IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 776/90

BETWEEN WILLIAM JOHN SCOTT

Plaintiff

AND DESMOND CLIFFORD PARSONS and LUCY MAY PARSONS

First Defendants

AND NORTH SHORE CITY COUNCIL

Second Defendant

AND JOHN GILMOUR MCCLINTOCK

Third Defendant

AND RANKINE & HILL LIMITED

Third Party/Fourth Defendant

Hearing: 11-15, 18-22 April 1993
13-16 June 1993

Counsel: Mr D G Lee and Mr J C Chamley for Plaintiff
Mr D F Dugdale and Mr P P Buetow for First Defendant
Mr H Waalkins and Mrs C Meechan for Second Defendant
Mr G MacDonald for Third Defendant
Mr D Heaney and Mrs N Edelman for Third Party

Judgment: 19 SEP 1994

RESERVED JUDGMENT OF CARTWRIGHT J

Solicitors.

For Plaintiff:	Thorne Thorne White & Clark-Walker (Auckland)
For First Defendants:	Kensington Swan (Auckland)
For Second Defendants:	Bell Gully Buddle Weir (Auckland)
For Third Defendants:	Phillips Fox (Auckland)
For Third Party/Fourth Defendant:	Heaney Jones (Auckland)

THE ISSUES

The plaintiff, William John Scott is seeking to recover losses occasioned by the collapse of a retaining wall and by the subsequent reinstatement of land and support. The first defendants, Desmond Clifford Parsons and Lucy May Parsons are also seeking to recover from the third defendant. The third defendant Mr McLintock was engaged by Mr and Mrs Parsons to design the retaining wall. He has admitted negligence in its design and construction. However he seeks partial indemnity from the first and second defendants.

The ~~first~~ second defendant, the North Shore City Council issued the permit for the retaining wall but because of Mr McLintock's admitted negligence and the part played by the third defendant, Rankine and Hill Limited, denies any liability either to Mr Scott or to Mr and Mrs Parsons. Mr Brickell is a partner in Rankine and Hill Limited and was instructed as a geotechnical engineer by the North Shore City Council to review the plans for the retaining wall and to advise whether a permit should be issued. Mr Brickell denies any negligence on his part and therefore any liability either to Mr Scott or to Mr and Mrs Parsons or to the Council.

Contractual relationships existed directly between the Parsons and Mr McLintock and between the North Shore City Council and Rankine and Hill Limited. Losses arising under those contracts or the duty of care owed by the four defendants to each other and to Mr Scott are questions for my determination as are questions of mitigation of damage, and quantum of loss suffered by Mr Scott and Mr and Mrs Parsons. The last includes the need to determine whether further remedial work is required to support Mr Scott's land permanently.

Finally, if contractual liability is established and the defendants are found to have a liability in tort, it will be necessary to apportion the losses quantified and to fix costs and interest. Submissions on the question of costs were directed particularly at the need to consider awarding costs at a high level given the length of the trial and the number of expert witnesses whose evidence became necessary.

THE PLEADINGS

The failure of the retaining wall had far reaching consequences. In Court these were reflected by the complexity and scope of the allegations contained in the proceedings filed which spun a web of mutual responsibilities and sought indemnity and contributions among the various parties. The interlocking series of proceedings require some comment.

The plaintiff, Mr Scott sues:

(a) Mr and Mrs Parsons in nuisance and in tort for depriving his land of its natural support and for negligently constructing the retaining walls causing his land to subside. He also seeks the restoration of the pre-existing support for his land.

(b) The Council for failing to exercise its duty of care in certifying the retaining wall work as satisfactory within the terms of the Planning Tribunal decision and in breaching its statutory duty by issuing a building permit for the work, thereby failing to ensure that support for his land by the Parsons' land was retained. He also alleges that the Council failed to supervise the work adequately.

(c) Mr McLintock for his negligence in the design of the retaining wall and its construction, for failing in his duty to ensure that the Parsons' land continued supporting his land, failing to exercise reasonable care in this regard and for inadequate supervision of the construction work.

(d) Rankine and Hill Limited for its negligence in reviewing, revising, altering and approving the retaining wall and programme and schedule of works, failing in its duty to Mr Scott in the performance of the work and supervision of others to ensure that his land was supported, failing to exercise reasonable care to protect Mr Scott's land and buildings, failing to note the defects in the design prepared by Mr McLintock, failing to ensure that errors in the design were corrected

before the building permit was issued, failing to warn the Council that the retaining wall was inadequate, failing to consider the impact of water pressure on the retaining wall and to provide for water seepage, failure to detect the inadequacies of the soil into which the piles were to be embedded and to detect the inadequate strength of the piles, using incorrect formulae for the design of the piles, relying on outdated borehole data and failing to update it, inaccurate estimates of the factor of safety of the wall and the loads on it and failing correctly to calculate the stability of the retained slope.

Mr and Mrs Parsons have themselves suffered loss and seek to recover personally as well as to deflect any responsibility they might owe to Mr Scott from themselves. They are suing the Council:

(a) For negligence particularly in the breach of its statutory duty to them and breach of the duty imposed by the Planning Tribunal decision when issuing the permit.

(b) Indemnity from losses suffered as the result of Mr Scott's claim.

From Mr McLintock they seek damages:

(a) In contract for the failure of the wall and loss of their building site.

(b) Indemnity from losses suffered as the result of Mr Scott's claim.

Mr and Mrs Parsons also sue Rankine and Hill Limited for the breach of its duty of care to them, the breach arising out of the design and engineering advice given to the Council.

The North Shore City Council claims:

(a) Against Rankine & Hill Limited in contract and tort for its failure to provide the advice and professional guidance sought by the Council before it issued a building permit for the retaining wall and for the breach of the Company's duty of care in giving that advice. It seeks contribution and indemnity against any successful claims brought against it as the result of the collapse of the wall.

The Council claims specifically that Rankine and Hill had used inappropriate analyses for the evaluation of Mr McLintock's design, had not undertaken sufficiently detailed calculations on the interaction among the three tiers of retaining walls, had not provided for the force of water on the walls or for water seepage, had relied on inadequate and outdated information about subsoil conditions, had failed to note that the soil at embedment depth was inadequate and had made an error in its calculations as to the stability of the slope.

The Council acknowledges that it owes a duty of care either to Mr Scott or to the Parsons' to exercise reasonable care in complying with the Planning Tribunal decision and in the discharge of its statutory responsibilities in the issue of the building permit. It claims contribution and indemnity from Mr McLintock in tort for his failure to use reasonable skill in the preparation of plans for a wall that would adequately support Mr Scott's property and for his failure to supervise the construction adequately.

Mr McLintock admits his responsibility as engineer for the defects in design and construction of the retaining wall but, as a joint tortfeasor, seeks contribution and indemnity against the claims by Mr Scott and the Parsons':

(a) From the Council for its negligence in issuing a permit based on the design submitted.

(b) From Rankine and Hill Limited for breaching its duty of care to Mr Scott and to the Parsons and for breaching the provisions of the Fair Training Act 1986 by

engaging in misleading or deceptive conduct in the provision of advice which resulted in losses both to Mr Scott and to the Parsons.

Rankine and Hill Limited while denying any liability, claims in tort for contribution and indemnity from the Council for its negligence in-

(a) Failing to obtain an appropriate engineering certificate from Mr McLintock, to ensure that its building permit was issued for a wall which would adequately support Mr Scott's land and which complied with Rankine and Hill's advice,

(b) Failing to supervise and inspect the construction to ensure that the works complied with its advice.

(c) Failing to exercise reasonable care in ensuring that Mr Scott's land received continuing support.

(d) Failing to detect the faults in Mr McLintock's wall design.

(e) Failing to identify the subsoil adequately and to ensure that the wall was embedded in appropriate subsoil.

(f) Failing to ensure that a suitably qualified engineer inspected the construction.

Rankine and Hill Limited claims a limitation of $200,000 on any liability that it might incur.

THE FACTS

The plaintiff, Mr Scott and the first defendants, Mr and Mrs Parsons own residential properties facing out across the Waitemata Harbour at Devonport. Both properties are built on the Stanley Point Peninsula with the common boundary at the east of the plaintiff's property and to the west of the defendants'. The plaintiff's home is built higher on the peninsula than the defendants', and is sited about 12 metres from the common boundary on level ground. The defendants' house was built further back from the cliff edge and in front was an area of land large enough to accommodate a second dwelling. It was the defendants' intention to build on

the front portion of their land and to obtain cross-lease titles for that purpose. In order to build on the front part of their section however, a significant amount of excavation was required as their land sloped steeply from the western boundary with the plaintiff's property towards their eastern boundary.

It was necessary to obtain planning approval for the building and excavation of the second home. After protracted proceedings culminating in a hearing before the Planning Tribunal, the defendants were given approval subject to conditions concerning the design of an adequate retaining wall for the necessary excavations. The Planning Tribunal said:

> *"The Tribunal is satisfied as to land stability both presently and once the proposed new residence (which the Parsons intend to live in) is constructed and its access way formed. However we recognise that a proper professional standard needs to be observed in the design and construction of earthworks, retaining walls and building foundations. Incompetent enthusiasm in the carrying out of earthworks needs to be prevented. .... "*

Subsequently the design for the retaining wall and the retaining wall programme and schedule of works were approved by the second defendant (at that time the Devonport Borough Council). The Council issued a permit. From March until July 1988 the first defendants carried out excavation work on their property. In order to provide a building site, it was necessary to excavate a significant portion of the sloping land or bank from their western boundary with the plaintiff.

The plaintiff had opposed the grant of a conditional use application for the building of a second house on the Parsons' property particularly, according to Mr Scott's evidence, because of his fear about the stability of the land once excavated. Mr Scott appealed from the Council's decision to grant the application. When the Planning Tribunal decision on appeal cleared the way for the second defendants to issue a permit the plaintiff engaged an engineer (Mr Hudson-Smith) to monitor the design and work being undertaken by Mr and Mrs Parsons on their property.

