IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA111/2023
[2024] NZCA 133

BETWEEN	TASMAN DISTRICT COUNCIL Appellant
AND	LOUISE BUCHANAN, KEITH MARSHALL AND ALISTAIR DONALD AS TRUSTEES OF THE BUCHANAN MARSHALL FAMILY TRUST Respondent

Hearing:	21 February 2024
Court:	Goddard, Mallon and Wylie JJ
Counsel:	C M Meechan KC and A C Harpur for Appellant A R Shaw and L C L Yong for Respondent
Judgment:	26 April 2024 at 11.00 am

JUDGMENT OF THE COURT

A **The application to adduce further evidence on appeal is declined.**

B **The appeal is allowed.**

C **The orders made in the High Court are set aside.**

D **The question of costs in the High Court is to be determined by that Court, in light of this judgment.**

E **The respondents must pay the appellant costs for a standard appeal on a band A basis, with usual disbursements.**

REASONS OF THE COURT

(Given by Goddard J)

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Introduction and summary

The owners' claim against the Council

[1] In 2004 the Tasman District Council (the Council) granted a building consent for an architecturally designed home oriented around a swimming pool set in a central courtyard. The home was constructed in accordance with that consent. In 2006 a code compliance certificate (CCC) was issued by the Council. In 2008 Ms Louise Buchanan and Mr Keith Marshall (the owners) purchased the property. They specifically checked that the house had a CCC. They purchased the house in reliance on the assurance provided by the CCC that the house complied with relevant building laws.

[2] However the design and construction of the house did not comply with requirements in relation to the fencing of swimming pools set out in the Fencing of Swimming Pools Act 1987 (FOSPA) and the building code. That was only discovered in 2019. In order to comply with the law in relation to fencing of swimming pools[1] it was necessary to undertake remedial work. The owners carried out that remedial work. The remedial work impaired the appearance and amenity of the house, reducing its value.

[3] The Council admits it acted negligently when it issued the building consent in 2004 and the CCC in 2006. If proceedings had been brought in time the owners could have recovered from the Council the losses that they suffered as a result of the Council's negligence in 2004 and 2006. But it was common ground before us that by the time the non-compliance was discovered in 2019, a claim based on the Council's negligence in 2004 and 2006 was barred by the 10-year longstop limitation period in s 393(2) of the Building Act 2004 (the 2004 Act).

[4] However in 2009, and again in 2012, the Council had inspected the swimming pool to check that it complied with FOSPA. On each occasion the Council incorrectly advised the owners that it did comply. The owners brought proceedings against the

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[1] In 2016 the Fencing of Swimming Pools Act 1987 [FOSPA] was repealed and replaced by materially similar requirements set out in subpt 7A of pt 2 of the Building Act 2004 [2004 Act]. So by the time the remedial work was carried out, the relevant requirements were found in the 2004 Act rather than in FOSPA.

Council in tort claiming that the 2009 and 2012 inspections had been negligent, and as a result of that negligence they had lost the opportunity to sue the Council in respect of its earlier negligence in 2004 and 2006. If the Council had carried out the 2009 and 2012 inspections carefully, and identified the non-compliance with FOSPA, the owners would have recovered all of their losses from the Council. So, they claimed, the negligent inspections in 2009 and 2012 caused them loss equal to the amount they could have recovered if they had sued in time in relation to the Council's earlier negligence.

High Court decision

[5] That claim succeeded in the High Court.[2] Palmer J held that the Council owed the owners a duty of care when carrying out the inspections in 2009 and 2012. The Council had breached that duty of care: the inspections were negligent. That negligence caused the owners to lose the opportunity to sue the Council for its negligence in 2004 and 2006.

[6] The Judge granted declarations that the Council had acted negligently in issuing the building consent, carrying out the original inspections and issuing the CCC, and carrying out the 2009 and 2012 inspections; and had made negligent misstatements about the property's compliance in those inspections. The Council was required to pay damages totalling approximately $246,000 to compensate the owners for loss of value of the property, remedial costs, and certain associated costs. The Council was also liable to pay $25,000 general damages for distress and humiliation.

Outcome on appeal

[7] The Council appeals to this Court. The primary basis of the Council's appeal is that the purpose of the 2009 and 2012 inspections was to protect the safety of young children, not to protect the economic interests of property owners. So, the Council argues, any duty of care it might have owed in connection with those inspections was not owed to property owners, and did not extend to economic loss suffered by them.

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2 *Buchanan v Tasman District Council* [2023] NZHC 53, [2023] 2 NZLR 287 [High Court judgment].

[8] The purpose of FOSPA was to promote the safety of young children by requiring the fencing of certain swimming pools. The owners of a pool to which FOSPA applied were required to ensure the pool was fenced in accordance with the requirements of FOSPA, to ensure young children were kept safe from drowning, at any time when the pool was filled or partly filled with water.

[9] The purpose of the FOSPA inspections carried out by the Council in 2009 and 2012 was to ensure that the owners of the property continued to comply with their obligations under FOSPA. The Council was performing its responsibilities in order to keep young children safe. Property owners are the persons whose conduct was regulated under FOSPA, not the intended beneficiaries of the regulatory function. In particular, the purpose of the legislation was not to enable property owners to discover existing rights of action they might have against the Council or builders or architects arising out of the original construction of the house and pool. It was not to enable those property owners to protect their economic interests by bringing (timely) proceedings against the Council or third parties in respect of any pre-existing defects.

[10] The 2009 and 2012 inspections did not contribute to the existence of any defects in the property: the defects that the owners were required to remedy existed from 2006 onwards. Put another way, it is not the case that if the Council had carried out the inspections carefully in 2009 and 2012 the property would have complied with FOSPA.

[11] In those circumstances we consider that when the Council carried out the 2009 and 2012 inspections, it did not owe a duty of care to the owners to take reasonable care to protect them from the loss of litigation rights against the Council and others. That was not the purpose of the inspections.

[12] Nor do we think it can be said that the owners acted in reasonable reliance on the statements made by the Council about FOSPA compliance in 2009 and 2012 by refraining from bringing proceedings against the Council. The owners were not contemplating bringing such proceedings. They were not looking to the Council to provide information or advice about the possibility of bringing such a claim. The Council was not aware that its inspections would be relied on to make decisions

about such claims. The owners did not receive any new information, or adopt any new course of action, as a result of the 2009 and 2012 inspections. The 2009 and 2012 inspections, and the statements about FOSPA compliance made following those inspections, were not in any meaningful sense a cause of the owners' loss. Rather, their loss was caused by the negligent acts of the Council in 2004 and 2006.

[13] It is also arguable that the owners' claim is a civil proceeding relating to the original building work in 2004–2006, and is time-barred because it was brought more than 10 years from the date on which the original building work was done. If a failure to identify defects in that work during a subsequent inspection, when those defects should have been apparent to the Council, is sufficient to start time running afresh then time could in some cases run indefinitely in respect of Council decisions to grant building consents and CCCs. That would be inconsistent with the purpose of the 10-year longstop.

[14] We have considerable sympathy for Ms Buchanan and Mr Marshall, who have suffered loss through no fault of their own, and are unable to recover that loss from the negligent Council because of a time bar. Limitation rules can on occasion produce harsh results of this kind: their very purpose is to prevent claims, however meritorious, being brought after the relevant limitation period has elapsed. But sympathy for deserving claimants does not justify circumventing limitation rules by distorting the substantive law. Here, the principled answer is that the owners' meritorious claims are time-barred. The claims based on the 2009 and 2012 inspections, which arguably are not time-barred, cannot succeed on the merits.

[15] The Council's appeal must therefore be allowed.

[16] Our reasons are set out in more detail below.

Background

[17] We draw with gratitude on the Judge's summary of the events leading up to these proceedings.

The property and pool

[18] In 2006 an innovative house, studio, garage, and swimming pool were constructed on a 2.9 hectare lifestyle block in Wakefield. It was a Local Category Winner in the Registered Master Builders House of the Year Gold Awards 2007. In the 2007 New Zealand Institute of Architects Architecture Awards it won an award in the Nelson Marlborough Residential Category and a Resene Colour Award. The house and studio are shown in Photograph 1 below.[3]

Photograph 1: the house and pool as originally constructed

[19] The pool is located in the centre of a courtyard. The pool barrier is made up of:

(a) The walls of the main dwelling north of the pool, and the walls of the studio and garage to the south;

(b) Boundary fences to the east and west, with a gate in the east fence;

[3] There is a further large hedge behind the vantage point from where the photograph was taken.

(c) Small sections of fencing to the north and south, with an entry gate in the south fence between the garage and the studio.

Consent, CCC and two inspections

[20] The Council issued a building consent for the house and pool in September 2004. It conducted inspections of the house and the pool during construction in June 2006. The Council carried out its final inspection of the building work on the house and pool and issued the CCC in October 2006.

