IN THE COURT OF APPEAL OF NEW ZEALAND

CA619/2010
[2012] NZCA 52

BETWEEN	MICHAEL JOHN SCANDLE Appellant
AND	FAR NORTH DISTRICT COUNCIL Respondent

Hearing: 12 October 2011

Court: Chambers, Ronald Young and Andrews JJ

Counsel: R J Katz QC and J D Turner for Appellant
S A Thodey and F P Divich for Respondent

Judgment: 1 March 2012 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a complex appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Chambers J)

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Defective construction of a holiday home in Kerikeri

[1] Corina and Michael Mullane owned a piece of land on Doves Bay Road, Kerikeri. They wanted to build a holiday home on it. Mr Mullane intended to build it himself. The Mullanes had plans drawn for a two-storey home.

[2] In September 2000 Mr Mullane applied to the Far North District Council, the respondent, for a building consent. In due course the Council granted it. Mr Mullane started work.

[3] On 10 November 2000, Mark Christiansen, a Council building inspector, inspected the building work. He found much that was wrong with it. He issued a notice to rectify under s 42 of the Building Act 1991. The effect of such a notice was to require the builder to stop all work until the matters specified in the notice were fixed up.

[4] Mr Mullane, on receiving the notice, engaged the services of a firm of consulting engineers, PK Engineering Limited. PK issued a report detailing the problems. They recommended a new design for the building. Mr Mullane also got Total Design Limited involved. Total Design was a company providing building and landscape design services. Between them, PK and Total Design came up with new plans for the house. The new house was to be only one storey. PK and Total Design submitted the new plans to the Council on 12 January 2001. Total Design also advised the Council that Mr Mullane had engaged a private certifier to inspect and certify the rest of the building work. Under the 1991 Act, the inspection and certification of building work for compliance with the building code[1] and the 1991 Act could be done by either a council building inspector or a private certifier. Under the Act, each was authorised to issue a code compliance certificate. The purpose of

[1] All building work had to comply with the building code: see Building Act 1991, s 7.

such a certificate was to provide assurance to those using the building and future purchasers that the building work had been done in accordance with the building consent.

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

[6] Mr Mullane resumed building work in February 2001. The house was finished by April 2002. Nationwide gave the Council reports on progress from time to time. At no stage did Nationwide advise the Council (in the prescribed statutory form or otherwise) that it was concerned that Mr Mullane was building other than in accordance with the approved amended design or the building code. Indeed, on 3 April 2002, Nationwide issued a code compliance certificate for the building work.

[7] Unfortunately, it now turns out Mr Mullane built a house that did not comply with the amended design or the building code.

[8] In February 2004 Michael Scandle, the appellant, entered into an agreement to buy the property from the Mullanes' family trust. Before too long many defects in the house emerged. Over time the defects became so serious that Mr Scandle and his family had to stop using the house. The projected repair costs are very high.

[9] Mr Scandle took legal advice and in 2008 commenced a legal proceeding, seeking to recover the cost of repairs. He sued the Mullanes' family trust as vendors of the property. He also sued Mr Mullane in his capacity as builder. Duffy J, who heard the case in the High Court, awarded more than $450,000 damages against the Mullanes[2] but Mr Scandle has not seen a cent of it. Mrs Mullane went bankrupt. At the time of the hearing before us, proceedings to bankrupt Mr Mullane were in progress. No recovery was expected from him. There was no point suing

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2 *Scandle v Far North District Council* HC Whangarei CIV-2008-488-203, 30 July 2010 at [163].

Nationwide; it was already in liquidation. There was no point suing PK and Total Design because Mr Mullane had not built according to their plans.

[10] The only player with deep pockets was the Council. But had it done anything wrong? Mr Scandle said it had. He sued the Council for breach of statutory duty and negligence. Duffy J found in the Council's favour on both causes of action. She found the Council had not been negligent. Nor were any of the Council's acts causative of the serious loss Mr Scandle had suffered.

