Smaill v Buller District Council 5

High Court Christchurch 10
28, 29, 30, 31 July; 1, 4, 5, 11 August; 25 September 1997
Panckhurst J

Town and country planning – Procedure – Duties in respect of planning matters – Whether judicial immunity for decisions – Whether statutory limitation applied – Whether breach of statutory powers – Whether breach of 15 *common law duty of care – Liability of council – When liability arose – Liability of DSIR as expert adviser – Whether joint tortfeasors – Whether insurer liable – Approach to damages – Positive defence of contributory negligence – Whether damages available for pure economic loss – Contribution from joint tortfeasor – Town and Country Planning Act 1953,* 20 *s 38A – Town and Country Planning Regulations 1960 (SR 1960/109), regs 22, 23 and 32 – Counties Amendment Act 1961, ss 22, 23 and 33 – Local Government Act 1974, ss 641 and 641A – Building Act 1991, ss 36 and 91(2).*

Town and country planning – Procedure – Whether Ministry of Works owed duty to council – Town and Country Planning Act 1953, ss 38 and 38A – 25 *Counties Amendment Act 1961, s 23.*

Negligence – Duty of care – Whether sufficient proximity and reliance to give rise to duty of care – Whether council had knowledge of hazards – Whether failure to investigate gave rise to breach of duty of care – When duty of care arose – Whether positive defences of judicial immunity, contributory negligence 30 *and statutory limitation available – Joint tortfeasors – Whether damages for economic loss available – Apportionment of liability.*

Damages – Assessment – Compensation for breach of statutory duty and breach of duty of care in common law – Whether damages available for pure economic loss – Joint tortfeasors – Apportionment between joint tortfeasors – 35 *Assessment of diminution of property value on basis of valuation.*

Insurance – Liability of insurer – Public liability – Factors negating liability of insurer – Test for non-disclosure of material facts – Test of materiality is objective.

This proceeding, issued in December 1993, was a claim for diminution in value 40 of properties, alleged to result from the council's negligence in authorising resort development and issuing building permits, or from its breach of statutory duties in relation to planning matters in an area of known geological instability.

The background of the action was an application of a developer in 1973 to the predecessor of the Buller District Council for consent to a land use change 45

at Little Wanganui on the West Coast. The proposal related to an unzoned rural area. The developer sought a land use change to a "resort zone" that would allow subdivision.

The application was referred to the council and to the Commissioner of Works and the District Commissioner of Works under the Town and Country Planning Act 1953 and also to the District Commissioner of Works under the Counties Amendment Act 1961. After consultation with these agencies, the council approved the change of land use in October 1973 and, subject to certain conditions as to the provision of facilities, the subdivision scheme was also approved.

In the following year the same developer sought to extend the subdivision. Consent was refused because of the scope of the extended proposal, but in 1975 a modified proposal was approved, subject to the provision of the necessary facilities. In 1978 the first building permits were granted, after the council had required rectification of defects in the facilities. Permits continued to be granted throughout the 1980s.

Concerns were first raised in the council about the stability of a cliff area in the vicinity of the subdivision land in 1981 and 1982. A report obtained from the Department of Scientific and Industrial Research (DSIR) in 1983 noted that there was a potential hazard from falling rocks. In July 1983 the DSIR was asked expressly to define the hazard zone for the cliff area. Although the DSIR dealt with the bluffs in the Punakaiki area, it was not known at that time what was done to identify the hazard zone at Little Wanganui.

When the district scheme became operative in 1987, the council's policy was to encourage development at Little Wanganui, subject to upgrading of the sewage facilities. No reference was made in that policy to any hazard zone or geological instability in its vicinity.

Between 1989 and 1991 the council permitted vegetation clearance to be carried out on part of the subdivision. The loss of vegetation was perceived to contribute to the danger to the subdivision land from rockfalls. The council obtained an expert report in September 1990, identifying the area and nature of the likely hazard as being limited to rock falls. The experts recommended a building restriction line. At that point the council notified its insurers of possible legal exposure for damage to Little Wanganui residents.

At the end of 1991 a more comprehensive report was obtained, which identified the high risk to the subdivision land from instability arising from and triggered by earthquakes, making the land unsuitable for residential development. The council notified residents of the hazard and recommended that properties in the area not be occupied.

In 1992 the council resolved to change the proposed district plan by introducing a hazard line to prevent further building in the subdivision area. After a full hearing by Commissioners, the council adopted the recommendation that although the resort zone should be retained, building permits should be issued subject to a notation on the title evidencing the hazard, with protection of the council against civil liability to owners or subsequent owners.

The plaintiffs pleaded negligence and breach of statutory duty against the council in relation to its approval of the subdivision scheme plan and its grant of building permits. The council denied the allegations, and raised defences of judicial immunity, statutory bar, and contributory negligence.

Held: 1 The decision of the council on the change of land use under the Town and Country Planning Act was made after a formal hearing by a committee with quasi-judicial functions. That decision was therefore immune from challenge for negligence. However, the approval of the subdivision scheme under the Counties Amendment Act was a purely administrative matter which did not involve a Court-like process, and therefore could be challenged for negligence (see p 206 line 15).

Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg [1971] SCR 957; (1970) 22 DLR (3d) 470, *Atkins v Mays* [1974] 2 NZLR 459, *Trapp v Mackie* [1979] 1 WLR 1083; [1979] 1 All ER 489 (HL), *O'Neill v Mann* (1994) 54 FCR 212; 126 ALR 364, *Tertiary Institutes Allied Staff Association Inc v Tahana* [1998] 1 NZLR 41 (CA), *Mann v O'Neill* (1997) 71 ALJR 903 (HCA) and *Bowen v City of Edmonton* (1977) 80 DLR (3d) 501 (Alta:SC) applied.

2 On the allegation of negligence, the council, knowing the risk of rock fall from February 1984, did not make an adequate and timely response but continued to operate without seeking proper assessment of the risk. That was conduct amounting to negligence (see p 209 line 20, p 209 line 36).

3 The provisions of s 641 of the Local Government Act 1974 (as amended by the Local Government Amendment Act (No 2) 1981) and (after 1 July 1992) s 36 of the Building Act 1991 placed a positive obligation on the council to consider the likelihood of damage from effects relating to geological instability, and to decline permits where there was a likelihood of damage. Seen in the context of the Local Government Act as a whole, s 641 conferred a right to seek damages on affected persons where a breach of statutory duty was upheld (see p 212 line 17).

Cutler v Wandsworth Stadium Ltd [1948] AC 398; [1949] 1 All ER 544 applied.

4 While the only loss was an economic loss, by diminution in property values, that loss would be recoverable where a breach of statutory duty was established (see p 212 line 31).

Pickering v Liverpool Daily Post and Echo Newspapers Plc [1991] 2 AC 370; [1991] 1 All ER 622 applied.

5 There was a common law duty of care owed by the council to those to whom it granted permits, where the tests for proximity and reliance were satisfied. The council breached that duty, in that after February 1984, when it was on notice as to the risk, it took no steps to safeguard persons or property and gave no warning of risk to permit holders (see p 213 line 44).

South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd [1992] 2 NZLR 282 (CA) and *Stovin v Wise* [1996] AC 923; [1996] 3 All ER 801 applied.

6 There was a sufficient degree of proximity between the council and the DSIR and there was reliance by the council on the DSIR, such as to give rise to a duty of care on the DSIR. No policy considerations dictated against recognising that duty. The DSIR was negligent from February 1984 in failing to complete a proper assessment of the risk or to delineate the hazard zone. The council's claim against the DSIR as third party, and the DSIR's positive defence of contributory negligence by the council both succeeded in part, requiring a 50 per cent contribution by the DSIR to the damages awarded against the council (see p 215 line 46, p 216 line 34).

7 The diminution of the land value would have occurred anyway, once the instability of the land was realised. The basis for assessment of damages should therefore be the loss in value of improvements (see p 219 line 32).

8 Although it was difficult to take into account the prospect of future 5 recovery of land values it was to be taken into account in assessing damages. In this case full recovery would never be achieved as nothing could be done to alleviate the risk of massive cliff failure (see p 220 line 1).

9 There was no liability on the Local Government Insurance Corporation Ltd, since the council had failed to disclose material circumstances known to it 10 (see p 222 line 16).

State Insurance v McHale [1992] 2 NZLR 399 (CA) applied.

Judgment accordingly.

Observation: It is not necessary to decide whether the Ministry of Works had owed a statutory or common law duty of care to the plaintiffs or the local 15 authority. The argument for a statutory duty was hardly compelling and it would be unusual if nevertheless a common law duty of care was found to exist (see p 215 line 32).

Other cases mentioned in judgment

Attorney-General v Birkenhead Borough [1968] NZLR 383.
20 *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA).
Flowers (R J) Ltd v Burns [1987] 1 NZLR 260.
McElroy Milne v Commercial Electronics Ltd [1993] 1 NZLR 39 (CA).

Action

This was an action for damages in negligence and breach of statutory duty.

25 *Nicholas Till* and *Hamish Evans* for the plaintiffs.
Richard Fowler and *Kirsten O'Rourke* for the defendant (Buller District Council).
Malcolm Parker and *Meredith Townsley* for the defendant/first third party (Attorney-General and DSIR).
30 *David Heaney* and *Sarah Macky* for the second third party (New Zealand Local Government Insurance Co Ltd).

Cur adv vult

PANCKHURST J.

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Introduction

This case concerns a resort development at Little Wanganui, about 17 km south of Karamea. The area offers various attractions. The settlement is adjacent to the mouth of the Little Wanganui River, in which whitebait run in season. The locality is one of rugged natural beauty, with extensive stands of native bush nearby and an imposing cliff face a short distance to the west of the settlement. The relative isolation of the area is also an attraction to many. A mix of permanent residents and bach holders have built some 25 dwellings at Little Wanganui and a larger group own undeveloped sections. On Christmas Day 1991 serious concern was raised as to the stability of the nearby cliff face. The Buller District Council decided that the settlement was unsafe on account of its siting. Life and property were at risk from the cliff, particularly in the event of a major earthquake. Residents were urged to leave the area.

Fortunately actual harm has not occurred to date, but the instability problem has affected the value of properties and sections. The present claim is for the diminution in value which has resulted. It is said that the council was negligent, or in breach of statutory duties which rested upon it, in authorising the resort development in the mid-1970s and in subsequently issuing building permits to landowners.

The action is brought in the name of three plaintiffs intended to be representative of a further 54 Little Wanganui property owners. The representative plaintiffs, two of whom are husband and wife joint owners, were selected on account of their obtaining building permits at various stages of the development from 1978 to 1983. Different considerations may arise according to when plaintiffs were granted permits and built on their land. Towards the end of the plaintiffs' case it became apparent that particularly in relation to damages the three named plaintiffs were not fully representative of the group as a whole. Moreover, it was self-evident that evidence would be required from plaintiffs in support of their claims for general damages for distress and suffering. On account of limitation and other liability issues, plaintiffs from the group of 54 may have rights markedly different to those of the representative plaintiffs. All counsel recognised the extent of the problem, and helpfully adopted a realistic and pragmatic approach. It was agreed that the plaintiffs' case be closed, but with leave reserved for those representative plaintiffs who had not given evidence to that point, and for group plaintiffs, to give such further evidence as may be required to finalise their claims in the light of the liability findings which result in the present proceeding. This agreement enabled the hearing to

continue uninterrupted, so that the evidence of other parties was heard and extensive submissions made to facilitate the primary findings required as to liability.