[21] In August 2008 Mr Marshall was appointed to the position of Chief Executive of Nelson City Council, having previously held chief executive positions at other councils. He and his wife, Ms Buchanan, who used to work for a large New Zealand corporate organisation, looked for a property to buy. In September 2008 Ms Buchanan and Mr Marshall (as trustees of the Buchanan Marshall Family Trust) agreed to purchase the property for $780,000, with settlement in October 2008. Prior to the purchase, they sighted the CCC. But for the CCC, they would not have purchased the property.

[22] In May 2009 the Council required the pool to be registered. Ms Buchanan filled out a form for that purpose. She did not check one of the boxes under the heading "immediate pool area" and she ticked "yes" to indicate the pool had gates that were "self-closing and self-latching". When doing so, her evidence is that she did not turn her mind to FOSPA.

[23] The Council conducted further inspections of the pool on 4 August 2009 and 24 January 2012. On each occasion, the inspector examined the locking and latching mechanisms on the house doors and advised Ms Buchanan that the pool and fence complied with the law. The checklist attached to the 2012 inspection ticked "yes" in relation to a 1.2m high fence, the gates being self-closing and self-latching, and any door having a locking device preventing it being readily opened by children under six.

The third inspection and non-compliance

[24] In 2019 the owners decided to sell the house to buy something smaller in preparation for retirement. They advertised the property for sale. The pool, and the gates and doors that lead to it, had not changed in any material way during their ownership.

[25] In November 2019 having seen the property advertised for sale, the Council conducted a further inspection. To Ms Buchanan's surprise, the inspector advised her that the pool had failed the inspection because the doors were not self-closing or alarmed, and the east gate in the side fence did not self-close. Ms Buchanan and Mr Marshall's uncontradicted evidence is that the east gate is wedged tightly shut and cannot be practically opened from the outside.

[26] That evening Ms Buchanan and Mr Marshall emailed the Council challenging its preliminary view of non-compliance. A few days later the Council sent them a letter advising the property was not compliant with ss 162A to 162E of the 2004 Act, which had come into force on 1 January 2017, because the pool barrier was non-compliant. The letter attached an email that was sent the same day, advising that the failed items were that the doors opening into the pool area from the house, studio and garage did not self-close/self-latch and the east gate did not self-close/self-latch. There was no mention of alarms, which was wrongly identified as a problem by the inspector, in the letter or email.[4] The Council accepts it did not pick up on the issue of the immediate pool area needing to be fenced. That issue was subsequently identified by the Ministry of Business, Innovation and Employment (MBIE).

[27] The owners took the property off the market. In December 2019 they challenged the Council's decision by seeking a formal determination from MBIE under s 177 of the 2004 Act. In the first half of 2020, the owners commissioned costings of remedial solutions.

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[4] Alarms are only required if there is a door in a building wall that provides access to the immediate pool area when the door does not have a self-closing device. These doors must also be single leaf, no more than 1000mm in width, and hinged or sliding: see Building Regulations 1992, sch 1 cl F9.3.4; and Ministry of Business, Innovation and Employment *Acceptable Solutions F9/AS1 and F9/AS2: For New Zealand Building Code Clause F9 Means of Restricting Access to Residential Pools* (27 April 2017) at [4.2.1] and [4.2.2].

[28] In December 2020 MBIE issued its draft determination.[5] It concluded that the pool must, but did not, comply with the requirements to have self-locking or self-closing doors or to have a physical barrier that restricts access to the pool by unsupervised children under five. It also determined, following the High Court judgment in *Waitakere City Council v Hickman*, that the pool fencing was not compliant with the current building code and the 2004 Act, had not complied with the building code in force at the time of construction, did not comply with FOSPA at the time of construction, and had not been exempted from the requirements of FOSPA.[6] This is not disputed.

[29] In December 2020 the owners issued proceedings against the Council.

[30] In July 2021 MBIE issued its final determination, which confirmed its draft determination.[7]

[31] In September 2021 the Council issued two notices to fix, requiring a temporary fence by 12 October 2021 and a permanent barrier by 1 December 2021. Ms Buchanan and Mr Marshall challenged those notices with MBIE. MBIE's draft determination found the notices were correctly issued. It also noted Ms Buchanan and Mr Marshall were not responsible in any way for carrying out the original building work or actively contributing to its non-compliance. There had been no final determination by the date of the trial of these proceedings.

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5 Ministry of Business, Innovation and Employment *Draft Determination 3209: Regarding the compliance of an existing pool barrier at Eighty Eight Valley Road, Wakefield* (16 December 2020).

6 At 19–20, citing *Waitakere City Council v Hickman* [2005] NZRMA 204 (HC) at [26]–[29].

7 Ministry of Business, Innovation and Employment *Determination 2021/015 Regarding the compliance of an existing pool barrier at 1373 Eighty Eight Valley Road, Wakefield* (19 July 2021).

Photograph 2: Pool with compliant barrier

[32] In December 2021 Ms Buchanan and Mr Marshall applied for a building consent for remediation. That work was carried out in 2022, as shown in Photograph 2. It passed its final inspection and a CCC was issued in June 2022. The owners say the required remediation has destroyed the central design feature of the house by interposing a reflective box-like structure into the central courtyard, ruining the character of the property.

The owners' claim against the Council

[33] It was common ground before us, as before the High Court, that the Council owed the owners a duty of care when it issued the building consent in 2004, and when it carried out inspections and issued the CCC in 2006. It was common ground that the Council breached that duty of care. And it was common ground that recovery for that negligence was time-barred by 2019 when the non-compliances were discovered. So the owners did not bring proceedings in respect of that negligence.

[34] Rather, as already mentioned, in December 2020 the owners filed proceedings against the Council in respect of the 2009 and 2012 pool inspections. Their claim pleaded three causes of action: negligence, negligent misstatement and breach of statutory duty under FOSPA. The relief claimed in respect of each cause of action included declarations in relation to the Council's negligent conduct, damages for loss of the opportunity to sue the Council in reliance on the negligently issued CCC and for certain other losses, and general damages of $50,000.

[35] The background facts were not in dispute at trial. Rather, the question was whether on those facts the owners had a claim against the Council. The Council argued in the High Court that it owed no duty of care to protect the economic interests of the owners when carrying out inspections under FOSPA, and, in any event, the claims were time-barred. The Council also disputed the claimed quantum of damages, and pleaded contributory negligence.

High Court judgment

Duty of care and breach — negligence

[36] The Judge began by noting that this proceeding is apparently the first occasion on which a Court has been called on to consider whether a local authority owes a duty of care to property owners in connection with FOSPA pool inspections. The Judge analysed whether this novel duty of care should be found to exist by applying the well-established test summarised by the Supreme Court in *North Shore City Council v Attorney-General* [*The Grange*]:[8]

> (a) whether, as a screening mechanism, the court is satisfied the loss was a reasonably foreseeable consequence of the defendant's act or omission;[9]

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8 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [157]–[160]. The Court applied the same approach in *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [184] and again in *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [14].

9 In *The Grange*, above n 8, at [157], the Court says "the plaintiff's act or omission" which must have been meant to be "the defendant's act or omission".

(b) whether the foreseeable loss occurred within a relationship between the parties that was sufficiently proximate; and

(c) whether factors external to the relationship would mean it is not fair, just and reasonable to impose the duty of care on the defendant.

[37] The Judge noted that this approach "is only a framework", the formulation of which "should not matter in the end" since "[f]ormulae can help to organise thinking but they cannot provide answers".[10] In other words, "this approach is a framework, rather than a straitjacket".[11]

[38] The Judge surveyed the statutory context within which the Council was carrying out its functions: we address this below. In light of that statutory framework, he proceeded to consider the three limbs of the approach to analysing a novel duty of care summarised above.

Negligence

[39] The Judge accepted that it was reasonably foreseeable that, if the Council undertook the 2009 and 2012 pool inspections negligently and advised the owners that the pool complied with the building code and FOSPA, the owners would be unaware that the pool did not comply and would not take action to seek redress for any loss they had suffered. FOSPA inspections are carried out to ensure the regulatory requirements are satisfied on an ongoing basis. There may have been some change to the pool or to its barriers after construction that makes the pool non-compliant. Or it may be that the pool had never been compliant. It is reasonably foreseeable that, if a Council's pool inspection does not reveal that the original design of a pool within a property breached regulatory requirements, the property owner would not be aware of the breach, would not remediate the breach, and would not take steps available at that time to seek any redress that might be available to the owner. It is reasonably foreseeable that the property owner would rely on the advice of the Council following

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10 High Court judgment, above n 2, at [26], citing *The Grange*, above n 8, at [149] and [161] and at [26], citing *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294(i). The Court further reiterated this point in *Spencer on Byron*, above n 8, at [184].

