IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-001899
[2014] NZHC 681

UNDER	the Consumer Guarantees Act 1993, the Fair Trading Act 1986, and the Building Act 2004
BETWEEN	THE MINISTER OF EDUCATION First Plaintiff
	... Plaintiffs continued over
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing:	29 - 31 January 2014
Counsel:	J Farmer QC, NF Flanagan and KC Chang for Plaintiffs DJ Goddard QC, RG Simpson and JQ Wilson for Defendant
Judgment:	4 April 2014

JUDGMENT OF ASHER J

This judgment was delivered by me on Friday, 4 April 2014 at 4.00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Meredith Connell, Auckland.
Bell Gully, Auckland.
J Farmer QC, Auckland.
DJ Goddard QC, Auckland.

THE SECRETARY FOR EDUCATION
Second Plaintiff

THE MINISTRY OF EDUCATION
Third Plaintiff

BOARD OF TRUSTEES OF
PAPATOETOE WEST SCHOOL
Fourth Plaintiff

BOARD OF TRUSTEES OF HOWICK
INTERMEDIATE SCHOOL
Fifth Plaintiff

BOARD OF TRUSTEES OF NEW
PLYMOUTH BOYS' HIGH SCHOOL
Sixth Plaintiff

BOARD OF TRUSTEES ROTOTUNA
PRIMARY SCHOOL
Seventh Plaintiff

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Introduction

[1] The plaintiffs own or administer various schools in New Zealand affected by weathertightness failures. They have issued proceedings against the four defendant manufacturers alleging that the cladding sheets and cladding systems[1] installed in various school buildings throughout New Zealand are defective. The defendants have applied to strike out the proceeding.

[2] At the outset of the proceedings the first, second and fourth defendants advised the Court that the cases against them had been settled and they did not pursue the strike out application, which is now supported only by the third defendant, Carter Holt Harvey Ltd (Carter Holt).

[3] Carter Holt is a producer of plywood cladding sheets. These are used by builders and designers in the construction of the exterior walls of buildings. The Carter Holt cladding product that is the subject of the claim is called "shadowclad". This cladding has been used in building numerous school buildings. The plaintiffs assert that shadowclad and the "system" supplied with it are inherently defective and causes damage because shadowclad allows water to enter. Until 2005 shadowclad was a stand-alone product, and Carter Holt did not provide any extra parts to go with the cladding sheets. Since 2005 Carter Holt has also provided flashings that can be installed with the cladding sheets.

[4] The plaintiffs allege five causes of action against Carter Holt:

(a) *First cause of action:* Carter Holt was negligent in designing, manufacturing, importing, and/or supplying the cladding sheets and cladding systems that were defective. It is alleged that the defendants owed a duty of care to the plaintiffs "to design, manufacture by import, and supply cladding sheets for use on the school buildings that complied with recognised Building Standards, the Building Code

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[1] Cladding systems as defined in the statement of claim are the cladding sheets, flashings, jointing systems, and specifications describing the features of the cladding system and the installation process.

requirements and the Building Acts." Various facts and circumstances are set out from which it is alleged the duty of care arises.

Carter Holt says this cause of action cannot succeed because Carter Holt was not sufficiently close and proximate in its supply of the shadowclad and the system. Carter Holt itself did not perform building work and simply supplied cladding sheets as part of a contractual chain. Even if there was sufficient proximity, it is submitted that policy reasons would militate against recognising a duty of care;

(b) *Second cause of action:* Carter Holt breached the guarantees set out in ss 6, 8, 9 and 13 of the Consumer Guarantees Act 1993 (CGA). Carter Holt submits that the CGA does not apply to the supply of the cladding through third parties to the plaintiffs. It is submitted there was in fact a supply of a building or buildings by third parties, and such supplies do not fall under the CGA;

(c) *Third cause of action:* Carter Holt negligently misstated the nature, characteristics and suitability of the cladding sheets and cladding system. Carter Holt says that no duty to take care arose in relation to the statements made by them to the plaintiffs;

(d) *Fourth cause of action:* Carter Holt negligently failed to warn the plaintiffs about the risk characteristics of the cladding sheets and cladding system that could cause damage to the plaintiffs' buildings. Carter Holt asserts that no such duty arises; and

(e) *Fifth cause of action:* Carter Holt breached s 9 of the Fair Trading Act 1986 by providing information that was misleading or deceptive as to the nature, characteristics and suitability of the cladding sheets and cladding system. This claim was not the subject of the strike out submissions.

[5] In addition to submitting that none of the first four causes of action could succeed, Carter Holt argued that the claims in negligence are subject to the 10 year long stop limitation in s 393 of the Building Act 2004.

Strike out principles

[6] The principles that govern the determination of a strike out application are well established and do not need to be set out in detail.[2] In summary:

- Before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.

- The jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied it has sufficient material to safely make a decision.

- The fact that applications to strike out raise difficult questions of law and require extensive argument does not exclude jurisdiction.

- The Courts should be cautious to strike out a claim alleging a novel duty of care. This is particularly so where the hypothetical facts cover a range of factual possibilities. In that context, deciding wide public policy questions may lead to an unfocussed approach because the inquiry is then set against too broad a factual canvas.

[7] Where an order for strike out is sought on the basis that a particular duty of care does not exist, it has been held by the Supreme Court that the question for the Court is:[3]

> [W]hether the circumstances relied on by the plaintiff are *capable* of giving rise to a duty of care ... . If a duty of care cannot confidently be excluded, the claim must be allowed to proceed. It is only if it is clear that the claim cannot succeed as a matter of law that it can be struck out.
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> ...

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2 See *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

3 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [2] and [33].

> The case must be 'so certainly or clearly bad' that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

[8] The Court of Appeal considered the approach to a strike out application where there was no existing duty of care owed by a building company to a city council in *Blain v Evan Jones Construction Ltd*.[4] The Court of Appeal observed:[5]

> We remind ourselves that the issue before us is whether it is arguable that a duty of care is owed to the Council by EJCL. We are not deciding whether such a duty is actually owed.

[9] Where the parameters of a duty of care are developing, as is the case in relation to liability for leaky buildings, a Court should be cautious of pre-empting a full contextual analysis of duty of care issues which can only occur at a trial.