The Devonport Borough Council instructed its own consulting engineer, Mr McLintock (the third defendant in these proceedings) to advise it on the design for the excavation and retaining wall submitted by the first defendants' engineer. From that point, officers of the Devonport Borough Council, Mr McLintock and representatives of the third party, Rankine and Hill Limited devoted a considerable amount of time to the design of a retaining wall. While they made material available freely to Mr Hudson-Smith, the engineer instructed by the plaintiff, he had no part in designing the wall. He had certain reservations from an early stage and began monitoring Mr Scott's property closely.

The design of the excavation and retaining wall on the shared boundary ultimately approved by the Devonport Borough Council provided for a series of three parallel retaining walls. The approved design and method of construction was to drive soldier piles to a depth of some 7.5 metres into the ground along the line of the shared boundary. It was decided to jack out the piles towards the Parsons' property and fill the gap between the piles and Mr Scott's land with no-fines concrete, then allowing the piles to revert to their upright position and become embedded in that substance. By this method it was intended effectively to reinforce the piles so that there was less chance that the pressure from the weight of Mr Scott's land might cause the retaining wall to collapse. The piles themselves were intended to be embedded in cemented Waitemata siltstone, a hard rock found in the Stanley Point peninsula area. The two lower walls erected on the Parsons' property were expected to provide extra support for the main retaining wall.

Approximately on 27 July 1988 large cracks appeared on the surface of the Scott's land between the wall of the home and the western boundary. By 29 July the major retaining wall erected on the boundary began to shift with the piles leaning out at an angle over the Parsons' proposed building site. The failure worsened as the days went by and various emergency remedial actions such as disconnection of power and gas to the Scott property were undertaken. Mr Scott returned as a matter of urgency from a holiday in Australia but was

the front portion of their land and to obtain cross-lease titles for that purpose. In order to build on the front part of their section however, a significant amount of excavation was required as their land sloped steeply from the western boundary with the plaintiff's property towards their eastern boundary.

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unable to occupy his home because of fears for its safety. The collapse of the primary wall on the common boundary proceeded to a stage where the piles leaned at an angle over the Parsons' land of about 45 degrees. Clearly there was a real likelihood that the whole wall would collapse bringing with it the land at Scott's boundary and causing his house to move.

No work to prop or prevent further movement was undertaken for several days, by Mr McLintock's estimate about two, and by other estimates up to five or six days. While there has been criticism of this inability to decide how best to deal with the situation focusing particularly on the suggestion that indecision about liability and its consequences for each of those involved might have had a bearing on the delay, nonetheless I prefer Mr McLintock's evidence when he said:

> *"Sir, when the wall was collapsing, by the time I was on site it had moved out approximately one metre and was visibly moving. And I felt at that time that I couldn't ask men to go beneath it because I felt it could have collapsed completely and there may have been loss of life."*

It was always acknowledged that the propping was a temporary measure and discussions began on the best way to provide a permanent solution for the failure of the wall. Initial discussions centred on an alternative wall design which would preserve Parsons' building site immediately adjacent to the boundary with Scott's property while at the same time providing the necessary support for Mr Scott's land. A proposal was made that a retaining wall be anchored back under Mr Scott's land. I accept that Mr Scott did not immediately refuse to consider the proposal. In all the circumstances it was appropriate for him to seek independent advice. I also accept that the immediate focus of attention was on preserving the Parsons' building site which lay immediately under the failed retaining wall. The unsafe condition of Mr Scott's house was of secondary concern and received less attention. In the event he was unable to occupy his home for some weeks and final restoration was not in fact completed for some months.

Ultimately a design prepared by a Mr Luxford was adopted and implemented. In short it restored the Parsons' land to something approaching its original shape, thereby providing support for Mr Scott's land but obliterating the building site. Mr Scott's ultimate decision on the proposal to anchor the wall back into his land had been clearly conveyed. Relying on the advice of his expert engineer as to the implications of the proposed design, he would not agree to the proposal as the metal tiebacks would pass through his land and surround his house at a depth which would interfere substantially with any plans that he or a later owner might have to develop the land further. His own advisor suggested an alternative design, a cantilever wall which would derive its support from the foundations of the Parsons' proposed home. The ultimate solution was, however, the one adopted and appears to have been selected for reasons of cost and conservatism. Mr Scott's permission was not required as his land was not utilised in any way by the Luxford design.

REASONS FOR THE FAILURE OF THE WALL

It was predictable that when responsibility amongst the Council, Mr McLintock and Rankine and Hill Limited was in issue, no clear consensus as to the reasons for the failure of the wall emerged before the hearing. As a consequence, considerable time was spent at trial in exploring this issue. Eventually a common theme emerged from the variety of theories put forward in evidence.

First, a combination of factors caused the primary retaining wall to fail. The most significant of those factors was the failure to ensure that the steel and wood piles were embedded into cemented Waitemata siltstone or in lay terms, embedded in rock. That factor, alongside the interaction of the three tiers of wall, were in my view, the most critical reasons for the failure. Other factors might well have played a part. These included a high level of ground water which added significant pressure to the retained walls. I am satisfied that drainage was adequate but the fact that the piles were jacked back and allowed to settle into no-fines concrete poured between the piles and the excavated bank may also have had its impact. No-

fines concrete is a mix which ought to be permeable and allow water to seep through. There is at least a possibility that the material used had less permeability than was desirable in the circumstances.

Another possibility was that the prestressing of the piles (by their jacking out and embedment in the no-fines concrete) was an inadequate solution for the weight of the Scott land on the wall. There was also significant discussion about the Rutledge method of design for the walls considered by many experts to be inappropriate for the particular site and for the extensive excavation proposed.

Mr Brickell, for Rankine and Hill Limited was critical of the fact that the walls as built, differed markedly from the designs that he had reviewed on behalf of the Council. He was particularly scathing about the fact that the primary wall as planned was to be excavated on the boundary of Mr Scott's property to a total depth of 6.5 metres but when built, extended to a depth of nine metres - a significantly more ambitious project. As well, the second wall was excavated closer to the primary wall than had been planned and he understood that the third wall had been deleted from the plans at the time of review. When he visited the site following the failure of the wall he noted that excavation was more extensive than originally contemplated and parts of the third wall in particular had been left unsupported while other work continued on the site - all factors in his view that increased the danger of wall failure.

FAILURE TO EMBED IN CEMENTED WAITEMATA SILTSTONE

All witnesses were united in their evidence that the piles for the primary wall were embedded at a depth where the soils were too weak to sustain the load. It was a fundamental principle that this wall depended for its stability on embedment into hard materials. In this area of Auckland cemented Waitematas are commonly found. Indeed they are visible to the naked eye when the cliff face below the two properties is examined from the seashore.

In order to determine at what depth cemented Waitemata are to be located, it was critical to undertake borehole tests. These tests give an indication of the underlying strata of materials but cannot give a complete picture. It is only when the piles are actually being bored or the excavation cut that the whole picture emerges. Consequently it is critical to ensure that as the piles are being bored, the tailings removed be examined to ensure that the ground conditions anticipated by the borehole tests are in fact present.

(a) The borehole data

Mr and Mrs Parsons had instructed Mr McLintock as early as 1978 to investigate the possibility of building on the coastal end of their property. At that time five borehole tests were conducted, supplemented by an additional two in 1987 when the Parsons received their planning permission to proceed. None of the 1978 tests went deeper than seven metres and all were hand bored.

Consequently any assertion based on those borehole tests that cemented Waitemata siltstone was encountered must be incorrect.

None of the bores probed to the nine metre depth of the actual excavation and it is agreed that none of those borelogs showed ground of sufficient strength at the depth where it was proposed the piles would be embedded to guarantee the stability of the wall as designed. In fact borehole data obtained after the wall failed demonstrated that the piles would have had to be embedded to a depth exceeding 14 metres to reach ground of sufficient strength.

The information derived from the borehole logs themselves was transposed by Mr McLintock onto the plans for the design of the wall. The transposition which did not accurately reflect the borehole data gave an over optimistic indication of the strength of the ground at embedment depth. As the reviewing engineer, Mr Brickell either did not

see the borehole data or failed to analyse the information critically and note the inadequacy of the ground into which it was proposed to embed the piles.

(b) Examination of the Tailings

With very little amendment, the plans reviewed by Mr Brickell in October 1987, became the plans upon which the permit was issued by the Council. The cross-section of the dual wall delinieated on the plan includes a line indicating that the finished ground level coincides with the line of *"cemented Waitemata"*. It followed hard material would be immediately visible as the excavation for the piles reached the proposed ground level. This made it eminently possible to test the strength of the material into which the piles were to be embedded without great difficulty. In fact cemented Waitematas were never exposed at the point anticipated in the plans. This should have alerted the supervising engineer to the fact that there were errors in his borehole data or that the anticipated ground had not been encountered.

All experts were agreed that this on-the-site checking and analysis of the ground into which the piles were to be embedded was essential, not just for this retaining wall but for any engineering construction which depended on the strength of the ground for the safety of the construction. The tailings from the holes bored and an examination of the ground being excavated was vial. As supervising engineer, Mr McLintock had this responsibility. He completely failed to appreciate first that his plans showed the piles embedded into ground that was far too weak to sustain the structure and secondly, that the material excavated and visible on site once construction had begun did not represent cemented Waitemata siltstone.

THE INTERACTION OF THE THREE WALLS

From the initial concept in July 1987 to the time when the plans received their permit in March 1988, a site plan included in Mr McLintock's plans showed three relevant retaining walls - Wall

No. 1 (the primary wall), Wall No. 2 (the intermediate wall), and Wall No. 5 (the third wall). The primary wall was that at the boundary of the Scott and Parsons' land; The intermediate wall was that built approximately 2.5 metres from the first, and according to the site plan would be placed at the western most line of the Parsons' proposed house; The third wall was to be built some metres from the intermediate wall and would be built about a third of the way under the proposed house.