11 *Carter Holt Harvey Ltd v Minister of Education*, above n 8, at [14].

a pool inspection without independent inquiry. And it is reasonably foreseeable that if Council inspections continue to not reveal a breach until after a limitation period has expired, the property owner will lose the opportunity to seek such redress and would suffer loss accordingly.[12]

[40] The Judge then turned to consider whether the relationship was sufficiently proximate. He approached this issue on the basis outlined by the majority in *The Grange*:[13]

> [158] Assuming foreseeability is established in a novel situation, the court must then address the more difficult question of whether the foreseeable loss occurred within a relationship that was sufficiently proximate. This is usually the hardest part of the inquiry, for as Lord Bingham said in *Customs and Excise Commissioners v Barclays Bank plc*, the concept of proximity is "notoriously elusive".[14] He was speaking of claims for economic loss but, in New Zealand at least, because of our no-fault accident compensation scheme, the majority of novel claims are of this character and those that are not will be sufficiently unusual as to raise comparable difficulties. Lord Oliver said in *Alcock v Chief Constable of South Yorkshire* that the concept of proximity is an artificial one which depends more on the court's perception of what is a reasonable area for the imposition of liability than upon any logical process of analogical deduction.[15] An examination of proximity requires the court to consider the closeness of the connection between the parties. It is, to paraphrase Professor Todd,[16] a means of identifying whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff.
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> [159] Richardson J has observed that the concept of proximity enables the balancing of the moral claims of the parties: the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected from an undue burden of legal responsibility.[17] A particular concern will be whether a finding of liability will create disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff. Another concern is whether it will expose the defendant and others in the position of the defendant to an indeterminate liability. The latter consideration may, however, be better examined at the second stage of the inquiry: whether the finding of a duty of care will lead to similar claims from other persons who have suffered, or will in the future suffer, losses of the same kind, but who may not presently be able to be identified.

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12 High Court judgment, above n 2, at [35].
13 *The Grange*, above n 8.
14 *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 (HL) at [15].
15 *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (HL) at 411.
16 Stephen Todd (ed) *Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) [*Todd on Torts*] at 143.
17 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 532.

[41] The Judge considered that it is "not much of a stretch" to find that the regulatory role of territorial authorities during the design and construction of a pool, like a residential house, puts them in the best position to independently check that pool barriers comply with the relevant regulatory requirements. The policy rationale for territorial authorities having a duty to subsequent pool owners to take reasonable skill and care in issuing building consents and CCCs about the compliance of pools with the building code when they are designed and constructed is, the Judge said, materially similar to issuing the same instruments about the compliance of residential houses with the building code. The proximity of the relationship is similar.[18]

[42] The Judge described it as "a slightly longer stretch" to find that territorial authorities' regulatory role of inspecting pools, to ensure that changes had not been made to pool barriers after construction, puts them in a similarly proximate relationship with pool owners.[19] The Judge concluded that the proximity of territorial authorities and pool owners regarding inspections of pools, to determine their compliance with regulatory requirements, is similar enough to their proximity when determining the compliance of residential buildings with regulatory requirements to justify the same duty of care.[20]

[43] The Judge then considered whether it is fair, just and reasonable to impose such a duty on the Council. The Judge concluded that this is not one of the relatively small number of cases where no duty of care should exist notwithstanding that the loss was foreseeable and the relationship sufficiently proximate.[21]

[44] The Judge found that the Council had breached the duty it owed to the owners: it did not take reasonable skill and care in conducting its inspections of the pool and fence in 2009 and 2012.[22]

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18 High Court judgment, above n 2, at [46].
19 At [47].
20 At [52].
21 At [57].
22 At [60].

Negligent misstatement

[45] The Judge next considered the claim in negligent misstatement. He noted the summary provided by the Supreme Court in *Carter Holt Harvey v Minister of Education* of the requirements that must typically be met before a plaintiff is owed a duty of care in connection with a statement or advice:[23]

> The necessary relationship between the maker of the statement and the recipient will typically arise where:
>
> (a) the advice is required for a purpose that is made known (at least inferentially) to the adviser;
>
> (b) the adviser knows (at least inferentially) that the advice will be communicated to the advisee specifically or as a member of an ascertainable class;
>
> (c) the adviser knows (at least inferentially) the advice is likely to be acted on without independent inquiry; and
>
> (d) the advisee does act on the advice to its detriment.

[46] Addressing those limbs, the Judge said:[24]

> (a) The advice of the Council about the results of its pool inspection is required for the purpose of determining whether the pool and pool barrier complies with the requirements of the Building Code. The Council knows this.
>
> (b) The Council knows that the advice will be communicated to the pool owner directly, because it communicates the advice.
>
> (c) The Council knows that the advice is likely to be acted on without independent inquiry because it is the only body accorded the statutory responsibility of making independent inspections.
>
> (d) The pool owner here has acted on the advice to their detriment.

[47] The Judge considered that the advice provided to the owners on the basis of the 2009 and 2012 inspections provided further reassurance to the owners that the pool barrier was compliant. They relied on those inspections in not initiating proceedings against the Council before the time-bar expired. So, the Judge held, the Council had made negligent misstatements on which the owners had relied.[25]

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23 At [61], citing *Carter Holt Harvey Ltd v Minister of Education*, above n 8, at [80].
24 High Court judgment, above n 2, at [62].
25 At [64].

Breach of statutory duty

[48] The Judge then considered whether FOSPA created a statutory duty enforceable by private action. A territorial authority had a duty under s 10 of FOSPA to "take all reasonable steps to ensure that this Act is complied with within its district". But there was no sign of any intention by Parliament that pool owners were intended to have an additional right to sue a territorial authority for breach of statutory duty if it failed to fulfil that duty.[26] Such a private law right is not obvious, is not necessary to achieve the purpose of the statute, and is not objectively within the intention of Parliament. The Judge therefore dismissed this cause of action.[27]

Time-bars

[49] The Judge set out the 10-year longstop limitation periods that have been enacted in the context of New Zealand building legislation in 1991, and again in 2004. At all material times, s 393 of the 2004 Act provided (as relevant):[28]

> **393 Limitation defences**
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> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2

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26 At [71]–[72].
27 At [72].
28 The provision was amended with effect from 7 September 2022, after the date of all relevant events and after the date of the trial.

> or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
>
> …

[50] The term "building work" was at all material times defined in s 7 of the 2004 Act as follows:

> **building work**—
>
> (a) means work—
>
> (i) for, or in connection with, the construction, alteration, demolition, or removal of a building:
>
> (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and
>
> (b) includes sitework; and
>
> (c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act (*see* subsection (2)); and
>
> (d) in Part 4, and the definition in this section of supervise, also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4 (*see* subsection (2)); and

[51] The Council argued that the building consent and CCC were the foundations of the causes of action in these proceedings, so the proceedings were time-barred. The Judge did not agree. He considered that the dates of issue of the consent and CCC were not relevant to calculating the limitation period.[29]

[52] The parties were in agreement that the Council's inspections of pools under FOSPA in 2009 and 2012, after the pool had been constructed and a CCC issued, did not amount to "building work" as defined. However the Judge took a different view. Compliance with FOSPA involves compliance with the building code, and involves independent assurance to pool owners that their pool complies with the regulatory standards, including because of steps taken during the construction process. The Judge considered that pool inspections relate to building work in the same way as house

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[29] At [82].

inspections prior to issue of a CCC. Construction of a pool barrier is building work. A territorial authority carrying out a pool inspection is performing a function under the 2004 Act relating to the construction of that building.[30]

[53] The Judge also saw the purpose of the longstop time-bar as relevant. Pool inspections involve checking compliance of pools and pool barriers with the building code. Whether they are conducted at the time of the original construction of a pool like any other building, or subsequently, territorial authorities should not face proceedings more than 10 years afterwards, any more than they should in relation to residential building inspections.[31]

[54] The Judge concluded that s 393(2) of the 2004 Act bars the claim regarding the 2009 pool inspection, but not the 2012 pool inspection.[32]

[55] The Limitation Act 1950 (LA 1950) applied to the claim in respect of the 2009 pool inspection. The relevant limitation period was six years from the date the cause of action accrued. The Judge considered that the elements of the causes of action in respect of the 2009 inspection were complete only when the owners lost their opportunity to sue in 2014 in respect of the consent, and 2016 in respect of the CCC. Before those points the inspections had not caused loss or damage because the opportunity to sue had not been lost, so economic loss had not occurred. In respect of the 2009 inspection, the proceedings issued in December 2020 were thus within the six-year limitation period under the LA 1950.[33]

[56] The Limitation Act 2010 (LA 2010) applied to the claim in respect of the 2012 pool inspection. The relevant limitation period was six years after the date of the act or omission on which the claim was based. The proceeding was brought outside that period. But the Judge considered that the claim was brought within three years after the "late knowledge date" provided for in s 14 of the LA 2010. The owners reasonably gained knowledge of the fact they had suffered damage or loss, due to the lost opportunity caused by the 2012 inspection, only when the 2019 inspection occurred

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30 At [86].
31 At [87].
32 At [88].
33 At [96].

and the defects were identified.[34] So the claim in respect of the 2012 pool inspection was not barred under the LA 2010.