For completeness I should mention that on 8 November 1993 a consent order in relation to the representative capacity of the plaintiffs was made pursuant to R 78 of the High Court Rules. At that time the Buller District Council was the only other party to the proceeding. The issue was not revisited when others were joined. With the benefit of hindsight it is clear that a representative action was never appropriate: *R J Flowers Ltd v Burns* [1987] 1 NZLR 260. For all that the constructive approach adopted by counsel when the extent of the difficulties emerged, has enabled the Court to determine the fundamental issues relevant to liability, if not to damages.

The parties to the proceeding are multiple. As with the representative plaintiffs many of the group plaintiffs are joint owners of properties or sections at the resort, being in the main married couples. The group as a whole includes a handful of permanent residents, but most of the 25 developed properties are used as holiday baches. The owners are predominantly from the South Island, but there are group plaintiffs from as far north as Auckland and two resident in England. The first defendant, the Buller District Council came into existence on 1 November 1989 upon the amalgamation of three local bodies which had previously existed in the Buller area. Little Wanganui was within the county of the Buller County Council, which ran from Punakaiki in the south to Kahurangi Point in the north, with the exception of the urban Westport borough area. Accordingly decisions relevant to development of the Little Wanganui resort were taken, and the issue of most of the building permits effected by the previous Buller County Council. However nothing turns on the amalgamation point and I shall refer to the previous Buller County Council and the present Buller District Council as "the council", without drawing distinction between the two.

At the commencement of the hearing the Attorney-General, sued in respect of the Ministry of Works (the ministry) and the Department of Scientific and Industrial Research (the DSIR), was only named as a third party. However three days into the hearing the plaintiffs applied to join the ministry as a second defendant. In a separate ruling I allowed the application, subject to certain procedural reservations designed to safeguard the new defendant from prejudice on account of the lateness of its joiner. As the case sought to be mounted by the plaintiffs against the ministry was in the same terms as that against it as a third party at the instance of the council, the late joinder was not as significant as might otherwise have been so. The allegations were of breach of statutory duty and negligence. The former related to the ministry's statutory functions under the Town and Country Planning Act 1953 and under the Counties Amendment Act 1961. In essence it was said the ministry should have intervened at the time the resort subdivision was mooted and at least warned the council of the risk posed by the adjacent cliff face. The allegation in negligence was to similar effect.

In 1983 – 1984 the DSIR gave advice to the council relevant to Little Wanganui. The council now maintains that, if it is answerable to the plaintiffs, the DSIR must share in responsibility on account of its failure to adequately investigate and advise the council of the extent of the danger.

Finally, the council joined the New Zealand Local Government Insurance Corporation Ltd (LGIC) as the second third party. It claimed that if it was liable to the plaintiffs the council was entitled to be indemnified by LGIC pursuant to

a claims-made policy of insurance for the period 1 July 1990 to 30 June 1991. Notification of a possible claim was given within that insurance period, but cover was declined on the grounds of non-disclosure of concerns about the Little Wanganui resort in the proposal which preceded the writing of cover.

The plaintiffs asked that the Court take a view of the cliff face adjacent to the resort. This was done on 14 August 1997 in the absence of any of the parties. The exercise was valuable. To view the bluff from the very position of the resort homes and baches gave an understanding and perspective not available from the photographs and plans produced as exhibits. The opportunity was also taken to visit Granity and Punakaiki, other areas where the council was required to grapple with the risks posed to houses by rugged natural landforms. Thereby the Little Wanganui problem was placed in its larger perspective.

Evidence – overview

It is convenient to set out a general overview of the evidence. Aspects of the evidence will require more detailed consideration when specific issues are considered later in the judgment.

Geology of the area

A significant volume of geological evidence was given by witnesses called for both the plaintiffs and the council. The plaintiffs called Mr M D Yetton an engineering geologist; while the council called Mr I R Brown likewise an engineering geologist and Dr C J Graham a geotechnical engineer. The relevant expertise and experience of these experts was unquestioned. In the event there was little or no difference of opinion between them. Nor were conclusions reached by engineers in Barrett Fuller and Partners Ltd, a Wellington firm commissioned by the council to advise it concerning Little Wanganui issues in 1990 – 1991, seriously challenged. Accordingly the geological background can be shortly described and without reference to source.

The Little Wanganui bluffs are comprised predominantly of Miocene sandstones, approximately ten million years old, which lie on the western limb of a large syncline. In geological terms the sandstone is a "soft rock", prone to jointing and in the event of rockfalls prone to break down into smaller debris. The bluffs rise to a maximum height of approximately 100 – 130 m. The sandstone is multi-bedded, having in the distant past been the seabed. The individual beds are up to 5 m in thickness and dip at about 20 – 30 degrees in a NNE direction, which is the general alignment of the bluff face. The high rainfall and mild climate of the Karamea area are conducive to the weathering of exposed sandstone. The tendency to jointing, vertical to the bedding planes, means the cliff is susceptible to the formation of loose blocks of rock potentially of considerable size. Their formation is advanced as a result of roots from the prolific bush vegetation forcing open the joints which naturally develop. This in turn allows the development of high water pressures within the bluffs and thereby the block break-up of the sandstone is further advanced. The 20 – 30 degree slope of the bedding plains assists the dislodgment of rock in the event of seismic activity or extreme rainfall conditions.

All of this results in periodic rockfalls from the cliff face, which can comprise a few tonnes of material or some thousands of tonnes. As a consequence the base of the cliff comprises a talus fan which extends out from the cliff face to a maximum of about 150 m. The talus debris lies at a moderate slope to the cliff face, in parts overgrown by native vegetation but also subject to bare outcrops when there has been a more recent rock fall. Generally

speaking rockfalls pose no danger to most of the resort properties. A few are close enough to the bluffs to be at some risk from this source. The subdivision itself is situated on a more gently sloping area between the edge of the talus slope and a road known as Glasseye Drive which borders at a little distance the Little Wanganui River. This more gently sloping area was described by the experts as "hummocky". An appreciation of how the area was formed provided the key to the geological aspects of the case.

There was general agreement that the Murchison earthquake of 1929 triggered a major failure to the Little Wanganui bluffs. As opposed to a rock fall of relatively minor proportions, a major block slide occurred along bedding planes. The blocks fell, disintegrated to form a debris flow, which flow and its associated air-blast extended beyond the present talus slope and as far as the Little Wanganui River itself. Put at its simplest the gentle hummocky slope upon which the subdivision was established 45 years later, comprised flow debris from the 1929 earthquake which had registered 7.8 on the Richter scale. Moreover, the experts were at one that a comparable event could reoccur and cause catastrophic damage to the subdivision. There are three earthquake fault lines a short distance inland of Little Wanganui and the main alpine fault line could also occasion a major failure.

Following the Murchison earthquake a geologist with the geological survey division of the DSIR, J Henderson, studied the effects of the earthquake and published an extensive paper in the July 1937 issue of the *New Zealand Journal of Science and Technology*. Henderson's paper included reference to the Little Wanganui area, with a photograph at fig 21 which depicted the debris flow from the bluffs extending out to the Little Wanganui River. Two debris islands remain in the river to this day. On the basis of the evidence from the various experts it was clear that Henderson's paper was not only well respected but also well known to New Zealand geologists and specialist engineers. It may be procured from the DSIR or from library sources throughout the country in at least the main centres.

Approval of the subdivision

As of 1973 the council was in the early stages of drafting its first district scheme. In April 1973 Little Wanganui Subdivisions Ltd (the developer), a Westport-based company, made application to the council for consent to a change of use in relation to some 40 ha of land at Little Wanganui which, although not zoned, was used for rural purposes. The proposal was to change the use of the land to a "resort zone" in terms of the council's draft scheme, and establish a subdivision of 48 sections suitable for the building of holiday cottages. The application for change of land use was served by the developer on the council and on the Commissioner, and District Commissioner, of Works at Wellington and Christchurch respectively. The council also referred the land use application to the District Commissioner. That was a standard procedure, since s 38A(3) of the Town and Country Planning Act 1953 entitled the Minister of Works and Development to be heard in relation to any application for change of land use.

Section 23(4) of the Counties Amendment Act 1961 also required the council to send to the District Commissioner a copy of any scheme plan of subdivision submitted for its approval, if the land had frontage to a state highway or government road. The District Commissioner, in turn, referred the scheme plan to its residency office in Westport and to the Commissioner of Crown Lands, Nelson, because the reserve implications of a subdivision in the Buller area were of concern to the Commissioner. The council received various

responses and in due course approved both the change of use and, subject to conditions, the subdivisional scheme plan. The conditions imposed included requirements in relation to internal roading, provision of a sewage and effluent disposal system, and provision of a reticulated water supply to all sections in the subdivision. The council's final approval of the subdivision, on 24 October 1973, required the subdivider to enter into a bond to ensure due performance of these conditions. The issue of building permits to section purchasers was withheld until the necessary services were operational to the council's satisfaction. 5

In November 1974 the developer lodged a scheme plan for stage 2 of the development. By this time almost all of the sections in stage 1 had been sold. Stage 2 envisaged the ultimate subdivision of a further 96 sections, for progressive release onto the market. The council followed a similar procedure of referring the application for change of land use and the scheme of subdivision to the ministry and to the Commissioner of Crown Lands. The ministry raised concerns as to the extent of the proposed development, by pointing out that a total subdivision of just under 150 sections represented a "substantial township" which, in the ministry's view, should only be considered in the context of a district planning scheme. On 20 December 1974 the council resolved to refuse consent to the scheme plan. Concern was expressed that the development threatened to develop to a size well beyond that originally anticipated. 10 15 20

In light of the council's decision, the developer submitted a revised proposal in March 1975. The matter was again referred to the ministry at Christchurch and to the Westport residency of the ministry. The proposal entailed a change of land use for a further area of 4.8 ha. In May 1975 the revised scheme was approved as to both land use and subdivision. But in line with its decision in relation to the proposal as originally formulated, the council only approved development of a lesser number of sections. The development, including stage 1, was to encompass some 80 sections in total. Similar requirements to those for stage 1 were imposed in relation to roading and water and sewerage services. 25 30

In October 1977 the council advised the developer that building permits would be issued for stage 1 of the development, but subject to rectification of various defects identified in relation to roading and the sewerage, water supply and electrical reticulation works. In August 1978 the first plaintiff was granted a building permit, which suggests that by then the remedial work had been carried out to the council's satisfaction. The grant of further permits, for sections in both stage 1 and stage 2 of the subdivision, followed in the late 1970s and throughout the 1980s. At a date not established with precision in the evidence, the developer experienced financial difficulties and ceased development of the subdivision. The company was not named in the proceeding. 35 40

Stability concerns

The first documented evidence of concern as to the stability of the Little Wanganui bluffs appeared in minutes of the council's works committee in March of 1981. The minute recorded: 45

> "Slip close to Little Wanganui Subdivision Area
> Councillor De Viries expressed concern about this matter and it was requested that the county engineer inspect the area as soon as possible." 50

At the next meeting of the works committee on 7 April 1982 the county

engineer Mr T E Wallis reported that he had examined the slip area and it appeared that heavy rains had brought away old earthquake rubble. He noted that the material had moved in a direction away from the subdivision. There was, in his opinion, no apparent danger to the subdivided area. He further noted
5 that it was difficult to say whether there would be any further slippage, but it was to be hoped that slip material would be contained by the fairly dense bush growth. The records of the council disclose no further action taken at that time.

