that materially differed from the plans and specifications the Council approved in January 2001. Those plans and specifications were prepared for the purpose of addressing the Council's concerns about the inadequacies of the original foundation work as evidenced by the Council issuing the notice to rectify. It is apparent from the work that was done by PK Engineering and Total Design that they believed that their solutions would fix the inadeqacies identified in the notice to rectify.

[25] All the expert witnesses were agreed that Mr Mullane had built an unsound house. The primary cause of the property being in its currently damaged state is obviously the way in which the house was actually built. Reaching this conclusion is simply a matter of common sense. As the builder, Mr Mullane was the person who controlled whether or not the house was built in accordance with the designs, plans and recommendations of PK Engineering and Total Design, or in some other fashion. For whatever reasons, he did not build the house in accordance with the revised design on which the amended building consent was based. His actions and

omissions in this regard must be one of the primary causes of the damage and resulting loss that has occurred.

[26] Nationwide's failure to do anything about Mr Mullane's deviant workmanship is another obvious primary cause of the damage to the property. Its conduct in issuing the code compliance certificate for the building work, as well as its failure to inform the Council that the house was not built in accordance with the revised plans, meant that Mr Mullane's deviant workmanship went unnoticed. The Council had issued a notice to rectify in November 2000 when its inspector became concerned about the poor construction work at that time. I have every reason to think that the Council would have acted in much the same way again had Nationwide informed the Council that the revised plans were not being followed.

[27] No one disputes that there were significant departures from the revised plans. A glaring example can be seen from the failure to build the deck support at the northern end of the house in accordance with the design of PK Engineering and Total Design. The deck was originally supported by piles that were placed in fill, which meant that the deck was inadequately supported. The pressure of this inadequate support on the fill added to its instability. This was a key reason for the Council issuing the notice to rectify. The solution which PK Engineering and Total Design devised was to use a cantilevered support system for the deck. This removed the reliance on the inadequate pile foundations.

[28] But the cantilevered deck support was never used. Instead, Mr Mullane continued using the original system. The result has been that the stability of the northern end of the house, particularly the north eastern corner, is badly affected. The Council's inspector recognised the inadequacies of the original deck support in November 2000. A competent private certifier should have been capable of doing the same. The Nationwide certifier overlooked the non-compliant deck support. Nothing was said or done about the deck support being neither adequate, nor in accordance with the amended consent.

[29] Even if Nationwide failed to notice there were substantial differences between the approved plans under the amended consent and what was actually being

built, as the building work progressed it should have become clear to Nationwide that the building work was not up to the required standards of the building code, and that there was a real likelihood of the house suffering from major stability defects. Instead, Nationwide issued a code compliance certificate for the building. By doing this, Nationwide gave a false sense of assurance that the property complied with the 1991 Act and that the house was properly built. Thus Nationwide's conduct was also a primary cause of the house being built in a way that has led to the loss in suit.

**Other causes of loss**

[30] I now turn to deal with the other alleged causes of loss. It is here that more attention needs to be given to the legal principles of causation, as well as the details of the claims Mr Scandle makes.

[31] Mr Scandle makes numerous claims about the way in which the Council acted or omitted to act. Whilst there is some degree of overlap in these claims, I consider that they can be divided into three groups. The first covers the time between the issue of the original building consent to the issue of the notice to rectify; the second covers the period from the receipt of the revised plans to the issue of the amended building consent; and the third covers the period following on from the amended consent.

*Group one*

[32] The claims Mr Scandle makes here are as follows:

i) The land at 69 Doves Bay Road was inherently unstable and, therefore, the Council should have either refused to issue a building consent, or alternatively, permitted building but then registered the land as a hazard on its hazards register;

ii) The proposed building work increased the nature of this hazard;

iii) By issuing the original building consent, the Council breached duties it owed under s 36(1)(a) of the 1991 Act not to permit building on land that was likely to be subject to erosion, subsidence and slippage unless the Council was satisfied that there was adequate provision to protect the land and building work from such hazards;

iv) The Council breached duties it owed under s 36(1)(b) of the 1991 Act not to permit building on land where the building work was likely to accelerate the hazards set out above unless the Council was satisfied that there was adequate provision to prevent this from occurring;

v) The Council breached duties it owed under s 24(e) of the 1991 Act to enforce the provisions of the building code; and

vi) The Council breached common law duties of care which it owed when issuing a building consent, inspecting work done under the consent and on finding non-compliance with the building consent.

*Group two*

[33] The claims Mr Scandle makes here are as follows:

i) The design solutions and related work of PK Engineering and Total Design were deficient and, therefore, the Council should not have approved the amended plans and permitted work on the building to proceed;

ii) Nationwide did not have all the information about the revised plans, and that the Council is partially responsible for this state of affairs;

iii) The Council breached duties that it owed under s 42 of the 1991 Act surrounding the issuing of notices to rectify, and regarding how it should satisfy itself that any building work, which the notice had stopped, could properly recommence;

iv) The Council breached duties that it owed under s 27 of the 1991 Act to obtain information and to undertake or commission research to enable it to carry out its functions under the Act; and

v) The Council breached common law duties that it owed in relation to approving and inspecting remedial work and enforcing the Act's provisions, including the notice to rectify.

[34] The third group of claims are:

i) All the buildings' defects and their resulting impact on the surrounding land have been caused by defective building foundations;

ii) The Council's actions and omissions have caused the loss which Mr Scandle has suffered;

iii) The Council has breached duties that it owed under s 76 to inspect or take all reasonable steps to ensure that any building work was being done in accordance with a building consent or any notice to rectify;

iv) The Council has breached duties that it owed under s 76 to inspect or to take all reasonable steps to ensure that any building remained safe, or if a building was likely to be deemed dangerous, then to make sure that it was aware of the building and the risk it posed;

v) The Council has breached duties that it owed under s 77 and Part 9 to carry out the functions and powers given to it under the 1991 Act, and to enforce them;

vi) The Council has breached duties that it owed under s 24 to determine whether any document for use in establishing compliance with the building code should be granted or refused;

vii) The Council breached duties that it owed under s 50 in relation to when it should accept and rely upon code compliance certificates that were issued by private certifiers; and

viii) The Council breached common law duties that it owed in relation to the performance of its functions and powers under the 1991 Act.

[35] Mr Scandle has tried to establish that the Council has in some way caused the damage to the property, even though what actually transpired on the property bears little relationship to the proposed building work which the Council approved under the amended consent, and even though the responsibility for inspecting the works under the amended consent had passed to Nationwide. But unless the Council's actions or omissions can be linked to the chain of causation of loss, the Council cannot be held liable under the claims Mr Scandle makes.

[36] I consider that the Council's actions or omissions cannot be so linked. Mr Scandle is essentially saying that had the Council acted differently, on any of the occasions that fall within one of the three groups, the damage in suit may never have occured. Undoubtedly, without the approval of the original consent or the amended consent, no building would have been built. But to argue in this way is to confuse the difference between causing a loss and providing an opportunity for its occurrence: see *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [27] and [28]. Tipping J's comments in this case provide an excellent illustration of the difference between these two events:

> The basis of the claim, save for two allegations of a more direct kind, seemed broadly to be that if the auditor had taken appropriate care at times earlier than those relevant to the Huges' investments, the solicitor's trust account would or should have been closed down. It followed in terms of the Hughes' allegations that their money would not have been lost, because there would have been no opportunity for the occurrence of the defaults which are later said to have occurred. In couching their claim on this basis, the Hughes claimants were stretching the proper concept of causation in this field beyond breaking point. They were seeking to apply a literal "but for" approach, which is not appropriate in claims based on tortious negligence.
>
> There is a material, indeed a crucial difference between causing a loss and providing the opportunity for its occurrence. The line between these concepts can often be difficult to draw but the distinction is vital … Plaintiffs in this field must show that the defendant's act or omission constituted a material and substantial cause of their loss. It is not enough that such act or omission simply provided the opportunity for the occurrence of the loss. The concept of materiality denotes that the act or omission must have had a real influence on the occurrence of the loss. The concept of substantiality denotes that the act or omission must have had more than de minimus or trivial contribution to the occurrence of the loss. Looking at the question in this dual way is both a reminder of the difference between opportunity and cause, and a touchstone for distinguishing between them.

**Legal principles**

[37] Whether or not an action or omission has caused damage entails a two stage inquiry: see *ACC v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340. First, there is a factual inquiry into whether the defendant's conduct caused the loss. This involves the application of the "but for" or causa sine qua non test. The purpose of this test is to determine if the loss would have arisen even without the defendant's conduct. If so, the defendant's conduct cannot be said to have caused the loss: see *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883. But if the loss would not have occurred but for the conduct, the second stage of the inquiry commences. Courts have always eschewed the idea of legal liability being imposed simply on a causa sine qua non basis. In *Fleming*, Cooke P explained the distinction between factual and legal causation in this way at 523:

> The law has in my understanding insisted on a cause as having to be material or substantial before affecting liability: a mere causa sine qua non should not automatically be enough.

[38] The second stage of the inquiry looks to see if there is causation in a legal sense; if there is, legal liability for the loss will follow. This involves two steps.

First, the appropriate scope of liability for the conduct is assessed; and secondly, there is an investigation into the proximity between the cause and the loss: see *Ambros* at [25].