First issue – negligence

[10] The plaintiffs claim that Carter Holt owes the plaintiffs a duty of care in designing, manufacturing and supplying the cladding sheets and cladding systems to be used in schools. Carter Holt denies that it owes the plaintiffs such a duty. The central question when deciding whether a novel duty of care should be recognised in New Zealand is whether, "in light of all the circumstances of the case, it is just and reasonable that such a duty be imposed."[6]

[11] In determining whether it is just and reasonable to impose a duty of care, the courts in New Zealand have adopted a two stage framework as set out in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd (South Pacific)*[7] and *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd (Rolls-Royce).*[8] The Court considers first whether the loss was foreseeable and whether there is a sufficient relationship of proximity such that in

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4 *Blain v Evan Jones Construction Ltd* [2013] NZCA 680.

5 At [33].

6 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 305 per Richardson J; *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58]. This has been endorsed by the Supreme Court in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [160]; and *Body Corp No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [232].

7 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd,* above n 6.

8 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 6.

the contemplation of a wrongdoer, carelessness on that wrongdoer's part may be likely to cause damage to the plaintiff.[9] If that question is answered in the affirmative, the Court then considers whether there are any policy considerations which ought to negate or limit the scope of the duty or the class of persons to whom it is owed. This approach has been widely followed in New Zealand.[10] Within this framework the boundaries between proximity and policy are not clear, and "some matters may be relevantly assessed at either stage, or may even need to be examined at both."[11]

Foreseeability

[12] For Carter Holt to owe the plaintiffs a duty of care, the loss suffered by the plaintiffs as a result of Carter Holt's breach of that alleged duty of care must be foreseeable. In *North Shore City Council v Attorney-General (The Grange)* the majority of the Supreme Court stated that:[12]

> Foreseeability is in such novel cases at best a screening mechanism to exclude claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss.

[13] The foreseeability of the loss is clearly established in this case applying strike out principles. As the manufacturer of shadowclad, Carter Holt at this strike out stage can be taken to be able to foresee that shadowclad would be used as cladding on buildings. If shadowclad or the cladding system leaked that could in due course lead to the weakening and rotting of structures and the development of growth and fungi capable of damaging human health.

[14] While it is necessary to establish that the loss was foreseeable, this does not determine the question of whether the parties were in a sufficiently close and

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9 In *The Grange*, above n 6, at [156] the Blanchard, McGrath and William Young JJ stated that foreseeability and proximity can be seen as two separate stages or as one stage which has two parts.

10 See *Connell v Odlum* [1993] 2 NZLR 257 (CA) at 265; *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [22]–[32]; *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited*, above n 6, at [58]–[65]; and *Couch v Attorney-General*, above n 3 at [78]. However, see also the recent discussion in *The Grange*, above n 6, at [147]–[161] where the majority explained that the framework was an "*Anns/Caparo/South Pacific* framework". At [156], the majority explained that "the framework has either two stages (one of which as two parts) or [has] three stages."

11 *The Grange*, above n 6, at [149].

12 *The Grange*, above n 6, at [157].

proximate relationship for a duty of care to arise.[13] Foreseeability "must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable" to impose a duty of care.[14] I turn now to consider the proximity of the relationship between Carter Holt and the plaintiffs.

Proximity

[15] Proximity "turns on the closeness and directness of the relationship between the parties".[15] It "reflects a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from an undue burden of legal responsibility".[16] Proximity therefore can be seen as a balancing of moral claims, and an assessment of how close the nexus is, as well as a consideration of the burdens of imposing a duty and whether the consequences to the defendant may be out of proportion to the fault.[17]

(a) The Building Acts and the Building Code

[16] In discussing proximity, the obvious starting point is the Building Act 2004 (the 2004 Act). The 2004 Act and its forerunner, the Building Act 1991 (the 1991 Act), establish the statutory framework for how building work is regulated in New Zealand. Integral to the operation of both the 1991 and 2004 Acts is the Building Code.[18] The Building Code sets out certain minimum functional requirements and performance criteria that buildings and building elements must comply with.[19] Of relevance to this proceeding is cl E2 which provides that exterior walls must prevent the penetration of water into a building.

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13 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 6, at 306 per Richardson J; and *The Grange*, above n 6, at [157] and [158].

14 *R v Imperial Tobacco Canada Ltd* [2011] 3 SCR 45 at [41] as approved of in *The Grange*, above n 6, at [157].

15 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 6, at 306 per Richardson J. See also the majority in *The Grange*, above n 6, at [158].

16 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 6, at 306, affirmed by the majority in *The Grange*, above n 6, at [159].

17 *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 6, at [60].

18 Building Regulations 1992 (SR 1992/150), sch 1.

19 Building Act 2004, s 17 and Building Act 1991, s 7.

[17] Section 17 of the 2004 Act provides:[20]

> **17 All building work must comply with building code**
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> All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

[18] While all building work is required to comply with the requirements set out in the Building Code, both counsel accepted that under both the 1991 and 2004 Acts, when Carter Holt manufactured and indirectly supplied the shadowclad it was not carrying out "building work" in terms of either of the Acts.

[19] Building work was defined in the 1991 Act as work "... for, or in connection with, the construction, alteration, demolition, or removal of a building, and includes site work." And in the 2004 Act as follows:

> **building work —**
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> (a) means work—
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> (i) *for, or in connection with, the construction, alteration, demolition, or removal of a building;* and
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> (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
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> (b) includes sitework; and
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> (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; and
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> (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.
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> (emphasis added)

[20] Under both the 1991 and 2004 Acts, the purpose of the Acts was to provide for the regulation of building work.[21] The Acts were not concerned in any direct way with suppliers in the position of Carter Holt. Unlike the position in relation to

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[20] The Building Act 1991 had a similar provision in s 7.

[21] Building Act 1991, s 6(1) and Building Act 2004, s 3(a).

builders, architects and designers or even councils, who carried out "building work", there were no duties imposed on the supplier of building components by either Act.[22]

[21] Mr Goddard QC for Carter Holt pointed out that it was critical to the reasoning of the majority in the Supreme Court judgment of *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* that the 1991 and 2004 Acts had imposed duties on Councils.[23] Thus he submitted that the freedom of contract of builders (and indeed Councils) is affected by the building legislation, but the freedom of suppliers is not. He questioned whether it was fair or reasonable to find a duty owed by suppliers when Parliament did not impose any statutory duties under the 1991 or 2004 Acts. He pointed out how, on the reasoning of the Supreme Court in the *Spencer on Byron* decision, the fact that general duties were imposed on Councils was critical to the majority's decision to extend the liability of Councils in relation to commercial buildings. The relevant provisions of the 1991 Act were treated by the Supreme Court as central to the policy inquiry.[24]

[22] I accept that the position of suppliers of building components in relation to the 2004 Act is different from that of Councils, and that at least until 2013 the Act did not impose duties on such suppliers.[25] The provisions of the 2004 Act do not point to the finding of a duty, insofar as the suppliers were providing components for building work covered by the Act.