[11] Mr Scandle now appeals against that judgment. He accepts the Council cannot be liable for all the loss flowing from what Mr Mullane did wrong. Part of the claim against the Mullanes related to issues of weathertightness. Mr Scandle accepts the Council has no responsibility for those problems. His complaints against the Council are limited to problems relating to the piling beneath the deck of the house. It was agreed at the hearing before us that, if Mr Scandle succeeded against the Council, we should award him damages of $205,000. That was the figure the experts called at trial agreed would be the cost of remedial work for damage caused by inadequate piling.

Issues on the appeal

[12] Mr Katz QC appeared for Mr Scandle before us. He had not been Mr Scandle's trial counsel. Mr Katz did not pursue the cause of action for breach of statutory duty. Rather, he submitted that Duffy J had been wrong in her factual assessment of the Council's actions and whether they amounted to negligence. He also mounted an interesting argument on causation. He detected inconsistency in appellate authority on the test for causation. He wanted us to resolve the alleged inconsistency and also to reassess the Judge's factual findings on that aspect.

[13] We found it very difficult to isolate exactly what the issues were on this appeal. The ground kept shifting. Mr Katz prepared detailed written submissions. They were in part at variance with the pleadings on which the case had gone to trial. But that was not the only problem. There were three others. First, the ground of attack shifted within the written submissions themselves. Mr Katz began with a four

proposition summary, but the later explanation of those four propositions considerably widened the attack from that contained within the summary and attempted to raise new complaints which were not in the pleadings and which were not in issue at trial. Secondly, the statement of issues filed by Mr Katz under r 42A of the Court of Appeal (Civil) Rules 2005 did not completely mesh with the written submissions. Thirdly, Mr Katz in his oral submissions subtly changed ground yet again. We are not criticising Mr Katz: counsel retained on appeal often wish a trial had been run differently. But these matters have made it difficult for us to pin down exactly what Mr Scandle's challenge is on this appeal. To her credit, Ms Thodey, for the Council, did not bleat, at least unduly, about the shifting nature of Mr Scandle's case. As Mr Katz attempted to move his pieces on the board, sometimes in a direction which had not been foreshadowed, Ms Thodey moved from her own set play to block each and every advance.

[14] In this summary of issues, we have been guided principally by Mr Katz's summary of issues in his written submissions. In the reasons that follow, however, we have been prepared to discuss other matters which Mr Katz raised outside that summary, both in later written submissions and orally. But there has been a limit to our tolerance in that regard.

[15] In his written submissions, Mr Katz developed an argument that the Council had been negligent in four respects. First, he noted that Duffy J had found the Council was "remiss in not requiring a geotechnical report before it granted the original building consent".[3] The Judge had gone on to hold, however, that this failure on the Council's part — the only failure she found established — was not "a substantial and material cause of the loss in suit".[4] She explained in some detail why this failure was not causative. Mr Katz submitted the Judge had applied the wrong test on causation. This led her to wrongly discount this act of negligence. The first issue is therefore: was the Council's failure to require a geotechnical report before issuing the first building consent causative of the loss suffered by Mr Scandle? This issue in turn involves consideration of the appropriate legal test for causation.

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3 At [48].
4 At [49].

[16] Mr Katz summarised the second act of negligence in the following way:

> The Council was negligent in issuing the building consent in January 2001 when it well knew that there was stability issues on the site, thus engaging s 36 of the Building Act. In these circumstances, if it decided to issue a consent it was required under s 36 to notify the District Land Registrar so the title could be tagged with a notice of risk factors. Having failed to do so, that act of negligence led to [Mr Scandle] purchasing the property when he otherwise would not have done.

[17] Ms Thodey, while, as we have said, generally tolerant about the shifting nature of Mr Scandle's attack, did object to Mr Katz's attempt to raise this issue, as a breach of s 36 had never been pleaded. Mr Katz accepted that. This line of complaint would have given rise to additional evidence. It is too late to raise this as an issue now.

[18] Mr Katz summarised the third act of negligence in the following way:

> The Judge erred in not holding that the failure by the Council to require stability issues to be addressed and for the overburden to be removed (perhaps as a consent condition) were not an effective cause of the loss. It was irrelevant that the builder built otherwise than in accordance with the amended consent. Had the Council required removal of the overburden the failure would likely not have occurred.