Damage, loss and relief

[57] The Judge considered that it was clear that the owners would have initiated legal proceedings against the Council if they had become aware that the pool was non-compliant when it was inspected in 2009 or 2012. The owners had shown on the balance of probabilities that they would have brought such a claim. Alternatively, if a loss of chance approach were used, the Judge considered that it would be appropriate to assess their chance of success in proceedings at 100 per cent.[35]

[58] If the owners had succeeded in proceedings brought within the time-bar for negligence or negligent misstatement in relation to the Council's conduct in 2004 and 2006, the Judge considered they would have recovered damages reflecting the costs of remediation and the post-remediation diminution in value of their property. The Judge considered these losses were sufficiently closely connected with the damage from their loss of opportunity to sue the Council to justify imposition of liability for those losses.[36]

[59] On the basis of the evidence on remediation cost, and the evidence about reduction in value as a result of remedial work given by the valuers called by each party, the Judge found that:[37]

(a) The owners suffered a loss of $195,000 as a result of losing the opportunity to sue the Council for the loss of value in their property when they bought it.

(b) They would also have been able to sue for the cost of remediation. That cost, discounted back to 2008 values, was $45,000.

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34 At [97].
35 At [111].
36 At [112]–[113].
37 At [119]–[122].

(c) Modest amounts were also recoverable in respect of certain other costs including $1,022.15 for clean-up costs (which formed part of the remediation) and $4,640.67 for valuation costs and legal fees for trying to resolve the issue with the Council.

[60] The owners had claimed general damages of $50,000 for distress and humiliation. The Judge accepted that dealing with the Council had caused distress and humiliation to Ms Buchanan in particular. The Judge awarded general damages of $25,000, which he saw as comparable to recent awards of general damages for the stress and inconvenience of a leaky home due to negligent inspections.[38]

[61] The Judge considered that this was a case in which declarations should be granted. He said:

> [126] I accept that the level of actionable negligence and negligent misstatements by the Council, in the context of its unactionable negligence; in issuing the building consent in 2004; in issuing the CCC in 2006; in conducting the pool inspection and making the associated misstatement in 2009; and in conducting the pool inspection and making the associated misstatement in 2012, warrants the declaration sought by Ms Buchanan and Mr Marshall. That form of public accountability is appropriate in the circumstances.

Contributory negligence

[62] The Judge dismissed the Council's argument that there had been any contributory negligence on the part of the owners.[39]

Issues on appeal

[63] The Council's appeal raised a number of issues, the most significant of which are the scope of the duty owed by the Council when carrying out inspections under FOSPA, and whether the claims against the Council are time-barred.

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38 At [124].
39 At [130].

[64] The appeal also raised a number of less significant issues including:

(a) whether negligence had been established, when the standard of pool inspections by Council officers was not established by any evidence;

(b) whether the amounts of special damages awarded by the High Court were excessive; and

(c) whether the amount awarded as general damages was excessive.

[65] The owners gave notice of an intention to support the judgment on other grounds. They argue on appeal that the High Court erred in finding that the 2009 and 2012 inspections under the FOSPA were "building work" as defined by s 7 of the 2004 Act. As a result, they say, the High Court erred in finding that the claim for damages relating to the 2009 inspection was barred by s 393(2) of the 2004 Act.

The statutory setting

[66] The Judge dismissed the claim for breach of statutory duty, and the owners did not challenge that conclusion on appeal. However as the Judge recognised, the statutory setting is also central to the analysis of the existence and scope of a duty of care in tort in circumstances where the acts and statements that are the subject of the claim took place in the course of performance by the Council of statutory functions. We therefore begin our analysis by setting out in some detail the relevant statutory provisions.

Fencing of Swimming Pools Act 1987

[67] From 1979 territorial authorities had the power to make bylaws to require pool fencing.[40] However not all councils made bylaws under this power. A model bylaw was prepared, but it was not mandatory and was adopted by some, but not all, councils.[41] FOSPA was enacted in 1987 to achieve greater consistency and appropriate minimum standards throughout New Zealand.

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40 Local Government Act 1974, s 684(34).

41 *Waitakere City Council v Hickman*, above n 6, at [13]–[14].

[68] The long title of FOSPA recorded that the purpose of the Act was "to promote the safety of young children by requiring the fencing of certain swimming pools". FOSPA applied to both existing pools and new pools at any time when they were filled (or partly filled) with water.[42]

[69] Owners of existing pools were required to advise the territorial authority of the existence of their pools.[43] Every person who proposed to construct or install a pool to which FOSPA would apply was required to notify the territorial authority of their intention to do so before commencing construction or installation.[44]

[70] Section 8 of FOSPA as it stood at all relevant times imposed an obligation on the owner of a pool to ensure that the pool, or some or all of the immediate pool area including all of the pool, was fenced by a fence that complied with certain requirements. Initially those requirements were set out in the schedule to FOSPA. From 1992 the relevant requirements were set out in the building code in force under the Building Act 1991 (1991 Act), then under the 2004 Act. But compliance with the schedule to FOSPA was treated as compliance with the building code.[45] Failure by a property owner to comply with that ongoing fencing obligation, without reasonable cause, was an offence.[46]

[71] Section 10 of FOSPA provided that every territorial authority was required to take all reasonable steps to ensure that FOSPA was complied with within its district. Section 11 conferred a power on the officers of territorial authorities to enter on land and carry out inspections if they had reasonable grounds to believe that there was a swimming pool on the relevant land and that it was not fenced as required by FOSPA.

[72] The schedule to FOSPA set out means of compliance for fences under FOSPA, including detailed requirements in relation to height, ground clearance, materials, and gates and doors.

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42 FOSPA, ss 3 and 4.
43 Section 7(1).
44 Section 7(2). FOSPA was subsequently amended to provide that an application for a building consent under the 2004 Act in respect of the construction or installation of a pool was sufficient notification under that provision: see s 7(3).
45 Section 13B.
46 Section 9(1).

[73] When the 1991 Act was passed, it amended FOSPA in a number of respects. The requirements to be met in relation to pool fencing were moved to the building code made under the 1991 Act. The building code reframed those requirements in performance-based terms, requiring for example that swimming pool barriers be "of appropriate height" and "restrict the access of children under 6 years of age to the pool or the immediate pool area".[47] But as already mentioned, compliance with the prescriptive requirements in FOSPA was treated as compliance with the building code.

[74] The 2004 Act made further amendments to FOSPA which are not material for present purposes.

[75] Territorial authorities responsible for ensuring compliance with FOSPA encountered difficulties in its interpretation and application. Those difficulties led to an application by the Waitakere City Council to the High Court seeking declarations under the Declaratory Judgments Act 1908 about the interpretation of some key provisions of FOSPA. The High Court provided guidance on a number of these issues, but did not make any formal declarations.[48] In particular, the High Court provided guidance on the concept of "the immediate pool area", and the requirements of the Act in relation to doors providing access to a pool from a building.

Repeal of FOSPA and enactment of subpt 7A of pt 2 of the 2004 Act

[76] FOSPA was repealed by the Building (Pools) Amendment Act 2016. The regulatory requirements for pools were instead included in the 2004 Act as subpt 7A of pt 2. As the Judge said, those provisions make more explicit, but do not materially change, the regulatory regime:[49]

> (a) Section 8(1)(b)(ii) of the 2004 Act defines "building" to include "any means of restricting or preventing access to a residential pool".
>
> (b) Section 162A provides that the purpose of subpt 7A "is to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age".

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47 See cl F4 of the building code set out in the schedule to the Building Regulations 1992 as initially made.

48 *Waitakere City Council v Hickman*, above n 6.

49 High Court judgment, above n 2, at [31].

(c) Section 162C requires every pool which is at least partly filled with water to have physical barriers that restrict access to the pool by such children, and requires the means of restricting access to comply with the requirements of the building code that:

(i) are in force; or

(ii) were in force when the pool was constructed and in respect of which a building consent or code compliance certificate was issues.

(d) Section 162D requires territorial authorities to ensure residential pools are inspected at least once every three years "to determine whether the pool has barriers that comply with the requirements of section 162C". Councils are empowered to accept certificates of periodic inspection from an independently qualified pool inspector for that purpose.