[23] While the absence of this factor indicating a duty of care is to be noted, it is far from determinative of the issue of proximity. The plaintiffs do not rely only on a breach of the provisions of the Building Code, but also on more general breaches of the relevant recognised building standards that applied in the industry at the relevant time. Those relevant recognised building standards are set out in schedule six to the amended statement of claim and include standards in documentation produced by industry bodies and industry authorities. They do not all derive from the 2004 Act or the Building Code. I did not receive submissions as to whether these related in detail

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22 Section 14G of the Building Act 2004 was inserted as from 28 November 2013 setting out responsibilities on product manufacturers and suppliers.

23 *Spencer on Byron*, above n 6.

24 *Spencer on Byron*, above n 6, at [17] per Elias CJ, at [29] per Tipping J, and at [71], [104], [162] and [193] per McGrath and Chambers JJ.

25 See above n 22.

to building components, but I assume that at least in general terms they impose standards for building components.

(b) The contractual relationship between the parties

[24] The inquiry into proximity is concerned with the relationship between the parties.[26] Carter Holt's contextual evidence described a supply chain from Carter Holt's manufacturing division to third party building supply merchants and Carter Holt's own building supply merchant. As a generalisation, these merchants in turn sold building materials to contractors in the building trade. Those contractors used these materials to construct the school buildings.

[25] At each stage in the chain between the manufacturer, building supply merchants, trades persons and building owners there will be contracts in place which allocate responsibilities and risks. There will be associated limitations or exclusions of risk. Carter Holt in contextual evidence exhibited a number of its standard terms of trade, each of which limited its obligations or excluded or capped its exposure to damages. On this point it is a key argument of Mr Goddard that it would not be just and reasonable to impose a duty of care on Carter Holt that cuts across the contractual chain between Carter Holt and the persons it supplies and the plaintiffs, and that reallocates risks in a manner that disregards the contracts.

[26] There are a number of cases which have found there to be no duty of care because the parties have placed themselves in a position whereby their relationship is governed by contract.

[27] In *South Pacific* the Court of Appeal considered whether an investigator, contracted by an insurer to investigate a claim, owed a duty of care to the insured commercial party. Richardson J observed that the limited ability of the insured party to claim against the insurer was as a result of the "respective bargains the present

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[26] *The Grange*, above n 6, at [156]; and *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 6, at [59].

parties had made."[27] Richardson J explained that:[28]

> Tort theory should remain consistent with contract policies. In public policy terms I consider that where, as here, contracts cover the two relationships, those contracts should ordinarily control the allocation of risk unless special reasons are established to warrant a direct suit in tort. This accords, too, with *Simman General Contracting Co v Pilkington Glass Ltd (No 2)* where for policy reasons the English Court of Appeal concluded that any claims by A (Simman) against B (Feal) and by B against C (Pilkington) could and should be pursued down the contractual chain and that there was no warrant for extending the law of negligence to impose direct liability in tort on C in favour of A.

[28] In *Simaan General Contracting Co v Pilkington Glass Ltd (No 2) (Simaan)* the English Court of Appeal held that a glass manufacturer who had no contractual relationship with the head contractor did not owe a tortious duty of care to the head contractor for economic loss suffered as a consequence of the building owner withholding money from the head contractor due to unsightly discolourations in the glass.[29] In the absence of any physical damage to other property owned by the plaintiff, the Court unanimously held that no negligence claim could arise unless the manufacturer had voluntarily assumed a direct responsibility to the plaintiff for the colour and quality of the glass panels.[30] The refusal by the Court to recognise such a duty was because the Court considered that the function of tort law was to fill gaps in the law. There was no need to resort to tort law because claims by the owner of the property could be pushed down the contractual chain.[31]

[29] In *Rolls-Royce* the New Zealand Court of Appeal noted that the *Simaan* decision had been "widely approved, both in New Zealand and in the United Kingdom".[32]

[30] In *Rolls-Royce* Carter Holt had contracted with the Electricity Corporation of New Zealand Ltd (ECNZ) to procure the design and construction of a co-generation plant. Shortly afterwards, ECNZ contracted with Rolls-Royce New Zealand Ltd for

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27 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 6, at 308.
28 At 308 (reference omitted).
29 *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)* [1988] 1 QB 758 (CA).
30 At 805.
31 At 804.
32 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 6, at [84].

Rolls-Royce to design, construct and commission the plant. The co-generation contract between Carter Holt and ECNZ was entered into on the basis that Rolls-Royce would be the sub-contractor but there was no direct contractual relationship between Carter Holt and Rolls-Royce. When the contracts were being negotiated the parties considered whether to contract directly between Carter Holt and Rolls-Royce, but the decision was made that there should be no such contract. In an extract relied on by Mr Goddard it was held:[33]

> The strongest factor pointing away from a proximity finding is the very contractual structure that made loss to Carter Holt foreseeable and provided a close nexus between Rolls-Royce's alleged negligence and Carter Holt's loss. There is an unusual contractual structure in this case in that the ECNZ was never intended to be directly involved in the design and construction phase. In that sense, Rolls-Royce was not a subcontractor but the only contractor. This is reflected in the obligations of the ECNZ being expressed in terms of using best endeavours to ensure the specifications were met.

[31] The Court of Appeal noted that construction contracts typically contained limitation or exclusion clauses.[34] The Court held:[35]

> The details of that very same contractual structure, however, in our view, point strongly against a finding of proximity. As indicated above, Carter Holt had the choice of contracting directly with Rolls-Royce. It did not choose to do so. ...

[32] The Court held that due to the lack of proximity and for policy reasons there was no duty of care and the claim should be struck out. *Rolls-Royce* was referred to by the majority in *Spencer on Byron* without disapproval.[36] It was distinguished on the basis that specific statutory obligations were placed on inspecting authorities.[37]

[33] Mr Goddard, in support of his submission, said this consideration was conclusive in this case in determining that there could be no duty of care, pointing to the severe limitations on liability imposed in the contract documents by Carter Holt with those who purchased cladding directly from Carter Holt. How, he asked, could it be fair that Carter Holt could then be liable to third parties with whom it had not contracted at all? He pointed to the fact that the plaintiffs, if they had wanted

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33 At [103].
34 At [111].
35 At [121].
36 *Spencer on Byron*, above n 6, at [47] per Tipping J at [194] per McGrath and Chambers JJ.
37 at [47] per Tipping J and at [194] per McGrath and Chambers JJ.

warranties as to the quality of the panelling supplied, could have required those with whom it contracted to obtain and provide written warranties from suppliers.