[19] This was a reference to the fact that Mr Mullane had cut into the slope and had then spread some of the earth so cut over the rest of the site. Mr Katz refers to the earth so spread as "overburden" and is submitting that the Council should have insisted on that earth being removed as a condition of the building consent it approved in January 2001. Mr Katz's summary refers to paragraphs 73 – 83 of his submissions. As we shall see, those paragraphs go beyond this summary and appear to raise other acts of negligence.

[20] Fourthly, he submitted the Council had been negligent in not following through on its notice to rectify. Having issued a notice, the Council was duty bound to keep on the case until all matters specified in the notice were rectified to the Council's satisfaction.

[21] Coupled with this was an argument that the Council had been negligent in not checking Nationwide's reports. The Council should also have checked the accuracy of Nationwide's code compliance certificate. We shall treat that as a separate issue.

Was the Council's failure to require a geotechnical report prior to the issue of the first building consent causative of Mr Scandle's loss?

[22] At trial, the Council conceded it should have required a geotechnical report before it granted the first building consent. Its defence was that that failure could not on any sensible view be seen as a cause of Mr Scandle's loss. The Council submitted to Duffy J that there was no evidence that the land was inherently dangerous to build upon. Indeed, Mr Scandle's own expert had described the underlying ground as being of reasonable strength. None of the experts suggested the land was so inherently unstable that the Council should have refused permission to build on it.

[23] The Council submitted to Duffy J that the true cause of the damage to the house was Mr Mullane's failure to implement the solutions PK had presented. Mr Mullane had not complied with the Council's amended approval and with the building code. Somewhat inexplicably, Nationwide had not only tolerated but formally approved his building work, notwithstanding significant non-compliance.

[24] Duffy J accepted the Council's argument. Her summary on this point is worth setting out in full:

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

[25] Mr Katz disputed that conclusion. His principal argument was that the Judge had applied the wrong legal test for causation and that this had led to error in her factual analysis. Mr Katz submitted that the Judge had followed the "inappropriate" test for causation set out in *Accident Compensation Corporation v Ambros*[5] rather than the correct test set forth in *Price Waterhouse v Kwan*.[6] He submitted the latter case established that, so long as the negligence established remains "*an* effective cause of the loss",[7] liability is established.

[26] We do not accept Mr Katz's criticism of the test the Judge applied. We make six observations.

[27] First, it does not appear the argument was taken in the current form in the High Court. It is clear from her Honour's judgment that submissions were made about the appropriate causation test, but it does not seem as if the argument was presented in the way Mr Katz has presented it. We are not criticising Mr Katz in saying that; we mention it solely to emphasise that we have not had the benefit of the trial Judge's view on what is now alleged to be an inconsistency between *Ambros* and *Price Waterhouse*.

[28] Secondly, we have read carefully *Ambros* and *Price Waterhouse* and do not see any significant difference between them. The Court of Appeal in *Ambros* did not cite *Price Waterhouse*. That probably indicates counsel did not cite it to the *Ambros* panel. If that is the case, it will explain some of the differences in phraseology between *Price Waterhouse* and *Ambros*. We consider those differences to be superficial. Certainly Duffy J cited both *Ambros* and *Price Waterhouse* and purported to be following both of them; she obviously did not see a distinction

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5 *Accident Compensation Corporation v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.
6 *Price Waterhouse v Khan* [2000] 3 NZLR 39 (CA).
7 The emphasis is Mr Katz's.

between them, and nor do we. Mr Katz has not cited any case in which any other court has considered *Ambros* and *Price Waterhouse* to be in conflict. Professor Todd, in his chapter on causation in *The Law of Torts in New Zealand*, has not identified the alleged discrepancy.[8]

[29] Thirdly, *Price Waterhouse* is not authority for Mr Katz's proposition; namely that liability exists where the alleged negligence is *an* effective cause of the loss. The Court of Appeal did not accept the respondent's argument on causation, which the Court said amounted effectively to a "but for" approach, which was "not appropriate in claims based on tortious negligence".[9] The Court continued:

> [28] 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. The point was addressed in the judgments delivered in this Court in *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand* [1996] 1 NZLR 392. 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 made a more than de minimis 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. In some instances, the words used have been material *or* (as opposed to *and*) substantial. It is preferable, for the reasons just mentioned, to focus on both concepts for they are each relevant to causation issues. No form of words will ultimately provide an automatic answer to what is essentially a question of commonsense judgment.