(e) Section 222(1)(a) authorises inspections by territorial authorities of building work, buildings and "any residential pool (or the immediate pool area)" and s 222(1)(c) authorises authorised officers of a territorial authority to enter premises for the purpose of determining whether s 162C is being complied with. Inspection is defined specifically by s 222(4)(a)(iia) to include taking all reasonable steps to determine whether s 162C is being complied with

…

[77] The building code was also amended in 2016, with the requirements that must be met by swimming pool fences now set out in cl F9 of that code. The objective of cl F9 is set out in cl F9.1: to prevent injury or death to young children involving residential pools.

Application for leave to adduce evidence on appeal

[78] The Council sought leave to adduce further evidence on appeal in relation to the sale of the property by the owners some six months after the High Court hearing. The evidence that the Council sought to adduce included a marketing video of the property showing the swimming pool and the fence around the immediate pool area, in addition to evidence about the sale transaction itself.

[79] Leave to adduce further evidence on appeal will generally be granted only where that evidence is fresh, credible, and cogent.[50]

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[50] Court of Appeal (Civil) Rules 2005, r 45; *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192; and *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6], n 1.

[80] The marketing video is not fresh. The images it contains show the pool as it stood at the time of the High Court trial. If further still or video imagery was seen as relevant to the Council's case, it could have been created and adduced before the High Court. Nor is this evidence cogent: it does not assist in determination of any of the issues for this Court.

[81] The evidence of the price at which the owners sold the property is fresh. But it is not cogent. It was common ground before the High Court, and before us, that if the loss suffered by the owners as a result of relying on the CCC was recoverable, that loss fell to be assessed at the time that loss was first suffered.[51] The parties assumed that the relevant date was the date on which the owners purchased the property in 2008, and the expert evidence quantifying loss was prepared on that basis. The price at which the property was sold in January 2023 sheds no light on quantification of recoverable loss in this case.

[82] We therefore decline leave to adduce the further evidence.

Liability for negligent misstatement?

Submissions

[83] The Council's primary argument on appeal was that the scope of any duty of care owed by the Council in connection with the 2009 and 2012 inspections did not extend to taking care to protect the owners as property owners from economic loss. Ms Meechan KC emphasised the purpose of FOSPA: the promotion of the safety of young children, rather than the protection of the economic interests of property owners.

[84] Mr Shaw, who appeared for the owners, largely adopted the reasoning of the Judge on the existence of a duty of care and the scope of the duty owed by the Council. He emphasised that the purpose of FOSPA inspections was to confirm whether the pool and its fencing were compliant with FOSPA and the building code. He put

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[51] The argument before us proceeded on the basis that the owners suffered loss when they purchased the property in 2008. Arguably that loss was not suffered until as late as 2019, when the non-compliances were discovered: see [131] below. But it could not sensibly be suggested, and the Council did not attempt to argue, that the relevant date for assessing loss was in 2023.

considerable emphasis on the linkage between FOSPA and the building code, and the line of Supreme Court decisions finding that territorial authorities assume responsibility to the New Zealand public to perform their building consenting and inspection functions with reasonable care and skill.

[85] Mr Shaw also submitted that it is wrong to limit the scope of duty of local authorities with respect to FOSPA inspections to the legislative object of FOSPA.

Discussion

[86] The owners' claims are founded squarely on the statements made by the Council's inspectors to them in 2009 and 2012 that, at those times, their property met the requirements of FOSPA. This is not a case about inspections in the course of carrying out building work, where if inspections had been carried out carefully the building work would have been done differently. Where a claim is brought against a Council in relation to supervision of the construction of a building, it is well established that liability may be founded not only on incorrect statements about compliance with the building code in a CCC, but also — even in the absence of a CCC — on careless inspections that resulted in the building being constructed with defects that would otherwise have been avoided.[52] In the present case, careful inspections and advice in 2009 and 2012 would not have altered in any way the construction of the house and swimming pool. The only relevance of the 2009 and 2012 inspections is that they led to the statements made by the Council's inspector about (continuing) compliance with FOSPA.

[87] In these circumstances, it is in our view most appropriate to begin by analysing the owners' claim in negligent misstatement. If that claim is upheld, a claim in negligence adds nothing. If it is not upheld, it is difficult to see how a claim based on negligently made statements could succeed in negligence more generally.

[88] As the Supreme Court has confirmed on a number of occasions, the requirements that must generally be met before a plaintiff can bring a claim based on

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[52] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] at [61]–[62].

negligent misstatement — the requirements that identify sufficient proximity in this context — are as follows:[53]

> (a) the advice is required for a purpose that is made known (at least inferentially) to the adviser;
>
> (b) the adviser knows (at least inferentially) that the advice will be communicated to the advisee specifically or as a member of an ascertainable class;
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> (c) the adviser knows (at least inferentially) the advice is likely to be acted on without independent inquiry; and
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> (d) the advisee does act on the advice to its detriment.

[89] So the first step is to identify the purpose of the 2009 and 2012 inspections. These inspections were not expressly required by FOSPA: three-yearly inspections were not mandatory until subpt 7A of pt 2 of the 2004 Act came into force in 2016. But the inspections plainly were carried out by the Council in the course of performing its functions under s 10 of FOSPA, in order to give effect to the purpose of that legislation: promotion of the safety of young children. More specifically, s 8 of FOSPA imposed a continuing obligation on the owner of a pool that was filled (or partly filled) with water to ensure that the pool, or some or all of the immediate pool area including all of the pool, was fenced by a compliant fence. The purpose of the inspection was to ensure that the owner continued to comply with that requirement. The Council as regulator was checking that the property owner — the regulated person — was complying with their statutory obligations, to promote the safety of young children.

[90] As the Judge observed, non-compliance with FOSPA detected by such an investigation could result from initial non-compliant construction, or from a change in the pool fencing after construction.[54] However it is, we think, reasonably clear that the reason for periodic inspections of swimming pool fences is the potential for a change in the pool fencing (or the pool area) after the time of construction. Councils do not return to a house periodically to check whether it complied in other respects

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53 *Carter Holt Harvey Ltd v Minister of Education*, above n 8, at [80]. See also *The Grange*, above n 8, at [189], citing *Caparo Industries plc v Dickman* [1990] UKHL 2, [1990] 2 AC 605 (HL) at 638.

54 High Court judgment, above n 2, at [45].

with the building code at the time it was first built. The 2004 Act proceeds on the basis that compliance with the building code in the course of construction is checked during the construction process. Once the CCC has been given, the Council has no continuing responsibility for periodically checking whether it was correctly given. In part of course that is because some building elements (such as foundations) are covered over in the course of construction, and could not be the subject of subsequent inspections. But many features of a building remain accessible and able to be inspected. The 2004 Act does not contemplate such inspections. FOSPA did. And subpt 7 of pt 2 of the 2004 Act now requires them.

[91] Changes made to the pool fence, or changes in the pool surroundings, may mean that property owners cease to comply with their continuing obligation to securely fence their pools. The primary purpose of subsequent inspections is to identify such changes, and require a pool owner to take steps to perform their statutory obligations and restore compliance with (ongoing) pool fencing requirements.

[92] The purpose of subsequent pool inspections is not to identify, for the benefit of the property owner, rights of action that they may have against builders, architects or councils in relation to the original construction of the pool. The inspections are carried out to enforce compliance with the legislation by the owner, not to assist the owner to identify rights of recovery against the Council and/or third parties.

[93] Returning to the criteria set out at [88] above, the 2009 and 2012 inspections were not carried out for the purpose of identifying claims that the owners might have against the Council or others. If the inspectors had been asked why they were carrying out the inspections, the answer would have been to ensure that the pool did not represent a threat to the safety of young children. The inspectors might have added that the inspections were being carried out to ensure that the owners were complying with their obligations in relation to the pool. It seems most unlikely that it would have entered the inspectors' minds that the purpose of the inspections, and the advice they gave at its conclusion, was to enable the property owners to identify rights of action against the Council and others. Similarly, it seems most unlikely that it would have occurred to the owners, if asked, that the purpose of the inspections was to identify errors in the Council's inspections and grant of a CCC back in 2006, and to draw to

their attention any rights of action they might have against the Council and others as a result. That might conceivably happen — but it would be the incidental product of inspections carried out for a wholly different purpose, for the benefit of persons other than the property owners.

[94] The Judge considered that the first of the four requirements set out at [88] above was met because the Council's advice about the results of its pool inspections was required for the purpose of determining whether the pool and pool barrier complied with the requirements of the building code.[55] However we consider that it is necessary to go further, and ask *why* ongoing compliance was being checked: who was to be protected by these checks, and what was the harm from which they were to be protected? For the reasons set out above, we consider that the purpose for which the owners now say they were entitled to rely on the information provided by the Council is not the purpose for which that information was initially given.