[34] The Court of Appeal considered contractual relationship issues in the school context in *Minister of Education v Econicorp Holdings Ltd*.[38] Econicorp built a school hall pursuant to a contract with the school's Board of Trustees. Econicorp engaged LHT Ltd to provide design and other services. The Minister of Education was not a party to the contract between Econicorp and the Board, although it owned the land. Later defects became apparent with serious damage arising, and the Board issued proceedings against Econicorp and LHT. Econicorp applied to strike out the claims.

[35] Although that case did not involve a supplier, it is significant for the purposes of this application that Arnold J, while acknowledging the force of the commercial/contractual considerations, considered that this was arguably not a truly commercial situation given the involvement of school boards with their management obligations. A relationship between the Minister and the Board was arguably at least not commercial and was a public law relationship.[39] However, Arnold J did not comment on how this public law relationship between the Minister and the Board impacted on the relationship between the Minister and Econicorp.

[36] Mr Goddard pointed out that Glazebrook J, who accepted the conclusion of Arnold J, did not specifically concur with the paragraphs that contained these and other extracts helpful to the plaintiffs' arguments, and that Harrison J dissented. While Harrison J accepted that there was not "the orthodox chain of separate construction contracts between the owner, builder and subcontracting-entities" present in the case, his Honour considered that the "same principles apply to disqualify a claim by A against C where the only linkage is through separate contracts with B."[40] On this basis, Harrison J would have held that there was not sufficient proximity between the Minister and Econicorp.

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38 *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450, [2012] 1 NZLR 36.
39 At [61](b).
40 At [82].

[37] I agree with Mr Farmer QC for the plaintiffs that the facts of this case, as presented in the statement of claim and the affidavits setting out the context of supply, show a very different commercial situation from that in *Rolls-Royce*. In *Rolls-Royce* there was a one-off contract in relation to a particular enterprise, where the exact circumstances were known to all parties and those parties chose to contractually regulate their situation in a particular way. In relation to *Econicorp*, the degree of association between Carter Holt and the plaintiffs in this present case is more limited. However, the facts of *Simaan* were closer to the present and featured an indirect supply, and a refusal to find a duty of care, although the plaintiff was a contractor and not the owner.

[38] When commercial parties are in a situation where they are in a position to govern their relationship by contractual provisions, there is a greater reluctance to find the requisite proximity, and indeed there may be policy reasons not to find a duty of care. This is particularly so when the parties know each other, and have contemplated the option of entering into a contract.

[39] On the face of it, it was open to the plaintiffs to protect themselves against defects in the cladding by contract. They could have required warranties as to certain products. They could have required a specific warranty from the builder. Although school boards were involved, the contract was essentially commercial. Institutions were entering into significant commercial building contracts with other commercial parties. It was free for them to organise their contractual affairs as they wished. It was free for them to organise warranties and other contractual obligations. A Court should hesitate before imposing tortious duties in such circumstances.[41]

[40] Where there is a contractual relationship that relationship should ordinarily control the allocation of risk between the parties, unless for some very special reason it is fair and just that the risk be controlled additionally by an obligation in tort.[42]

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41 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 6, at [123]; and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 6, at 308.

42 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 6, at 308 per Richardson J, and at 318–319 per Hardie Boys J; and *Simms Jones v Protochem Trading NZ* [1993] 3 NZLR 369 (HC) at 376.

This factor points away from there being the requisite proximity between the plaintiffs and Carter Holt. However, there may be other reasons establishing the necessary proximity. The proximity question involves looking at all facets of the relationship between the plaintiffs and defendant. While the contractual chain and commercial nature of the parties points against there being sufficient proximity, other factors, such as vulnerability, may point to there being sufficient proximity.

[41] There was no evidence as to whether component warranties were obtained commonly by owners in the industry in this context, or whether indeed it would have been at all practical to insist on such warranties.

(c) Vulnerability

[42] In *Woolcock* the majority of the High Court of Australia stated that:[43]

> 'Vulnerability' in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, 'vulnerability' is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.

[43] In *Spencer on Byron*, Tipping, McGrath and Chambers JJ refused to adopt the vulnerability test as a decisive factor.[44] Tipping J stated that "issues of vulnerability are apt to be problematic and may give rise to more problems than they solve".[45] Further, in a footnote, Tipping J mentioned that "Any underlying assumption that commercial parties are generically not vulnerable cannot be right. Equally not all residential parties are vulnerable". This was echoed by McGrath and Chambers JJ who stated that:[46]

> The assumptions [that commercial parties are sophisticated and wealthy while home owners are vulnerable and naive] have too many exceptions to make them safe assumptions on which to build a legal policy.

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43 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515 at [23].

44 *Spencer on Byron*, above n 6, at [38] per Tipping J and at [156] per McGrath and Chambers JJ.

45 At [38].

46 At [198].

[44] While vulnerability is not a decisive factor and the vulnerability of parties cannot be assumed, this does not mean that vulnerability is unimportant in establishing proximity. Vulnerability was important in *Rolls-Royce* in assessing whether the parties were in sufficient proximity. Glazebrook J considered the parties to be "sophisticated commercial parties capable of looking after their own interests."[47] Therefore the parties were not vulnerable as they could choose to protect themselves through contract but chose not to.

[45] In *Minister of Education v Econicorp*, Harrison J provided a detailed discussion of vulnerability in commercial cases.[48] Harrison J considered that vulnerability needed to be considered in the specific situation and that the vulnerability to be assessed was not "of the interest itself" but the "inability of [the plaintiff] to protect itself".[49]

[46] The plaintiffs were vulnerable in the sense that the Minister and Boards could not engage experts to inspect for defects as in the case of other latent defect cases, as no defects are likely to have been apparent.[50] It is arguable that they could not be expected to take protective measures to protect themselves given the degree of separation, and the multiplicity of components that go into a building. At the same time it could be expected that they would have the ability to insure or enter into contracts providing for warranties.

(d) Conclusion on proximity

[47] I accept that it was theoretically open to the plaintiffs and Carter Holt to govern their relationship by contract. However, there was a considerable degree of commercial separation between the plaintiffs and Carter Holt. In cases of indirect supply Carter Holt had no direct contact with the schools and indeed may have manufactured and supplied the product to wholesalers or building product stores years before the panels were acquired and used in the building, and those products may have passed through various hands. A more exact analysis will have to await

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47 At [123].
48 *Minister of Education v Econicorp Holdings Ltd*, above n 38, at [91]–[96].
49 At [93].
50 *Donoghue v Stevenson* [1932] AC 562 (HL) at 599.

trial when evidence can be given, but there is not enough before me to indicate that the parties could have been reasonably expected to individually negotiate warranties to cover leaking panels.