There was never any deviation from that proposal in the site plans and it was never drawn in detail on the plans, but from October 1987 the cross-section showing the alternative designs for a single or a dual wall did not indicate the positioning of the third wall. According to Mr Brickell, the original proposal for the third wall had been deleted by agreement, but Mr Deady for the Council disagreed he knew of no agreement to delete the third wall.

There is some divergence of opinion as to the importance of the excavation for the third wall. On balance I have come to the view that it was not a pivotal factor in the failure of the primary wall. Had all three walls been embedded in cemented Waitemata siltstone, the third wall would not have proved of any great consequence.

The fact that the intermediate wall was built closer to the primary wall than originally intended was also a matter for concern. It is clear from the evidence that excavation of any land will weaken the stability of a slope and for this reason it was necessary to analyse the interaction of the three walls as excavated. Nonetheless properly embedded and adequately supported there was at least the possibility that the three wall design as built, would not have failed.

The method selected for the design of the walls also drew adverse comment. The method known commonly as the Rutledge method was considered to be inappropriate for a construction of this complexity and magnitude. This was disputed by Mr Brickell and on his behalf by Mr Melville Smith. But the only real significance in this evidence is the adequacy of Mr Brickell's discharge of his duties as reviewing engineer, a subject to which I shall return.

RESPONSIBILITY FOR THE FAILURE OF THE PRIMARY WALL

That there may be concurrent responsibilities in contract and tort has been further affirmed in **Arbuthnott & Others v Fagan, Feltrim & Others,** (Now reported as **Henderson v Merrett Syndicate** [1994] 3 All ER 506) approving **Rowlands v Collow** [1992] 1 NZLR 178, Lord Goff of Chieveley said at 533:

> *"...In the present case liability can, and in my opinion should, be founded squarely on the principle established in* **Hedley Byrne** *itself, from which it follows that an assumption of responsibility coupled with the concomitant reliance may give rise to a tortious duty of care irrespective of whether there is a contractual relationship between the parties, and in consequence, unless his contract precludes him from doing so, the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous."*

In the present case the plaintiff's causes of action all lie in tort. The question of apportionment among different types of liability does not therefore arise.

J G MCLINTOCK

J G McLintock had a contract with the first defendants to build a retaining wall, and a responsibility to exercise reasonable care in its construction. The consequences of any failure of the wall built on a common boundary to provide protection for Parsons' land and support for Scott's boundary were patently as serious for the plaintiff as for the first defendents. The current New Zealand duty of care principles are helpfully discussed in **South Pacific Manufacturing Co Ltd v NZ Security Consultants and Investigations Limited** [1992] 2 NZLR 282, 293-294

> *"Duty of Care Principles*
>
> *It is perhaps a truism - and if so I have been guilty in a number of negligence cases of indulging in truism - to say that when a duty of care issue arises in a situation not clearly covered by existing authority the proper approach is to look at all the material facts in combination, in order to decide as a question of mixed law and fact whether or not liability*

should be imposed. In fuller form the New Zealand approach, established by what is now a long line of cases which it would be tedious to recite, is summarised in the judgment of this Court delivered by Richardson J in ***First City Corporation Ltd v Downsview Nominees Ltd*** *[1990] 3 NLZR 265, 275:*

'In ***Takaro Properties Ltd v Rowling*** *[1987] 2 NZLR 700, 709 Lord Keith of Kinkel emphasised the importance of considering all the relevant circumstances in deciding whether a duty of care should be imposed, and that the question was of an intensely pragmatic character well suited for gradual development bu requiring most careful analysis. The principles as to when duties of care arise in tort have themselves been considered on a number of occasions in this Court over the last 10 years. There is no need to raverse those decisions or to review authorities in other jurisdictions. Clearly, we have taken the view that the two broad fields of inquiry are the degree of proximity of relationship between the alleged wrongdoer and the person who has suffered damage - which is not of course a simple question of foreseeability of harm as beween the parties and involves the degree of analogy with cases in which duties are already established - and whether there are other policy considerations tending to negative or restrict the duty in that class of case. And, like Lord Keith of Kinkel, we have warned against laying down hard and fast rules as to when a duty of care arises, and have sresssed the importance of a step by step application to the facts of particular cases; see for example* ***Allied Finance and Investments Ltd v Haddow & Co*** *[1983] NZLR 22 and* ***Gartside v Sheffield, Young and Ellis*** *[1983] NZLR 37""*

The duty cast on McLintock when he undertook to design and supervise the building of the wall was the same for both landowners and no policy considerations could negate this duty. McLintock has acknowledged his negligence and the consequences of that negligence extend both to the Parsons with whom he had a contract but also to Mr Scott whose property was equally at risk.

THE COUNCIL'S RESPONSIBILITY

At the time the permit to build the retaining wall was issued and the failure of the wall occurred, the local authority was the Devonport Borough Council. Between that date and the time of issue of proceeding, that Council's role and responsibilities were taken over by the North Shore City Council. In respect of all matters relating to the local authority the term "the Council" will be used in this judgment, there being no distinction to be drawn between the

responsibilities of the Devonport Borough Council and the North Shore City Council in the context of these proceedings.

Before the permit was issued there had already been significant involvement between the Parsons' and the Council concerning Mr and Mrs Parsons' plan to build in front of their existing house. It appears that as early as 1978 Mr and Mrs Parsons had been granted consent to subdivide the property but allowed the consent to lapse. In 1986 they were granted a conditional use application to:

> *"cross-lease and erect a house on a rear site without the consent of the owners of the right-of-way access".*

In the body of that conditional use consent, Council imposed the following conditions:

> *"5. That all foundations and walls required for the proposed house be designed and their construction supervised by registered engineers.*
>
> *6. That the 1978 engineering report be updated to provide more specific information on the type of soils likely to be encountered when excavating, on the stability of the ground and any special measures needed to protect the adjacent properties during excavation and that this report and information be satisfactory to the Borough Engineer prior to the issuing of a building permit."*

Following the grant of the conditional use application in 1986 four appeals to the Planning Tribunal were consolidated and considered. In reviewing the various actions taken by Mr and Mrs Parsons which included an application for consent to subdivide the property, the Planning Tribunal touched on concerns raised by Mr Scott about the stability of the proposed excavation, referring to the Council's decision :

> *"E. That engineering advice by obtained on the effect of any proposed excavation on Mr Scott's property and whether any temporary retaining is required during construction."*

It was after this application for subdivision was refused that Mr and Mrs Parsons applied successfully to the Council for a conditional use to build their house. In dismissing Mr Scott's appeal which sought to prevent the construction of the Parsons' house, the Planning Tribunal imposed the following conditions in its judgment of 29 May 1987:

> *"No earthworks (other than any required for the purposes of engineering investigations) shall be carried out prior to the issue of building permits for the retaining walls and house foundations. Earthworks shall be carried out only in accordance with an overall earthworks, foundation and retaining wall programme and schedule of works designed and certified by a registered engineer. That programme and schedule must be lodged with the Council prior to or at the time application is made for any building permit in respect of such works. Those designs and that works programme shall, to the satisfaction of the Borough Engineer, provide for the protection of adjoining properties against slips or erosion. No building permit shall be issued or earthworks commenced until the engineer is so satisfied."*

It had been Mr Scott's contention before the Planning Tribunal that the stability of the land was questionable. According to Mr Scott's evidence before the Planning Tribunal, Mr Deady, the engineer employed first by the Devonport Borough Council and then by the North Shore City Council gave evidence that the Parsons' land was stable and that testing had been carried out to his satisfaction to establish that. The testing to which he referred were the five inadequate borehole tests conducted in 1978.

The Council therefore through its planning processes and in particular because of the direct involvement of its engineer, Mr Deady was familiar with the land on which the Parsons proposed to build. Its knowledge of the land and its characteristics were in fact far more detailed than would normally be the case when a permit to build was issued by a local authority. Moreover, the Council was well aware that Mr Scott retained a close interest and concern in the effectiveness of the design of the retaining wall. There was an exchange of correspondence before the permit was granted in which Mr Scott sought details of the plans so that he could take his own advice on them. This request was declined but the Council did write:

"In fact the method of construction and type of retaining wall were dictated by Council's requirement that there should be no ground movement on Mr Scott's property during or after construction of the wall. A much more conventional type of construction would have involved timber pole retaining walls which could have been expected to deflect by perhaps 50mm during construction. Council was not satisfied with the solution and requested Mr Parson's engineer to investigate an alternative which would not deflect. The resulting design, although a much more expensive one, is one which meets Council's criteria. In addition, during the design of the retaining walls Council has employed its own Consulting Engineer, Mr Andrew Brickell to review every aspect of the design. We have also given your clients Engineer Mr Hudson-Smith the opportunity to consult with Mr Brickell about the design. We feel the precautions which the Council has already taken are extremely thorough."

Nonetheless, in spite of Mr Scott's assertion to the Council that he would hold it responsible for any damage, not surprisingly it declined responsibility. The Council willingly provided information about the plans to Mr Scott's advisor but would not permit any representations concerning the design of the wall. The Council, and not Mr Scott would take responsibility for approving or disapproving the plan. In fact the only direct communication with Mr Scott was an early proposal to tie back the retaining wall into his land by the use of steel rods. Mr Scott indicated that he wished to obtain expert advice before giving his answer. This request was interpreted as a refusal and the three tier retaining wall plan was then developed.

As well as this knowledge and familiarity with the land and Mr Scott's pointed and long-standing concerns, the Council had certain statutory duties. Under S.641 (2) (b) of the Local Government Act 1974, these are :

"(b) The proposed building or alteration is, or within the useful life of the building or alteration is likely to be, subject to damage arising directly or indirectly from -

(i) Erosion, subsidence, or slippage of the land on which the building or alteration is proposed to be erected or any other land; or

ii) Inundation arising from such erosion, subsidence, or slippage -

unless the council is satisfied that adequate provision has been made or is to be made for the prevention of that damage;..."