[30] Fourthly, we accept that some support for Mr Katz's proposition can be found in an English decision, *Borealis AB* v *Geogas Trading SA*.[10] But even there the Judge found the chain of causation would be broken if there was an event which "obliterates" the defendant's wrongdoing. Even if that were the correct approach, here the Council's wrongdoing in failing initially to require a geotechnical report was "obliterated" by later events, including the Council's subsequent insistence on engineering reports, PK's redesign, the builder's failure to follow the new plans and

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8 Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) 941, especially at [20.3.01].

9 At [27].

10 *Borealis AB v Geogas Trading* SA [2010] EWHC (Comm) 2789, [2011] 1 Lloyd's Rep 482 at [42] – [44].

Nationwide's inexplicable approval of the builder's misfeasance. We wish to make clear, however, that, in so far as *Borealis* differs from *Price Waterhouse* it is the latter which must be followed in New Zealand.

[31] Fifthly, in so far as Duffy J put emphasis on one of this Court's decisions over another of this Court's decisions, a fair reading would indicate she found *Price Waterhouse* more helpful. It is true she began her discussion on legal principles by referring to the "two stage inquiry" suggested in *Ambros*,[11] but the actual test she applied, namely "whether the conduct constituting a factual cause is a substantial and material cause of the loss",[12] uses the terminology of *Price Waterhouse* and of the principal case cited in it, *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand*.[13] Indeed, after setting out the test she was applying, she referred expressly[14] to *Price Waterhouse*, saying the test was "well explained" at [27] and [28] of that judgment. It is perhaps no surprise she put more emphasis on *Price Waterhouse* as the discussion on the second stage of the inquiry (causation in law) is comparatively brief in *Ambros*.[15] That was because *Ambros* was not really concerned with the common law test for causation but was rather concerned with what the test for causation should be in the New Zealand accident compensation regime. Because of that particular focus in *Ambros*, we agree with Mr Katz that *Price Waterhouse* could be seen as perhaps the more helpful authority in the present context. Our point is that Duffy J thought so too.

[32] Finally, we would observe that, in so far as there may be a distinction in the test for causation between *Ambros* and *Price Waterhouse* (and we do not think there is), it is arguably *Ambros* that has the more relaxed test! Mr Katz's submission might have had more resonance if he had complained Duffy J had followed *Price Waterhouse* when she should have followed *Ambros*.

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11 At [37].
12 At [40].
13 *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA). Duffy J referred to *Sew Hoy* at [41] of her judgment.
14 At [40].
15 See the discussion in *Ambros* at [25].

[33] In summary, we consider Mr Katz's submission is erected on a faulty premise; his submission that *Price Waterhouse* establishes a test of "an effective cause" is, with respect, unsound.

[34] In our view, the Judge adopted the correct test. She then applied it correctly. We agree with her reasons for there being "no substantial and material causal link between [this particular] default and the loss".[16]

Was the Council negligent in permitting building in January 2001 without requiring the "overburden" to be removed?

[35] Council employees first became aware of loose fill (or "overburden") on the site when Mr Christiansen undertook his foundations inspection on 10 November 2000. The loose fill was a consequence of Mr Mullane having cut into the bank and then just spread over part of the site the earth he had dug out. As we have said, Mr Christiansen found much that was wrong when he undertook the inspection. Part of his concern, which he detailed in his s 42 notice, was the "stability of loose fill on site". He required Mr Mullane to obtain a report from an independent, appropriately qualified consulting engineer setting out how the problems were to be rectified. PK did exactly that. Among the recommendations they made was that 500 mm of fill material was to "be removed from the top of the steep slope in the northern portion of [the] site". Although it is common ground that the amended approval issued in January 2001 did not explicitly require the removal of 500 mm of fill from the top part of the site, its issuance was obviously premised on an assumption that PK's recommendations would be followed. In addition, new plans were prepared by PK and Total Design: those plans too had to be followed. These plans involved replacement of the piles on the seaward side of the house and provided for the deck to be supported not by piles but by means of a cantilever.