Proposed district scheme

In August 1981 a proposed district scheme for the Buller county was
10 publicly notified. Thereafter the council, particularly through its town and country planning committee, was involved in extensive work and hearings relative to the proposed scheme. One initiative was to obtain a report from the geological survey division of the DSIR. The report, dated April 1983, was entitled "Geological Comment for Buller County District Planning Scheme
15 Review" and began with the observation that the review was intended to provide a geological background of the county for the assistance of town planners. In the section headed "Engineering Geology" the danger of rockfalls was discussed. A problem with the Punakaiki township was noted arising from the siting of buildings beneath steep cliffs where there was a danger of
20 rockfalls, particularly following major earthquakes. A recommendation was made that further building permits not be issued, at least within the area of a hazard zone which the geological survey division would help define. The report did not contain express reference to Little Wanganui.

At a meeting of the council on 22 June 1983 the geological report was
25 considered and significantly the council resolved to request the DSIR to "define the hazard zone for the residential land fronting the limestone cliff areas at both Punakaiki township and the Little Wanganui subdivision, Karamea". A formal request to that effect was sent to the DSIR by letter dated 12 July 1983 under the hand of the county clerk. The DSIR responded that it could not undertake
30 the necessary field work until probably December or January. By February 1984 the hazard zone issue had still not been addressed by DSIR and the new county engineer, Mr J F Spooner, wrote to the geological survey division at Christchurch concerning the delay. A short time after the letter was written, Mr Spooner met Mr Simon Nathan of the DSIR and the two made site
35 visits to both Punakaiki and Little Wanganui. It will be necessary to return to the details of the discussion at the Little Wanganui subdivision, later. In August 1984 the town and county planning committee of the council resolved to recommend to the council that the DSIR's delineation of a hazard zone for Punakaiki be adopted for inclusion in the district scheme, and to that end that
40 there be public notification of a variation to the proposed scheme. Nothing was recommended relative to Little Wanganui.

In April 1985 an engineering geologist from the geological survey division at Christchurch, Mr McLean, visited Little Wanganui with Mr Spooner. In June Mr Spooner forwarded photographs to Mr McLean which had been obtained in
45 part from a local identity at Little Wanganui, a Mrs Rose Duncan, who had witnessed the Murchison earthquake as a young woman. The photographs were views of the bluffs and of the subdivision area before and after the earthquake. Aerial photographs from other sources were included, from which it was possible to see debris from the earthquake which had formed an island in the
50 Little Wanganui River. What work was undertaken by Mr McLean to define the hazard zone remains unclear. He left the DSIR in 1986 or 1987 and took up residence in France. He was not able to be located in relation to this proceeding.

Mr Nathan testified that he was unable to find work papers prepared by Mr McLean relevant to delineation of the hazard zone. As he put it it simply appeared that "the project lapsed".

In March 1987 the council's planning scheme became operative. The "Urban Settlements" section of the scheme referred separately to Punakaiki and Little Wanganui. As to the former the danger from rockfalls off steep cliffs was noted, together with the consequent imposition of a building restriction within a defined hazard area. With regard to the Little Wanganui subdivision the council's policy was recorded as:

> ". . . to encourage the development of holiday accommodation . . . conditional upon the sewerage reticulation being upgraded as a matter of urgency."

Explanation of this policy noted that the subdivision provided for more than 60 building sites, with approximately ten holiday homes built and one or two permanently occupied. A significant problem with sewerage reticulation which required remedial work was identified, with the result that further building permits would not be issued in the meantime. It is noteworthy there was no reference to a rock fall hazard or to the issue of a hazard zone as envisaged in mid-1983.

1989 – 1991

In October 1989 the Westland Catchment Board and Regional Water Board issued to a Mr Adamson a permit to clear part of his land at Little Wanganui, essentially situated on the talus fan slope. Over the next few months Mr Adamson proceeded to burn and clear native vegetation adjacent to the southern end of the subdivision. Property owners were immediately concerned. The third plaintiff Mr Hirst complained to the council in January 1990 about clearance of the land and related issues concerning Mr Adamson. Residents were plainly bothered by the aesthetic impact of the work, but also considered that the vegetation provided a natural buffer which protected houses from rockfalls off the bluffs. Throughout the next 20 months the controversy continued. Another resident made a complaint to the Ombudsman. Officers of the West Coast Regional Council, based in Greymouth, responded. The concerns of the Little Wanganui residents were refuted. In the final result the Chief Ombudsman concluded in August 1991 that there were insufficient grounds to sustain the complaint against the regional council. The Buller Council was also involved in the matter. A meeting attended by Little Wanganui residents, council representatives, and a West Coast Regional Council manager was held at the subdivision on 14 July 1991. A number of concerns arising from Mr Adamson's ownership of the subject land, and his activities upon it, were raised. One was the threat from rockfalls following clearance of the natural vegetation on the talus fan. The residents sought a lasting solution, which they argued would only be found if the land was compulsorily acquired from Mr Adamson. Significantly, the residents were not told anything of the extent of the council's concerns in relation to rockfalls from the bluffs.

In December 1989 the council's building inspector, a Mr T N Archer, prepared a memorandum to his superior, the manager of operations. It was headed "Hill Stability – Little Wanganui". Mr Archer expressed a concern, held by him for some time that a significant threat existed to land, buildings and people living under the hillside at Little Wanganui. He further opined that he was concerned as to the possible liability of the council for issuing building permits to residents of the subdivision. Mr Archer posed the question whether

the subject had been addressed at the time the subdivision was approved by the council. The operations manager, a Mr P G Ross, moved quickly. Three days later he carried out a site inspection. He noted that the slope at the foot of the bluffs was comprised of debris from the bluffs. He assessed the vertical faces of
5 the bluffs to pose a risk, and noted in particular what was described as a "block" which had been photographed by Mr Archer and which was currently being supported by debris on the talus slope but which was unstable. His report concluded with reference to an endeavour to locate a geological report which another council official thought existed, and a recommendation that it may be
10 necessary to engage a geologist to report on the stability of the bluffs.

In February of the following year Mr Archer wrote to the Geological Survey Division, Lower Hutt, seeking a copy of a report believed to have been prepared by Mr Nathan. On 7 March 1990 Mr Nathan contacted Mr Archer and advised that a report did not exist. Moreover, he spoke of
15 inspecting the bluffs with Mr Spooner and of being told by the latter not to proceed with a written report because it would be "political dynamite". Mr Nathan agreed that a geological report was required and provided an estimate of the likely cost. It is to be noted that Mr Archer's account of the March 1990 discussion with Mr Nathan was adduced by the inclusion of a
20 handwritten memorandum in the agreed bundle of documents. Mr Archer was not called as a witness. Mr Spooner denied that a conversation in such terms had occurred, and Mr Nathan's account was somewhat different. In cross-examination he agreed that he was greatly concerned for residents and property at the time of his visit to Little Wanganui in about February 1984. He
25 considered Mr Spooner was likewise concerned and saw the delineation of a hazard zone as politically sensitive. He did not accept however that a written report was declined on account of the sensitivity of the issue; rather that the council sought the preparation of a plan which defined the extent of the hazard. It shall be necessary to return to these aspects later.
30 It was not until July 1990 that the council liaised further with the DSIR, by seeking a quotation for the cost of a formal written report. Such was provided in August 1990. The council then obtained similar quotations from two other sources. In the result, in September 1990, it commissioned Barrett Fuller and Partners Ltd (Barrett Fuller) a firm of consulting engineers and geologists based
35 principally in Wellington but with four area offices including one in Greymouth, to investigate and report upon slope stability at Little Wanganui.

Barrett Fuller reported on 2 November 1990. The report identified two dominant forms of slope failure; rockfalls and debris flows. The report writers, a geologist and a geotechnical engineer, concluded:

40 "No evidence that large blocks of sandstone have ever been transported any further than the toe of the talus slope was observed during our investigation. Nor is there any evidence of slope failure triggered by either the Murchison or the Inangahua earthquakes. However, the consequences of a large rock fall or debris flow are considered to warrant
45 implementation of simple, inexpensive measures to mitigate the risk to lives and property by limiting future development in the area."

Accordingly a building restriction line was recommended, the drawing of which at that point was "indicative only". Finally it was suggested that further investigative work may perhaps result in more specific and less conservative
50 recommendations.

The council was obviously concerned as to its possible legal exposure to Little Wanganui residents. On 31 May 1991 it notified a potential public

liability indemnity claim to NZI Insurance, the agent for LGIC. The subsequent history of that notification can be left to the insurance section of this judgment.

Otherwise the council does not appear to have addressed the matters raised in the Barrett Fuller report throughout 1991. During that period it was involved in seeking to allay the fear of Little Wanganui owners concerning Mr Adamson's activities upon the talus slope area. One element of that dispute was the loss of protection from rockfalls after the clearance of native vegetation, but there were other issues relevant to water supply, sewerage reticulation, and access to Glasseye Creek which arose from Mr Adamson's land ownership.

In October 1991 further attention was given to defining the building-line restriction for the subdivision. There was renewed contact with Barrett Fuller who advised that to reach an improved risk assessment they would need to study all available aerial photographic evidence, excavate several trenches in the hummocky slope area, and examine historical records of local earthquakes. This was authorised in early November 1991, and on 22 November Barrett Fuller provided a draft report under cover of a letter which included:

> "Contrary to the conclusions in our initial report dated October 1990 which was based on a limited scope investigation there is direct evidence that the Murchison earthquake of 1929 triggered a massive failure of the cliff behind the subdivision. We are now of the opinion that the subdivided land is primarily at risk from debris flows probably triggered by earthquake shaking. This mode of failure is sudden and rapid and one of the more hazardous types of instability. Based on site observations, historical records and a study of relevant scientific papers we have concluded that most of the subdivided land is unsuitable for residential development."

As if to emphasise the seriousness of the situation, two significant rockfalls occurred on 22 December 1991. Following two days of heavy rainfall there were significant block slides from the bluff involving material of a volume of about 2500 cubic m. The combination of factors galvanised the council into action.