[39] Stephen Todd *The Law of Torts In New Zealand* (5th ed Brookers, Wellington 2009) at 962 suggests that a helpful method of approach for assessing the appropriate scope of liability is to ask: "… whether the plaintiff's loss is within the scope of the risk created by the defendant's conduct". Todd recognises at 963 that "on this approach questions of liability and questions of cause overlap and ... tend to become indistinguishable". In *Price Waterhouse v Kwan* at [30], Tipping J expressed reservation about permitting any such overlap: "We observe only that it is desirable to keep the question of the existence of a duty of care and its content conceptually separate from issues of causation". Despite this, an inquiry into whether the plaintiff's loss is within the scope of the risk has been bedded into the staged test for causation developed in *Ambros*.

[40] The second step can be viewed as either the final stage of the causation inquiry, or as a separate inquiry into remoteness of damage. It is then that the court comes to assess the issue of proximity, by looking at whether the conduct constituting a factual cause is a substantial and material cause of the loss. It is not enough that the conduct merely creates the opportunity or occasion for the loss to occur; only if the conduct was a substantial and material cause is legal causation established. As I have said at [36], the distinction is well explained in *Price Waterhouse v Kwan* at [27] and [28].

[41] Before *Ambros*, courts often skipped over the "but for" test and moved directly to apply the second step of the second stage of the *Ambros* inquiry. On this approach, the assessment of causation was viewed as a discrete common sense determination, supported by reasoned argument, of whether the conduct was causally linked in a substantial and material way with the plaintiff's loss: see *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) and *Fleming*. Whilst arguably lacking the sophistication and complexity of the *Ambros* approach, I consider that, in the present case, either approach would produce the same result.

[42] For reasons which I set out below, I am satisfied that there is no causal link between any act or omission of the Council and Mr Scandle's loss. It follows that even if the Council at times failed to discharge properly its statutory responsibilities for the building works, this is of no consequence.

**Group one claims**

[43] Mr Scandle contends that the Council either should have refused Mr Mullane permission to build on the land, or else allowed him to do so but noted the land on its hazards register. Mr Scandle submits that by not doing one of these alternatives, the Council has caused him to suffer the loss in suit.

[44] But there is no evidence to prove that the land was inherently dangerous to build on. The earthworks which Mr Mullane carried out, the retention of non-engineered fill on the land, and the use of poorly braced piles which either stopped short of, or only went a short way into solid ground have resulted in unstable foundations at the northern end of the house. This is where the most serious foundation defects are to be found.

[45] Georg Winkler, a geotechnical expert witness for the plaintiff, described the low strength of the fill as being consistent with spoil, from cuts made to the southern half of the building site, having been spread in an uncontrolled manner over the northern half of the site. Mr Winkler described the underlying ground beneath the fill as of reasonable strength. He said that the natural underlying soils beneath the wedge of fill were relatively high in strength, "with measurements of undrained shear strength generally being more than 200kPa". NZS 3604 requires the undrained shear strength of soil to be 100kPa or better. Mr Winkler was of the view that if the fill had been removed from the site, there would have been a stable platform on which to build. Nothing that the other geotechnical experts said contradicted this description. None of the expert evidence I heard suggested to me that the land was so inherently unstable that the Council should have refused permission to build on it, or noted it on its hazards register.

[46] In their joint statement on agreed issues, the geotechnical expert witnesses were asked the question:

> In mid 2000 was the land of the proposed building site subject to (or likely to suffer from) erosion, avulsion, inundation, falling debris, subsidence and slippage, such that it would not have been appropriate for the building to take place as proposed?

[47] The experts agreed that the land was likely to have been subject to erosion, subsidence and slippage, and that a geotechnical report specific to the proposed building should have been required as part of the building consent application. The experts also agreed that "it is likely that this would have resulted in the footings for the rear (northern) deck and rear portion of the house requiring specific engineering design (engineer's calculations and drawings)".

[48] The Council was, therefore, remiss in not requiring a geotechnical report before it granted the original building consent. The Council has conceded this point. Thus, but for the Council's failure to require a geotechnical report at the time it issued the building consent, the house may never have been built in the way in which it was built. The issuing of building consents and the maintenance of hazards registers falls within the scope of a territorial authority's liability for any defaults arising from such conduct. Hence, stage one and the first step of stage two of the causation test identified in *Ambros* is met. But there remains the second step of stage two of the *Ambros* test; the assessment of proximity between the default and the damage. This is where Mr Scandle's case against the Council falls short. The house that was the subject of the original consent never eventuated.

[49] The Council's failure to require a geotechnic report before issuing the original consent may be a default on its part, but it is not one that, on any sensible view, can be seen as being a substantial and material cause of the loss in suit. This is because the connection between the default and the loss is trivial, and the default has had no real influence on the loss in suit. Other more significant and influential factors have intervened. Their intervention has meant there is no substantial and material causal link between the default and the loss. These factors are:

i) the Council's recognition in November 2000 that the work on site was defective and unacceptable;

ii) the issuing of the notice to rectify which stopped all building work until the defective and unacceptable work was remediated;

iii) the abandoning of the original two-storey design for a single storey house;

iv) the obtaining of reports and designs from PK Engineering and Total Design to ameliorate the defects which had given rise to the notice to rectify; and

v) the failure of Mr Mullane to implement those design solutions.

[50] Nor can it be said that there is anything in the construction of the building under the original consent that has led to an increase in hazards as they are defined in s 36(1)(a) of the 1991 Act. The joint statement of the experts records their agreement that the proposed construction in mid 2000 would not have made the situation on site any worse. The experts considered that the proposed cut earthworks and roof stormwater control would have improved matters. Though, as it was, the proposed earth works cut as shown on the original plans was not made. This is but another example of Mr Mullane failing to follow approved plans. However, the agreed view of the experts is that the Council's approval of the original plans did not increase the site's instability. There is no evidence to suggest anything to the contrary; accordingly, I accept the experts' agreed view.

[51] The Council's consent to the original building works enabled Mr Mullane to commence work on the land; this in turn provided the occasion, or the opportunity for him to proceed to build a house that has turned out to be significantly defective. But this is the closest the Council's omission to require a geotechnical report before issuing a building consent comes to having any connection with the damage that has since occurred. Regarding the grant of the original consent, there is nothing that the

Council did or omitted to do in this regard that constitutes a legal cause of the damage to the house.

[52] Mr Scandle maintains that the Council's conceded default in not requiring a geotechnic report before issuing a building consent can be causally linked in a legal sense with the present damage. He relies on *Johnson v Watson* [2003] NZLR 626 (CA) to support the proposition that this default was a cause of loss in a "but for sense" and that what occurred subsequently, (Mr Mullane's departure from the amended plans and Nationwide's failure to identify the defective work that resulted from this departure), was a novus actus causans that runs with the Council's default.

[53] The Council, on the other hand, argues that the later conduct of Mr Mullane and Nationwide constituted a novus actus interveniens, which severed any link between the Council's default and the damage that occurred.

[54] *Watson* is a case involving defective building work, which caused damage, and later work (the prevention work) that was done to prevent any additional damage arising from the original defects. The prevention work was also defective. The original work was outside the limitation period, but the prevention work was not. The builder/defendant argued that the loss the plaintiff claimed to have suffered was caused by the original work, and that even if the prevention work was ineffective, it could not be a cause of this loss. The Court of Appeal found that provided the plaintiff established that the defective prevention work was negligently carried out and that this default was a substantial and material cause of the loss, it would be a concurrent cause that ran with the original default. Hence, if the original work was negligently carried out, and the prevention work was also negligently carried out, both defaults were concurrent causes of the plaintiff's loss. Mr Scandle seeks to persuade me to view the damage to his property in the same light.

[55] Whether defective work which precedes an original default is a novus actus causans, or a novus actus interveniens turns on the nature of the proceeding work. In *Watson*, the builder who built the house defectively returned to it to carry out prevention work. By the time the prevention work was completed, the house was finished. The question for the court was whether the defective prevention work

could be sued for separately, or whether it was subsumed in the original work which was by then outside the limitation period. This is a separate issue from the present, which is whether original defaults on the part of the Council that have been admitted can be seen as contributing in a substantial and material way to the damage that has occurred.

[56] In the present case, the Council's failure to require a geotechnical report before it issued the original building consent cannot give rise to legal liability because it is too far removed in time to be causally linked to the present damage. Furthermore, any failure to order a geotechnical report at the time the original consent was sought has been overcome by the geotechnical information the Council received and relied upon when it issued the amended consent.

[57] Another alleged default of the Council which falls into the first category of claims is Mr Scandle's contention that the Council should have recognised the defective work in October 2000 at the time of the first inspection, and that this failure has caused the loss in suit. The Council does not dispute that any defaults arising from its role as an inspector of building works fall within the scope of its liability.

[58] Mr Scandle argues that action to rectify the defective works was not taken at the earliest opportunity. However, only one month later Mr Christiansen carried out a second inspection. He saw the defects and issued the notice to rectify. Whilst action one month earlier would have meant that the works were less advanced than they were at the time the notice to rectify was issued, there is no evidence to suggest that what occurred between October and November 2000 has had any long lasting impact which has led to the loss in suit. It is hard to see how this conduct can meet the "but for" test, let alone the test for legal causation.

[59] I now turn to November 2000 when Mr Christiansen recognised there was defective work and so he issued a notice to rectify which stopped Mr Mullane from doing any further building work. The immediate result of this action was to prevent any further defective work from occurring. No fault can be attached to the Council's actions here.

**Group two claims**

[60] Mr Scandle contends that the Council was negligent in the way in which it allowed building work to recommence on the property. This happened as a result of the Council issuing an amended building consent based on the revised plans and other work prepared by PK Engineering and Total Design.