[36] Mr Katz's argument is that the Council, by not making removal of the fill an explicit condition, was negligent. With respect, we do not accept this submission. There are many difficulties with it. For a start, Mr Scandle never explicitly pleaded that the January 2001 approval should have been tagged with such a condition.

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[16] Set out at [24] above.

[37] Secondly, there was in any event no need for a specific condition. Mr Mullane, as the builder, knew what PK had recommended in that regard. He must have appreciated that Mr Christiansen, in approving PK's plans, was adopting PK's recommendations as to the measures needed to rectify the problem.

[38] Thirdly, the Council was entitled to assume that a close watch would be maintained during the building process, whether it or a private certifier was engaged for the process. A private certifier would have access to all the expert information the Council held. At the time of giving the approval, the Council would not have been able to anticipate that Nationwide was to fail so dismally in its task of supervising the building work.

[39] Fourthly, although there appears to be no evidence specifically focused on the failure to tag — an unsurprising omission given there was no pleading that the amended approval should have been tagged — there was much evidence, which the Judge was justified in accepting, that the Council's approach to the amended application for a building consent was in accordance with the approach other councils were taking in similar circumstances at that time.

[40] Finally, the need to remove 500 mm of fill has assumed undue emphasis in Mr Katz's submission. As the Judge observed, the solution which PK and Total Design devised "was to use a cantilevered support system for the deck" which would have "removed the reliance on the inadequate pile foundations".[17] The problem is Mr Mullane did not adopt the cantilevered deck support system but instead "continued using the original system".[18] The failure to remove the fill, while regrettable, would not have been so devastating had Mr Mullane followed PK's plans and utilised the cantilevered support system which had been designed and approved by the Council.

[41] We do not consider the Council was negligent in the manner alleged.

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17 At [27].
18 At [28].

[42] As we have said, Mr Katz's detailed submissions under this head ranged beyond his summarised ground of appeal. For instance, he criticised Duffy J's finding that there was "no evidence that the land was inherently dangerous to build on". That is a different point entirely. But in any event we are satisfied that the Judge's finding in that regard was justified on the evidence.

[43] Mr Katz then raised the question of the adequacy and reliability of PK's report. He referred to the joint report of the experts at trial; the experts had said that the PK report left unanswered certain issues. Again, that is a different point. We are not considering whether PK's report was negligently prepared. The issue is whether the Council, which had no in-house engineering or geotechnical expertise itself, was reasonably justified in relying on PK's report. We are satisfied it was.

[44] Next Mr Katz submitted that the Judge was in error in holding that the fact the house was not built in accordance with the amended consent was an answer to the Council's alleged failure in giving the amended approval. He submitted this overlooked the Council's failure to put in place "adequate precautions ... to ensure compliance with the amended consent". That is really a different point. But what could the Council do in that regard? The then legislation permitted owners to retain private certifiers to ensure building work conformed with the 1991 Act and the building code. Councils had no control over such certifiers. Councils were entitled to assume those certifiers would carry out their inspection duties in an appropriate way.

Was the Council negligent in not following through on its notice to rectify?

[45] Mr Katz submitted that Duffy J had erred in holding that the notice to rectify was spent or superseded by the new plans and amended consent.[19] He submitted the Council had an obligation to "enforce its notice to rectify". The issuance of the amended consent and the intrusion of Nationwide "did not absolve or relieve [the Council] of that obligation". Mr Katz cited no authority in support of that proposition.

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19 At [103], [104], [135] and [137].

[46] We do not accept the submission. The Council acted properly in ordering work to stop when Mr Christiansen detected problems. Mr Christiansen listed the matters he wanted the consulting engineer to consider and report on. PK did report on those issues and recommended solutions. PK then prepared plans for what was effectively a new building. In those circumstances, we consider the Judge was justified in holding that the Council's concerns had been addressed. Of course, someone needed to check that construction would take place in accordance with the new plans. Mr Mullane, as was his right, chose a private certifier to undertake the inspection role. It was that certifier's responsibility, not the Council's, to exercise reasonable care in its role of inspecting the ongoing construction. The Building Act did not envisage that parallel systems of inspection would be running.

[47] We uphold the Judge's reasoning on this point.

Was the Council negligent in not checking Nationwide's reports?