On Christmas Day 1991 the mayor and the council's district manager travelled to Little Wanganui and met about 20 residents. A notice to householders was distributed. It included:

> "A potentially serious hazard exists in that there is a possibility that a larger rock fall will occur, although when it will occur cannot be predicted. It may occur very soon or it may not occur for many years. Further studies will be carried out to more accurately assess the degree of risk.
>
> The possibility of another fall is such that council considers the hazard in the subdivision area between Glasseye Drive and the cliff is significant and strongly advises you not to occupy your property in that area."

The notice concluded with the observation that the council could not force residents to move and it was up to individuals to determine whether to stay and accept the risk or leave the area.

In early January Barrett Fuller provided the council with a full geotechnical report, in which it endeavoured to further assess the risk. On 10 January 1992 the council wrote to residents, advised that a full report had been received, and reiterated its advice that owners should not occupy their Little Wanganui properties. Subsequently residents were advised to lodge claims with the Earthquake and War Damages Commission. These were declined. The council also considered implementation of a loan scheme to

assist the residents to relocate. Various initiatives were taken at a political level. These too were unsuccessful. Further, the council explored legal avenues which might be used to require the residents to leave Little Wanganui. Advice was received that the council could not force the issue. Finally, in mid-1992 the
5 council resolved to change the proposed district plan by the introduction of a hazard line which would prevent further building in the area. Because of the sensitivity of the proposed change independent Commissioners were retained to conduct a public hearing. This occurred in November 1992. Several of the present plaintiffs were directly involved in the process. In the end result the
10 Commissioners recommended to the council that the proposal to introduce a hazard line not proceed because it would probably not be effective in securing the movement of residents from the danger area. Instead the Commissioners recommended that the council allow the resort zoning to remain, but issue future building consents in terms of s 36(2) and (4) of the Building Act 1991.
15 Pursuant to the section the consents would include a condition that an entry be made on the owner's certificate of title evidencing the relevant hazard. Further, the council as the relevant territorial authority would be deemed not to be under any civil liability to the owner or subsequent owners. On 26 November 1992 the council adopted this recommendation.

20 In the meantime residents had formed the Little Wanganui Subdivision Ratepayers Association Inc. The association was active in relation to the various initiatives considered or taken by the council. Finally the association instructed solicitors, who on 23 December 1993 issued the present proceeding.

The case against the council

25 Six causes of action were pleaded against the council. The claim can be conveniently considered in two parts. First it was alleged that the consent to a change of land use from "rural" to "resort", and the approval of the scheme of subdivision, were decisions reached in breach of statutory duty or were negligent decisions. The second aspect of the case concerned the subsequent
30 issue of building permits to Little Wanganui residents. It was likewise alleged that the council acted negligently, or in breach of statutory duty, in issuing the permits. On account of an amendment to the Local Government Act 1974 the allegation of breach of statutory duty was formulated on a slightly different basis as between different plaintiffs according to when their permits were
35 issued.

The council in its defence raised a general denial and three affirmative defences: judicial immunity; that aspects of the claim were out of time; and contributory negligence. It is convenient to begin with a consideration of the judicial immunity defence, since it is potentially of far-reaching consequence.

40 *Judicial immunity*

Two decisions of the council are relevant in this context. First a decision to give consent to a change of land use under the Town and Country Planning Act 1953. Section 38A provided that pending a district scheme becoming operative no change of land use could occur, except with council consent.
45 Section 38A(2A) provided that in granting or refusing consent the council must have regard to the public interest, and the likely effect of the proposed use on amenities of the neighbourhood, on the health, safety, convenience, and economic and general welfare of affected inhabitants. Pursuant to the Town and Country Planning Regulations 1960 (SR 1960/109) the required hearing
50 process was closely defined. Regulation 32 prescribed the form of application, for service thereof on interested parties, for public notification of full

particulars of the proposed change, an objection process, and importantly a procedure for a formal hearing. In that regard regs 22 and 23 envisaged the examination of witnesses under oath, and for the hearing committee to furnish a report and recommendation to the council respectively. The council was then required to deliver and distribute the decision. Finally, a right of appeal to the Town and Country Planning Appeal Board was provided. 5

The procedure for council approval of a scheme plan of subdivision pursuant to the Counties Amendment Act 1961, was somewhat different. The developer required council approval of the scheme plan in order to proceed: s 22(1). The council was empowered to refuse approval if in its opinion the land was not suitable for subdivision, proposed service amenities were not adequate, the proposal was contrary to recognised principles of town and country planning, or closer settlement of the land was not in the public interest: s 23(1). In the event that the land to be subdivided had frontage to a highway or road the District Commissioner of Works was to be sent a copy of the scheme plan (s 23(4)), but neither service on interested parties or public notification of the approval application was required. Nor was a hearing necessary. If the council refused approval notice was to be given to the owner in writing with the grounds of refusal set out: s 23(5). Finally, s 33 provided a right of appeal to the Town and Country Planning Appeal Board in favour of any person aggrieved by the decision, including the Minister of Works and any nearby council. Against these different statutory backgrounds it is necessary to inquire whether the respective council decisions enjoyed the protection of judicial immunity. 10 15 20

In support of the defence primary reliance was placed on two Canadian decisions where judicial immunity was asserted and upheld in relation to local body zoning and subdivisional decisions. The first case was *Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg* (1970) 22 DLR (3d) 470. The defendant corporation by an amending bylaw purported to rezone land for use for single family residential to multiple family dwellings. Welbridge, in reliance upon the new bylaw commenced to erect a multi-storey apartment building. However, the rezoning bylaw was declared invalid upon procedural grounds. The relevant town planning procedure required that zoning amendments be publicly notified before a committee heard representations upon the proposed change. Notice was not given to affected parties, hence the eventual decision that the amending bylaw was invalid. Welbridge sued for damages being its expenditure on the apartment project before the bylaw was struck down. 25 30 35

The Supreme Court of Canada, in a single judgment, held that the defendant in passing the amending bylaw was involved in a "legislative exercise" which involved a quasi-judicial function at the hearing stage. The Court at p 478 concluded: 40

> "A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or *quasi*-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of the Court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach." 45

This decision was followed in *Bowen v City of Edmonton* (1977) 80 DLR (3d) 501. The plaintiff sought damages on account of his inability to 50

build on land because of soil instability. The municipality, following a formal hearing during which the issue of soil instability was raised, approved a scheme of subdivision which included the land subsequently acquired by the plaintiff. Although the Supreme Court of Alberta accepted that the defendant municipality had acted negligently, it considered the failure was auxiliary to the exercise of a quasi-judicial function. Accordingly immunity existed in relation to a private action for damages.

Two further cases were cited. In *O'Neill v Mann* (1994) 126 ALR 364 the Federal Court of Australia was required to decide whether defamatory letters of complaint concerning a Magistrate written to the Federal Attorney-General amongst others were protected by the defence of absolute privilege or immunity. The decision is helpful for a discussion concerning when a hearing, or a disciplinary process, is quasi-judicial so as to attract absolute privilege. An extract from the speech of Lord Diplock in *Trapp v Mackie* [1979] 1 All ER 489 at p 492, was adopted:

> "So, to decide whether a tribunal acts in a manner similar to courts of justice and thus is of such a kind as will attract absolute, as distinct from qualified, privilege for witnesses when they give testimony before it, one must consider first, under what authority the tribunal acts, secondly, the nature of the question into which it is its duty to inquire, thirdly, the procedure adopted by it in carrying out the inquiry and, fourthly, the legal consequences of the conclusion reached by the tribunal as a result of the inquiry."

Applying this test the Federal Court determined that the Attorney-General's consideration of the complaint could not be properly characterised as judicial or quasi-judicial in nature. Accordingly absolute privilege did not apply. The decision was upheld by the High Court of Australia: *Mann v O'Neill* (1997) 71 ALJR 903.

By contrast, and of closer relevance, is the decision in *Atkins v Mays* [1974] 2 NZLR 459. Defamation was asserted in relation to a written statement made in the context of a hearing under the Town and Country Planning Act 1953. The hearing was into an objection to aspects of a proposed town planning scheme. McMullin J accepted that the hearing was a judicial inquiry to which the rule of absolute privilege attached. The council in the present case argued that this decision was generally supportive of its affirmative defence.

Since the hearing in the present case, the Court of Appeal has delivered judgment in *Tertiary Institutes Allied Staff Association Inc v Tahana* [1998] 1 NZLR 41. Keith J gave the judgment of the Court concerning whether a letter of complaint to the council of a polytechnic was absolutely privileged. The Court of Appeal relied upon the approach followed by the House of Lords in *Trapp v Mackie*. Further the judgment is instructive for its reaffirmation of the need to examine whether the statutory process at issue was of a judicial character. Also for the discussion that the duty to act judicially is a narrower concept than that of the duty to comply with natural justice.

Returning to the evidence in the present case the developer in early 1973 sought consent to the change of land use, and approval of the scheme of subdivision, as one initiative. As required under the Town and Country Planning Act and Regulations the change of use application was publicly notified and, as previously noted, the District Commissioner of Works and the Commissioner of Crown Lands were furnished with copies of the consent application and of the subdivisional scheme plan. The Town and Country Planning and Land Subdivision Committee (the committee) of the council

considered both aspects. A hearing was convened on 18 June 1973. In the event there were no objections to the change of use application, but the committee heard evidence on behalf of the developer and questioned its witness. Following that hearing the committee resolved to recommend to the council that both the change of use, and the subdivisional scheme plan, be approved 5 subject to conditions. These included amendments to the scheme plan to provide a greater esplanade reserve and requirements relevant to roading and a range of services. Further, the committee recommended that Little Wanganui be designated a "resort zone" in the council's proposed district scheme and that Ministry of Works approval be obtained of the subdivisional scheme plan. It is 10 apparent from the documentary records produced that the committee dealt with the change of use, and the subdivision approval, as one. That was obviously a convenient approach since the committee was charged with consideration of both aspects, which in any event were closely interconnected.

Despite the approach of the committee the issue of judicial immunity 15 cannot be approached on an all or nothing basis. There is a marked difference between the respective statutory backgrounds. Only the change of use decision fell to be dealt with in the context of a formal hearing by a committee having a quasi-judicial function. Applying the test enunciated in *Trapp v Mackie* I am satisfied the town and country planning committee in considering the change of 20 land use was required to act in a manner similar to a Court of justice. It follows that when its recommendation was adopted and became the council decision consenting to the change of land use, such decision was immune from challenge for negligence. On the other hand the approval of the subdivisional scheme plan under the Counties Amendment Act was a purely administrative, 25 rather than a quasi-judicial, function. It is not decisive that the council was required in the event of rejection to give written reasons, or indeed that as a matter of procedure the rules of natural justice may have applied. The characteristics of a Court-like process did not attach. Indeed there was no requirement to have a hearing. In my view the Counties Amendment Act, being 30 the authority under which the council acted, and the procedure prescribed, plainly indicate the function was administrative in nature. This aspect of the council's decision may therefore be challenged for negligence.