[61] The Council's actions in issuing an amended consent, and allowing the building work to recommence are more closely connected with the completed building than is the Council's earlier involvement. If the Council had left the notice to rectify in place, and refused to issue an amended consent, the house would not have been built. In this broad simplistic sense, the Council's actions by issuing the amended consent and allowing work on the house to recommence, meets the "but for" test.

[62] Next there is the question of legal causation. The first step is to consider whether the subject loss falls within the scope of risk created by the defendant's conduct. It is well established that a territorial authority has a duty to ensure that the building approvals it issues will result in a building that is compliant with the building legislation then in force, and is not so defective in its construction that it is unsafe to live in. An unreasonable or careless failure to recognise that the proposed design of a building will not meet these requirements, coupled with the grant of a building consent, risks the construction of a non-compliant and defective building. Hence, defaults of this type will fall within the scope of that risk. The second step is to assess the proximity between the alleged cause and the loss.

[63] It is clear from the plans and reports prepared by PK Engineering and Total Design that part of their tasks included remediating the existing structure, where possible, to bring it into line with the applicable New Zealand Standards, and where this could not be done to propose an alternative design solution.

[64] Mr Kumar's report on the structural issues for remedial work records that site investigations were undertaken. These caused Mr Kumar to reach the following conclusions:

i) the slope stability at the northern end of the proposed building comprised 0.9 metres of weakly compacted fill lying on top of weak to firm clay soils;

ii) the stability of the steep northern slope was in doubt; and

iii) the deck piles (which were on the northern side of the building) were founded in fill.

[65] Mr Kumar made no comment about the stability of the building platform in areas other than on the northern side. This suggests to me that Mr Kumar had no concerns about the stability of the other areas of the building platform.

[66] The report also refers to visual inspections that were done to detect where the works on site did not meet with standard construction practices, and to identify where there was a need for specific design for those elements that were outside the scope of NZS 3604. The report notes that structural analysis was performed on all non NZS 3604 elements, and structural integrity was either proven, or suitable solutions formulated.

[67] In his report, Mr Kumar proposed a cantilever supported deck to fix the ineffective deck piles. He also commented on the adequacy of the bearers, identified certain inadequacies, and suggested replacements. The report concluded with a series of recommendations, these being:

i) Half a metre of fill material to be removed from the top of the steep slope in the northern portion of the site;

ii) The deck structure be supported as shown in the revised subfloor/foundation plan, and the accompanying details S1, S2, S3 and S4 (the cantilever support system);

iii) The over-spanning (2.6 metre) bearers to be checked for continuity over two spans. If not continuous, an additional 200 x 50 must be nailed to the existing bearer using diameter

3.15 x 90 millimetre nails at 150 centres, staggered top and bottom;

iv) The cantilevered bearers supporting the opposing bearer be connected as shown in detail four;

v) The bearers connected via secondary piles be connected as shown in detail five;

vi) The bearers which require packing under, be connected in detail S5;

vii) The 250 x 100 untreated pile be removed and a 125 x 125 (H5) pile be put in their place; and

viii) Subfloor bracing be provided as shown in the new subfloor plan.

[68] The plans prepared by Total Design showed a revised subfloor framing plan, and accompanying details about how the recommended work by PK Engineering would be achieved. The plans show a proposed floor plan and cross-section. The floor plan and cross-section changed in the subsequent plans dated January 2001.

[69] The report dated 21 December 2000 from Brian Hutchings of Total Design sets out his observations and recommendations following his inspection of the building site on 11 December 2000. He identified where the existing construction had failed to comply with NZS 3604 and suggested specific design solutions for rectifying the defects. He found the standard of some of the timber used in the wall framing was poor and below the requirements of NZS 3631 for number one framing. He recommended that the substandard timber be identified and replaced. He identified where spacing in the studs was inadequate and how this could be rectified. He found that the plywood deck flooring and particle board flooring required re-fixing. He identified defects where the floor joists were joined over bearers, and stated what needed to be done to rectify them. He found that parts of the floor

lacked sufficient nogging. His advice on how this was to be rectified was set out in an attached subfloor plan that accompanied the report. He identified other issues regarding the flooring such as gaps between joists and bearers, the need for better packers and remedial work to correct an overhang where the flooring and wall framing overhung a boundary joist. He noted deficiencies in the bearers, piles and the subfloor bracing. His report ended by either offering a solution in the new subfloor plan, or by reference to solutions in the PK Engineering report.

[70] Mr Scandle contends that the revised design proposed by PK Engineering and Total Design was deficient and that this should have been apparent to the Council. Implicit in this argument is the assertion that had the Council recognised the alleged deficiencies, it would not have issued the amended consent and so the house would not have been built. This argument overlooks the fact that what was built is materially different from the proposed building which the Council approved.

[71] The joint agreement the independent expert witnesses reached in this proceeding is to the effect that the design solutions PK Engineering and Total Design proposed would not have resulted in a building that complied with the 1991 Act and the building code as:

> There would still have been an 'inadequate safety factor of slope stability for the rear [northern] portion of the building [and] [t]here would remain a risk that excessive settlement and lateral movement could still have occurred.

[72] But there is no evidence that these potential inadequacies would have led to the type of damage the house has actually suffered. No expert witness has provided a counter factual analysis to establish that much the same damage would have occurred even if the house had been built in accordance with the revised design. Without such evidence, the assertion that the revised design had its own inadequacies is meaningless. In any event, the Council's alleged omission to see these potential inadequacies did no more than to cause it to go ahead and issue the amended consent. All that this meant is that the Council's regulatory authority under the 1991 Act presented no obstacle to the damage which occurred. But that is distinct and quite different from being a substantial and material cause of that damage. In this case, the potential for the Council to recognise defects in the revised designs provided an opportunity which may have led to the building work on the

property remaining at a standstill. But that is the closest the Council's approval of the revised designs comes to having a connection with the defective building work that was done.

[73] Furthermore, Mr Scandle's assertion that the Council should have recognised something deficient in the revised design is not supported by the evidence. The evidence does not establish that any potential inadequacies inherent in the revised designs were so apparent that the Council ought reasonably to have recognised them and foreseen that they would lead to a non-compliant and defective building.

[74] The evidence shows that the Council considered the revised designs would lead to a safe, well constructed house, which met the requirements of the 1991 Act. This is how the written material and design work of PK Engineering and Total Design was presented, and how it was received by the Council.

[75] The expert engineering witnesses agreed that the level of information the Council received as a result of the notice to rectify was consistent with the quality of information normally accepted by the Council at that time.

[76] The written material and design work expressed where the professional concerned had identified a defect or departure from required standards, and it provided a design solution to cure the defect or departure. During cross-examination it was suggested to Council witnesses that the design plans did not identify the parts of the original work that were acceptable and, therefore, could be safely incorporated in the newly designed house. I do not think that such a suggestion can be supported. The silence about other aspects of the original structure can be interpreted as a finding that such work was acceptable. Rarely does a professional person who has been engaged to identify and remedy defects do so and then go on to report extensively on what he or she finds right with the object of inquiry. This seems to me to be a matter of common sense. But in addition, there is the evidence of the Council's expert witness, Mr Flay, about the standard practices and conduct of territorial authorities in the discharge of their regulatory responsibilities under building legislation.

[77] Mr Flay referred to the PK Engineering reports saying nothing about the land being unsuitable to build on, or that the proposed building work would worsen the physical state of the land. Mr Flay's view was that most Council officers in receipt of PK Engineering's report would have expected Mr Kumar to allude to any such issues if he thought they existed. This statement is consistent with the view I have formed that a reader of a report, from professional experts, setting out remedial advice would expect the areas and items requiring remediation to be identified, and anything that was not mentioned could be understood as not requiring remedial attention.

[78] In his evidence, Mr Christiansen referred to the advice in one of the reports from PK Engineering that Mr Kumar was satisfied that the cut slope retained by a stone retaining wall was satisfactory. Mr Christiansen also referred to Mr Kumar's advice that the structure was to be modified from a two-storey to a single storey dwelling, which would have an impact on the structural requirements of the subfloor structure. It was for this reason that Mr Kumar said further engineering work should be done once the new building geometry was finalised. The impression I have of Mr Christiansen's evidence is that the inference he drew from Mr Kumar's report was that, whatever inadequacies the subfloor structure may have suffered from in relation to the original proposed two-storey dwelling, the modification of the building's geometry to that of a single storey dwelling was something to be considered when assessing the structural requirements of the subfloor structure. Furthermore, the evidence shows that the revised subfloor framing plans matched the proposed subfloor plan for the single storey house. The use of a cantlievered support system for the deck instead of piles also affected the design of the subfloor structure. The new design solutions were presented as the cure to the inadequacies identified in the notice to rectify, and this is how the Council understood them.

[79] One of the principal issues regarding the stability of the site, and the building's foundations was in relation to how the deck at the northern end of the building was supported. Dr Fendall, the expert engineering witness for the Council, said most of his onsite deflection measurements away from the north eastern end showed very little foundation movement, and that the balance of the house was on cut ground, which he described as being an ideal platform for foundations.

Mr Christiansen had inspected the site before the notice to rectify was issued. When he was confronted with the revised designs which focused on curing the instability at the northern end of the house, he had no reason to second guess PK Engineering and Total Design's advice. The focus of the design work was fixing stability issues with the subfloor structure at the northern end of the house, and this would have been consistent with the impression that Mr Christiansen had gained from his inspection of the site. Dr Fendall's evidence goes to confirm that the Council, PK Engineering and Total Design had their attention focused in the right direction. Whilst Mr Winkler was more critical of the building's foundations following his inspection of them, he too agreed that apart from the piles in the north eastern corner, which did require remediation, the remainder of the foundations had settled less than allowed for in NZS 3604. The joint view the experts reached was that this low level of settlement was an indication that the remainder of the piles did not require remedial work. Accordingly, out of 64 piles, the experts agreed that approximately 10 to 11 of the piles would need to be redone. This is another factor which confirms for me that the Council, PK Engineering and Total Design had correctly recognised where the foundations of the original building were deficient, and where those foundations were sufficient.