[48] Vulnerability is not a decisive factor,[51] but it remains a consideration and if anything helps establish sufficient proximity. Reliance is a separate issue and should not be linked to vulnerability. There is little that can be said about reliance at this stage, except that the plaintiffs presumably had the expectation that cladding supplied by reputable manufacturers could be relied on to be weatherproof.

[49] I conclude that the relationship between the parties may be sufficiently proximate. This will have to be established at trial. Mr Goddard has not persuaded me that, when all the facts have been presented, the negligence claim must fail on this ground.

Policy considerations

(a) Damage to buildings and health

[50] Mr Farmer placed weight on the fact that the lack of water tightness of the panels and system led to water ingress, which caused or will cause significant physical damage to buildings. He also emphasised that a further consequence of the water ingress was damage or potential damage to persons, namely pupils and teachers who would have to work in a damp environment and could inhale fungal spores. In addition to causing actual damage to the building, the negligent design and manufacture of cladding encompassed risks to personal health and safety of children and teachers. He submitted that this was not truly a case about economic loss, and that it was at least in part about physical damage and consequential risks to health.

[51] It is arguable that the risk to health is a policy reason for there to be remedies available, so that sufferers can obtain redress which will enable the risk to be

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[51] *Spencer on Byron*, above n 6, at [38] per Tipping J.

alleviated. This is so even if the sufferers are not the plaintiffs in these proceedings, and will therefore benefit only indirectly.

[52] The plaintiffs argued that this was a distinguishing factor from *Rolls-Royce*, a case which was purely about economic damage. It was submitted that *Simaan* was in a similar distinguishable category because *Simaan* concerned the loss of profits from a contract rather than any physical damage. Indeed, in *Simaan* the Court expressly stated that a duty of care would be owed by the manufacturer to avoid physical injury or damage to person or property.[52]

[53] Mr Goddard, on the other hand submitted that the case was in essence about economic loss, and that physical damage was not at the heart of the case. He emphasised that the loss suffered was the cost of repairing the affected buildings as well as diminution in value of the buildings.

[54] In New Zealand it is clear that the distinction between physical damage and economic loss is not critical in determining whether a duty of care is owed.[53] However, physical damage or potential physical damage remains a factor that is referred to and considered in assessing whether there should be a duty of care. Thus, in *Sunset Terraces* the interest of protecting the health and safety of non-owners was specifically recognised as relevant in assessing the existence of a duty of care.[54] The Courts are concerned to protect the habitation interest of those who use buildings.[55] In an extract relied on by Mr Farmer, William Young J, in his dissent concluding that there was no duty of care, stated:[56]

> It is right that everyone should take reasonable care not to damage the person or property of others.

[55] Further, Mr Farmer relied on *Milne Construction Ltd v Expandite Ltd*.[57] That case involved the failure of an adhesive which did not cause direct damage but

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52 *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)*, above n 30, at 803–804.
53 *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] at [30].
54 *Sunset Terraces*, above n 54, at [49]; and *Spencer on Byron*, above n 6, at [163]–[165] per Chambers J.
55 At [163].
56 At [241].
57 *Milne Construction Ltd v Expandite Ltd* [1984] 2 NZLR 163 (HC).

resulted in damage to the concrete layers. Weight was placed on the physical damage in recognising the existence of a possible duty of care.[58]

[56] It will generally be the case that in the context of leaky buildings the failure of materials or workmanship will not lead to direct physical damage. Nevertheless, such failures allow damage to develop as a consequence of water ingress. Risks to the health of occupants follow. It is a factor that weighs in favour of finding a duty of care.[59]

(b) Unfair apportionment of responsibility

[57] In assessing policy considerations I accept that product manufacturers and suppliers play a direct role in the harm suffered by building owners as a result of using their defective products. The fact that they are only one of a number of parties who may be responsible for the leaks must be considered. Suppliers of generic products will by definition tend to be significant corporate entities, while many involved in directly doing the building have limited financial backing. Experience shows those who do the work on site will often become insolvent prior to the resolution of any Court proceeding concerning building defects. There is a risk that, if a duty of care is held to exist, building suppliers will end up bearing an undue and disproportionate responsibility for leaking buildings. This is especially so if other parties, who may have contributed to the weathertightness issues affecting the school buildings, would have the protection of the long stop provision in s 393 of the 2004 Act, while building suppliers do not.

[58] I recognise that territorial authorities have borne much of the responsibility for compensating building owners to date despite the fact that they have often played no direct role in the causing of harm, but merely failed to detect it. However, they have a special responsibility under the 2004 Act and have the ability to finance claims by levies on ratepayers.

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58 At [188].

59 My assessment of this issue is somewhat different to my assessment in *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC Auckland CIV-2007-404-4090, 25 June 2009 at [60]–[73]. This is because of the statements of the Supreme Court in *Spencer on Byron*, above n 6, at [41]–[45] and [50] per Tipping J, and at [163] and [187] per McGrath and Chambers JJ recognising health and safety concerns of those occupying buildings.

[59] As against this it may be considered that there are real public benefits from imposing a duty of care on product manufacturers, as it will promote the careful development and testing of products, and accurate marketing as to their qualities.

(c) Commercial certainty

[60] In commercial cases, there is a need for commercial certainty particularly when commercial parties have allocated the risk under contract. Mr Goddard relied on an extract from *The Law of Torts in New Zealand*:[60]

> … commercial relationships should be decided straightforwardly on what the parties have bargained for, and the courts should not transfer to the defendant what was properly a commercial risk accepted by the plaintiff.

[61] He argued that here the plaintiffs, in not insisting on manufacture warranties of standard building components, had accepted a commercial risk.

[62] In *Rolls-Royce* the Court of Appeal commented that for policy reasons it may not be just or reasonable to impose a duty where parties had not contracted for such protection as to do so would undercut the need for commercial certainty. It was stated that, even where there was no actual notice of a standard exclusion clause given to a third party, it may be:[61]

> … appropriate to enforce a standard form of exclusion or limitation provision against a commercial party … if the plaintiff could be expected to know that the product or service in question is normally supplied subject to such condition.