Was the council negligent?

The finding that the council's decision on the change of land use was 35 immune from challenge for negligence, makes it unnecessary to examine whether that particular decision was in any event negligent. However, in case the immunity finding should be overturned and because the change of use and the subdivision approval are so interlinked, it is sensible to consider the allegation of negligence in the round. Further whether the council was at fault 40 in not recognising the risk of cliff failure subsequent to the 1973 decisions must also be examined. The council strongly resisted the allegation of failure on its part, both in fact and in law.

It is first necessary to review aspects of the evidence in greater detail. The gist of the allegation against the council was that it failed to investigate, or to 45 investigate adequately, the stability of the cliff at Little Wanganui which investigation would have confirmed the existence of a major problem and indicated that the resort development should not proceed or proceed further. Further it was contended that the council should have known that subsequent purchasers of land in the subdivision would rely on the council's approval of 50 the development as evidencing that the land was safe for residential occupation. Thereby, a duty of care was alleged to exist.

The allegation of failure to investigate was particularised: that photographic and scientific evidence of the extent of the debris flow from the Murchison earthquake was readily available, that knowledge of the 1929 event was widespread amongst local residents, and that in any event a visual
5 inspection of the subdivision site should have conveyed the need for proper assessment of the cliff's stability.

The Murchison earthquake was witnessed by Mrs Rose Duncan then a girl of 16 years and who remains a resident at the Little Wanganui township. She was not called as a witness. However, one of the third plaintiffs, Mrs Hirst gave
10 evidence of a discussion she had with Mrs Duncan in about 1986 – 1987. Mrs Hirst was intent upon recording something of the history of the Little Wanganui area for the benefit of her children and grandchildren. What Mrs Duncan told her was tendered as evidence of local knowledge which was equally available to the council when the subdivision was approved in 1973.
15 Mrs Duncan supplied a graphic description of the effects of the earthquake. She described how a portion of the cliff fell "as if it had been cut with a knife", and described the debris flow as extending to the Little Wanganui River which was temporarily obstructed until an outlet was dug to allow the river to again flow. On the basis of this account the debris flow passed over the area occupied by
20 the subdivision.

In 1937 the DSIR geologist, Mr J Henderson, published his paper on the Murchison earthquake in the *New Zealand Journal of Science and Technology*. The paper included a photograph taken at the time of the earthquake which showed the extent of the debris flow from the cliff extending out to the Little
25 Wanganui River. The various geologists and engineers who gave evidence relied upon the Henderson paper for information as to damage wrought by the 1929 earthquake. The paper was readily available to the experts when they conducted a literature check of geological sources in New Zealand. But Mr Nathan of the DSIR described the paper as a "relatively specialist
30 publication" and said it was not the sort of paper which he would expect the Ministry of Works resident engineer at Westport, for example, to be aware of. The plaintiffs also relied upon what was probably a copy of the photograph included in Mr Henderson's paper, which photograph for some period of time after about 1982 was on display in the hotel at Little Wanganui township.
35 Again, the suggestion was that the photograph was something of which the council should have been aware.

The plaintiffs also called evidence from Mr W D Rhind, a retired farmer at Karamea, and a member of the council from 1971 until 1980. He gave evidence that councillors in about 1972 visited Little Wanganui during a tour of each
40 riding in the county before expenditure estimates were set. Moreover, he recalled a discussion with Mrs Duncan in the period 1973 – 1974 when she spoke of the Murchison earthquake and made the comment that the subdivision should not proceed. Inexplicably the witness said he considered the information was given to him in confidence and therefore he did not divulge it to councillors
45 or council officers. In cross-examination Mr Rhind further explained his position. He said that he did not think that a comparable debris flow could occur again because the cliff face had "already fallen down". He explained that his only concern was in relation to rubble from the cliff, which he considered would not endanger the subdivision area because of the barrier of native bush
50 between the houses and the cliff face.

Finally, the plaintiffs relied upon the circumstance that councillors and officers of the council visited Little Wanganui at the time of the subdivision

proposal. It was contended that the visual impact of the cliff was in itself sufficient to put interested observers on notice of the instability problem. In relation to this argument the scene visit made by the Court was of considerable assistance. That visit was some 23 years after the time when the subdivision was approved. However, the time lapse was not significant since the visual 5 impact of the cliff face obviously remained a constant feature of the landscape. Although the cliff was certainly imposing, its presence and appearance was not such as to put a lay observer on notice that the subdivision area was at risk from cliff failure. The distance between the subdivision and the cliff face, of the order of about 200 m at the closest point, indicated otherwise. An untrained eye could 10 not anticipate and visualise the possibility of a debris flow of such magnitude as would extend to the subdivision area.

This conclusion is in my view supported by two other aspects of the evidence. First, the evidence of Mr Rhind was most significant for his interpretation of the situation and absence of concern at the crucial time. Even 15 armed with Mrs Duncan's account of what had happened in 1929, Mr Rhind did not consider the proposed subdivision to be at risk from the cliff face. He saw only a risk of rockfalls, as the major failure had already occurred. Second, and even more significant was the evidence from the firm of consulting engineers and geologists, Barrett Fuller, retained by the council in late 1990. 20 After visiting the subdivision a geologist and a geotechnical engineer in a joint report to the council concluded there was no evidence that large blocks of rock had ever flowed beyond the toe of the talus slope. It was only in November 1991, after a study of historical records including the Henderson paper and after digging trenches in the subdivision area, the Barrett Fuller experts 25 recognised the risk of a massive failure of the cliff. The inability of the geologist and the engineer to appreciate the risk following a site visit in 1990 puts the issue of foresight in perspective. The contention that council officers should in 1973 have recognised the threat posed by the cliff, is not in my view realistic. The magnitude of the risk is only apparent when knowledge of the 30 extent of the 1929 failure is coupled with an awareness that the geological make-up of the cliff is such that a comparable event could reoccur. There is no concrete evidence that any officer of the council had knowledge, or should have known, of both aspects in the 1970s.

The first evidence of actual concern as to the stability of the bluffs was the 35 minute of the works committee in March 1981, when a councillor expressed concern about a slip close to the Little Wanganui subdivision area. The matter was investigated by the county engineer who reported to the works committee that earthquake rubble had been dislodged following heavy rains but there was no apparent danger to the subdivision. However, the position changed markedly 40 in February 1984 as the council sought to advance its proposed district scheme. A problem from the danger of rockfalls was recognised at Punakaiki and in June 1983 the council resolved to have the DSIR define hazard zones relative to housing at both Punakaiki and Little Wanganui. To that end in February 1984 Mr Simon Nathan of the DSIR and the council's new county engineer, 45 Mr J F Spooner, visited the Little Wanganui subdivision. Mr Nathan was an experienced geologist who had been with the DSIR since 1967. He specialised in the geology of the West Coast region and contributed to the April 1983 DSIR report, "Geological Comment for Buller County District Planning Scheme Review" in which the risk at Punakaiki was recognised. Speaking of the visit 50 to Little Wanganui with Mr Spooner in February 1984, Mr Nathan said in-chief:

"At the site I had a discussion with Mr Spooner, and told him that I was surprised that the subdivision had been approved because of the danger from rockfalls. I said that the sections closest to the cliffs were very likely to be affected by future rockfalls, but was uncertain how far these would extend towards the Little Wanganui River. I believed that it was possible that the whole subdivision could be threatened by potential rock fall."

Under cross-examination a more graphic version of the conversation emerged. Mr Nathan accepted that he could have used the word "horrified" in relation to the fact the subdivision had been allowed. Further, he agreed that Mr Spooner had referred to the Little Wanganui situation as a "political hot potato", although the exact context in which that phrase was used was somewhat unclear.

By contrast Mr Spooner either denied, or had no recollection of, a conversation in these terms. He maintained nothing was said to indicate there was a major instability problem. The two accounts are incompatible. I prefer the evidence of Mr Nathan, who was a more forthcoming witness and who impressed as having a better memory of the relevant events. Mr Spooner's evidence was vague in relation to important aspects.

Accordingly, I consider that from February 1984 the council was on notice that the Little Wanganui subdivision was at risk on account of instability of the adjacent bluffs. However there was no adequate and timely response to the problem. The issue drifted, until in April 1985 Mr McLean, an engineering geologist with the DSIR, visited Little Wanganui with Mr Spooner. Subsequently the latter forwarded photographs taken before and after the 1929 earthquake, and aerial photographs of the area. For unknown reasons Mr McLean did not attend to the delineation of a hazard zone and any active involvement on the part of the DSIR lapsed. In 1987 the council's planning scheme became operative, without the problem at Little Wanganui being addressed. It was not until late 1989 that the council's building inspector, Mr Archer, forced the issue by documenting his concerns and by seeking advice from Mr Nathan concerning why the DSIR had not completed a report to the council some five years earlier. Finally, in 1990 – 1991 Barrett Fuller were retained and a full assessment of the magnitude of the risk was ultimately received.

To summarise it is my view that the council was negligent from February 1984 when Mr Nathan gave a sufficient assessment of the risk, to require that decisive action be taken to properly evaluate the instability problem and adopt measures for the protection of people and property. It is necessary to consider the significance of this general finding in relation to the specific causes of action relied upon.

Change of use/subdivision approval

The first causes of action against the council are based upon the 1973 decision consenting to a change of land use, and the 1973 and 1975 decisions approving stages 1 and 2 of the subdivisional scheme plan. I have already held that the land use decision enjoyed the protection of judicial immunity. The factual conclusion that the council did not know, and could not be expected to know of the risk of major cliff failure at Little Wanganui prior to February 1984 is also decisive.

Counsel made detailed submissions concerning whether particular provisions of the Town and Country Planning Act 1953 and the Counties

Amendment Act 1961 afforded, in the circumstances of this case, causes of action for breach of statutory duty. In view of my factual conclusions it is unnecessary to consider this question. I note however that counsel for the plaintiffs acknowledged in closing submissions that the cause of action alleged to arise under the Town and Country Planning Act was dubious indeed in the light of the decisions in *Attorney-General v Birkenhead Borough* [1968] NZLR 383 and *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA). Likewise, counsel made submissions concerning whether the council in consenting to the change of land use, and in approving the subdivision, owed a duty of care to subsequent purchasers of the sections. This aspect impressed me as more arguable from the plaintiffs' perspective. However, it is unnecessary for me to reach a concluded view on the matter.