[95] The second requirement is obviously met: the Council knew that the results of the inspections would be communicated to the owners.

[96] We agree with the Judge that property owners could not be expected to go behind that determination to establish the matter independently.[56] So the third requirement is also met.

[97] But the fourth requirement is not, in our view, met. We agree with the Judge that the owners relied on the building consent and CCC for assurance when purchasing the property.[57] However we do not think that it can be said that they acted on the inspections by not initiating proceedings against the Council before the time-bar expired. Before those inspections happened, they did not have proceedings in contemplation. Nothing changed as a result of the inspections, and the information provided as a result of those inspections to the effect that the pool continued to comply with FOSPA. The owners did not suggest in evidence that they turned their minds to whether they had a claim against the Council and, reassured by the 2009 and 2012

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55 At [62(a)].
56 At [63].
57 At [64].

inspections, decided not to do so. They did not embark on any new course of action as a result of the 2009 and 2012 inspections. They did not consciously avert to the course of (in)action they had adopted in relation to the Council, and decide to continue with it, as a result of the inspections and the advice given. If the inspections had not happened and the advice had not been given, they would have done exactly the same.

[98] In those circumstances, we do not consider that the advice provided by the Council following the 2009 and 2012 inspections was relied on, or acted on, in the relevant sense.

[99] Thus the first and fourth requirements of the established test for proximity in the context of negligent misstatement are not met. These requirements are at the heart of the inquiry into proximity, and into whether it would be fair, just and reasonable to find that the Council owed a duty to the owners to take reasonable care when carrying out the 2009 and 2012 inspections to protect the owners from the loss in respect of which they now claim — the loss of rights of action in respect of events in 2004–2006. We do not consider that such a duty was owed in this case.

[100] Our conclusion is confirmed by the close parallels between this claim and the claim that was struck out by this Court in *Attorney-General v Carter*.[58] That decision was referred to with approval by the Supreme Court in *North Shore City Council v Body Corporate* [*Sunset Terraces*] for the proposition that the broad purposes of relevant legislation are a highly material factor in determining whether and to what extent a duty of care is owed at common law. The Supreme Court described that approach as "conventional in New Zealand jurisprudence".[59]

[101] *Attorney-General v Carter* was another "subsequent inspection" case, on that occasion in relation to a ship rather than a swimming pool. The plaintiffs purchased a vessel, the *Nivanga*, in reliance on certificates of survey issued by the Ministry of Transport (MOT) and Marine and Industrial Safety Inspection Services Ltd (M&I). The survey was required by the Shipping and Seamen Act 1952. The purpose of the survey was to determine whether or not the relevant requirements of the Act and rules

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58 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).
59 *Sunset Terraces*, above n 52, at [40].

and regulations made under the Act were being complied with, and whether or not the ship was "in all respects satisfactory for the service for which the ship is intended to be used".[60] The plaintiffs claimed that a survey shortly before they purchased the ship had been negligent, and that they had relied on the negligently issued certificates of survey in purchasing the ship. They claimed for the economic loss they suffered as a result of the *Nivanga* not being seaworthy in various respects.

[102] This Court considered that it was clear that the survey requirement was focussed on matters of safety and seaworthiness. The reference in the legislation to the ship being satisfactory for the service in which it was used was a requirement that it had to be satisfactory from the safety point of view. There was nothing in the legislative scheme, or in the individual sections, suggesting that survey certificates were intended to be issued or relied on for economic purposes.[61]

[103] Discussing the concept of assumption of responsibility, this Court said (emphasis added):

> [26] In most cases … there will be no voluntary assumption of responsibility. The law will, however, deem the defendant to have assumed responsibility and find proximity accordingly if, when making the statement in question, the defendant foresees or ought to foresee that the plaintiff will reasonably place reliance on what is said. *Whether it is reasonable for the plaintiff to place reliance on what the defendant says will depend on the purpose for which the statement is made and the purpose for which the plaintiff relies on it. If a statement is made for a particular purpose, it will not usually be reasonable for the plaintiff to rely on it for another purpose. Similarly, if the statement is made to and for the benefit of a particular person or class of persons, and the plaintiff is not that person or within that class, it will not usually be reasonable for the plaintiff to place reliance on it so as to oblige the defendant to assume responsibility for carelessness in its making.*
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> [27] Hence, before the law of torts will impose on the author of a statement a duty to take care the plaintiff must show that it is appropriate, on the foregoing basis, to hold that the author has or must be taken to have assumed responsibility to the plaintiff to take reasonable care in making the statement. If that is shown, the necessary proximity will have been established, leading to a prima facie duty of care. The second inquiry is of course whether policy considerations negate or confirm that prima facie duty. *When, as in the present case, the environment which brings the parties together is legislative, the terms and purpose of the legislation will play a major part in deciding the issues which arise. It is the legislation which creates and is at the heart of the*

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60 *Attorney-General v Carter*, above n 58, at [12], citing Shipping and Seamen Act 1952, s 206(2).
61 At [16].

> *relationship between the parties. It will often contain policy signals bearing on that aspect of the inquiry.*

[104] The Court then proceeded to apply that test and concluded that proximity was absent because the legislative purpose was safety. It was not reasonable for the purchasers to rely on the survey certificates for the quite different purpose of protecting their economic interests.[62] This Court said:

> [34] It cannot reasonably be said that the MOT and M&I assumed or should be deemed to have assumed responsibility to the plaintiffs to take care in issuing the certificates not to harm their economic interests in the *Nivanga*. Hence the necessary proximity between the parties is absent. There are essentially two reasons for that conclusion, one more fundamental than the other; albeit each is fatal to the plaintiffs' case. The first and more fundamental problem the plaintiffs face is that, as we have discussed, the statutory environment is such that the purpose of the certificate was entirely different from the purpose for which the plaintiffs claim to be entitled to place reliance on it. The second is that in none of the capacities in which the plaintiffs claim to have suffered loss were they the person or within the class of persons who were entitled to rely on the certificates. They do not sue as passengers on the vessel or as crew or as other seafarers, damaged in a material way by the allegedly negligent certificates. In a sense the second problem can be viewed as a manifestation of the first. We mention it simply to exemplify the plaintiffs' essential difficulty in another way. For these reasons we hold that there was no relevant proximity between the parties so as to satisfy that criterion for the imposition of a duty of care.

[105] This Court added that the safety focus of the survey regime was also a policy reason which pointed away from the imposition of a duty of care to guard against economic loss.[63]

[106] So, this Court concluded, it would not be fair, just or reasonable to impose on the regulators duties of care of the kind asserted against them, that is to take care to guard the purchasers against economic loss as a result of their relying on the survey certificates upon which the claim was based. The decision of the High Court to strike out the causes of action based on common law negligence was upheld.[64]

[107] The present case is in our view indistinguishable from *Attorney-General v Carter*. In this case also, the sole purpose of the relevant legislative scheme — under FOSPA then under subpt 7 of pt 2 of the 2004 Act — is protection of the safety of

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62 At [33].
63 At [36].
64 At [39].

young children. The purpose of the inspections was to ensure that there was no supervening post-construction risk to the safety of young children. It was not to protect the economic interests of the property owners. Rather, it was to check that they were complying with their legal obligations to protect young children from the risk of drowning. Echoing *Attorney-General v Carter*, it can be said here that the purpose of the 2009 and 2012 inspections, and the advice received following those inspections was "entirely different from the purpose for which the [owners] claim to be entitled to place reliance on it".[65]

[108] We do not accept Mr Shaw's submission that the scope of duty of local authorities with respect to FOSPA inspections should not be limited to the legislative object of that Act. The legislative context goes to both proximity and policy factors, as this Court explained in *Attorney-General v Carter*.

[109] The leading Supreme Court cases on liability of councils for negligent performance of building consent, inspection and CCC functions do not call into question the correctness of this Court's decision in *Attorney-General v Carter*. To the contrary, *Attorney-General v Carter* was cited with approval in a number of those decisions.[66] That line of Supreme Court decisions is in our view distinguishable from *Attorney-General v Carter*, and from the present case, in three important respects.[67]

[110] First, those decisions proceed on the basis that the interests that are intended to be protected by the 1991 Act and the 2004 Act include the interest of the building owner in having a building constructed in accordance with the building code. In *Sunset Terraces* the Supreme Court referred to the "habitation interest" of the claimants, which it said had consistently been protected by the New Zealand building regulatory regime.[68] But the purpose of the shipping legislation was not to protect the economic interests of ship owners in their vessels. Likewise, the purpose of FOSPA was not to protect the economic interests of property owners in connection with their swimming pools.

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65 At [34].