[63] In *Simaan* the English Court of Appeal stated that it would be unjust to recognise a duty of care which was contrary to contractual exclusion clauses. Bingham LJ observed that, unless the nature of the duty was the same as that imposed by the Sales and Goods Act, "if the duty is unaffected by the conditions on which the seller supplied the goods, it is in my view unfair to him and makes a mockery of contractual negotiation."[62]

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60 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers Ltd, 2013) at [21.5.01].

61 At [111].

62 *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)*, above n 29, at 804.

[64] In this case there may be issues about the scope of the duty of care argued by the plaintiffs. While the need for commercial certainty and the issues raised point against recognising a duty, the points made are not necessarily unanswerable. They may be best left to a trial, where the plaintiff has a full opportunity to adduce evidence on whether, given the contractual distance between the parties, certainty is not a major consideration.

(d) Cutting across other areas of law

[65] A further policy consideration is the impact of recognising a duty on other established areas of law. In *South Pacific*, Cooke P stated that:[63]

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

[66] Recognising a duty would not conflict with either the 1991 or 2004 Acts. While manufacturing and supplying building products is not covered by the 1991 or 2004 Acts, it could be argued that because the Building Code establishes certain minimum performance-based requirements that rely on building elements functioning effectively, recognising a duty of care may assist with the functioning of the Building Code and 1991 and 2004 Acts.

[67] The CGA may also be relevant, in that it may be argued in due course that if it does apply there is no gap that needs to be filled by tortious liability. In the alternative a contrary argument might be put forward that the CGA in imposing duties on a manufacturers supports the existence of a duty of care extending to the supply of components. I do not propose grappling with this issue which was not argued.

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63 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd*, above n 6, at 298.

Concluding analysis on duty of care

[68] There are a number of factors which militate against the finding of a duty of care. There are no specific duties placed on the suppliers of components under the 2004 Act, and the situation is different from the position in *Spencer on Byron* where the Supreme Court placed weight on the specific duties placed by the Act on territorial authorities. The supply of shadowclad arises from commercial contracts between parties of relatively equal negotiating power, who may be able to control their relationships by contract. They may be able to make contractual provision for where the risk will fall if cladding leaks. On the other hand, that argument is not as strong as in cases such as *Rolls-Royce* where there were direct dealings between the parties.

[69] In favour of a duty is the obvious foreseeability of loss, and the fact that the damage resulted from loss is not just economic. There will be damage to property from water ingress and a risk to health. The risks to health in particular point in favour of recognising a duty, although there is at this stage no precise analysis of the alternative remedies available to the occupants of these buildings in the event that there is a threat to health. There is also the fact that, on some occasions at least, the involvement of school boards in the contractual situation distinguishes the present case from a truly commercial situation. It may be arguable that there is a heightened degree of vulnerability and reliance on the part of such boards.

[70] I do not accept that the imposition of a duty of care would necessarily provide the plaintiffs with a free warranty as to quality as was suggested by Mr Goddard. To prove negligence actual carelessness must be shown, a requirement that does not exist in the context of a contractual guarantee. Suppliers have paid for their services and manufacturers make profits from their products. They have the ability to add a margin. It may be considered that requiring them to insure against the risk of failures causing leaky building claims will be for the benefit of the public.

[71] I note Tipping J's observation in *Spencer on Byron* that once proximity is established a duty of care should be found to exist unless it would not be in the public interest to recognise the duty.[64] Tipping J observed:[65]

> If the loss is reasonably foreseeable and the parties are otherwise in a proximate relationship I do not consider it just to deny the plaintiff a cause of action for loss negligently caused by the defendant unless the wider interests of society mandate that denial.

[72] The decision as to whether there is a duty of care is finely balanced. Bearing in mind the recent warnings of the Supreme Court against precluding cases where the circumstances are capable of giving rise to a duty of care from going to trial,[66] I am not prepared to strike out the statement of claim or any portion of it in relation to this cause of action. I do not consider that the fact that the supplies arose in a largely commercial context and could have been covered by contract, is conclusive in finding against a duty. I conclude that it is arguable that there was the necessary proximity between Carter Holt and the plaintiffs. While I recognise the force in the policy argument of commercial certainty, I am not of the view that this sufficiently militates against the possibility that a duty may be found.

[73] In relation to direct supply by Carter Holt, the determination will be much more fact specific. There are insufficient facts in relation to direct supplies to warrant a decision that the parties should be treated as having decided to govern the situation between them "in a certain way" as was the case in *Rolls-Royce*. I am not prepared to strike out the direct supply part of the claim.

Second issue – the Consumer Guarantees Act

The issues

[74] The plaintiffs argue that Carter Holt in supplying cladding sheets and cladding systems was a supplier supplying goods to a consumer and that the CGA applies.

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64 *Spencer on Byron*, above n 6, at [54].
65 At [54].
66 *Couch v Attorney-General*, above n 3, at [2] and [3].

[75] Mr Goddard argued that the CGA does not apply because, although it applies to goods attached to or incorporated in real property, its application is expressly excluded in relation to buildings.[67] He also argued there is no pleaded supply of cladding sheets to the plaintiffs directly, and no pleaded supply of cladding sheets to the plaintiffs by any intermediary (as distinct to the supply of buildings). He submitted that the claim must be considered on the basis that the plaintiffs acquired finished school buildings from their contractors. They did not purchase cladding sheets as goods direct from Carter Holt or indirectly via their contractors. Therefore, he submitted the plaintiffs are not consumers of goods and the statutory guarantees in ss 6, 8, 9 and 13 of the CGA do not apply.

[76] Mr Flanagan, for the plaintiffs, on the other hand submitted that there can be more than one supplier, and that Carter Holt is a supplier. Both consumer and supplier do not need to be a party to the contract in question. In support of this proposition, he relied on *Bunnings Group Ltd v Laminex Group Ltd*.[68] He also submitted that goods include building parts, irrespective of whether they have become part of a building.

[77] The causes of action of allegedly breached guarantees under ss 6, 8, 9 and 13 of the CGA all turn on "goods" being "supplied to a consumer". These words are used at the start of each section.

[78] "Supply" has the usual meaning and includes re-supply. "Supplier" is defined as:

> **supplier—**
>
> (a) means a person who, in trade,—
>
> (i) supplies goods to a consumer by—
>
> (A) transferring the ownership or the possession of the goods under a contract of sale, exchange, lease, hire, or hire purchase to which that person is a party; or
>
> …

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[67] See the definition of "goods" in s 2 of the Consumer Guarantees Act 1993.

[68] *Bunnings Group Ltd v Laminex Group Ltd* (2006) FCA 682 at [7].