The grant of building permits

The third to sixth causes of action all related to the common law, or statutory duties, of the council in granting building permits at different points in time. Slightly different causes of action were pleaded consequent upon amendments to the Local Government Act 1974 concerning the grounds upon which a local authority might refuse to grant a building permit for land unsuitability. However, the third and fourth causes of action related to periods prior to November 1981 and were abandoned on limitation grounds. It was conceded that s 91(2) of the Building Act 1991, which extends to ten years the limitation period for civil proceedings relating to any building work, applied. This proceeding was issued on 23 December 1993. Accordingly any claim based upon the grant of a building permit up to 22 December 1983 was time-barred. Building permits for Little Wanganui were granted however throughout the 1980s and early 1990s, so the claims of some plaintiffs remained alive. The fifth and sixth causes of action alleged that the council was in breach of statutory duty, or negligent, respectively in granting building permits when the risk of cliff failure was known, or should have been known. The finding that the council was aware of the problem from February 1984, when Messrs Nathan and Spooner visited Little Wanganui, means that there is an evidentiary basis for the claims of those plaintiffs who were granted permits subsequent to then.

The Local Government Amendment Act (No 2) 1981 substituted new sections in the parent Act relating to building permits. The new s 641 relevantly provided:

> **641. Refusal of building permit** – . . .
>
> (2) Notwithstanding anything in any bylaw made under section 684 of this Act the council shall refuse to grant a permit for the erection or alteration of any building where –
>
> (a) The land or part of the land on which the building is proposed to be erected or altered is not suitable for the building or the alteration unless the council is satisfied that adequate provision has been made or is to be made to render the land suitable for the building or alteration; or
>
> (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; or . . . .

Section 641A of the 1981 amendment also introduced new powers. Under that provision a council may issue a permit for a building at risk from erosion, subsidence or slippage if satisfied that the building could be relocated from the particular site. In such instances the District Land Registrar was to be notified and an entry made on the relevant certificate of title as to the basis upon which the building permit was granted. Further the council was protected from civil liability arising from the issue of a permit.

Finally, from 1 July 1992 ss 641 and 641A were repealed by the Building Act 1991. Thereafter the material provision was s 36:

> **36. Building on land subject to erosion, etc.** – (1) Except as provided for in subsection (2) of this section, a territorial authority shall refuse to grant a building consent involving construction of a building or major alterations to a building if –
>
> (a) The land on which the building work is to take place is subject to, or is likely to be subject to, erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage;
>
> . . .
>
> unless the territorial authority is satisfied that adequate provision has been or will be made to –
>
> (c) Protect the land or building work or that other property concerned from erosion, avulsion, alluvion, falling debris, subsidence, inundation, or slippage; . . .

Subsection (2) provided that a building consent may nevertheless be granted subject to the certificate of title being tagged, and subject to subs (4) whereby the territorial authority and its servants were deemed not to be under any civil liability for granting the building consent.

Against this statutory background the council argued that the issue of a permit was essentially nothing more than an authorisation pursuant to a statutory power to build according to approved plans and specifications. Accordingly, it was submitted, the issue of the building permit could not be interpreted as a representation pertaining to the stability of a cliff situated some distance from the subdivision area. Detailed argument was also addressed to the precise terms of the legislation. It was argued that until the Building Act was passed the statutory focus of the power to refuse the grant of a permit was upon land unsuitability, or the likelihood of erosion, subsidence or slippage, of "the land" on which the building was to be erected. Only with the introduction of s 36(1)(a) in 1991 was there a requirement to consider whether the land on which the building work was to take place was subject to "falling debris". Thus for the first time there was a legislative focus on danger emanating from outside the land to be used for building purposes. It was contended these factors were relevant to the existence of both of the causes of action asserted by the plaintiffs.

To my mind the proper construction of s 641 of the Local Government Act 1974, is important. I consider that the council was bound to refuse to grant a permit where, within the useful life of the building, damage was "likely" arising "directly or indirectly" from not only erosion, subsidence or slippage of the building land, but also from erosion, subsidence or slippage of "any other

land". These words convey that the likelihood of damage to a building emanating from an external source was expressly contemplated from at least 1981 onwards. Subsequently the use of the phrase "falling debris" in the 1991 provision clearly required the council to consider the likelihood of damage as a result of failure of the adjacent cliff face. 5

In determining whether a statute which imposes a duty also confers a personal right to damages the observations of Lord Simonds in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at p 407 remain apposite:

> "The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, 10 including the pre-existing law, in which it was enacted."

Two matters of particular importance are whether the statute was passed for the benefit of an ascertainable class of persons, in which case it is more likely members of that class have a right of action. Second, it remains important to ascertain whether the statute provides a remedy for breach of the relevant duty. 15 Again, if not, there is a greater likelihood a damages action was intended.

My consideration of s 641, in the context of the Local Government Act 1974, as a whole, leads me to the conclusion that a breach of duty on the part of a council or territorial authority, confers on the affected permit holder a right to seek damages. The statutory duty to refuse to grant permits where the 20 likelihood of damage during the building's lifetime existed, clearly rested with the council or territorial authority, and was well defined. The function was expressed in obligatory, rather than discretionary, terms. Plaintiffs who were granted building permits comprise, to my mind, an easily ascertained class of persons to whom the statutory duty was owed. The statute does not provide any 25 form of remedy in favour of persons affected by a breach. Moreover, the introduction in s 641A(3), repeated in s 36(3), of a provision which protected the council or territorial authority from civil liability if the certificate of title was tagged, strongly suggests that otherwise breach of the duty would confer an actionable right. 30

As to whether the duty was breached in this case I have no hesitation in finding that after February 1984 the council was on notice that buildings erected at Little Wanganui were likely, within their useful lifetime, to be subject to damage from erosion, subsidence, or slippage. A further point raised by this present case is whether the plaintiffs suffered injury of a kind which the statutes 35 were designed to prevent. So far no one has suffered injury to person or damage to property. The claim is for purely economic loss: the diminution in property values. Concerning this issue there is comparatively little authority, save for the House of Lords decision in *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 1 All ER 622. That case concerned in part whether 40 alleged contemptuous publication of material in breach of a statutory provision might give rise to a claim for damages at the suit of the individual affected. Lord Bridge of Harwich held at p 632 that although the publication may constitute an invasion of privacy, it did not "cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to 45 property or economic loss." Thus although the publication may have been adverse to the plaintiff's interest, it was "incapable of causing him loss or injury of a kind for which the law awards damages". In the light of the observations in this speech I conclude that economic loss, diminution in property value, is recoverable where breach of statutory duty is established. 50

The plaintiffs contend that they were also owed a common law duty of care by the council. It was argued the plaintiffs relied upon the grant of a building permit as showing not only was their proposed dwelling of adequate design and construction, but that the land site was safe for residential occupation. The principles to be applied in deciding whether a duty is owed in a new factual situation appear from *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA). It is not necessary to recite the required approach, nor list the range of factors which may fall for consideration. That the loss claimed is purely economic is a factor telling against recognition of a duty of care, but is not decisive in itself. In my view proximity and reliance are established in the present case. Against the statutory background I consider it was entirely reasonable of the plaintiffs to proceed on the footing that the grant of a building permit carried with it the implication that the land was safe for human occupation. The council was expressly required to consider that very issue. In New Zealand the liability of local bodies for negligence in relation to approving building plans and specifications which do not comply with bylaws or are otherwise deficient, and for negligent inspection of new buildings, is well established. It is an appropriate incremental step to extend liability to the negligent grant of a building permit where risk to life and property from the failure of an external but nearby landform is established.

The speech of Lord Hoffman in *Stovin v Wise* [1996] 3 All ER 801 at p 827, is much in point:

> "Whether a statutory duty gives rise to a private cause of action is a question of construction (see *Hague v Deputy Governor of Parkhurst Prison, Weldon v Home Office* [1991] 3 All ER 733, [1992] 1 AC 58). It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision. As Lord Browne-Wilkinson said in *X and ors (minors) v Bedfordshire CC* [1995] 3 All ER 353 at 371, [1995] 2 AC 633 at 739 in relation to the duty of care owed by a public authority performing statutory functions:
>
> > '. . . the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done'.
>
> The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed."

In this case much of the reasoning relied on to support the conclusion that breach of statutory duty availed the plaintiffs, applies also in the present context. To summarise I consider the council also owed a common law duty of care in relation to the grant of building permits, and was in breach of that duty from February 1984 when it was on notice as to the extent of the risk. No steps were taken to safeguard persons or property, nor were permit holders warned of the risk of cliff failure.

The case against the ministry

The seventh and eighth causes of action pleaded on behalf of the plaintiffs allege breach of statutory duty, and negligence respectively, against the ministry. The specific allegations mirror those made by the council against the ministry as a third party. The focus is upon events in 1973 when the change of land use was consented to and the subdivision approved. To a lesser extent events in 1975 are also relevant, when stage 2 of the subdivision was approved.

It is first necessary to notice the statutory background. Section 38(14) of the Town and Country Planning Act 1953 at the relevant time provided:

> (14) Where any subdivision of land or other proposed work (whether public or private) or any change of use of any land or building would in the opinion of the Minister be contrary to the public interest or would or might adversely affect any public work maintained or proposed to be constructed or established by the Minister, the Minister may at any time require the Council to prohibit absolutely or conditionally the carrying out of the subdivision or other proposed work or the change of use or may prescribe and notify the Council of conditions subject to which it may be carried out.

In addition s 38A of the Act prevented any change in the use of land pending a district scheme becoming operative without the consent of the local authority. Subsection (2A) provided:

> (2A) In granting or refusing consent to any application under this section, the Council shall have regard to –
> (a) The public interest; and
> (b) The likely effect of the proposed use on the existing and foreseeable future amenities of the neighbourhood, and on the health, safety, convenience, and economic and general welfare, of the inhabitants of the district and of any other area affected by the application.

Further, subs (3) conferred upon the Minister of Works a right to be heard before the council and to appeal against a decision of the council concerning a change of land use.

On the basis of these provisions it was argued the ministry owed a statutory duty to both the plaintiffs and the council to "prohibit absolutely or conditionally the carrying out of the subdivision . . . or the change of use". Alternatively it was contended that pursuant to s 38A(3) the ministry was obliged to be heard in opposition to the change in land use proposed in 1973 on account of the likely adverse effect to the "health, safety, convenience, and economic and general welfare, of the inhabitants of the district . . .".

The ministry resisted liability on the dual grounds that it was not in breach, and in any event owed no statutory or common law duty of care to either the plaintiffs or the council. It is convenient to confront the factual aspect first. The ministry's involvement in 1973 – 1975 was summarised in the "Evidence – overview" section, under the heading "Approval of the subdivision". Mr G C Suggate a retired engineer and town planner was the sole witness called for the ministry. Until his retirement in 1978 he was in the Christchurch office of the ministry. He reviewed applications for change of land use, and subdivision proposals, referred to that office in the early 1970s. It is unnecessary to review Mr Suggate's evidence in detail. Reference to three features will suffice.