[80] Mr Christiansen's evidence was that he relied on the design work of PK Engineering and Total Design to rectify the inadequacies identified in the notice to rectify. Mr Kumar was a locally based appropriately qualified engineer whose work was known to Mr Christiansen. Total Design, which was responsible for drafting the revised plans, said that the proposed new design work addressed the NZS 3604 issues. Faced with this information, it was not for Mr Christiansen to second guess their professional advice.

[81] Highly qualified experts in geotechnic and structural engineering have given evidence in this case. As I have noted at [71] above, those experts have agreed between themselves that the revised designs which the Council approved would still have led to inadequacies in terms of the building's compliance with the 1991 Act. Dr Fendall considered that the work of PK Engineering had addressed the land stability issues, but not in a way that offered a satisfactory solution. However, regrettably, Dr Fendall also revealed in evidence that his view on the inadequacy of

PK Engineering's solutions, which found its way into the experts' statement on agreed issues, was influenced to a significant dgree by what has since occurred on the site. The parties should have ensured that the experts were properly briefed, and knew that any opinion they offered on the adequacy of PK Engineering's work excluded events subsequent to the approval of the amended consent. Any opinion on the adequacy of PK Engineering's design work could only be offered on a hyptothetical basis as that design work was never implemented. For this reason, it would be wrong to look at what has occurred, and to allow that to influence any view reached on the adequacy of PK Engineering's design work.

[82] When it comes to assessing the Council's conduct surrounding the approval of the amended consent, it is important to consider only the information that was available at that time. Every effort needs to be made to avoid hindsight influencing the view taken of the adequacy of the new design work. My assessment of the evidence is that at the time Mr Christiansen viewed the design work for the new proposed single storey house, he saw nothing that indicated that construction of such a house would result in the defective and non-compliant house that has eventuated. Nor could he reasonably be expected to have seen otherwise. The tenor of those reports is to the effect that the implementation of their designs and recommendations would overcome the existing inadequacies identified in the notice to rectify and, subject to compliance with other applicable NZS building standards, result in a building that complied with the building code and the 1991 Act.

[83] The Council did not at that time, nor does it now, employ engineers and architects. In these circumstances, I consider that it could justifiably rely on advice it had received from approproiately qualifed professionals. It was in no position, nor could it be expected, to carry out an exercise equivalent to a peer review of that advice. A territorial authority only needs to take reasonable steps to satisfy itself that building works will comply with the applicable building legislation, or a consent issued under that legislation: see *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC); and *Dynes v Warren & Mahoney* HC Christchurch A252/84, 18 December 1987. I consider that it was reasonable for the Council to rely on the design work of PK Engineering and Total Design, and to conclude that a building constructed in

accordance with that design work would be a sound building which met the requirements of the building code and the 1991 Act.

[84] Mr Scandle argues that aspects of PK Engineering's report, such as the recommendation to remove loose fill from the site, should have been made requirements of the amended consent. Because they were not, Mr Scandle argues that the amended consent was deficient and could not be taken to have addressed all of the inadequacies identified in the notice to rectify. I do not accept this argument. I consider that the work of PK Engineering and Total Design needs to be viewed in its entirety. Seen in this way, the work formed a total package which informed the Council of what was required to remedy the defects that had led to the notice to rectify. The Council knew that Mr Mullane had obtained the reports, so he could be taken to know their contents. The Council could reasonably have expected that the house Mr Mullane built under the amended consent would be built in accordance with the designs and recommendations of the professionals he had engaged. Those designs and recommendations were intended to ensure the house complied with the 1991 Act and the building code. Any departure from or omission to implement them could reasonably be foreseen to result in a refusal to accept and certify the building work. It is not as if the grant of an amended consent, in the form in which it was issued, precluded the Council or a private certifier from imposing further requirements on Mr Mullane, if he was later found not to be following the recommendations of PK Engineering or Total Design.

[85] Mr Harris, who was one of Mr Scandle's expert witnesses on engineering issues, said that he would have expected the Council to carry the PK Engineering recommendation to remove loose fill from the building site over to the amended consent requirements. Save for this omission, Mr Harris considered that the process the Council followed when dealing with Mr Mullane's response to the notice to rectify, and the issuing of the amended consent, was similar to the way other non metropolitan Councils acted/operated.

[86] I do not consider that the Council's omission to stipulate the removal of loose fill as a condition of the amended consent is a default on its part, and certainly not a default that has caused the defects that have occurred. When it came to the presence

of loose fill on the site and the need to retain it, this was one of the inadequacies identified in the notice to rectify. The detrimental impact of loose fill on the stability of a building platform is obvious and, therefore, is something that any competent council building inspector, or private certifier would be aware of. From the Council's perspective, it could reasonably expect that any failure by Mr Mullane to remove fill in accordance with Mr Kumar's recommendations would only lead to further requirements to remove the fill being imposed.

[87] Apart from the professional advice of PK Engineering and Total Design, later in February 2001 the Council received further confirmation that if the proposed house it had approved under the amended consent was properly completed in accordance with the listed plans and specifications (those of PK Engineering and Total Design), the house would comply with the building code. This was in the form of the building certificate issued by Nationwide on 13 February 2001. In the course of the hearing, Mr Scandle accepted that the reference in the certificate to "the proposed building work" was a reference to the work approved under the amended consent. Nationwide's confirmation may not count for much now. But at the time the Council received the certificate, there was nothing to indicate that Nationwide could not be relied upon.

[88] It had all the appearance of a suitably qualified and competent building certifier. It follows that every indication the Council received at the time from qualified independent persons was to the effect that proper compliance with the plans and specifications on which the amended consent was based would lead to a house that complied with the building code. Thus the Council's approval of the amended consent was reasonable and in accordance with accepted standards.

[89] It was also reasonable for the Council to treat the requirements of the notice to rectify as having been answered by the adoption and implementation of the revised design. The notice to rectify was issued because of obvious inadequacies with the building work under the the original consent. The Council knew that some of the original building work was to form part of the revised design. Save for where PK Engineering and Total Design had identified that specific alterations were needed, there was nothing in their design work and other written material which

suggested that the existing building work was unsuitable for incorporation in the revised design. Hence, it was reasonable for the Council to take the view that construction of a new building in accordance with the amended consent would remedy the inadequacies identified in the notice to rectify. It was also reasonable for the Council to allow work in accordance with the amended consent to commence on the site.

[90] The views I have reached are consistent with the evidence I heard from Mr Flay on the standard practices then adopted by territorial authorities. His evidence was that other territorial authorities would have acted as the Council did.

[91] Mr Scandle's expert on this topic, Dr Walls, took a different view. Dr Walls has considerable experience in the building regulatory practices of metropolitan territorial authorities. He considered that one of the Council's building inspectors should have contacted Mr Kumar about the ground conditions of the site in order to confirm that the current design was consistent with the known site conditions and the notice to rectify. Dr Walls' view was that rather than simply relying on the printed material from the professional experts, a Council building inspector should have checked the site to satisfy himself that the site stability and foundation work had been done as recommended by PK Engineering. Dr Walls thought that the Council should have issued formal advice to Mr Mullane that building work could recommence, and that once the recommencement began it should have proceeded in stages with the remedial work being done first.

[92] But I do not see how the approaches which Dr Walls outlined would have led to a better outcome. The Council did not employ its own engineers. Its building inspectors lacked the knowledge to critique the professional advice that Mr Kumar had given. The printed material from PK Engineering and Total Design positively indicated that the new design work would result in a code compliant building. It is hard to see how a discussion with Mr Kumar may have led to another view being formed. There is no practical difference between a notice permitting work to recommence of the type Dr Walls described, and issuing an amended building consent which allowed work in accordance with revised designs to commence. When it came to starting the new building work, as Mr Flay pointed out in his

evidence, there was no need for the work to progress in certain stages. But, despite this, the material from PK Engineering did, in fact, provide for a staged approach to the new works. Thus the design work would have given the impression that there was to be a staged approach. Dr Walls' expectation that the remedial work commence first would make sense if the original building design was still being followed. But once it was replaced with a new design, it was reasonable for the Council to leave it to the builder to work in a way that best effected the new design.

[93] Mr Flay had no difficulty with how the Council handled the issues surrounding the approval of the amended consent, and I agree with him. On this topic, I find the opinion evidence of Mr Flay to be more reliable and persuasive than the evidence given by Dr Walls. Mr Flay was someone who gave objective independent opinion evidence. Dr Walls tended to preface parts of his evidence with comments of what he would have done, rather than to refer to his knowledge of standard practices. Such evidence from expert witnesses is unhelpful: see *Bindon v Bishop* [2003] 2 NZLR 136 (HC). Dr Walls' evidence was very critical of the Council's conduct. I detected a lack of objectivity in Dr Walls' evidence that is incompatible with what the Court expects from expert opinion evidence. For example, he said that he found it:

> … incredible ... that at the time the Council would consider that all of the known defects associated with the building, and as under the notice to rectify, would be superseded by a new architectural design for a single storey house, and with the input of Nationwide rather than the Council.