While there was no evidence other than Mr Scotts' before the Planning Tribunal from which to draw an inference that the Parsons' land was *likely* to suffer damage as the result of erosion, subsidence or slippage of the land, nonetheless from the terms of the Planning Tribunal's conditions on refusing Mr Scott's appeal, it is plain that stability of the land was a matter of some importance at that time.

The combined effect of the various applications and appeals which were considered over the years in respect of the suitability of Parsons' land for building draws me to the view that the Council had at least the duty to take reasonable care if not a heightened responsibility to the Parsons when granting any building permit and, given his physical proximity to the Parsons' land and his consistently voiced concern over the years, also to Mr Scott.

The duties of local authorities have been the subject of much scrutiny both by this Court and by the Court of Appeal, over a period of almost two decades. Although **Murphy v Brentwood District Council** [1991] 1 AC 398 restricted a local authority's duty of care to an occasion where economic loss is suffered, nonetheless the New Zealand Courts have continued to adopt the approach laid down in **Anns v Merton London Borough Council** [1978] AC 728, 750 and have held that a local authority is under a duty to take a reasonable care to decide whether works to be undertaken comply with the Council's bylaws and statutory responsiilities.

In **Anns**, the two stage test criticised in **Murphy** was enunciated: first, is there sufficient relationship of proximity such that in the reasonable contemplation of the alleged wrongdoer, carelessness on his part may be likely to cause damage to the person who has suffered damage and secondly, are there any policy considerations which ought to negative, reduce or limit the scope of the duty.

In South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Limited [1992] 2 NZLR 282, the Court of Appeal held that the law relating to negligence in New Zealand had not changed, notwithstanding the judgment in Murphy. In declining to follow Murphy, Richardson J said:

> *"There are two reasons why, unless required by higher authority to adopt that course, I should consider we should not do so. The first is that, as all counsel recognised, the same considerations would be weighed in one way or another on either approach and there are no considerations on an incremental approach which would not be taken into account in the New Zealand focus on the two broad fields of inquiry. That is not surprising given that the ultimate question is whether it is just and reasonable that a particular duty of care to the particular plaintiff should rest on the particular defendant.*
>
> *In Takaro Properties Limited v Rowland [1987] 2 NZLR 700, 709, their lordships explained that underlying the decision in Yuen Kun Yeu v Attorney General of Hong Kong [1988] AC 175, "is the fear that a too liberal application of the well-known observation of Lord Wilberforce in Anns v Merton London Borough Council ... may be productive of a failure to have regard to, and to analyse and weigh, all the relevant considerations in considering whether it is appropriate that a duty of care should be imposed.' They went on to emphasise that the Courts in all common law jurisdictions were striving to achieve a careful analysis and weigh all the relevant competing considerations. So long as that crucial point is kept firmly in mind the precise road to be followed in arriving at the answer to the ultimate question would not seem to be of critical significance.*
>
> *This leads on to the second reason for not changing course. Over the last fourteen years since Anns, the New Zealand Courts have taken the same general approach to duty of care issues without any apparent dissatisfaction. Certainly it has not been suggested in any of the cases in this Court that the method of approach has caused difficulty or concern to the Bar or the wider community."*

In South Pacific Manufacturing Co Limited (supra) Cooke P expressed the issue as follows:

> *"The ultimate question is whether in the light of all the circumstances of the case it is just and reasonable that a duty of care of broad scope is incumbent on the defendant (Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd [1985] AC 210, 241 per Lord Keith of Kinkel). It is an intensely pragmatic question requiring most careful*

> *analysis. It has fallen for consideration in numerous cases in this Court over recent years and, drawing on Anns v Merton London Borough Council, we have found it helpful to focus on two broad fields of inquiry. The first is the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage. That is not of course a simple question of foreseeability as between parties. It involves consideration of the degree of analogy with cases in which duties are already established and, as I shall develop shortly, reflects an assessment of the competing moral claims. The second is whether there are other policy considerations which tend to negative or restrict - or strengthen the existence of - a duty in that class of case."*

The duty placed on the Council and the responsibilities it assumed were onerous. I shall deal with the latter first. Mr Deady was employed by the second defendant throughout the relevant period. He is a registered engineer and in the course of his duties with the Council and its predecessor, was responsible for all engineering services within Devonport. His responsibilities as engineer included considering an estimated 30 to 40 sites annually which he considered to involve problem applications. Clearly the application for planning consent and later for a building permit by Mr and Mrs Parsons fell within this category.

Mr Deady asserted to the Planning Tribunal that the land was stable. It appears that the Tribunal relied on this evidence in reaching its finding that it was

> *"...satisfied as to land stability both presently and once the proposed new residence ... is constructed and its accessway formed."*

He discussed the planned retaining wall with the Parsons' engineer, Mr McLintock in considerable detail and he, on behalf of the Council, instructed Mr Brickell, a partner in Brickell Moss (now Rankine and Hill Limited, the fourth defendant and third party) to advise Council on the proposed development, being of the view that he did not have the appropriate geotechnical expertise to evaluate Mr McLintock's plans.

Thereafter Mr Deady met with Mr McLintock and with Mr Brickell, inspected the site, did his own checks and spent an extraordinary amount of time (estimated at between 100 and 150

hours) on the Parsons' project. No matter whether I apply the more rigid two-stage approach advocated in **Anns** or the approach laid down by Cooke P in **South Pacific Manufacturing Co Ltd**,

> *"...the proper approach is to look at all the material facts in combination, in order to decide as a question of mixed law and fact whether or not liability should be imposed"*,

the Council had a detailed knowledge of the Parsons' proposal, knew precisely what fears Mr Scott had concerning it and became closely involved in the development of the plans.

It also had a clear statutory duty as well as a responsibility imposed by the Planning Tribunal to exercise reasonable care in discharging its responsibilities to Mr Scott and the Parsons. The Council took the correct approach in instructing Mr Brickell, a civil engineer with specialist qualifications and experience in the field of geotechnical engineering. But it then took a course which caused a blurring of the lines of responsibility. Quite properly the Council did not delegate total responsibility for consideration of Mr McLintock's design to Mr Brickell. Through Mr Deady, it exercised a degree of control over the design of the walls and the Council retained the responsibility to make the ultimate decision to issue the permit.

But in my view, Mr Deady went beyond the role of a professional engineer who exercised his judgment in the granting of a permit based on the information provided to him by Mr McLintock as evaluated by Mr Brickell. He became involved in the designing consultations to the degree where it could be said that he lacked objectivity and was not sufficiently detached to balance the competing needs of the Parsons who wished to build on their land and Mr Scott, who was concerned about loss of support for his.

The Council has sought to deflect responsibility either to Rankine and Hill Limited relying on its expert evaluation of the McLintock plans or to Mr McLintock himself whose negligence in the design and inspection of the boreholes has been conceded. There is no doubt in my mind

that both bear some degree of the responsibility, but simply because this is so does not absolve the Council of its obligations to Mr and Mrs Parsons or Mr Scott.

Had the council used its own in-house experts to review Mr McLintock's designs it would be liable for the negligence of its employees. It retains the same responsibilities for independent contractors hired by it. In **Murphy v Brentwood District Council,** (supra) at 279, Ralph Gibson LJ cited with approval **Cassidy v Ministry of Health** ***(Fahrini, third party)*** [1951] 1 All ER 574 at 586, [1951] 2 KB 343 at 363 where Denning LJ said:

> *"I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services."*

The Council had a statutory duty to be satisfied at the time that it issued the permit that the design of the retaining wall was appropriate for the proposed building. By reason of Mr Deady's close involvement and intimate knowledge of the plans for the retaining walls and the concerns about the land on which they were to be constructed, it ought to have known that the design was inadequate.

Moreover the Council terminated Mr Brickell's brief as reviewing engineer before the final plan on which the permit was endorsed was completed. He was not instructed to continue to review the plan or the construction of the retaining walls. The plans on which the permit were issued were the last in a long series which were contradictory and confusing. Had the Council been acting with true detachment it would have required Mr McLintock to prepare plans which showed that he understood the difference between Waitemata series and cemented Waitemata siltstone and which showed the relationship among the three retaining walls accurately.

On site it would have required confirmation from its own expert, Mr Brickell, that the piles would be embedded in cemented Waitematas, that the three walls' design was an appropriate one for the site, that the walls were constructed at the correct distance apart and in all other ways according to plan. Nor can it escape liability because it is good engineering practise to check the embedment of the piles as the holes are being drilled on site. Its responsibility was primarily at the time the permit was issued. If the wall was not correctly designed at that stage, if as was clear from the plans that the ground into which the piles were to be embedded was described in a contradictory manner the Council should then have been alert to prospective problems.

There are occasions where liability will shift to an independent contractor. In Dynes v Warren and Mahoney and Others (A.242/84 HC Christchurch Registry, Tipping J, 18 December 1987) the first defendant, an architect, instructed consulting engineers to advise it on the construction of a swimming pool and house complex on filled land. The Court held that the building inspector did all that was reasonably expected of him and that the Council was entitled to rely on the design certificate supplied by the engineers. Tipping J said,

> *"However, it is quite clear that a local body is not an insurer and its duty is no more than to take reasonable care in all the circumstances".*

This statement was echoed in Sloper v W H Murray Ltd & Maniapoto County Council (Unreported judgment of Hardie Boys J, A 31/85 High Court Dunedin, 22 November 1988),

> *"A local authority is not an insurer, nor is it required to supply to a building owner the services of an architect, an engineer or a clerk of works. It has a responsibility to ensure the maintenance of adequate standards of health, safety and building construction. In general, this responsibility is discharged by the enactment and enforcement of by-laws; and in relation to particular projects, by control exercised in two phases, first that of permit approval, and secondly that of inspection during the course of the work. In both phases the local authority's duty is to take reasonable care. What is reasonable will depend on 'the degree and magnitude of the consequences which are likely to ensue' - per Greig J at first instance in Stieller [1983] NZLR 628,635. The foundations therefore call for closer scrutiny than the other less essential parts of the*

> *building. What is reasonable will also to a degree depend on the nature and constitution of the local authority itself, and the resources available to it."*

The North Shore City Council even in its Devonport Borough Council days was a metropolitan authority with access to a wide range of expertise. This is demonstrated by the fact that it employed its own Borough Engineer who took a close interest in this particular project. There is a marked contrast between the situation in **Dynes** and that in **Sloper** where the building inspectors' qualifications were such that they were obliged to rely heavily on the expertise of others. Moreover the role of a building inspector checking on building construction is of more limited scope than that imposed on a council engineer faced with issuing a permit for a complex and major earth-retaining project.