First, the documentary evidence demonstrated that the ministry's attention was not drawn to the Little Wanganui cliff face as a relevant issue to be

considered. Copies of the application for change of land use and for approval of the subdivisional scheme plan were forwarded to Christchurch, but this material did not broach cliff instability as a possible issue. However, Mr Suggate confirmed that copies of the papers were sent to the ministry's
5 resident engineer in Westport. He was a Mr James Douglas, now deceased, but described by Mr Suggate as experienced and well-versed in West Coast matters. Mr Suggate accepted that he would have expected the resident engineer to have visited the Little Wanganui site before reporting his absence of objection to the subdivisional proposal to the Christchurch office. Third, and perhaps the high
10 point of Mr Suggate's evidence from the viewpoint of the plaintiffs and the council, was a passage in the cross-examination conducted by council for the second third party. Confronted with a photograph of the present subdivision with the cliff face in the background, Mr Suggate conceded that had he seen a similar photograph in 1973 he may well have formed the view that
15 investigation of the cliff's stability was required. Moreover he further conceded that Mr Douglas, with the benefit of a site inspection, may have been placed to reach a similar judgment.

This evidence raised the question whether in 1973 the ministry was in a superior position to that of the council, and with the advantage of its greater
20 resources whether it should have appreciated the possibility of cliff failure and at least embarked upon further investigation of that issue. My conclusion is that even in the face of the concessions made by Mr Suggate the evidentiary basis for a finding against the ministry is tenuous. In that regard I return to the evidence concerning the initial assessment of the cliff face made by the
25 geologist and geotechnical engineer from Barrett Fuller in 1990. Their attention had been specifically drawn to the fact of rockfalls from the cliff face. They were commissioned to provide a formal report to the council, yet the initial assessment was of a risk of rockfalls, but not large-scale instability. Given the nature of his brief I can see no proper basis for a finding that Mr Douglas some
30 17 years earlier should have foreseen the risk and recommended against the subdivision proposal.

It is therefore unnecessary to decide whether a statutory, or a common law, duty of care was owed to the plaintiffs or to the council. It is sufficient to observe that the argument for the existence of a statutory duty was hardly
35 compelling, and it would be unusual if nevertheless a duty of care at common law was held to exist.

The case against the DSIR

In its third party claim against the DSIR the council alleged that two involvements of the DSIR gave rise to a common law duty of care. The first
40 was the preparation by the geological survey division of the DSIR in April 1983 of the report entitled "Geological Comment for Buller County District Planning Scheme Review". The report noted a risk at Punakaiki to buildings from rockfalls. This produced a resolution of the council in June 1983 to retain the DSIR to define a hazard zone for not only Punakaiki township but the Little
45 Wanganui subdivision as well.

In due course, in February 1984, Messrs Nathan and Spooner visited Little Wanganui and the former expressed his opinion as to the danger which existed in relation to the subdivision as a whole. The subsequent failure of the council to react to this advice, and of the DSIR to provide a detailed assessment of the
50 risk, have already been discussed. I have found that the council was negligent from February 1984 for its failure to take decisive action. The DSIR was likewise, in my view, negligent in failing to complete a proper assessment of

the risk and provide a delineation of the hazard zone, as sought by the council. In closing submissions for the DSIR it was contended that its brief was a limited one: to delineate the hazard zone, not to make a general assessment of the instability of the cliffs. I do not accept the distinction. Proper delineation of the hazard zone would have necessitated an assessment of the kind eventually 5 undertaken by Barrett Fuller. Such assessment would have revealed that the whole subdivision was at risk and the DSIR would have been bound to advise the council accordingly.

Although formally denied in its statement of defence, detailed submissions were not addressed on behalf of the DSIR against the existence of a duty of 10 care. In my view a sufficient degree of proximity, or of relationship, was established as was reliance on the part of the council. Nor do I consider there are policy considerations which dictate against recognition of a duty. Three affirmative defences were advanced: contributory negligence by the council, that any breach of duty was not causative of loss, and that any breach was 15 waived by the council's subsequent actions. As to causation I am satisfied that if the DSIR had met its obligations by completing an assessment of the risk and defining the extent of the hazard area, the council would have taken decisive action in relation to the issue of new building permits in particular. I regard the causation argument as a facet of the contributory negligence assessment rather 20 than as a stand-alone defence. It was contended the council's failure to ensure that the DSIR completed its brief, and the council's approval of its district scheme in March 1987 without incorporation of a hazard zone for Little Wanganui, constituted waiver of the DSIR's breach of duty. The basis in principle for this defence was not developed, but in any event I likewise see this 25 aspect as one to be weighed in relation to the assessment of the council's contributory negligence.

Apportionment as between the council and DSIR requires consideration of a number of factors. On the one hand the council was in the position of immediate responsibility. The residents of the Little Wanganui resort were its 30 ratepayers. Ongoing decisions were required of the council in relation to the grant of new building permits. Throughout much of the relevant period it was in the process of finalising an operative district scheme.

On the other hand, briefed to define a hazard zone and afforded a site visit in early 1984, the DSIR in the person of Mr Nathan, was best placed to 35 comprehend the significance of the risk and to appreciate the need for decisive action. At the site Mr Nathan dealt with a newly appointed county engineer, Mr Spooner, who plainly lacked experience and more particularly the expertise to appreciate what was appropriate and required by way of immediate response. Yet nothing was put in writing by Mr Nathan. The Geological Survey Section 40 had the personnel and resources to undertake the work necessary to adequately report back to the council. Henderson's 1937 report and aerial photographs, for example, were on hand. No explanation has been forthcoming as to how and why the DSIR failed to meet its obligations over an extended time. The entire exercise followed what counsel rightly described as a languid course. But 45 equally, the council failed dismally to complete the initiative it commenced in 1983 to assess the Little Wanganui hazard. In my view the just and equitable course is to reduce the contribution to which the council would otherwise be entitled by 50 per cent. Responsibility should be shared equally.

Damages 50

As finally formulated the claim for damages was for a global sum of $1,224,500 on account of diminution in property values, and $15,000 general

damages for each plaintiff. At this stage it is not possible to address the claims for general damages. Each of the representative plaintiffs obtained building permits before February 1984. In their cases there is now no basis for a general damages award. Consideration of the claims of other plaintiffs must await the 5 Court's receipt of evidence in support of each claim.

Evidence was led from three valuers, each of whom was highly experienced and qualified. For the plaintiffs Mr R A Aubrey of Christchurch gave evidence, while the council called Messrs A G Stewart and P J Mahoney, of Wellington and Auckland respectively. Each valuer inspected the properties 10 at Little Wanganui, unearthed relevant local valuation data, and produced detailed reports and supporting schedules. In advance of the hearing their respective reports were exchanged. That process served to identify the essential points of difference between Mr Aubrey on the one hand and the defence experts on the other. The common method of approach employed was to value 15 all of the properties owned by the 57 different plaintiffs on a "non-blighted" and "blighted" basis, and then arrive at a figure for the difference between the two assessments. Such figure would represent the total diminution in value of all plaintiffs' properties. On this basis the relevant figures were:

	Mr Aubrey	Mr Stewart	Mr Mahoney
Non-blighted	$2,021,500	$1,443,500	$1,486,000
Blighted	$ 797,000	$ 987,125	$1,095,000
Difference	$1,224,500	$ 456,375	$ 391,000

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Expressed in percentage terms Mr Stewart assessed a diminution in value figure 37 per cent of the order of that assessed by Mr Aubrey. In Mr Mahoney's case the comparable figure was 32 per cent. It was notable Mr Aubrey arrived at a total non-blighted figure markedly higher than that of the other experts, and 30 likewise a blighted figure which was markedly smaller. In other words the gross difference of opinion flowed from both components of the valuation exercise.

Given the approach adopted by the experts, a property-by-property comparison would not be helpful. In any event, the diminution in value in respect of many of the properties is no longer relevant, on account of the 35 findings as to liability. In my view the necessary approach is to focus upon the essential differences between Mr Aubrey, and Messrs Stewart and Mahoney, in order to judge the worth of the respective opinions. Three major points of difference emerged:

(a) That Mr Aubrey proceeded on an assumption that, but for the council's 40 recognition of the hazard and the change in market perception which followed, the Little Wanganui subdivision would by now have been entirely or largely built up. That is to say the great majority of sections would have been developed to a good standard with an accompanying improvement in general recreational facilities. As Mr Aubrey 45 envisaged it Little Wanganui would now be a "unique fully serviced resort settlement". The defence experts disputed this conclusion.

(b) In arriving at the non-blighted values Mr Aubrey acknowledged he placed more reliance than usual on the replacement cost of improvements less depreciation. Again, the other experts took issue at this approach.
(c) In the assessment of present blighted values Messrs Stewart and Mahoney made allowance for an element of recovered value in the marketplace since the low which immediately followed news of the council's concerns and endeavours to clear residents from the subdivision. By contrast, Mr Aubrey denied that a recovery had occurred. In his opinion the picture was bleaker than ever, and a thesis of partial, even entire, recovery of value with the passage of time he regarded as not well founded.

Some further examination of these aspects, is required.

The view held by Mr Aubrey that but for the adverse publicity Little Wanganui would by now be a fully developed resort settlement, I am unable to accept. The best evidence of the likely development trend is the pattern which emerged from late 1977 when building permits were first issued. Although sections sold readily, building development was slow by comparison. Stages 1 and 2 of the subdivision encompassed of the order of 80 sections. From about 1978 to the end of 1991 some 25 homes or baches, of varying standards, were built. Development was therefore by no means spectacular. Despite Mr Aubrey's opinion to the contrary I do not accept Little Wanganui would by now be near to fully developed, but for the cliff instability problem. Section prices within the subdivision were cheap by comparison to land prices generally elsewhere in New Zealand. It was not surprising therefore that there was a ready demand for sections at Little Wanganui as they came onto the market. But the financial commitment required to build at this relatively remote location has, in my judgment, inhibited full development of the area. Even absent safety concerns for the subdivision, I am satisfied further housing development would have occurred at much the same rate as prevailed up to late 1991.

In formulating his non-blighted values Mr Aubrey reached the conclusions that both section prices, and the value of improvements at Little Wanganui were higher than elsewhere in the Buller area. He concluded that a typical present-day section price for the subdivision would be of the order of $12,000, whereas a figure of about half that would procure a residential section in many parts of the region. Mr Aubrey justified his opinion by reference to the servicing of Little Wanganui sections. Likewise Mr Aubrey generally judged the value of improvements at Little Wanganui as of higher value than improvements elsewhere in the area. He had regard to both replacement cost less depreciation, and to comparable sales evidence, but acknowledged greater weight was given to the former than would ordinarily be the case. As a result of those factors the non-blighted values reached by Mr Aubrey, were markedly higher than those of the defence valuers. Mr Aubrey resisted criticism of his view by pointing out that the locations from which the comparable sales evidence was drawn were typically much older communities, where houses of considerable age prevailed. In my view this point of distinction was valid to a degree, but I conclude that Mr Aubrey placed too much weight on replacement cost, and at the expense of market evidence.