However, if professional experts had provided advice which represented that the new single storey design would result in a code complaint building, which in turn would answer the requirements of the notice to rectify, what is wrong with the Council accepting and relying on that advice? The original design had only progressed to the point where the subfloor structure and some wall framing had been constructed. At such an early stage in the construction of a building what reason could there be, in principle, for discounting the idea that a new design, which resulted in a substantially different building (single storey instead of two-storey), would remedy problems associated with the original design. Although Dr Walls made it clear that what occurred did not fit with how he considered things should be done, he said little about the general practices of territorial authorities in this regard. Nor did he take

into account the Council's dependence on external professionals. Overall, I found Mr Flay's evidence on this topic to be more considered, measured and realistic.

[94] There is nothing about the Council's conduct regarding the group two claims that satisfies the first step of the second stage test in *Ambros*.

[95] Nor is there anything that satisfies the second step of that test. The evidence does not establish that the revised design work was a substantial and material cause of the damage that has occurred. This is because nothing that PK Engineering specified or recommended was carried out, and much of Total Design's plans were ignored. By issuing an amended consent and thereby allowing work on the property to recommence, the Council provided an opportunity for Mr Mullane to carry out his defective building work. But that consent did not approve or permit Mr Mullane to build in the way in which he did. The Council's amended consent had no real influence on and was not, therefore, a substantial and material cause of the damage which has resulted. The most the evidence suggests is that the new design work had the potential to result in a non-compliant building when it came to the slope stability for the northern end of the building. This is too remote from what has occurred. The Council cannot be legally liable for hypothetical damage that might or would have resulted had the plans and designs it approved actually been followed. I find, therefore, that in granting the amended consent, and allowing the construction of the building to recommence (the group two claims), the Council has not caused loss in the legal sense.

**Group three claims**

[96] I now turn to the allegation that the Council was negligent in failing to inspect the property after issuing the amended consent. Mr Scandle argues that the Council was under an obligation to satisfy itself that the notice to rectify could be lifted, and that this entailed the Council inspecting the property to ensure that the building work had proceeded in accordance with the amended consent.

[97] Before the 1991 Act, statutory powers and responsibilities to inspect building works to ensure that they were proceeding in accordance with what the law rquired

were vested in territorial authorities. The detection of a builder's deviation from legally required building standards was part of a territorial authority's statutory responsibilities. Thus before the 1991 Act, it would have been the Council's responsibility to detect that Mr Mullane was not building in compliance with the amended consent, or in a way that otherwise complied with the applicable legislation.

[98] However, with the passing of the 1991 Act, Parliament introduced a system in which inspections to determine whether building work complied with the Act and consents issued under it were undertaken by either a territorial authority, or a private certifier. Under s 32 buildings could not be constructed, altered or demolished without a building consent. Under s 35 territorial authorities were responsible for issuing building consents. But the land owner or person undertaking the building work (the applicant) was permitted to choose who would undertake the inspections. Provided the chosen private certifier was registered under s 53, and had the necessary approval under that section to carry out the type of work for which he or she was engaged, the territorial authority had no power to override the applicant's choice. Once engaged, a private certifier was empowered to sign off the building work by issuing a building certificate and a code compliance certificate, and the territorial authority was obliged to accept those certificates. Section 50(1) of the 1991 Act make this much clear. The section provided:

> **50 Establishing compliance with building code**
>
> (1) A territorial authority shall accept the following documents as establishing compliance with the provisions of the building code:
>
> (a) A building certificate or code compliance certificate to that effect issued by a building certifier under section 43 or section 56 of this Act:
>
> (b) A determination to that effect given by the Authority under section 20 of this Act:
>
> (c) A current and relevant accreditation certificate to that effect issued by the Authority under section 59 of this Act:

(d) Compliance with the provisions to that effect of a document prepared or approved by the Authority under section 49 of this Act.

(e) In so far as compliance with any requirements imposed by any regulations made under the Electricity Act 1968 or the Gas Act 1982 is compliance with any particular provisions of the building code, a certificate issued pursuant to either of those Acts or the Electrical Registration Act 1979 or pursuant to any such regulations and to the effect that any energy work complies with any such requirements.

(f) In so far as compliance with any requirements imposed by any regulations made under the Electricity Act 1992 or the Gas Act 1992 is compliance with any particular provisions of the building code, a certificate issued pursuant to any such regulations and to the effect that any energy work complies with any such requirements.

[99] Private certifiers were required to report to the territorial authority in the manner provided for in the Building Regulations 1992, reg 8; s 57(3). They were also required to notify the territorial authority if they expected to be unable to inspect the building work (s 57(3)(a)), or if they believed the building work contravened the building code and their directions to rectify the contravention were not done within a reasonable time (s 57(3)(b)). If a private certifer became unwilling to continue to inspect the building work, s 57(3)(c) required the applicant to notify the territorial authority, which then amended the building consent and assumed responsibility under the 1991 Act for making inspections.

[100] Private certifers issued code compliance certificates through the combined use of the powers in ss 43(2)(b) and 56(3). If a private certifier was not satisfied that the building work complied with the building code, he or she could refuse to issue a code compliance certificate. In such cases, the private certifier was required to advise the applicant (s 43(5)), and the territorial authority (s 56(4)). On receipt of such notice, the territorial authority was required to issue a notice to rectify (s 42). The statutory scheme made no provision for territorial authorities to maintain an inspection role relating to code compliance certificates once a private certifier was engaged. Under s 50(3), territorial authorities were given immunity from civil proceedings for anything done in good faith in reliance on a building certificate or a code compliance certificate issued by a private certifier. Redress for any default by a

private certifer was available as against the certifer; in this regard no certifier could, as a term of engagement, limit his or her civil liability (s 57(2)). And under s 51(3)(b), persons seeking to register as private certifers were required to have insurance to cover any default on their part in issuing a code compliance certificate, or a building certificate. Approval for registration as a private certifer was controlled by the Building Industry Association (BIA), which under s 52 could only grant approval if satisfied that the prospective certifer was appropriately qualified. Any complaints about the conduct or competence of a private certifier had to be addressed to the BIA. Sections 54 and 55 provided for how such complaints were to be dealt with.

[101] Apart from the statutory scheme described above, territorial authorities had general powers of inspection under s 76. This provision enabled territorial authorities to enter on to land for the purpose of, inter alia, taking all reasonable steps to ensure that any building work was being done in accordance with the building consent (s 76(1)(a)). There was, therefore, a power available to the Council to allow it to inspect the building work, even though Mr Mullane had engaged a private certifier. But, unless there was something to put the Council on notice that the private certifier was not carrying out the inspection services correctly, I consider that a Council could quite justifiably conclude that there was no need for it to carry out inspections as well.

[102] In the present case, following the issue of the notice to rectify, Mr Mullane decided that he would engage the services of a private certifier, Nationwide. After the Council received the amended design from PK Engineering and Total Design, and issued the amended consent, it took no further part in inspecting whether the building work complied with the amend consent, or met the requirements of the 1991 Act and building code.

[103] Nationwide assumed responsibility for inspecting the building work. For some reason best known to Nationwide, it permitted Mr Mullane to build a single storey house that failed to comply in any way with the approved design, and which was built in a way that has led to it being so defective that it is now uninhabitable. In what way, if at all, can the Council be held to have caused this loss?

[104] The statutory scheme of the 1991 Act makes it clear that ordinarily once a private certifer was engaged, he or she assumed responsibility for inspecting the building works, and issuing a code compliance certificate. I consider that, in general, once a private certifer was engaged there was no obligation on the territorial authority to maintain any oversight to ensure that the private certifer was carrying out his or her role properly, and that the territorial authority could leave the inspection and issuing of the code compliance certificate entirely to the private certifer. The following factors cause me to reach this view:

i) The presence a mandatory requirement for territorial authorites to accept a code compliance certificate issued by a certifier;

ii) The absence of any statutory power for territorial authorities to override a decision to engage a private certifier;

iii) The immunity from civil proceedings for territorial authorities which have relied on code compliance certificates issued by privater certifers;

iv) The requirement for private certifiers to carry insurance against civil liability arising from the issue of code compliance certificates;

v) The preclusion of private certifiers contractually exempting themselves from civil liability for any default on their part;

vi) The requirement for private certifiers to inform the territorial authority if building work they were inspecting was non-compliant with the building code, and was not being rectified within a reasonable time; and

vii) The requirement for the persons who had engaged a private certifier to inform the appropriate territorial authority if the engagement ceased.

*Is this case exceptional?*

[105] Mr Scandle argues that the present case falls outside the ordinary rule, and that the Council had a continuing responsibility to ensure the house complied with the building consent and the building code. He submits that what distinguishes this case from the ordinary case is that the Council had issued a notice to rectify. He argues that this event required the Council to inspect the building to ensure that it satisfied the requirements of the notice to rectify. Mr Scandle also has an ancillary argument that Nationwide failed to issue reports to the Council in a timely fashion and that the reports it did issue should have set the Council on inquiry. He adds to this Mr Mullane's conduct in only choosing a private certifier after the notice to rectify was issued. Had the Council made its own inquiries (by inspecting the property) it would have discovered the defects, and could then have issued a further notice to rectify.

[106] The issue of the notice to rectify in November 2000 did not change matters. The inadequacies identified in the notice to rectify related to the original building consent. I see the redesigning of the proposed building as a change of circumstance. Once the Council was faced with a new design for the proposed building, the focus would have changed from the inadequacies of the original proposal to whether the new proposal ameliorated them. Once the Council was satisfied that the new proposal did address the inadequacies satisfactorily, the Council could revert back to treating this particular building project as being no different from any other, and therefore not warranting special attention.