[48] Mr Katz's final point was that the Council had been negligent in not checking Nationwide's reports and in particular in not questioning the accuracy of Nationwide's code compliance certificate. He accepted that this Court had held in *Auckland City Council v McNamara*[20] that councils were not required to supervise private certifiers as a general rule, but said that the present case fell within the exception which he said this Court had recognised in *McNamara*:

> [27] No doubt the case could be different if a council well knew that a certifier was issuing certificates which it had no right to do. The purpose of the notification under s 57 would have been served and the territorial authority might be expected to set about performing the obligations cast upon it by that section. But that scenario is not suggested in this case.

[49] Mr Katz submitted a duty of continuing inspection fell on the Council from the following facts. First, the Council had a continuing responsibility to ensure compliance with its notice to rectify. Secondly, Nationwide issued only three inspection reports within 15 months after issue of the amended consent. This should have alerted the Council to problems with the inspection process. Thirdly, the Council had some knowledge of the progress of the building work as a result of a

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[20] *Auckland City Council v McNamara* [2010] NZCA 345, [2010] 3 NZLR 848.

complaint from a neighbour in May 2001 about fill at the bottom of the site "showing signs of further movement".

[50] We do not accept this submission. The Council had no inspection role once the Mullanes had elected to retain Nationwide. The circumstances in which a Council can resume inspections in terms of s 57 of the Building Act did not come to pass in the present case. We have already dealt with the point concerning the notice to rectify: it was superseded by the amended plans and the amended approval. By granting that approval, the Council was permitting work to resume on the site, in accordance with the amended plans, which it was believed would remedy the defects previously observed, if properly carried out. The obligation of properly carrying out the work fell on the builder and Nationwide.

[51] Where a developer retained a private certifier, the local authority did not have an obligation to monitor the certifier's activities. In any event, there might be a host of reasons as to why the certifier's inspection reports were sporadic, the most obvious being that building work was progressing slowly or in a stop-start fashion.

[52] The fact the Council received a complaint from a neighbour might trigger a duty to investigate the complaint but would not lead to the Council being required to take over from Nationwide as the inspecting authority. The Council did write to Nationwide following that complaint, advising Nationwide that a neighbour had complained that the fill at the bottom of the site was showing signs of further movement. This, coming on top of the sorry history of this building project, should have alerted Nationwide to the need for extreme vigilance in its inspection responsibility. But it did not mean the Council had to take over the role of inspector. Mr Katz's submission cuts right across a fundamental premise of the 1991 Act, namely that developers were free to choose private certifiers, who Parliament assumed would be competent because the Building Industry Authority would be registering as certifiers only people with appropriate qualifications, adequate relevant experience, and sufficient knowledge of the building code.[21]

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[21] Building Act, ss 51–53.

[53] In addition, Mr Katz's argument overlooks s 50 of the Building Act. Under s 50(1), a territorial authority was obliged to accept "as establishing compliance with the provisions of the building code" a code compliance certificate issued by a building certifier. Subsection (3) went on to provide that, "for the avoidance of doubt, no civil proceedings may be brought against a territorial authority ... for anything done in good faith in reliance on [a code compliance certificate issued by a building certifier]". Mr Scandle has never alleged a lack of good faith of the Council's part.

[54] Mr Katz submitted that s 50(3) was "an affirmative defence", proof of which fell on the Council. That submission, with respect, involves a misunderstanding. The subsection is intended to provide *additional protection* for local authorities. In the circumstances where the subsection applies, it would not be enough to found liability that the local authority had been negligent, say; it would also have to be shown that the local authority had not acted in good faith in relying on the certifier's code compliance certificate. In this case, Mr Scandle does not get past first base, as we have found, like the Judge, that the Council was not negligent. The Council therefore does not need to rely on the additional protection accorded by s 50(3).

[55] We dismiss this ground of appeal as well.

Result

[56] We agree with the conclusions to which Duffy J came. We dismiss the appeal.

[57] We wish to record that we feel very sorry for Mr Scandle and his family for the predicament which has befallen them. The problem for them is that, in our view, the Council is not the villain of the piece.

Solicitors:
McVeagh Fleming, Auckland for Appellant
Heaney & Co, Auckland for Respondent