Whether the Council chose to delegate its responsibility totally to consulting engineers or as occurred, retain responsibility for the ultimate approval of the plans, it still had a duty to take reasonable care in granting the permit to build and ensuring that the inspection during the work was adequately carried out. It did neither adequately.

The fact however that the Council must bear some responsibility does not automatically absolve Rankine and Hill and it is necessary to examine Mr Brickell's part in the evaluation of the design of the retaining walls.

RANKINE AND HILL
LIMITED'S LIABILITY

Rankine and Hill Limited is the company which succeeded Brickell Moss Raines and Stevens Limited. Andrew Brickell of the latter company was engaged by the Council to

> *"carry out an independent review of a building permit application for retaining walls associated with a residential development".*

At that time the role of a reviewing engineer was set out in a practice note issued by the Association of Consulting Engineers New Zealand under Bylaw No. 4 "***Reviewing the Work***

of a Professional Engineer". The practice note distinguishes between the role of a *"reviewing"* and a *"checking"* engineer, but to all intents and purposes any distinctions are not relevant to the present set of facts. Insofar as the practice note is relevant to the present proceedings, it states:

> *"Any person being 'reviewed', even in an internal review within a consulting engineer's office, tends to react defensively.*
>
> *For the review to be constructive and helpful to the engineer, and his client, it must be conducted sensitively and in an atmosphere or trust with full disclosure of facts and opinions.*
>
> *Such a position of trust cannot be maintained if there is a risk of accusation of blame for some loss resulting from the execution of a consultant's work."*

And at paragraph 5:

> *"A member shall exercise discretion, tact and restraint in the role of a checking engineer and shall do his best to ensure that the check is carried out in a climate of mutual confidence and understanding.*
>
> *6. A member shall recognise that he has no duty to comment on the choice of the design, only upon its validity and satisfactory compliance with a local authority's by-laws or checking procedure. He must also recognise that unnecessary delays on his part could mean loss of revenue to the owner and may lead to a complaint being laid with the institution.*
>
> *7. Any member shall consider the consequences of his decisions as they may effect risks and costs to the owner or to the public, the reputation and livelihood of the design engineer and equally important, to the good standing of the profession itself. Where he feels that the design engineer's work is seriously at fault, the member shall make every endeavour to resolve the matter with the design engineer and shall not hesitate to obtain another independent opinion."*

Other material in the practice note stresses the requirement that a reviewing or checking engineer remain independent of the design engineer and his client. A number of relevant themes emerge:

1. That the reviewing engineer's primary responsibility is to consider the consequences of the proposed work both for the owner and for the public at large.

While undoubtedly Mr Brickell had a responsibility to the Council, nonetheless that responsibility can be determined only in the light of the interests of the ultimate client, Mr Parsons. In the circumstances of this case, the work being undertaken on the Parsons' land demonstrably had consequences for Mr Scott's adjoining land. Consequently Mr Scott's interests were also pivotal if not as a client, then at least as a member of the public who is likely to be affected directly both by the design decisions and the construction of the retaining walls. Both the Parsons' and Mr Scott's interests would clearly fall within the guidelines set out in the practice note.

2. While it is essential to remain independent of the design engineer, nonetheless the reviewing or checking engineer has a responsibility to ensure that the design is functional in the interests of the client and the affected public generally. In order to maintain working relationships which will achieve the desired objective, it is necessary that normal professional courtesies and tact be exercised in the review function. Collegiality is not an end in itself, simply a means to the end of ensuring that the client and the public's interests are served.

In my view, objectivity, professional detachment and preserving good communications in the interests of ensuring that the public's interests are served are all important facets of a reviewing engineer's role.

There can be no criticism of Mr Brickell's endeavours to reach a cordial and satisfactory conclusion so that Mr McLintock's designs could receive a permit from the Council. He maintained constructive and positive relationships with both Mr McLintock and Mr Deady.

There have however been some allegations about Mr Brickell's failure to observe certain professional standards. The most critical are first, in relationship to the third wall and

secondly the fact that the primary retaining wall in particular was not embedded in cemented Waitemata siltstone.

(a) **The Third Wall**

It was Mr Brickell's evidence that he understood after discussion with Mr McLintock, the third wall would be deleted. While that may have been Mr Brickell's impression it was not shared by the designing engineer, Mr McLintock and nor by Mr Deady. The issue is not confined to a determination of credibility. The third wall was shown on the site plan consistently from the first design submitted through to the last plan that Mr Brickell reviewed prior to the issue of the permit. Detailed calculations were not contained in the plans but even a lay observer could note that a third wall was in contemplation.

The fact that Mr Brickell failed to require a clear, final plan that overtly deleted the third tier is symptomatic of the careless plan presentation which was condoned by him. The plans should have demonstrated precisely what was proposed. If he considered that it was pivotal for the safety of the design, Mr Brickell's responsibility was to ensure that the third wall had been eliminated . It was not good enough to assume that a decision to eliminate the third wall had been made when the site plan continued to show its existence.

If Mr Brickell remained of the view that the deletion of the third wall from the plans was important then he did not adequately communicate that either to Mr McLintock or to Mr Deady. In this respect his role as reviewing engineer failed.

(b) **Embedment**

On the evidence before me the borehole data and its review was probably more critical. I accept Mr Brickell's evidence that he considered it essential to embed the piles for the primary wall in cemented Waitemata siltstone. The borehole data obtained by Mr

McLintock in 1978 and supplemented in 1986 was inaccurately transposed to the plans. The borehole data itself was freely available from the Council or from Mr McLintock. Reference was made to it in correspondence and it appears likely that Mr Brickell at one stage would have had the opportunity of reviewing the material in Mr McLintock's file. He did not take the step to review this fundamental information. He relied on the data transposed onto the plans and while it is his assertion that it would be inappropriate to double check all of Mr McLintock's material, nonetheless the consensus of opinion from all the experts who have given evidence during this trial is that the embedment material was a critical, if not the most critical factor in the design of the retaining wall. This being so it would seem basic to check the data in the same way that he undertook a responsibility to check Mr McLintock's calculations.

Moreover there was confusion in terminology on the plans which referred to:

"start of Waitemata series"

and *"cemented Waitemata NB: this is the worst case for the depth of the Waitemata series from the top of the wall"*.

The interchangeable use of the term *"Waitemata series* and *"cemented Waitematas"* demonstrates the lack of precision in the plans and ought to have alerted Mr Brickell to the need to check whether Mr McLintock was referring to the embedment material in its generic sense or specifically as the hard rock which was pivotal to the design. Had he checked the borehole data he would have noted immediately that ground of quite inadequate strength was encountered during the tests and advised Council accordingly. At that point the design could have been amended or a permit refused.

It is Mr Brickell's submission that as the holes for the piles are being drilled or the ground excavated, the strength of the material must be checked so that the adequacy of the design can be confirmed. All experts were agreed that this was an important part of the supervision of a construction of this nature. In my view however, that both

accurate initial borehole data and monitoring of the ground during construction are important. The design depends on the former and confirmation of its safety on the latter. Monitoring during construction assumes importance only if the anticipated ground strength is not encountered. At that point plans would have to be amended to accommodate the new conditions and occasionally work stopped until that is done. But early analysis of the anticipated ground by way of borehole tests is important to the design and the issue of a permit depends on it. Rankine and Hill cannot therefore rely on the intermediate inspection to escape responsibility for not having reviewed the borehole data.

(c) The Primary Wall

As well as those specific matters, it is my view that Mr Brickell's part in the review of the initial design went beyond the role of an objective reviewing engineer. First, I am satisfied that he did not always stand back, criticise the design and ask the designing engineer to provide solutions, but proposed solutions himself which were then adopted by Mr McLintock and incorporated into the design. The amendments from timber to steel piles, the substitution of no-fines concrete for scoria, and the supply of calculations which were adopted by Mr McLintock fall into this category.

I was left with little doubt but that Mr Brickell, Mr Deady and Mr McLintock spent a significant amount of time discussing the initial proposal and reaching agreement amongst themselves as to how it ought to be amended. It is a fine line between reviewing and requiring solutions or appropriate amendments, and actually suggesting or appearing to suggest changes which are ultimately incorporated into the design. It should be said however that in circumstances such as these it will always be difficult to maintain that professional detachment. Nonetheless I do not consider that Mr Brickell managed to achieve the appropriate amount of detachment. The planning and the review merged and a composite design was the result.

In addition, the confused nature of the plans satisfy me that Mr Brickell, Mr McLintock and Mr Deady all believed they knew what the detail of the design was to be and therefore did not consider it essential to have a clean plan in its finally amended form for permit purposes. Mr Brickell relied on Mr Deady to check that all amendments discusssed amongst the three engineers were incorporated into the finally permitted plan and did not insist that he check the final plan for himself. There were inconsistencies both as to the inclusion of the third wall and as to the terminology for embedment conditions.

Finally, Mr Brickell failed to detect Mr McLintock's lack of confidence in aspects of the design. For example, Mr McLintock was unsure about the suggested change from timber to steel piles. Had Mr Brickell appreciated this, he might well have inferred that Mr McLintock's skills and experience were insufficient for the complexity of the design.