[107] Whilst some of the subfloor structure and other aspects of the original design were intended to form part of the new design, this was in circumstances where a consulting engineer and draughtsman had implicitly advised that the totality of the new design would meet the requirements of the building code. I have already found that the Council did, and quite properly could, conclude that the inadequacies present in the original design would be fixed by the revised design. Once the amended consent was issued, I consider that the Council was entitled to conclude that the building work would proceed in accordance with the new approved design, which the Council understood at the time to be in accordance with the building code.

[108] The expert evidence I heard from Mr Flay confirms my view on how the Council acted following the notice to rectify. Mr Flay's view was that the Council's issue of the amended consent was an endorsement of the revised plans, and the trigger for work to recommence. His opinion was that in light of the notice to rectify, the Council's actions were consistent with the practices of other territorial authorities at the time.

[109] It follows that when it issued the amended consent, the Council could reasonably have seen no need to exercise its powers of inspection under s 76. Whilst, as events have turned out, Nationwide has done its job very badly, there is nothing to show there were indications of this eventuality at the time Nationwide was engaged.

*Inference to be drawn from change to private certifier*

[110] The next issue is whether Mr Mullane's choice of a private certifier should have put the Council on inquiry.

[111] I do not see Mr Mullane's decision to engage Nationwide as something that should have indicated to the Council that Mr Mullane intended to cut corners and so build the proposed house badly. There was evidence that Mr Mullane was unhappy with Mr Christiansen and had sought to have him removed from responsibility for inspecting the building work. Mr Mullane is also said to have indirectly threatened Mr Christiansen. However, I do not see any of this as being a reasonable indicator to the Council that Nationwide would subsequently fail to perform in the way that it did. The Council saw Nationwide as a reputable approved private certifier. It had no reason to think that Nationwide would not discharge its responsibilities. In this regard, Nationwide's failure was not reasonably foreseeable.

[112] The 1991 Act contemplated that owners or persons carrying out building works should have freedom of choice between territorial authorities and private certifiers. The Act set in place a scheme to ensure that fault on the part of private certifiers could be remedied through the insurance they were required to carry, and through the imposition of civil liability. In this statutory environment, I see no

reason why Mr Mullane's exercise of that choice could constitute notice to the Council that Mr Mullane was going to build a house that deviated significantly from the amended consent. If the Council had any concerns that this might occur, the reasonably foreseeable outcome would be that Nationwide would detect the defects, and if Mr Mullane did not rectify them, then Nationwide would inform the Council of the need for a further notice to rectify. This is what Nationwide should have done. The Council was entitled to rely on the prospect of Nationwide carrying out its task in accordance with the statutory scheme.

*Council supervision of Nationwide*

[113] Another issue is whether there was something about Nationwide's conduct that should have alerted the Council to the fact Nationwide, as well as Mr Mullane, was not doing its job properly.

[114] The first knowledge the Council had that a private certifier was being engaged was on 12 January 2001 when it received the letter from Total Design. The letter stated that it was Total Design's understanding that Mr Mullane had engaged a building certifier to complete the required inspections for the remainder of the construction. Then, on 13 February 2001, pursuant to s 56 of the 1991 Act, Nationwide formally notified the Council of its engagement. The notice informed the Council that the nature of engagement covered "field inspections" and "issue of code compliance certificate". The subject of the engagement was described as a "new building" and as a "single storey building" inspection.

[115] Mr Scandle argues that the reference in the s 56 notice to proposed building work should be understood to be work yet to be done and, therefore, this would exclude the foundations and other work that was already in place before the notice to rectify was issued. I do not read the s 56 notice in that way. The work that was already done before the notice to rectify was issued was later considered by PK Engineering and Total Design for the purpose of it forming part of the new design for a single storey house. Where those professionals thought it necessary, they provided for alterations to be done to the existing work. An example of this is the requirement for the deck support piles to be replaced with a cantilevered support

system. But where they did not recommend any alteration to the existing work, the Council's understanding, with which I agree, was that the existing work could suitably be incorporated into the new building design. I do not consider that Nationwide could have seen matters differently from this. If the proposed building work was to include foundations that were in place for an earlier abandoned design, those foundations could only be seen as forming part of the proposed new work.

[116] Nationwide issued an inspection report under s 57(3) of the 1991 Act in February 2001. This report recorded that the building work had progressed to the extent specified in the attached page headed "progress as at 28 February 2001 monthly report". The certificate noted that the inspector was satisfied on reasonable grounds that to date the building work had been undertaken in accordance with the plans and specifications attached to the building consent. The project was described as "a new building, a one-storey dwelling, stage one of stage one". This was also on the building certificate issued on 13 February 2001. The attached report referred to inspections occurring in January 2001. Mr Scandle referred to these inspections having been carried out before Nationwide had sent its notice of engagement on 13 February 2001. I see no difficulty with the fact that Nationwide may have commenced work before sending a formal notification of its engagement to the Council.

[117] The first report of Nationwide describes bored piles as complying, with everything else in the itemised checklist checked as non-compliant. However, it is difficult to know what to make of this report. It contains nothing more than ticked items on a checklist. Much of the work checked as non-compliant is work that clearly had not yet been undertaken. For example, plumbing, fire control, insulation, and the installation of the hot water cylinder, is recorded as being non-compliant. It seems that Nationwide did not have a third column for not applicable when the work had clearly not progressed to the stage where those items were completed.

[118] On 28 March 2001, Nationwide contacted the Council regarding a potential boundary problem. This issue related to an approximate 0.5 metres square of the roof overhanging at the front right corner of the carport. This was a planning matter which was dealt with under the Resource Management Act 1991. Since Nationwide

had no jurisdiction to demand corrective action of planning matters, the Council was asked to investigate and confirm remedial action. The Council did this. There is no evidence that at the time Council officers visited the site to look at the carport roof overhang, they could see matters of concern relating to the construction of the building. On 29 March 2001, the Council wrote to Nationwide advising that an inspection had been undertaken, and that Mr Mullane had agreed to cut the section of the roof that overhung the right of way, which would solve the problem. Then, on 14 May 2001, the Council wrote to Nationwide providing a list of the inspections it had undertaken of the property. This showed there had been a site inspection prior to the issue of the building consent, a footing inspection, and then a stop work inspection, which was followed by the notice to rectify. The letter says that various other inspections had been undertaken as a result of the notice to rectify, and there was a requirement that the remedial work indicated in the information supplied by Mr Mullane be undertaken prior to further work commencing. The Council recorded its understanding that Nationwide would be undertaking these inspections, and went on to state that there remained a question as to whether the work had been made to comply with the notice to rectify. The letter went on to refer to a neighbour complaining that fill at the bottom of the site was showing signs of further movement. The evidence does not record any response from Nationwide.

[119] It was not until 31 March 2002 that Nationwide provided a further inspection report under s 57(3). The report confirmed the certifier's engagement to inspect the work, and confirmed that work had progressed to the extent specified in the attached page. The report also contained the statement that the inspector was satisfied that the work to date had been undertaken in accordance with the plans and specifications attached to the building consent. The monthly report recorded some non-compliant items. However, one of these related to the roof of the carport overhanging the boundary. That clearly had been rectified by the time this monthly report was prepared. The report sets out a series of dates which show when items had been found to be compliant or non-compliant. As from 23 February 2001, all items appear to be compliant, apart from the hot water cylinder strapping.

[120] On 30 March 2002, on a re-check, Nationwide had recorded that "all items corrected okay for: code compliance certificate". Two general items were identified as not ready, without their nature being identified.

[121] Then, on 3 April 2002, Nationwide issued a final code compliance certificate for all the building work under the building consent. The consent described the project as a new building, being a one-storey dwelling. There was also a 3 April 2002 monthly report. Also on 3 April 2002, Nationwide sent an advice of completion of building work. Noted on the certificate was a comment by the inspector that the "workmanship was not the best but meets building code requirements".

[122] Mr Scandle refers to two matters that he contends should have alerted the Council to the need for it to inspect the building work, even though Nationwide had been engaged. First, Nationwide's failure to provide the Council with monthly reports. Regulation 8 of the Building Regulations 1992 required a building certifier to provide a territorial authority with inspection reports at least once each calendar month from the date of the certifier's engagement until the building work was completed. Secondly, the reports provided contained various notations that identified certain items as non-compliant.

[123] The Council argued that Nationwide's failure to adhere to the requirement for monthly reports, and the contents of the reports that were issued, were of little significance to territorial authorities. In this regard, Mr Flay gave evidence that, in his experience, sometimes building work was slow and for some months there might be little that was done, so that there was no point in sending a monthly report. Hence, private building certifiers did not always send monthly reports. Mr Flay also said that the s 57(3) reports received from private certifiers were for information record-keeping purposes only. Their purpose was not to allow the Council to police the work of private certifiers. He also said that a council officer reading Nationwide's reports would not recognise them as notifying the Council of a building's non-compliance with the building consent or building code.

[124] I can understand that as a matter of practical convenience there may well have been occasions when private certifiers did not always file monthy reports as required by reg 8. But where the building work comprised a new dwelling, I would have expected that, even with delays in the progress of the construction, over the months that passed while the building was being built, work would have been completed that should have been reported. In this case, there were only three reports under s 57(3): the first was dated 12 February 2001, and was issued at an early stage in the construction of the single storey dwelling; the second report was dated 31 March 2002, by which time the building work was almost completed; and the third was dated 3 April 2002, and it accompanied the code compliance certificate. Clearly between the first and the last two reports, a lot of building work would have been carried out, and it should have been reported. The issue of only three building reports, with a space of some 13 months between the first and the second, not only fails to comply with reg 8, but it is also hard to describe this occurrence as simply being down to construction delays.