66 See *Sunset Terraces*, above n 52, at [40]; *The Grange*, above n 8, at [188] and [224]; and *Spencer on Byron*, above n 8, at [294].

67 We note that *Attorney-General v Carter*, above n 58, was distinguished in *Spencer on Byron*, above n 8, at [180].

68 *Sunset Terraces*, above n 52, at [49], n 71.

[111] Second, those decisions proceed on the basis that the only way in which the safety of occupiers of buildings can be protected is through a duty owed to the owner, as it is only the owner whose pocket is damaged as a result of the negligence of the building inspector. It is only the owner who can undertake the necessary remedial action.[69] But the scheme of the shipping legislation was different: ship owners had a continuing obligation to ensure their ships were safe when in use. If the ship was not safe, the owners' obligation was to cease to use the ship until any defects were remedied. Their performance of that obligation did not depend on a right of recovery against the regulator. The scheme of FOSPA is much closer to that of the shipping legislation. The property owner has a continuing obligation to ensure compliance with pool fencing requirements while the pool is filled with water, for the benefit of young children. If the owner cannot meet those requirements they can empty their pool, and the requirements will cease to apply. The owner will lose some amenity, but the legislative purpose is achieved because small children are protected from drowning. Alternatively, the property owner must immediately remedy any non-compliance: in the swimming pool fencing context, it would not be acceptable for an owner to wait until the conclusion of a successful claim against a council to take steps to protect small children from accessing the pool and drowning. The link between protection of small children and a right of recovery against a council is thus absent both as a matter of principle and from a practical perspective.

[112] Third, and very importantly, the Supreme Court decisions on liability of councils in connection with negligent building work emphasise the council's control over building work at the time it is carried out. As already mentioned, if the council performs its functions properly at that stage the defects will not come into existence. A compliant building will be constructed. However that was not the case in relation to survey certificates of ships in *Attorney-General v Carter*, and is not the case in relation to post-construction swimming pool inspections for the purposes of FOSPA.

[113] The cross-references to the building code in FOSPA do not affect our analysis. It remains the case that FOSPA had a specific, narrower purpose than the general building legislation has been found to have. And in relation to post-construction

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[69] At [53]; and *Spencer on Byron*, above n 8, at [164].

inspections, the critical element of control over the construction process (and the associated ability to prevent defects) is absent as the construction process has already been completed, and the defects already exist.

[114] For the sake of completeness we note that in *Marlborough District Council v Altimarloch Joint Venture Ltd* the Supreme Court confirmed that a council that provides a land information memorandum (LIM) under s 44A of the Local Government Official Information and Meetings Act 1987 owes a duty of care to the person who requests that LIM.[70] A LIM includes information about building consents and CCCs, among other matters. In providing a LIM the council is not exercising control over any building work carried out on the land that may be referred to in that LIM. But provision of a LIM is a (statutory) service provided by a council to a requester, for a fee. The requester is the person intended to benefit from that service. The central purpose of a LIM is to enable the person seeking it to rely on the information that it contains to make decisions about the land concerned, including decisions in relation to the purchase of that land. And as the Supreme Court explained in *Altimarloch*, the legislation that provides for the issue of LIMs contains a number of indications supporting the existence of a duty of care in that context.[71] We do not consider that the *Altimarloch* decision supports the recognition of a duty of care in the present case: the purpose for which a LIM is provided is very different from the purpose for which a swimming pool inspection is carried out, reflecting differences in the statutory setting.

[115] In summary, the proximity between the owners and the Council that is required to found a claim in negligent misstatement is absent in relation to the statements made following the 2009 and 2012 inspections. Policy factors also point against recognising a duty of care in this legislative context. It would not be fair, just and reasonable to impose a duty of care in relation to those statements, which were made for a very different purpose from that for which the owners now claim to be entitled to rely on them. The appeal must be allowed in relation to the claim based on negligent misstatement.

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70 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

71 At [86]–[90].

Liability for negligence?

[116] Both parties proceeded before us on the basis that a council would be liable in negligence to owners of a property if it fails to take reasonable care in relation to compliance with requirements for pool barriers at the time the council grants a building consent, inspects the property during construction, and grants a CCC. We are content to proceed on that assumption. When a building with a pool is being constructed, and the council is performing its consenting and inspection functions, the control element discussed at [112] above is present. That control element may well mean there is sufficient proximity to found a duty of care in the context of performance by a council of its construction-related functions.

[117] However we do not consider that the owners' claim against the Council in respect of the 2009 and 2012 inspections can be reframed as a claim in the tort of negligence in a manner that overcomes the difficulties discussed above in relation to their negligent misstatement claim. For precisely the same reasons explored above, there was insufficient proximity between the Council and the owners so far as the 2009 and 2012 statements about compliance were concerned. The difficulties that the owners face in establishing proximity in respect of those statements cannot be overcome by focussing on the inspections carried out by the Council inspector before making those statements. The careless inspections did not in themselves cause any defect in the pool or the property, as already explained: this is a key difference from the case of inspections carried out by a Council in the course of construction of a building. The only sense in which the 2009 and 2012 inspections caused loss is that they led to the making of statements which did not alert the owners to the possibility of bringing a claim against the Council and others. Put another way, it was only because the Council did not make different statements, informing the owners about the original non-compliance of the property, that any causation of loss can be contended for even on a "but for" basis.

[118] In this respect also the present claim is indistinguishable from *Attorney-General v Carter*. The issue of the survey certificates in that case was preceded by an inspection that the purchasers claimed had negligently failed to identify significant defects in the *Nivanga*. But as this Court explained, it was the

purpose of both the inspections and the certificates to protect the safety of persons travelling on the ship. It was not the purpose of the inspection and survey certificate regime to protect the economic interests of the owners of the ship. Precisely the same applies here.

[119] It is not necessary for us to decide whether a duty of care of some kind was owed to the owners in connection with carrying out the 2009 and 2012 inspections, and reporting on the results of those inspections.[72] But what is we think clear is that the Council did not, when carrying out those inspections and advising the owners of their outcome, owe the owners any duty to take care to protect them from loss of rights of action against the Council and others. That was not the purpose of the inspections under FOSPA. As we said above, it is most unlikely that it would have occurred to either the Council inspector or to the owners that this was one of the purposes of the inspections at the time those inspections took place.

[120] The Council's appeal must therefore be allowed. There was no duty of the scope claimed. In those circumstances we can deal relatively briefly with the remaining arguments presented to us.

Breach of duty?

[121] The Council argued that it was incumbent on the owners to call evidence from an expert in relation to the procedures adopted by the Council when carrying out FOSPA inspections in 2009 and 2012, to establish a yardstick or benchmark against which the Council's conduct could be measured. The Council argued that the Judge was wrong to extrapolate the concession that the Council was negligent at the CCC stage in 2006 to a finding of negligence in relation to the subsequent FOSPA inspections.

[122] That submission is in our view untenable. It was common ground that the property as constructed in 2006 was not compliant with FOSPA or the building code,

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[72] In particular, we expressly refrain from deciding whether a duty of care might be owed to property owners to protect them from mental or emotional harm caused by failure to identify non-compliances which lead to a young family member drowning. Such harm would be much more closely related to the purpose of the legislation.

for reasons that were readily apparent on visual inspection of the property. The error made in 2006 did not relate to the care with which the physical inspection of the property took place. It related to the Council's understanding and application of the requirements of FOSPA: that is, the Council's understanding of the regulatory requirements by reference to which it was carrying out the inspection. The Council inspector made exactly the same errors based on the same misapprehensions about the requirements imposed by FOSPA in 2009 and 2012. If the Council was negligent in 2006, it was negligent in 2009 and 2012. We accept Mr Shaw's submission that it would have been a waste of time to call expert evidence on this issue.

Quantification of damages for loss of a chance

[123] If the owners had identified the non-compliances earlier and had brought proceedings against the Council in (say) 2012, claiming that the Council had acted negligently in issuing a building consent, carrying out inspections and issuing a CCC, it is in our view clear by analogy with the defective foundation and leaky home cases that they could have recovered damages assessed by reference to their loss at the date on which the non-compliances were identified. That would have been the date on which they suffered economic loss. That economic loss would be assessed by reference to the cost of remediation and any residual loss in value caused by the defects and/or the remedial work.

[124] That is what the Judge awarded in this case. As an assessment of the loss that would have been recoverable in a claim based on the Council's negligent conduct between 2004 and 2006, it cannot be faulted.

[125] The additional step in the Judge's reasoning was that because the Council had conceded that this loss would have been recoverable if the owners had brought proceedings in time, the opportunity that they lost to do so had a value equal to the full amount that would have been recovered.