I found Mr Luxford's evidence particularly helpful when considering the responsibilities of a reviewing engineer. Mr Luxford's concern was with the failure on the part of the design reviewers to note that the primary and intermediate walls impacted on each other and "*could not be designed independent of each other*". He went on to say:

> *"However the review process while failing to identify the primary deficiency in the design, in my opinion effected design changes which exacerbated the overall deficiency ..."*

Mr Luxford reserved particular concern for the implementation of the pre-stress on the piles which:

> *"completely changed the stress conditions behind the poles and led further to an overstressing of that soil in front of the poles which was resisting the load on the poles... In short, a very sophisticated design modification was attempted without any evidence of an understanding of the design ramifications. This in my opinion aggravated the overall deficiency."*

While acknowledging that this evidence was called on behalf of Mr McLintock who himself hopes to share the responsibility for the wall failure with the Council and Rankine and Hill Limited, nonetheless Mr Luxford's evidence lacked partisanship. His technical analysis coincided with my impression that design modifications which I find were suggested by Mr Brickell, may well actually have had an unintended impact on the safety of the overall structure. It should also be said that neither Mr Deady nor Mr McLintock had the necessary experience or knowledge to have conceived the plan to pre-stress the piles by jacking them out and embedding them in no-fines concrete. Even if on closer analysis this pre-stressing did not contribute to the failure of the wall, nonetheless it demonstrates that Mr Brickell went beyond the role of a detached reviewing engineer in making a suggestion which was incorporated into the design.

THE ROLE OF THE REVIEWING ENGINEER

The practice note and the objectives of a review require the following:

1. Professional detachment.
2. Placing the interests and safety of the ultimate client and the public at the forefront.
3. Maintaining normal professional courtesies among engineers. Tact, courtesy and discretion are necessary only to ensure that the design objectives are achieved in an atmosphere of mutual trust and confidence. Professional jealousies could endanger this.
4. Each person involved must maintain a particular role. It is the designer's role to design the edifice, while the reviewer stands back, evaluates the whole concept from his or her professional perspective and cross-checks pivotal features such as calculation for load factors and the strength of the embedment conditions.

5. If the reviewing engineer has doubts, they must be expressed clearly and in detail, and preferably in writing so that the local authority has adequate material on which to make decisions about permits. The reviewing engineer also has a responsibility to set out clearly and unambiguously the design and monitoring criteria which are to be observed by the designing engineer.

6. Before completing the review, the reviewing engineer should sight plans or other relevant information which confirm that any amendments resulting from the review are correctly interpreted by the designing engineer and unambiguously incorporated in the design.

7. Where the reviewing engineer has serious doubts about the designing engineer's ability to provide an adequate design, this should be stated and if necessary a second opinion obtained. This is not interference in another professional's role; it is a step which must be taken if the client or the public's interests or safety might otherwise be jeopardised.

LIABILITY AND CONTRIBUTION

The fourth defendant was in a contractual relationship with the Council. Applying the principles enunciated in Henderson v Merrett Syndicates Limited (supra), contractual duties can and do exist alongside a duty of care. The latter responsibility to Parsons and Scott is no less proximate for the fourth defendant than for the second, but lies initially to the Council because of the contractual relationship. If the fourth defendant was negligent in its work for the Council then the consequences which might flow were obviously likely to be detrimental to the interests of the plaintiff and the first defendant. Moreover its negligence might well have an adverse effect on the third defendant whose work he was reviewing.

Rankine and Hill Limited accepted a responsibility to review and check the concept and detail of the proposal to build the retaining walls on Parsons' land. In failing to ensure that the piles were to be embedded as indicated on the plans in cemented Waitemata siltstone, it breached the terms of its contract with the Council.

It was submitted, reflecting the statement of Cooke P, in South Pacific v NZ Security, (supra) at 298, that both Mr Scott and Mr and Mrs Parsons had adequate remedies against the Council which would enable the fourth defendant to avoid liability -

> *"Conversely, a point telling against recognising a new common law duty of care arises when such a duty would cut across established patterns of law in special fields wherein experience has shown that certain defences, not dependent on absence of negligence are needed; or wherein an adequate remedy is already available to a party who takes the necessary steps."*

However, that test depends on a finding that there was no negligence on the fourth defendant's part. Applying the test in Murphy v Brentwood District Council (supra) 269, where a Council would be liable for the negligence of consulting engineers notwithstanding that they were independent contractors, both Mr Scott and the Parsons have claims in tort against the Council for its negligence in the issue of the permit and failure adequately to ensure that the construction was in accordance with the permitted plans. The Council, however, has its own action against Rankine and Hill Limited, both in contract and in tort, and Mr McLintock an action in tort against the Council and Rankine and Hill Ltd. The end result of my finding of negligence against those three parties is that responsibility for the failure of the wall must be shared between the Council, Rankine and Hill Limited, and with Mr McLintock who has admitted his negligence.

The fourth defendant submitted that any liability which it might owe to the Council is limited to the sum of $200,000. In Conditions of Engagement for Consulting Engineers, a document prepared by the Association of Consulting Engineers for New Zealand and produced by the Fourth Defendant, the limitation of liability is expressed as:

> *"12. If the Consulting Engineer or any subconsultant shall be found liable to the Client (whether under the express or implied terms of this agreement and whether in negligence or otherwise in common law) for any costs, loss or damage suffered by the Client, however caused and of whatever nature, arising out of or connected with the performance or*

failure of performance of services by the Consulting Engineer or any subconsultant, then the maximum amount of that liability in total for the aggregate of all such claims shall be $200,000."

The point was not pleaded but does not in any event survive a finding of negligence against it in its dealings with the third defendant. Even if it was an express term of its contract with the Council that the fourth defendant's liability would be limited, that limitation cannot be imposed on any third party to whom a duty in tort is owed.

Having traversed the findings on facts, it is appropriate to consider the question of liability for the damages sought by the plaintiff and secondarily by the first defendants. The plaintiff was not in a contractual relationship with any of the defendants. His pleadings have been founded in tort against each. In addition he claims in nuisance against Mr and Mrs Parsons for their failure to provide natural support to his land. In support of his claim in negligence against the Council he asserted that it had failed to discharge a statutory duty to him and therefore had breached its duty of care. The third defendant owed him a duty of care; if the wall was inadequately designed because of his failure to exercise reasonable skill and care then the plaintiff's land was as much at danger as the first defendant's. The fourth defendant in failing to review the design of the wall adequately also breached a duty of care and the consequences for the plaintiff were as patently obvious as they were for the Parsons.

The plaintiff has brought his proceedings against all four defendants. While there may be some ambiguity over the precise standing of Rankine and Hill Limited (described as third party/fourth defendant) nonetheless the company has been treated throughout as being on the same footing as the first three defendants. There may be an argument for making findings only against the first defendants leaving them to seek contributions from the second, third and fourth defendants. That is not a course that I favour. All four defendants have a concurrency of obligation owed to the plaintiff, a concept developed in "*Contribution between Defendants*" 1980 16 VUWLR, 235 Malcolm J M Shaw.

"For most purposes, including contribution between tortfeasors, any distinction between joint tortfeasors and merely several tortfeasors is redundant. Section 17 (1) (c) of the Law Reform Act 1936 which provides for contribution between tortfeasors applies equally to all tortfeasors. Williams suggests a suitable name for both is 'concurrent tortfeasors'; they are members of the larger class of 'concurrent wrongdoers'. Concurrent tortfeasors are persons whose tortious acts have concurred to produce the same damage, and each is liable in full for the damage collectively done."

Each tortfeasor has breached an obligation to the plaintiff and a combination of the wrongs committed gave rise to the damage suffered by him. Moreover, the case has been argued on the basis that whatever damage has been suffered by the plaintiff should be apportioned among those found liable. It is therefore appropriate to treat the four defendants as joint and concurrent tortfeasors and apportion liability for the damage in the interests of the overall justice of the case. This approach will also effectively dispose of the substance of the contractual cross claims among some of the defendants.

Section 17 (1) (c) of the Law Reform Act 1936 clearly contemplates such a course. It enables a tortfeasor to recover against another who would have been liable in respect of the same damage *"whether as a joint tortfeasor or otherwise..."*. Some analysis of the tort committed by each defendant is nonetheless necessary in order to identify the concurrency of responsibility and to ensure that the apportionment of contribution is appropriate.

The plaintiff is entitled to recover against the first defendants for damage occasioned by the failure of the retaining wall. He measures the extent of the damage suffered broadly under these headings:

(a) The cost to him of reinstating his land and repairing the damage to his house and access to it.

(b) The loss of value to his property arising from the stigma attaching to land which has proved unstable.

(c) General damages for stress and inconvenience.

The first defendant bears losses himself (a) for the loss of his building site and (b) for the costs of his preparations to build, interrupted well into the building programme. The second, third and fourth defendants share responsibility both contractually and tortiously. As amongst themselves the degree of responsibility will become a matter of some moment.

McLintock has attempted to mitigate the losses suffered by Mr and Mrs Parsons by purchasing the house which was about to be erected on the building site, and has spent many unpaid professional hours supervising the temporary restoration work. He seeks to share the responsibility for further cost with both the Council and the fourth defendant and to receive an appropriate credit for the cost already borne by him.

The Council has failed in both its claims to deflect responsibility either to McLintock for his primary role in the collapse of the wall and to the fourth defendant as its independent contractor. It clearly owes a duty of care enhanced by the Statutory and Planning Tribunal responsibilities to both the plaintiff and the first defendant. The fourth defendant has a contractual duty and a duty of care to the Council and a duty to McLintock for its failure to review his work adequately as well as for its assistance in the design of the Walls. Rankine and Hill also has a responsibility due to its proximity to both the plaintiff and first defendant. The first defendants are liable in nuisance to the plaintiff to provide support to his land. Much if not all of the financial consequences of that duty can be shifted to the second, third and fourth defendants as a consequence of the contractual responsibilities and duty of care owed by them to Mr and Mrs Parsons.