(ii) supplies services to an individual consumer or a group of consumers (whether or not the consumer is a party, or the consumers are parties, to a contract with the person); and

(b) includes,—

(i) where the rights of the supplier have been transferred by assignment or by operation of law, the person for the time being entitled to those rights:

…

(iv) a person who, in trade, is acting as an agent for another, whether or not that other is supplying in trade; and

…

"Supplied" to a consumer?

[79] I accept that it is arguable that Carter Holt transfers the ownership or the possession of goods under a contract of sale, but when Carter Holt supplies the goods to a wholesaler, as it will often do, it does not supply them to a consumer. This is because "consumer" is defined as follows:

Consumer means a person who—

(a) Acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and

(b) *Does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of—*

(i) Resupplying them in trade; or

(ii) Consuming them in the course of a process of production or manufacture; or

(iii) In the case of goods, repairing or treating in trade other goods or fixtures on land:

(emphasis added)

[80] Therefore, when Carter Holt is supplying a wholesaler or any party who will re-supply the goods in trade, it is not supplying to a consumer.

[81] Mr Flanagan advanced the argument that Carter Holt had indirectly supplied the plaintiffs with shadowclad through a contractual chain. He pointed to the definition of "supply" which includes resupply as support for this proposition and

relied on the Australian case of *Bunnings Group Ltd v Laminex Group Ltd* to support the notion that indirect suppliers are still liable.

[82] I am not persuaded by Mr Flanagan's argument that by Carter Holt indirectly supplying the plaintiffs with shadowclad, Carter Holt became a "supplier". This is for three reasons. First, such an argument ignores the definition of supplier in s 2 of the CGA at (a) which requires Carter Holt to have been a party to a contract through which the shadowclad was transferred to the plaintiffs. Only in cases of direct supply could Carter Holt have been such a party. Second, if such a meaning was accepted this would render the distinction the CGA draws between "suppliers" and "manufacturers" nugatory because all manufacturers will have indirectly supplied consumers with their goods. Third, to accept the interpretation Mr Flanagan advanced would mean that any party involved in the supply chain between manufacturer and consumer would be a "supplier" to the consumer. This would mean that the consumer would be able to seek relief from multiple parties for a single supply.

[83] I do not accept that the reference to "re-supply" in the definition of "supply" helps the plaintiffs. Carter Holt clearly has not functioned as a re-supplier. Carter Holt did not act as an intermediary. It was the source of the goods.

[84] I do not consider the plaintiffs' proposed broad interpretation reflects the purposes and structures of the CGA. In my view Carter Holt was not a "supplier" under the CGA, when its products indirectly became part of a building.

Carter Holt as "manufacturer"

[85] However, this is far from a complete answer to the claim against Carter Holt. This is because the guarantee as to acceptable quality in s 6 gives the consumer a rights of redress not only against the "supplier", but also against the manufacturer.[69] Sections 7(1)(i), s 9(4)(b) and s 13 apply to both "suppliers" and "manufacturers". A "manufacturer" is defined as:

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[69] Consumer Guarantees Act 1993, s 6(2)(b).

> **Manufacturer** means a person that carries on the business of assembling, producing, or processing goods, and includes—
>
> (a) Any person that holds itself out to the public as the manufacturer of the goods:
>
> (b) Any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods:
>
> (c) Where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods:

[86] Carter Holt can be seen as a manufacturer in that it carries out the business of assembling, producing or processing goods. The guarantee sections apply to a manufacturer when another person "supplies" the goods. Section 25 sets out the right of redress against manufacturers, and I cannot assume at this strike out stage that any of the exceptions in s 26 apply.

Are the items that were supplied "goods"?

[87] Both Carter Holt and the plaintiffs accepted that cladding falls within the definition of "goods" in s 2 of the CGA. However, Mr Goddard submitted that the relevant item that was supplied to the plaintiffs was not the cladding itself but rather a whole or part of a whole building which is not "goods" under the CGA. The definition of "goods" in s 2, contains this qualification at (c):

> despite paragraph (b)(i), does not include a whole building, or part of a whole building attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation.

[88] The purpose of limb (c) would appear to be to exclude homes or offices that are sold as such rather than as individual parts. It will protect vendors and their agents. If the plaintiffs had purchased a completed school building from another party then it could well be that the plaintiffs would be unable to claim that it had received goods under the CGA. On the other hand, if shadowclad was supplied to the plaintiffs, or to the plaintiffs' agent, or a contractor, and then later included in a building constructed for the Minister, what would have been supplied, depending on the precise facts, were components and not a building or part of a building.

[89] I do not have any detailed information on how the cladding to the buildings was supplied. It has not been demonstrated that the cladding received from Carter Holt could not fall within the definition of "goods".

[90] I record that I have received little assistance from the case of *Bunnings Group Ltd v Laminex Group Ltd*.[70] In that case Bunnings had served the manufacturers of insulation products, and the Court was considering whether the insulation products were goods ordinarily acquired in the course of business. The issue of whether the manufacturers were also suppliers was not an express consideration. In the appeal it was accepted that the relevant supply was that between the manufacturer and the buildings, not between the manufacturer and Bunnings Group Ltd.

[91] I also have not relied on the case of *Herbert Construction Co Ltd v Carter Holt Harvey Ltd* to which I was referred.[71] In that case where a construction company had acquired roofing material from Carter Holt, Carter Holt was held to be not a consumer because it did not acquire goods for "personal, domestic or household use or consumption", but rather in the course of business constructing a building for commercial gain. However, the particular purpose for which the product was acquired and the particular supply is not determinative. Whether the product was "of a kind ordinarily acquired for personal, domestic or household use or consumption" was not considered. The ordinary acquisition of the goods may have been domestic. I would not wish to be seen as expressing a view on this or accepting that decision as correct.

Conclusion on CGA claim

[92] Carter Holt is a manufacturer that produces goods and it is arguable that consumers who acquire those goods, with or without a direct contract with the manufacturer, can be the beneficiaries of the guarantees set out in ss 6, 9 and 13 of the CGA. The fact that the goods may have been incorporated ultimately into whole buildings does not necessarily mean that the Act cannot apply. Whether that is so will turn on an analysis of the facts of the various transactions.

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70 *Bunnings Group Ltd v Laminex Group Ltd*, above n 68.

71 *Herbert Construction Co Ltd v Carter Holt Harvey Ltd* [2013] NZHC 780 at [17].