[125] The s 57(3) reports are not simple record-keeping on the part of a territorial authority. Parliament provided for private building certifiers to provide such reports because it intended that territorial authorities be kept informed of the work the certifier was carrying out.

[126] But should Nationwide's failure to comply with its obligations under reg 8, as well as the nature of the reports it did file, have been recognised by the Council as evidencing a need for it to check on Nationwide's inspection work? Mr Scandle emphasised the failure on Nationwide's part to comply with the time limits in reg 8. He did not, however, draw the Court's attention to any expert evidence that would suggest that, at the time, the standard approach of territorial authorities to those types of failures was to undertake inspections using their power under s 76.

[127] Mr Scandle's expert on how councils managed their responsibilities under the 1991 Act was Dr Walls. There is no doubt that, whilst Dr Walls was employed by a territorial authority, he had considerable experience dealing with the application of legislation, as well as other regulatory matters relating to the construction of buildings. But by the time private building certifiers became actively involved in the

inspection of buildings, Dr Walls was no longer employed by a territorial authority. He has no direct experience of the interactions that occurred between territorial authorities and private building certifiers when it came to the performance of their respective statutory roles under the 1991 Act.

[128] Dr Walls' knowledge of how the regulatory scheme worked in practice has been gained from historical analyses that he has carried out using the records of territorial authorities for the purpose of providing expert evidence on issues that arise primarily in disputes involving leaky buildings. His opinion of the interaction between territorial authorities and private building certifiers is not based, therefore, on actual experience, and will have been coloured by the context of his historical analyses. For this reason, I attach little weight to Dr Walls' expert opinion evidence on the standard of care which territorial authorities followed when it came to how they interacted with private building certifiers, including how they might respond to the reports building certifiers provided under s 57(3). Any ideas Dr Walls may have on this topic are no more than his supposition of how the interactions may have occurred.

[129] On the other hand, the Council's expert witness on this topic, Mr Flay, has had extensive experience both as an employee of territorial authorities, and as a contractor acting for them in their interactions with private building certifiers. He has also been engaged to act for a private building certifier. Unlike Dr Walls, therefore, Mr Flay has direct experience of how the system of inspections and issuing of code compliance certificates by both territorial authorities and private building certifiers actually worked in practice. Mr Flay's evidence, in essence, is that the Council's conduct regarding how it interacted with, and reacted to the involvment of Nationwide was no different from the practices adopted by other territorial authorities at the time.

[130] The expert opinion evidence I have heard does not inform me that as a matter of general practice, territorial authorities faced with the type of reports Nationwide provided, and the general lack of timeliness in providing such reports, would have taken this as an indication that they needed to carry out their own inspections under s 76. Without such evidence, I am not prepared to accept Mr Scandle's arguments

that the manner in which Nationwide conducted itself, and the nature of its reports, should have alerted the Council to the need for it to carry out its own inspection of the building work.

[131] Furthermore, in light of the statutory scheme, I do not consider that the contents of Nationwide's s 57(3) reports would be enough to set any reasonable territorial authority on its own inquiries about whether or not the building work complied with legal requirements. This is because reg 8 expressly provided that where a building certifier believed there was a contravention of the building code, and the person carrying out the work had failed to rectify those contraventions, the building certifier was to notify the territorial authority in accordance with form 6 of the second schedule to the regulations.

[132] Form 6 was in the following format:

FORM 6
BUILDING CERTIFIER'S NOTICE OF
CONTRAVENTION OF THE BUILING CODE

*Regulation 8(2), Building Regulations 1992*

Under Building Consent No. ……

Issued by: ……
currently approved and registered as a building certifier
To …… Council

The Council is hereby notified that:

The building certifier has been engaged to inspect specified building work in relation to listed provisions of the building code as detailed in the ….. page(s) headed "Scope of Building Certifier's Engagement No. ……", attached to this notice.

The building certifier believes that there is a contravention of the provisions of the building code and has directed the person carrying out the work to rectify the contravention, but that person has not done so within a reasonable time, all as detailed in the attached ….. page(s) headed "Particulars of Contravention".

Signed by *or* for and on behalf of the building certifier

Name: ……...
Position: ……..……. Date: / /

[133] The regulations provided an express procedure for a private building certifier to inform a territorial authority that the building work was non-compliant, and that the builder was not taking remedial action. The procedure included a specific form

for giving notice of a contravention. Against this background, I do not accept Mr Scandle's argument that the Council should have read and interpreted Nationwide's s 57(3) reports as indications of non-compliant work that required the Council's intervention. A territorial authority could reasonably expect that any such notification would be in a form that resembled, if not replicated, form 6 of the second schedule. I also consider that a territorial authority could not reasonably be expected to look for signs in s 57(3) reports of the presence of non-compliant work, which was not going to be attended to and corrected.

[134] In contrast to form 6, the 1991 Act did not require any specific format for s 57(3) reports. Nationwide's s 57(3) reports were no more than a pro forma checklist with boxes for compliant and non-compliant items. I do not see why the Council could reasonably be expected to understand from checks made on a pro forma checklist that anything ticked as non-compliant would constitute notice as envisaged in reg 8(2).

[135] It follows that there is nothing in relation to Nationwide's conduct, or how the Council responded to that conduct, which can be seen as indicating something that would have caused a reasonable and competent territorial authority to inspect the building work for itself.

[136] Mr Scandle also contended that the Council's query to Nationwide in the letter of 14 May 2001 indicated that the Council remained unsatisfied about whether the building work met the requirements of the notice to rectify. There is no evidence that Nationwide responded to this letter. This in itself could be seen as a reason for the Council to undertake further enquiries. The absence of any evidence showing any enquiries suggest none were carried out. But the Council's failure to carry out such enquiries needs to be seen in the context that Nationwide never gave any notice of non-compliance in terms of form 6, reg 8(2). Nationwide subsequently issued a code compliance certificate, coupled with a report of 3 April 2002, that recorded that on a re-check "all items corrected okay for CCC".

[137] The Council could, therefore, justifiably and reasonably rely on the information Nationwide had provided. In this regard, I accept the opinion evidence

of Mr Flay, who opined that at the time the Council received the code compliance certificate, the Council had no reason to question it. At the time the Council received the code compliance certificate, there was nothing before the Council to suggest that Nationwide had been so remiss in carrying out the terms of its engagement that it had issued a code compliance certificate for a building that departed in a significant way from the amended building consent, and the requirements of the building code.

[138] Nationwide's abandonment of its statutory responsibilities as a private building certifier could not have been reasonably foreseeable to the Council. Nor do I consider that the Council should be obliged to act as indemnifier for Nationwide. Once Nationwide was engaged, the Council was entitled to rely on Nationwide performing its role under the statutory scheme properly.

[139] It follows that whilst Nationwide's omissions have been a substantial or material cause of the damage to the property, the Council's conduct in not exercising a supervisory role over Nationwide is outside the scope of the risk for which the Council would have been liable. The entire scheme of the 1991 Act was to keep private certifiers separate from territorial authorities. Private certifiers were obliged to have their own insurance. Under s 50(3), territorial authorities enjoyed an immunity from civil proceedings, which I have already discussed at [100]. These aspects of the statutory scheme are clear indications that territorial authorities were not to assume a supervisory responsibility for private building certifiers. Furthermore, the Council's omission to supervise Nationwide is not a substantial or material cause of the damage. At the most, it provided an opportunity for Nationwide to fail to discharge its responsibilities.

*Statutory immunity*

[140] Looked at in another way, when it comes to the Council's reliance on Nationwide, I consider that the Council would be protected by the immunity in s 50(3). The Council relied on Nationwide's code compliance certificate as evidence that the building had been built in accordance with the amended building consent. It had earlier seen the plans and specifications on which the amended building consent

was issued as resolving the inadequacies in the notice to rectify. Once it received a code compliance certificate advising that the building had been built in accordance with the amended consent, it was entitled to rely on that certificate as evidencing the truth of what it said. There is no evidence to show that the Council has acted otherwise than in good faith.

[141] For the Council to lose the immunity's protection, Mr Scandle would have to show that the Council lacked good faith. To say there is lack of good faith is simply another way of saying there is bad faith, which is a grave allegation requiring more than proof of an honest though mistaken act or ommission: see *Cannock Chase Council v Kelly* [1978] 1 WLR 1 at 6:

> ... bad faith, or, as it is sometimes put, "lack of good faith", means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant.

[142] A similar approach to bad faith, or lack of good faith, which would see this concept distinguished from an honest mistake, was taken in *Harvey v Derrick* [1995] 1 NZLR 314. At 322 Cooke P found that the immunity then afforded to District Court judges was limited to occasions where the judge had acted in good faith and without gross negligence. The juxtaposition of good faith with gross negligence shows that Cooke P saw good faith as being separate from gross negligence. It follows that the presence of negligence simpliciter could not amount to bad faith. Thus Mr Scandle would have to establish more than simple negligence on the Council's part before it lost the immunity under s 50(3). He cannot do so.

**Council's affirmative defences**

[143] The Council has raised an affirmative defence of novus actus interveniens. The Council argues that Mr Mullane's substantial departure from the amended consent, coupled with Nationwide's failure to report this departure to the Council, are intervening acts which would break any link in a chain of causation that might tie the Council to the damage.