The first defendant must however bear some degree of responsibility. He pursued his application to excavate and build vigorously over a lengthy period and against the implacable opposition of the plaintiff who Cassandra-like warned all who participated in the various planning applications of impending doom.

The proportionate responsibilities of all four defendants must be evaluated and their respective duties of care and contractual responsibilities delineated. The need to restore support to Scott's property was forseeable if the wall collapsed. The extent of the necessary restoration requires determination.

ADEQUACY OF THE RESTORATION WORK

Professional views on the adequacy of the restoration work done following the failure of the walls fall into two predictable groups. Those claiming that the work is adequate and can be treated as permanent remedial work are the Council, Mr McLintock and Rankine and Hill Limited on whom might fall the responsibility for further expenditure to restore the land and provide permanent support for Mr Scott's property.

Mr Scott takes the view that the restoration work can be regarded as only temporary and that further major work is required to reinstate the support for his land to the standard it was prior to the failure of the walls. Mr and Mrs Parsons remain neutral. They have no practical interest in the outcome, having since sold the property.

In support of his contention that the work could be regarded as temporary only, counsel for Mr Scott called Dr D V Toan. Dr Toan has academic qualifications of the highest order and he has significant experience and expertise in land stability and restoration following structural failure. Dr Toan conducted a retrospective or "*back*" analysis of the factor of safety of the land on Parsons' property prior to the excavation and compared it with the present condition of the land following what I shall describe as "*temporary*" restoration. In the latter analysis he

also considered the impact of an earthquake of the magnitude which might occur once every fifty years. It was his opinion that following the temporary restoration the slope had a factor of safety of 1.2 which is considered to be inadequate for long term stability of the land and lower in the assumed earthquake conditions. It was also his opinion that factors both of safety were less than that retrospectively analysed for the land prior to the construction and subsequent failure of the walls under both normal and earthquake conditions.

Counsel for Mr McLintock called Mr N S Luxford. His qualifications are impressive both academically and in terms of his experience and expertise in the field of geotechnical engineering. Mr Luxford carefully analysed the evidence given by Dr Toan and reached a different conclusion. It was his opinion that the land as temporarily restored has a factor of safety of 1.73 which would be considered adequate for permanent stability and which in his opinion was a better level of safety than existed prior to the construction and failure of the walls. He criticised Dr Toan's analysis particularly on the basis of the assumption made about the ground water level both before and after the failure of the walls. In Mr Luxford's view the assumptions made were contradictory and were not consistent with the clear information obtained from a survey of the land which provided data about seepage and effectiveness of the drainage installed.

Dr Toan's assumptions in short had ground water at a higher level than Mr Luxford considers to be accurate. The added pressure of ground water on the restored land will obviously be greater the higher the ground water level is determined to be.

Dr Toan was challenged at some length about the conclusions he had reached concerning the stability of the temporary restoration. It remains his view that its factor of safety is lower than that which obtained before the excavation commenced. In his opinion the assumptions that he made about ground water level were not in any event such a critical factor as Mr Luxford considered. In fact applying slightly different assumptions did not have any

significant impact on his conclusion. In the final analysis it is his opinion the soil strength in the temporary restoration is weaker than that prior to excavation.

Viewed objectively that conclusion must be so. First, the land that was excavated on the Parsons' property had remained undisturbed possibly for centuries. The restoration work involved compacting of fill into the excavated slope which comprises the steps which were cut for the three walls. Inside the newly restored slope remain the steel and timber piles and the timber struts which were placed to prop the failing wall. Those piles and struts give an additional strength to the excavated wall at the boundary between Mr Scott's property and the Parsons' land but to some degree inhibited the compacting of fill. Although extensive new planting has been undertaken, the land prior to excavation had undisturbed cover which added to its surface stability. On any pragmatic view, while the temporary restoration work has been undertaken with great success, nonetheless it is likely to be less stable than the undisturbed land.

My view on the stability of the land depends not only on the analyses conducted by two highly qualified engineers and what I have termed the objective view, but on the evidence on the site which has been reviewed over the years since the temporary restoration was put in place. Mr Hudson Smith for the plaintiff, described cracking which he considered consistent with a gradual "*creep*" of the temporary restoration down the slope. Mr Luxford took the stance however that this was not "*creep*" indicating possible failure of the restoration but a shrinkage of the clay and topsoil skin that had been placed over the compacted fill. Shrinkage was to be expected because the compacted fill was permeable material providing excellent drainage.

A consulting engineer was engaged to assess the possibility that there was ongoing movement on Mr Scott's property. Over a period from May 1993 some movement has been detected. However, it is not possible to assess whether shrinkage or ongoing instability is the cause.

I have considered the question of the stability of the temporary restoration with some anxiety. On the one hand the cost of restoring the land to its previous stability with certainty is great. On the other hand if left as it is, first and least importantly, the land between the boundary and Mr Scott's house remain one to two metres lower than the original level. It has been argued that Mr Scott is not entitled to have that part of his land restored as there is some evidence that it was filled land. Mr and Mrs Parsons' obligation to Mr Scott's land is to support its natural state not the filled portion. On the other hand Mr Scott has lived in that property for many years with the land to the boundary at a higher level than it exists today. That is a loss to him occasioned by no fault of his own. Loss of the land can be compensated but without extensive more permanent restoration work, it cannot be replaced.

More important however, is the central question of the real stability of the temporary restoration. It must always be acknowledged that the original slope might not have been at the highest level of stability. Indeed Mr Scott recognised that himself when he protested for so long about the Parsons' plans to build on their land. But if the factor of safety is less than before excavation, the threat to his property and physical safety is high given the proximity of Mr Scott's house to the temporary restoration.

The other factor is this. Three engineers, one of whom was a well qualified and experienced geotechnical specialist considered that the original plans to excavate and construct retaining walls were sound. Primarily because of human failings that wall collapsed. There is no evidence at all that the temporarily restored slope has endured the same mistakes but I cannot ignore the fact the original plans proved unsafe and that the land is now at best only marginally safer than it was previously.

As I have already indicated, it is however my view that temporary restoration has a factor of safety lower than that which previously obtained. There are some signs which include the shrinkage and evidence of marginally increasing cracks in Mr Scott's house that give me cause for concern. If for some reason the temporary restoration does fail and its failure is due to

the fact that it is weaker than the original land, then the physical safety of those occupying Mr Scott's house has been put at increased risk. On balance then I consider that permanent restoration should be undertaken.

PERMANENT RESTORATION

I have heard evidence from Dr Toan proposing that the existing piles at present buried under the temporary restoration be tied back to anchors at the boundary of Mr Scott's land. This proposal has been criticised primarily because it was one which has been described as identical to that declined by Mr Scott. While I have already found that Mr Scott's reluctance to agree to such a proposal was understandable in the circumstances, the proposed plan is in fact not identical. The original plan put by Mr McLintock involved anchoring the wall at a comparatively shallow level beneath the ground around Mr Scott's house. Dr Toan's proposal by contrast uses the same method but the anchors will be at the boundary of the Scott and Parsons' land and anchored at a sharp level and deep at that point. Interference with any development of Mr Scott's property will be minimised as a consequence. With the original proposal he would not without great difficulty be able to excavate anywhere in the vicinity of his house nor given the slump in the land at the boundary could he carry out any redevelopment to within about eight metres of his boundary. Dr Toan's proposal means that he would be able to excavate or develop the property to within about three metres of the boundary and is therefore a much less intrusive plan.

In coming to this view I have also considered the consequences for Mr Scott and the Parsons. The construction of the remedial work recommended by Dr Toan which I have accepted, has what at first sight is a further advantage. It will permit the building site on the Parsons' land to be developed. The permanent restoration will also allow the slumped land on Mr Scott's side of the boundary to be restored. However there will be no significant practical advantage to the Parsons. They have sold the land and the purchaser who happens to be Mr Scott will benefit from the prospective recovery of the building site. While the agreement for sale and purchase specifically states:

"It is acknowledged by both parties that this transaction is entered into by a willing vendor and a willing purchaser, and it is agreed by both parties that this transaction is entered into as a transaction independent of the present High Court proceedings between the parties and is in no way connected with those proceedings or induced thereby."

in attempting to achieve a result that is just to both parties and fair to the other three defendants, I cannot ignore the fact that Mr Scott may be seen inadvertently to benefit from my determination on the question of the restoration work. I shall take that factor into account when assessing general damages.

MR MCLINTOCK'S LIABILITY

As the designing and supervising engineer, Mr McLintock played the most critical part and had to carry the most substantial responsibility for the failure of the wall.

MEASURE OF DAMAGES

1. **The plaintiff is entitled to recover:**

   (a) The loss of support for his land in its natural state from the first defendants.

   (b) The loss of the filled portion of the land.

   The first defendants may shift liability under (a) to Mr McLintock, the Council and Rankine and Hill Limited who must also bear the losses sustained under (b). Both of these claims will be met by restoration of the land. The total cost of permanent restoration has been calculated at $230,000 (plus GST). There is no serious disagreement with that sum which I now fix.

2. **Mr Scott must also recover the cost:**

   (a) of repairing the damage to his house.

The damage to his home was slowing but still apparent as at the date of hearing. The cost of repair (estimated at $16,000) will be calculated after completion of the permanent restoration work agreed among the parties and met by the second, third and fourth defendants in the proportions I shall fix.

(b) of repairing the right of way.

It was always Mr and Mrs Parsons' intention to meet the cost of repairing the right of way shared with Mr Scott and one or two other adjoining owners when their house was built. The cost of repair to that portion of the right of way used for access to the Parsons' building site down to the time when the walls began to fail will be met by them totally. Damage to the last portion of the right of way which was used only for access to Mr Scott's house was caused when as a matter of urgency it became necessary to bring heavy machinery onto the property as the walls began to subside. The cost of restoring the part of the right of way used exclusively for access to Mr Scott's house will be ascertained following the completion of the permanent restoration work and met by the second, third and fourth defendants in the proportions I shall fix..