[126] Suppose the owners had become aware of the original defects in the property in 2012, and had consulted a lawyer with a view to bringing proceedings against the Council. If that lawyer gave negligent advice to the owners that the claim could not succeed for limitation reasons, so should not be brought, it would be entirely orthodox

to assess the loss caused by that negligent advice on a loss of opportunity basis. Few claims are wholly without risk, and it would be an unusual case in which there was no relevant risk of a claim failing. But it would be open to a Judge to find, as a matter of fact, that what had been lost in a particular case was 100 per cent of the amount that could have been recovered (perhaps, less an allowance for the costs of doing so).[73]

[127] If we had accepted that the Council owed a duty of care to the owners in relation to the 2009 and 2012 inspections, we would not have disturbed the Judge's award of special damages.

General damages

[128] Similarly, if the Council had owed a duty of care to the owners in relation to the 2009 and 2012 inspections, we consider that it was well open to the Judge to make an award of general damages of $25,000 on the basis of the evidence before him about the impact of the Council's conduct on the owners. That represents only $12,500 for each of the owners. The award was in our view modest.

Limitation issues

When did the owners suffer loss as a result of the inspections in 2009 and 2012?

[129] The Council argued that the owners suffered loss when they bought the property in 2008. It was worth less than they paid because of the burden they took on when they became the owners of the property: the responsibility of installing, and meeting the cost of, a FOSPA-compliant fence. So, the Council submitted, the claim became time-barred under the LA 1950 in 2014.

[130] The fundamental difficulty with this submission is that the duty contended for was a duty owed by the Council to the owners when the inspections were carried out in 2009 and 2012 to take reasonable care to identify, and draw to their attention, defects

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[73] For a detailed discussion of the approach which can be taken in assessing the quantification of damages for the loss of opportunity to bring a claim in damages, see the judgment of Neuberger J (as he then was) in *Harrison v Bloom Camillin* [1999] EWHC 831 (Ch), [2000] Lloyd's Rep P N 89 and the authorities discussed therein. See also James Edelman (ed) *McGregor on Damages* (21st ed, Sweet & Maxwell, London, 2021) at [10-099]–[10-107].

in the original construction of the property. The loss that would be suffered by the owners as a result of breach of such a duty is loss of the opportunity to make a claim in relation to those initial non-compliances after receiving an accurate report on the respects in which the pool fencing failed to comply with the law. That loss cannot as a matter of logic have been suffered before 2009 (in the case of the 2009 inspection) or 2012 (in the case of the 2012 inspection). And that loss cannot as a matter of logic have been suffered until the time for bringing a claim based on the 2006 Council conduct had expired: until then, no opportunity had been lost. The longstop limitation provision barred a claim based on the Council's 2006 conduct from 2016 onwards. So that was the earliest date when the owners can be said to have suffered a loss caused by the 2009 and 2012 inspections.

[131] Arguably, by analogy with *Invercargill City Council v Hamlin*,[74] the owners did not in fact suffer any loss as a result of the Council's conduct in 2004, 2006, 2009 or 2012 until the non-compliances were discovered. Up to that time they could have sold the house without any loss in value. If the owners had sold the property in (say) 2012, before the non-compliances were discovered, the price they received would not have been reduced to reflect remedial costs or loss of amenity value. On that basis, no loss of any kind was suffered by them until 2019.

Did the longstop limitation provision apply to the 2009/2012 inspections?

[132] The Judge held that the 2009 and 2012 inspections were themselves "building work" for the purpose of the longstop limitation period in s 393 of the 2004 Act. But it was common ground before us that those inspections were not "building work".

[133] The Council submitted that the common factor in "building work" as defined in the 2004 Act is that it relates to the creation of a physical state of affairs: a new building is created or an existing building is altered, demolished or removed. What the Council did in 2009 and 2012 had none of those hallmarks. All the Council did was look at an existing pool. Those inspections do not come within the definition in s 7 of the 2004 Act.

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[74] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

[134] We agree. We add that as we read s 393 of the 2004 Act, the grant of a building consent, carrying out inspections and issuing a CCC are not themselves building work. Rather, a claim based on conduct of that kind on the part of a council is a claim *relating to building work* because it relates to (defects in) the building work authorised, inspected and certified by that council. The premise of the Judge's analysis — that inspections of this kind amount to building work — is in our view incorrect. And for the reasons already explained, we do not consider that the analogy drawn by the Judge between inspections during construction (which involve control over building work) and inspections under FOSPA post-construction is a good one: the inspections here did not have any practical consequences in relation to the building work carried out on the property.

[135] It follows that time did not run under the longstop limitation provision from the date of each of the 2009 and 2012 inspections.

When would the claims have been time-barred?

[136] We have found that the pleaded duty of care did not exist. But on the counterfactual assumption that there was such a duty, when would a claim for breach of that duty have been time-barred?

[137] The LA 1950 applies in relation to the 2009 inspection. The claim would be time-barred six years after the cause of action arose. The cause of action would only arise when loss was suffered. As explained above, the relevant loss of opportunity was suffered in 2016 at the earliest. So the LA 1950 limitation period had not expired when the owners filed their claim in 2020.

[138] In relation to the 2012 inspection, the LA 2010 applies. The primary limitation period is six years from the date of the act or omission on which the claim was based.[75] That primary period expired in 2018. But the primary period can be extended under s 14 of the LA 2010 where a claimant has "late knowledge" of relevant facts, including that they have suffered relevant loss or damage. For the reasons given by the Judge, there is a strong argument that time would not have started running in respect of the

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[75] Limitation Act 2010, s 11.

2012 inspection until the non-compliances became known to the owners in 2019. That was when they knew they had suffered a loss. The late discovery period of three years would then have run from that date. So the LA 2010 limitation period had not expired when the owners filed their claim in 2020.

[139] We add that we see some force in the argument that the owners' claim is in substance a proceeding relating to the original building work carried out at the time the house was constructed in 2004–2006, so is barred by the longstop limitation period in s 393(2) of the 2004 Act. The loss the owners seek to recover is loss relating to defects in that original building work. They rely on the 2009 and 2012 inspections to extend the time within which they can claim for the loss caused by that original negligence: in effect they argue that the Council negligently concealed the right of action that the owners had against the Council. But a limitation period cannot be extended by merely negligent conduct on the part of a defendant, as opposed to fraudulent conduct.[76] And even fraudulent concealment cannot extend the longstop limitation period.[77]

[140] If a failure to identify defects in building work during a subsequent inspection, when those defects should have been apparent to a council, is sufficient to restart the limitation clock then time could run indefinitely in respect of decisions taken by that council to grant building consents and CCCs. In relation to swimming pools, mandatory three-yearly inspections would in effect mean that time would start running again every three years unless and until any initial non-compliances are identified. So a claim for loss caused by a council's negligence in connection with the initial construction of a pool would never be time-barred. That would be inconsistent with the purpose of the 10-year longstop.

[141] Thus it is in our view well arguable that the owners' claim is a claim relating to the original building work, and is barred by the longstop limitation period. However

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76 *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC) at 709–710; *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 536; and *Daisley v Whangarei District Council* [2022] NZHC 1372 at [383]–[400]. We note that an appeal from the High Court's judgment in *Daisley* has been heard by this Court, but judgment has not yet been delivered.

77 *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [8].

we need not decide that point, as the issue arises only on the counterfactual assumption that a duty of care was owed in 2009 and/or 2012.

Declaratory relief

[142] Finally, the Council submitted that the Judge should not have granted declarations in addition to awarding damages.

[143] We accept Mr Shaw's submission that if the claim for damages was brought within time, the owners would equally have been in time to seek declaratory relief.

[144] However we also accept the Council's submission that where damages in tort are awarded, those damages are themselves a vindication of the claimant's rights, and recognise the wrong done to the claimant by the defendant. The court has the power to grant a declaration as well as an award of damages in tort in an appropriate case. But we were not referred to any case where this has been done. Some compelling reason would, we think, be required to justify such an exceptional combination of remedies. The need for vindication, which is normally met through a finding of liability coupled with an award of damages, is not in itself sufficient. In the present case, we are not persuaded that granting a declaration would have been appropriate in addition to awarding damages, if the owners' claims had succeeded.

[145] We also accept the Council's submission that insofar as the declaration granted related to the Council's conduct in relation to the grant of building consent in 2004, and inspections, and the issue of a CCC in 2006, it was precluded by the longstop limitation period. Section 393(2) of the 2004 Act is clear: it provides that *no relief* may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceeding is based. That provision precluded the grant of declaratory relief in respect of the Council's original negligence.

Result

[146] The application to adduce further evidence on appeal is declined.

[147] The appeal is allowed.

[148] The orders made in the High Court are set aside.

[149] The question of costs in the High Court is to be determined by that Court, in light of this judgment.

[150] The owners must pay the Council costs for a standard appeal on a band A basis, with usual disbursements.

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