Messrs Stewart and Mahoney each arrived at blighted values considerably higher than Mr Aubrey's figures. Their opinions included allowance for a recovery factor. Valuation literature was cited which indicated that upon the

occurrence, or threatened occurrence, of a natural disaster affecting land, values would plummet in the first instance but generally recover thereafter. The studies indicated that the rate and extent of recovery depended upon the nature of the disaster and the likelihood of recurrence amongst other factors. Mr Aubrey made no allowance for this phenomenon. In his view there had been no recovery at Little Wanganui between 1991 and the present time. He saw the picture as bleaker than ever. The resolution of this difference of opinion was assisted by reference to recent actual sales at Little Wanganui. Some eight sales were referred to which provided a comparison between Mr Aubrey's blighted capital figure and an actual sale price. The trend was plain: that properties realised figures higher than Mr Aubrey's blighted values. In cross-examination he contended that some of the purchasers involved were either uninformed or for special reasons paid above true market value. These considerations may have been at play in one or two cases, but it is my conclusion that the overall trend of the recent sales figures did demonstrate a degree of recovery in market value.

My general conclusion in relation to the valuation exercise is that Mr Aubrey's total figure for diminution in value is significantly overstated, while the opinions of Messrs Stewart and Mahoney understate the loss in property value to some degree. In what is a very difficult case because of the number of properties involved, I have reached the view that on balance the appropriate total figure for diminution should be of the order of $700,000. However, many of the properties which were necessarily included in the valuation exercise are no longer relevant on account of my findings as to liability. The actual total diminution in value figure will require calculation following consideration of properties on a case-by-case basis. To that end I rule that the damages recoverable in relation to individual properties shall be calculated by increasing the difference between Mr Stewart's "as is" and "unfettered" values by a percentage of 50 per cent. For example if Mr Stewart arrived at an as is value of $32,000 and an unfettered value of $43,000, the difference of $11,000 shall be increased by 50 per cent to $16,500.

The council raised three further issues relevant to damages. First it was argued that various permutations to the general approach to the calculation of a plaintiff's loss, may exist as a result of particular fact situations. One of these was where a plaintiff purchased a section pre-February 1984 but obtained a building permit after that date. Damages, it was submitted, should be limited to the diminution in the value of improvements, not land. The premise relied upon was that the land was acquired before any breach on the part of the council. In the absence of a breach it could not be said that loss was caused by the council. Put another way diminution in the value of the land would have occurred anyway, once the instability problem became public knowledge. By contrast it was accepted the council's negligent issue of a building permit was causative of the diminution in the value of improvements. Without the permit such improvements would not have been embarked upon.

I accept the validity of this argument. However it is not possible to calculate the adjustment required to the general damages formula. Mr Stewart did not individually value the land component of his "unfettered" and "as is" figures. The issue may be capable of resolution between counsel. There may be other permutations arising from the factual situation of individual plaintiffs, which similarly require further consideration. Such must await counsel's further reconsideration of the issues.

Second, the council argued that, if it was accepted property values at Little Wanganui had recovered since the trough reached in the early 1990s, such recovery would probably continue and allowance must be made for that factor. I have not found this an easy issue. There is an absence of authority as to the approach to be adopted when in the period between breach and the hearing the extent of an alleged loss has diminished as a result of some external factor. I think it necessary to return to first principles. The first consideration must be that damages are compensatory: the aim is to secure to the successful party a sum which will place that party, so far as money can, in the same position as if the wrong or breach had not occurred. Second, as a general rule damages are to be assessed as at the date of the loss. But this is not an immutable rule. Rather a pragmatic approach is required if upon analysis of the particular facts of the case it should prove reasonable to assess the loss at some other date up to the date of hearing: *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39. Third, the circumstance that it may be difficult for the Court to determine a future probability, is no reason for shrinking from the exercise. Future or prospective loss, attributable to ongoing personal injury for example, has frequently been assessed by the Courts. Likewise I consider that where there is an evidentiary basis for the conclusion that a market will recover and thereby a plaintiff's loss will diminish, account must be taken of that factor. In this case I conclude that price recovery was most likely to accrue in the medium term after the diminution of value first struck. The Little Wanganui bluffs constitute a massive landform, the effect of which will not be diminished by time. It was common ground that nothing could be done to alleviate the risk from massive cliff failure. In these circumstances it is my view that although property values have rebounded, and will continue to improve to some degree, full recovery will never be achieved. The best which the Court can do is to recognise this factor and take it into account in reaching a judgment as to the overall loss. That I have done, in that the formula set out earlier whereby Mr Stewart's difference figures are to be scaled up by 50 per cent, has a built-in allowance for future price recovery.

Next the council raised contributory negligence in relation to the plaintiffs' claims. In essence it argued that in purchasing land and building at Little Wanganui the plaintiffs were at fault in that they failed to appreciate, or make adequate inquiry, concerning the stability of the nearby cliff face. For reasons which are set out earlier in my consideration of the council's position to February 1984, I reject this plea. I do not accept that laypersons in the position of the plaintiffs had reason to fear for the well-being of their assets and were therefore negligent in not making adequate inquiry. However, if there are cases where diminution in value is claimed in respect of improvements effected after December 1991, then the issue of contributory negligence may well arise. At this stage it is not clear to me from the evidence whether this issue will require further consideration.

Insurance issues

The council claims that LGIC is bound to indemnify in respect of its liability to the plaintiffs. On 14 June 1990 the council completed a renewal proposal in respect of its public liability insurance cover. Question 13 of the proposal provided:

> "Is the applicant or any of its employees, after inquiry, aware of any circumstances which could give rise to a claim against the applicant or any of the present or former employees? If so please give full particulars."

In answer the council supplied particulars relevant to two possible building claims, neither of which had reference to Little Wanganui. The council obtained renewal of its Officials Indemnity Insurance Policy for a period of 12 months from 1 July 1990. The limit of indemnity was $1m, subject to a deductible of $5000 for each claim, or claims, arising out of any one act, error or omission. The exclusions to the policy included as cl 5(b):

> "This policy does not apply to any claim made against the insured
>
> . . .
>
> (b) arising out of any circumstances or occurrences known to the insured prior to the inception of this policy, and not disclosed to the underwriter at inception. . . ."

On 31 May 1991 the council gave notice of a possible claim in these terms:

> "Possible public indemnity in relation to erection of dwellings in a Buller county approved subdivision within a rock fall area."

In a letter which accompanied the notice the Little Wanganui subdivision was identified and a copy of Barrett Fuller's initial report prepared in November 1990 was enclosed in explanation of the basis for the council's concern.

Finally by letter dated 18 February 1992 NZI Insurance, as principal underwriter of the policy, advised the council that LGIC had determined to avoid the policy for non-disclosure.

It was common ground between the council and LGIC that the test to be applied in relation to an issue of non-disclosure was the "prudent insurer" test: *State Insurance v McHale* [1992] 2 NZLR 399 at p 406 (CA). As the judgments in that case recognise the duty of disclosure is not absolute. Rather the insurer may expect disclosure of facts within the actual or presumed knowledge of the insured. Whether a fact, known or presumed, must be disclosed depends upon whether a prudent insurer would regard it as material. In this context materiality is a question of fact, and the reasonableness or otherwise of what was claimed by an insurer to be material would be a relevant consideration in determining materiality.

Against this background and with agreement as to the test to be applied, the issue between the council and LGIC was whether decliniture was available to the insurer. The answer depends upon an assessment of the factual situation as at June 1990 when the renewal proposal was completed.

The argument for the council was that the threshold for notification was not reached until notice of a possible claim was given in late May 1991. Distinction was drawn between the council's knowledge of the danger from rockfalls, as opposed to the hazard of massive debris slide endangering the whole subdivision. It was argued the former was not a material circumstance for disclosure purposes. I do not accept this argument either in principle or on a factual basis.

As early as February 1984 the county engineer was told by Mr Nathan of the DSIR that "the whole subdivision could be threatened by potential rock fall". On any view of it, this was a warning of a danger of very significant proportions. If that evidence were not enough, the concerns held by the council's building inspector by December 1989 plainly gave rise to a duty of disclosure. It is sufficient to quote from a memorandum prepared by Mr Archer to his superior, the manager of operations:

> "I have been concerned now for some time of what I consider to be a significant threat to land, buildings and people living under the hillside at

> Little Wanganui. It becomes very obvious that part of the hill has slumped and settled as the attached photos depict. Apart from the very obvious actual results from slippage in the area, I am also concerned as to the possible liability which council may be under for issuing building permits in this area." 5

That memorandum dated 5 December 1989 was responded to by Mr Ross the manager of operations on 20 December 1989. In the interim he had inspected the site, with particular attention paid to the unstable block which Mr Archer had photographed. Mr Ross expressed the opinion:

> "I think it likely that the block is currently being supported by the 10 debris slope at its foot. I am concerned that it may not be stable long term and that its performance in a moderate earthquake is uncertain."

His memorandum continued that further comment was beyond his competence and he recommended that professional advice be sought concerning the stability of the bluffs. 15

LGIC called evidence as to the likely impact of the above evidence upon an underwriter, assuming disclosure had occurred. The first witness, Mr A R Tulloch an experienced underwriter expressed the opinion that disclosure of the Little Wanganui problem would have resulted in a term in the 1990/1991 policy excluding cover for any claim connected with instability of 20 the cliff face. Mr G M W Mercer, the present assistant manager of LGIC, gave evidence to similar effect. The test of materiality is an objective one, but this evidence confirmed my own view that by June 1990 employees were well aware of circumstances which could give rise to a claim against the council. In Mr Archer's case the potential for liability arising from the very act of issuing 25 building permits, was recognised and documented. In all the circumstances I find there was material non-disclosure and LGIC was entitled to avoid the Little Wanganui claims.

Summary

To summarise the principal issues determined in this judgment were as 30 follows:

(a) The decision of the council to approve a change of land use at Little Wanganui enjoyed the protection of judicial immunity.
(b) Although the council was not at fault in approving the subdivision in 1973 – 1975, it was negligent from February 1984 in failing to act 35 upon advice received from the DSIR.
(c) In subsequently issuing building permits the council breached both its statutory, and common law, duty of care to the plaintiffs.
(d) The claims against the ministry both as a defendant, and as a third party, failed in that officials in the ministry were not neglectful in their 40 consideration of land use and subdivisional issues.
(e) The claim against the DSIR as a third party that it failed to fully investigate the Little Wanganui instability problem from February 1984 was established.
(f) Responsibility as between the council and the DSIR was equal. 45
(g) Where the claims of plaintiffs were sustained the measure of damages shall be calculated by increasing the difference figure arrived at by Mr Stewart by 50 per cent, but subject to further consideration of specific damages issues where the factual position so dictates.

(h) The indemnity claim against LGIC as a third party by the council pursuant to its insurance policy failed on account of non-disclosure of material circumstances.

Costs are reserved. Until counsel have considered this judgment and 5 decided whether a further hearing is required, any costs ruling would be premature. Leave is reserved to counsel to file such memoranda as to costs, and other issues, as may be appropriate.

Judgment accordingly.

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10 Solicitors for the defendant: *Phillips Fox* (Wellington).
Solicitors for the defendant/first third party: *Crown Law Office* (Wellington).
Solicitors for the second third party: *Heaney & Co* (Auckland).

Reported by: Briar Gordon, *Barrister*