(c) The reduced value of the Scott property.

I accept the evidence that once land has slumped there will be a buyer resistance which will have an effect on price. Mr Scott's property is clearly a desirable one which on the evidence will generally be sought after and the detrimental effect will therefore be ameliorated. However the failure of the wall received wide publicity which undoubtedly resulted in the market being made aware of possible problems ahead. Mr Scott personally co-operated with that publicity and is therefore at least partly responsible for spreading the message of gloom. The end result is however that the property will have achieved a reputation and no party seriously disputed that.

The plaintiff called evidence which confirmed that the market value of cliff side properties will always be affected by the risk of natural erosion occurring but that the Scott property suffered the additional stigma of a known major subsidence which resulted in damage to the house. The defendants disagreed about the degree to which the property had reduced in market value. Based on market sales' evidence relating to a nearby cliff side property, Mr Esplin for the plaintiff fixed the discounting factor at 15%, arriving at a hearing date valuation of approximately $600,000. However in reaching the 15% discount figure, he relied heavily on the sales history of a property of a significantly lower value which was the subject of a mortgagee's sale.

There is no clear analogy between the two properties. The only similarity is that both are cliff side and have suffered stigma in the market's view because of subsidence nearby. By contrast the Council's expert witness fixed a 5% discount factor for the market stigma attaching to the property calculated after considering the caution with which potential buyers already approach to cliff side properties. Restoration of the land and repairs to Mr Scott's house will do much to remedy any pessimistic market perception.

I do not accept that a 15% depreciation is appropriate. There is an additional factor which would normally depress sale price on a mortgagee sale and much market resistance will be met by permanent restoration of the land and repair of the Scott house. All in all I take the view that 5% of the value of the plaintiff's house is a fair figure for any loss in value as the result of the failure of the walls. The valuation evidence before me fixes a value of $750,000 at hearing date. 5% of that sum is $37,500 and I fix that sum under this head of damages payable by the second, third and fourth defendants in the proportions I shall fix..

3. **General damages and disbursements**

The plaintiff also claims certain specific costs and expenses incurred by him as a consequence of the failure of the walls. None have been challenged as to quantum and all I find are recoverable against the second, third and fourth defendants. In addition he has sought a sum of general damages for the inconvenience suffered when he was unable to live in his home for a period exceeding four months and for the stress and ongoing inconvenience caused by the collapse of the wall. He suffered real inconvenience and was undoubtedly extremely worried about the safety of his property over a lengthy period. Damages have seldom been substantial under this heading. I also consider the fact that he will, as a consequence of my orders, gain a more valuable property from the purchase from the Parsons' than had been in contemplation.

I fix the following sums:

(a)	For airfares for his return from Australia, motel accommodation, toll calls and fees incurred for reconnecting essential services	$1,178
(b)	Survey costs incurred in connection with construction of remedial work to the boundary	$ 696.08
(c)	Engineering costs incurred in instructing an engineer to advise and monitor the ongoing effects of the building of the boundary wall and its failure estimated at	$45,000
(d)	Landscaping estimated at	$ 500
(e)	General damages for stress and inconvenience	$ 5,000

4. Mr and Mrs Parsons, the first defendants have also suffered losses particularly the loss of a building site and the costs incurred in preparation for building. Much of the latter has already been met by Mr McLintock. They seek:

(a) Costs of preparation to build.

The first defendants seek to recover against Mr McLintock in contract. At the time the walls subsided substantial preparatory work had been done. This included:

i) The payment of engineering fees

(ii) Foundations

(iii) Incurring cost of purchase of house

(iv) Landscaping

Mr McLintock has mitigated his damage by purchasing the precut house and selling it independently. Caught in the maelstrom of events he paid the sum due direct to the builders, and as a consequence paid more than Mr and Mrs Parsons considered themselves liable. Any mistake that he might have made in that regard is not a factor that I can take into account.

The Parsons' proceedings are based in contract. Mr McLintock cannot therefore spread liability among himself and the third and fourth defendants. Provided the Parsons are not out of pocket there is no basis on which to make any further adjustment.

(b) Loss of building site

The value of Mr and Mrs Parsons' land diminished when the walls failed and the land was temporarily restored to provide support to the adjoining property. With the ability to build on two cross-leased sites the land had an enhanced value. They seek to recover the value of the lost building site. As the result of my finding that the land must be restored permanently it will now become possible to recover the building site. Any advantage to the Parsons or any subsequent owner is secondary to the need to ensure that the land at the boundary of Mr Scott's is stabilised and safely supports his land and house.

At first sight the permanent restoration has the added advantage of providing the Parsons with their smothered building site. However since Mr Scott brought these proceedings the first defendants have sold their property in its entirety to him. I have reached the conclusion that the parties intend that the agreement for sale and purchase be disregarded by me in coming to my final determination on questions of responsibility for damages. Having found that the safety of the land and its support for Scott's is the primary factor in my decision to order that the land be restored permanently and having found that once restored a building site on the Parsons' land can be recovered, I cannot require the second, third or fourth defendants in effect to meet the cost of the building site twice by awarding damages under this head in favour of the Parsons.

By their choice they have sold the property. It seems to me to be irrelevant that it has been sold to the plaintiff. There can be no suggestion of unjust enrichment. Had the Parsons sold to any other person there could be no such possibility. Moreover there is no overall injustice. Mr and Mrs Parsons' determined fight to gain approval to build has resulted in significant damage and inconvenience to Mr Scott. In any event according to their valuation evidence, they have suffered a comparatively small loss on the value of the overall property. The real loss sustained by them is ephemeral. They believed it possible to build on their section. That proved incorrect at least in the short term. Any losses suffered were prospective only; they have not been left seriously out of pocket in reality. I make no order for damages under this head.

Mr McLintock also incurred costs as part of the temporary restoration work, which I find were necessary to provide support to Scott's land. While it was hoped that this work would be considered sufficiently extensive to avoid more permanent work being undertaken, this expectation has not been borne out. There was however, a purpose and need for the temporary work. Without it the damage to the plaintiff's land and

home might well have been much more extensive. This head of damages falls under the joint tortious responsibility shared by the second, third and fourth defendants.

Mr McLintock submitted detailed invoices setting out the total cost to him of the remedial work. I take the view that with the exception of the legal fees incurred, these costs including his time spent on the project from the date of the failure of the wall (calculated at $54,725.00) should form part of the damages to be met in the proportions I fix. Legal fees have not identifiably been incurred as part of the costs of the temporary restoration. I have inferred that Mr McLintock's need for legal advice has arisen largely as the result of these proceedings. The other defendants must bear their costs. There is therefore no justification for allowing Mr McLintock to claim reimbursement. His time spent is in a different category. Supervision and co-ordination of the temporary restoration work was a necessity. Had Mr McLintock not been engaged then another engineer undoubtedly would. He will in any event recover only that portion of his fees that I find the second and third defendants must contribute to as part of their joint liability in tort.

APPORTIONMENT OF LOSSES

The damages fixed as arising from the failure of the walls and payable to the plaintiff including those yet to be quantified will be met by the Council, Mr McLintock and Rankine and Hill Limited. Certain damages specified in this judgment fall outside this category and are to be met by Mr McLintock personally. It is necessary to apportion responsibility among the three parties whom I have held responsible for the failure of the walls and the consequential losses.

1. Mr McLintock must and does accept the primary responsibility. His design and supervision was inadequate and his negligence in this regard triggered the losses suffered by Mr Scott. I fix his proportion at 60 percent. He has personally met costs which arose particularly for the temporary restoration work. This cost, although not part of the damages recoverable by the plaintiff, is also to be borne by the three relevant

parties in the proportions I fix. Consequently there will be a degree of reimbursement for him.

2. **The Council** has been unable to shift its liability totally either to the third or the fourth defendant. However by engaging a reviewing engineer it took the appropriate steps to monitor the design and construction. Its primary failure was in becoming closely involved in the amendments to the design, failing to ensure that agreed changes were clearly recorded and issuing a permit off confusing plans which had not been finally approved by the reviewing engineer. Its degree of responsibility is less than that of the designing or the reviewing engineers. Applying what I consider to be a just solution, I fix the proportion of damages payable to the plaintiff and by way of reimbursement to Mr McLintock at 15 percent.

3. **Rankine and Hill Limited** was engaged to provide a highly skilled review of the design of the walls. Its failure to do this adequately has been set out earlier in this judgment. The company knew that the Council relied on it to fulfil this task. I see the fourth defendant's role as being analogous to that described in ***Proposals to Reform the Law of Civil Contribution***" Canterbury Law Review [Vol 2, 1984] 171, 186, A M Dugdale.

> *"Where the supervisor is liable, it will be because he has failed to supervise an essential part of the work and this is the job he is well paid to do. His employer relies on his skill in this regard and the provisions of the building contract give him ample power to fulfil this function. Indeed, although the supervisor owes no duty to the contractor, the latter may well rely upon his skill to guide him in areas of difficulty. The construction of a complex project requires the cooperation of the supervisor and contractor. If loss is suffered due to both negligent construction and supervision, it is difficult to see why the supervisor should not carry some of the responsibility in an apportionment. "*

While I accept that the role of a reviewing engineer is to remain detached from the design process, nonetheless his skill will be relied on by the contractor. As I have said there is a

delicate balance to be achieved between actually helping design and providing objective scrutiny and guidance. The engineer designated by the fourth defendant stepped well over into the role of designer in his efforts to salvage a flawed plan. Moreover he did not note the design faults and inaccurate assumptions made by Mr McLintock. The fourth defendant's proportion of liability is fixed at 25 percent.

COSTS

I invite counsel to submit memoranda as to costs.