[144] In Anthony M Dugdale and Michael A Jones (eds) *Clerk and Lindsell on Torts* (19th ed, Sweet & Maxwell, London, 2006) at 2-82, the writers say that there are four issues to be considered in a novus actus interveniens. They are as follows:

i) Was the intervening conduct of the third party such as to render the original wrongdoing merely a part of the history of events?;

ii) Was the third party's conduct either deliberate or wholly unreasonable?;

iii) Was the intervention foreseeable?; and

iv) Is the conduct of the third party wholly independent of the defendant, that is does the defendant owe the claimant any responsibility for the conduct of that intervening third party?

[145] When the circumstances of this case are looked at in relation to those four issues, the following is obvious:

i) Any original default on the part of the Council relating to the granting of the original building consent is merely a part of the history of events;

ii) Mr Mullane's conduct in departing significantly from the plans and specifications on which the amended consent was issued was deliberate and wholly unreasonable; and

iii) Nationwide's failure to report to the Council the significant departure from the amended consent must have been deliberate, and certainly was wholly unreasonable.

[146] *Clerk and Lindsell* note that it may be easier to establish a novus actus interveniens when the intervention of the third party is deliberate and intended.

Citing Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956 at 986, where Lord Sumner said:

> In general, even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause … he insulates A from C.

[147] *Clerk and Lindsell* also note that the more unreasonable the conduct of the intervening third party, the more likely it will be that the conduct constitutes a novus actus interveniens. In *Environment Agency v Empress Car Co Ltd* [1999] 2 AC 22, Lord Hoffman commented that:

> … one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. Does the rule impose a duty which requires one to guard against, or makes one responsible for, the deliberate acts of third persons? If so, it will be correct to say, when loss is caused by the act of such a third person, that it was caused by the breach of duty … Before answering questions about causation, it is therefore necessary to identify the scope of the relevant rule. This is not a question of common sense fact; it is a question of law. In *Stansbie v Troman* the law imposed a duty which included having to take precautions against burglars. Therefore breach of that duty caused the loss of the property stolen.

[148] The acts or omissions of Mr Mullane and Nationwide were deliberate, unreasonable and not foreseeable. No reasonable council could be expected to foresee that Mr Mullane would depart in such a significant way from the amended consent, and that the private certifier would have failed so miserably to carry out its inspection responsibilities. Such conduct could never, in my view, be reasonably foreseeable. I also consider that the conduct of Mr Mullane and Nationwide was wholly independent of the Council. The Council does not owe Mr Scandle any responsibility for the conduct of either Mr Mullane or Nationwide.

**Have the Mullane trustees caused Mr Scandle to suffer loss?**

[149] The Mullane trustees were the legal owners of the land at the time Mr Mullane built the house. As owners of the land, they had some control over how the house was built. Mr Mullane is one of the trustees. He knew or must have known that the house was not built in accordance with the amended consent.

[150] The Mullane trustees as vendors under the sale and purchase agreement with Mr Scandle agreed to sell a house that complied with the building code. Clause 6 of the sale and purchase agreement (being the seventh edition ADLS sale and purchase agreement dated 17 March 2002) contained vendor's warranties to the effect that all works, for which a permit or building consent was required by law, on the property comply with the consent, and that all obligations under the 1991 Act were fully complied with. This would include the house which Mr Mullane built on the property. The house deviates in many significant ways from what the 1991 Act and the amended consent required. The house which Mr Scandle purchased is not the house he contracted to buy. This is a breach of the warranty in the sale and purchase agreement. This breach has caused Mr Scandle to suffer loss, in that he has received something of far less value than he contracted to buy.

**Liability of Mullane trustees and Mr Mullane**

[151] I have found that the Mullane trustees have breached the terms of the contract with Mr Scandle, and in doing so have caused him to suffer loss. It is well established that a breach of a vendor's warranty in an agreement for the sale and purchase of land, as a result of works on the land not being in accordance with the applicable building legislation, will give rise to liability for damages for breach of contract: see *Riddell v Porteous* [1999] 1 NZLR 1 at 7.

[152] I have found that, as the builder of the house, Mr Mullane has caused the house to be built defectively. It is well established that builders of residential houses can be liable in negligence for defective building: see *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394 (CA); and *Morton v Douglas Homes Ltd*.

[153] It follows that Mr Scandle has established liability in the breach of contract claim against the Mullane trustees, and in the negligence claim against Mr Mullane. Because of these findings on liability, I do not propose to make any finding on the alternative claim against the Mullane trustees in negligence for being developers of the property. Such claims against an owner/builder are unusual, and it is unnecessary to consider if such a claim can be established here.

**Loss**

[154] When the trial commenced, Mr Scandle was seeking the full cost to repair the house. This is estimated to cost in excess of $677,000. This estimate well exceeds the diminution in value between the current value of the property as is, and its value if it had been built in accordance with the building consent and building code.

[155] The decision of the Mullane trustees and Mr Mullane to withdraw from the trial part way through meant that they called no evidence. The only evidence I heard on loss was from Mr Scandle and from the Council.

[156] The Council argued that the repair costs would be less than the diminution in value. The Council's estimate is that repair costs would be in the vicinity of $262,000. However, the Council's expert in this regard, Mr Gillingham, gave evidence that at the time the experts assessed the defects, no invasive tests were carried out. He could not be sure without invasive tests if targeted repairs were acceptable. He conceded that in the absence of invasive testing, there was an element of speculation as to whether targeted repairs would be sufficient. A total re-clad of the house may be necessary for the house to comply with current legislative requirements. This uncertainty tells against the adoption of a cost of repair measure of damages

[157] I heard evidence from two valuers (one for Mr Scandle, and one for the Council) on their estimate of the diminution in the property's value. Their evidence was based on orthodox valuation principles. Mr Scandle's valuer, Russell Garton, estimated the value of the property as at April 2010 with the defective house in place, and with full knowledge of the issues of repair or demolition, as being $150,000. His estimate of the value of the property at the same date in an unaffected state is $625,000. The Council's valuer, Malcolm McBain, estimated the value as at April 2010 as being $250,000, and at the same date the value of the property in an unaffected state is estimated to be $650,000. Both valuers attempted other exercises which sought to value the land separately from the rest of the property, and some valuations took into account the property's value if various steps were taken to repair or remove the defective building. I consider the cleanest approach is simply to take

the difference in value between the property's value in its current state as at April 2010, and its unaffected state. This results in a difference of $475,000 on Mr Garton's values, and $400,000 on Mr McBain's values. I propose to adopt a figure that falls between those two estimates. Accordingly, I quantify the diminution in value at $437,000.

[158] Mr Scandle's estimated total cost of repairs is excessive. The House of Lords' decision in *Ruxley Electronics and Construction Limited v Forsythe* [1995] 3 All ER 268 is authority for the proposition that where the expenditure involved in placing a party in the same position as if the contract had been performed is out of proportion to the benefit to be obtained, some other measure of damages will be used. Recently, the Court of Appeal in *Vining Realty Group Limited v Marlborough District Council* [2010] NZCA 104 said at [60]:

> We accept that a plaintiff cannot always insist on being placed in precisely the same situation as would have obtained if the contract had been correctly performed and indeed that this is likely to be particularly so in building cases where the cost of performance may far exceed any realistic assessment of the loss to the plaintiff.

[159] Therefore, even though the general rule is that damages in contract are expectation based, there is an exception where expectation damages would be unreasonable to award because the cost to the payer far exceeds what is fair. Here the cost of repairs as sought by Mr Scandle is excessive in comparison with the diminution in the property's value. This is confirmed by the fact that the evidence of the need for repairs based on a full re-clad of the house is not supported by test results following invasive testing. The Council's estimate based on targeted repairs suffers from the same lack of support. In such circumstances, the best approach is to adopt the more reliable valuation evidence, and assess the loss on the diminution in the property's value.

[160] Mr Scandle sought general damages. A court may award general damages in a building negligence case. *Sunset Terraces* and *Bryron Avenue* show that the appropriate measure depends on individual circumstances. For owner occupiers, the usual award is $25,000, and for owners who do not occupy, $15,000. Mr Scandle

accepts that the property was not his usual residence, and seeks $15,000, which I consider to be an appropriate award in this case.

**General comment**

[161] The faulty workmanship that has caused some of the superstructure defects is unconnected with, and post-dates the defects identified in the notice to rectify. But the findings I have reached mean that it is unnecessary to distinguish between the causes of the various defects. This would only have been necessary if I had found the Council liable in negligence.

[162] It has also been unnecessary to determine the Council's contributory negligence claim against Mr Scandle, or its claim for contribution against Mr Mullane and the Mullane trustees. At the end of the hearing the Council sought to amend its contribution claim to include a claim for an equitable apportionment of liability between itself and the Mullane trustees, in the event of a finding against the Mullane trustees in contract and a finding against the Council in tort. The Mullane trustees were given an opportunity to oppose the application but they took no such step. I, therefore, granted the application. But the findings I have made on Mr Scandle's claims against the Council mean that it has not been necessary for me to consider any of the Council's cross-claims against the other defendants.

**Result**

[163] Mr Scandle has established his claim for breach of contract against the Mullane trustees. He has established his claim in negligence against Mr Mullane. Mr Scandle has failed to establish his claims in either breach of statutory duty or negligence against the Council. The damages he is entitled to obtain from Mr Mullane and the Mullane trustees are: $437,000 for the diminution in value of the property; $15,000 general damages.

[164] Any application for costs is to be filed within 15 working days of the date of this judgment. The party responding to the application has a further 15 working days

to file a response. Any reply is to be filed within seven working days of that response.

Duffy J

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