[93] In all the circumstances it cannot be said that the claims based on ss 6, 9 and 13 of the CGA are so clearly untenable that they cannot possibly succeed. The claims based on the breach of s 8 of the CGA cannot succeed because the guarantee only applies to "suppliers". However, given that this is only a minor aspect of a claim that is likely to be amended further I will not strike it out.

Third issue – negligent misstatement

[94] The third cause of action is that Carter Holt negligently misstated the specifications produced and supplied, and its promotional activities and marketing contained representations that were relied on by the plaintiffs. It is asserted that the representations were misleading and this constituted negligent misstatement.

[95] Carter Holt submitted that to succeed the plaintiffs had to establish that there was a special relationship between Carter Holt and the plaintiffs, and that Carter Holt had assumed responsibility to the plaintiffs to take reasonable care concerning the truth of its statements about shadowclad. Reliance was placed on *Hedley Byrne & Co Ltd v Heller* which recognised a duty of care in relation to statements which caused pure economic loss, this being premised on a voluntary assumption of responsibility by the maker of the statement or a special relationship between the maker of the statement and the audience.[72] It was submitted that there was a requirement of an affirmative assumption of responsibility in New Zealand relying on *The Grange*,[73] and that there was no affirmative assumption of responsibility by Carter Holt, and indeed only the most general form of reliance.

[96] I accept that there is a question whether the requirement of a "special relationship" imposes an additional requirement beyond the generally accepted two part test for imposing a duty of care in negligence.[74] But here, in the context of a supply of a specialist building product, the designer and manufacturer of a cladding system does have a special skill that it can be expected will be relied on in relation to the proposed functionality and performance of the product. There is no ability to establish the qualities of such a product by inspection. In my view it was arguably

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72 *Hedley Byrne & Co Ltd v Heller* [1964] AC 465 (HL) at 529.

73 *The Grange*, above n 6, at [189].

74 *Attorney-General v Carter*, above n 10, at [32]; and *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA).

specifically foreseeable that consumers like the plaintiffs would rely on the statements as to quality and systems provided by Carter Holt.

[97] As McGrath and Chambers JJ stated in *Spencer on Byron*, while reliance has only a limited role in negligence, in the tort of negligent misstatement "(specific) reliance is an essential feature in the chain of causation".[75] In *The Grange*[76] the test for reliance was drawn from *Caparo:*[77]

> [T]he necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice is communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive …

[98] Thus, a reliance inquiry will to an extent be fact dependent, and will turn on issues of what information the plaintiffs received, and what they acted on. The general circumstances that arise in this case are enough to raise the possibility of sufficient reliance, although I would have thought the real issue is going to be the negligence pleading in the first cause of action. There is enough for me to not strike out this cause of action, although I see it as peripheral.

Fourth issue – negligent failure to warn

[99] The plaintiffs allege that there was a negligent failure to warn in relation to the risk characteristics of the Carter Holt products. Carter Holt claims that no such duty exists. It submits that the product is not a danger to people or property and that the duty to warn does not extend to alleged defects in a chattel that merely reduce its economic value.

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75 *Spencer on Byron*, above n 6, at [199].
76 *The Grange*, above n 6, at [189].
77 *Caparo Industries PLC v Dickman* [1990] 2 AC 65 (HL) at 638.

[100] I see this cause of action as very much an alternative that is unlikely to give rise to different issues than those that arise in relation to the primary negligence claim. If there is no duty of care on the part of Carter Holt in relation to the primary pleading of negligence, it is unlikely there will be any liability for a failure to warn. In particular, it would be surprising if there was no duty that covered the negligent manufacture and supply of shadowclad, but there was a duty to warn of its shortcomings when it was used for its designed purpose. There is nothing to indicate that Carter Holt was aware of any problem with its product, and indeed that is not pleaded.

[101] The underlying rationale behind imposing a duty to warn is when there is an:[78]

> … imbalance between the information, and hence knowledge, held by the manufacturer on the one hand and the consumer on the other, regarding risks or dangers that may be inherent in using the product.

In this case, there undoubtedly is an imbalance of information between Carter Holt and the Minister, as Carter Holt has information about the strengths and weaknesses of their product, which the Minister will not be able to evaluate. However, the manufacturer will almost always possess greater knowledge about the product than the consumer, so more than a mere imbalance is required.[79] A duty only arises when the manufacturer has knowledge about the danger that the consumer could not reasonably by expected to possess because the purpose of the duty to warn is to address, or ameliorate, this imbalance.[80]

[102] Determining whether Carter Holt possessed such knowledge and whether this knowledge is the type of knowledge the plaintiffs could not reasonably be expected to possess will need to be determined at trial. It could be established that, as a longstanding specialist manufacturer of building products, Carter Holt knew about the risk characteristics and had a duty to warn the plaintiffs about them.

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78 *Pou v British American Tobacco (NZ) Ltd* HC Auckland CIV-2002-404-1729, 3 May 2006 at [34].

79 *Pou v British American Tobacco (NZ) Ltd*, above n 78, at [34].

80 *Pou v British American Tobacco (NZ) Ltd*, above n 78, at [34].

[103] As in relation to negligent misstatement, this claim seems to be peripheral to the main negligence claim and may be an example of over pleading. However, I find this duty of care to be also arguable and will not strike it out.

Fifth issue – are the proceedings time barred?

Key provisions

[104] Although some other arguments were proposed by other defendants, Carter Holt only raised a single limitation point which it argued should result in the striking out of much of the claim. Carter Holt submits that the 10 year long stop imposed under s 91 of the 1991 Act or s 393 of the 2004 Act applies.

[105] At the heart of the submission is the interpretation of the long stop sections in the 1991 and 2004 Acts. The history of the two sections featured in submissions. Section 91(1)–(4) of the 1991 Act provided:

> **91 Limitation defences**
>
> (1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from—
>
> (a) Any building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition, or removal of that building.
>
> (2) Civil proceedings *relating to any building work* may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2) of this section if—
>
> (a) Civil proceedings are brought against a territorial authority, a building certifier, or the Authority; and
>
> (b) The proceedings arise out of the issue of a building consent, a building certificate, a code compliance certificate, or an Authority determination—
>
> the date of the act or omission is the date of issue of the consent or certificate or determination.

(4) For the purposes of subsection (2) of this section, if civil proceedings are brought against the Authority and the proceedings arise out of the issue of an accreditation certificate, the date of the act or omission is the date at which the accreditation certificate was relied on.

(emphasis added)

[106] Section 393 of the 2004 Act provides:

393 Limitation defences

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

(b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

(emphasis added)

[107] The structure of the key part of the long stop in (2) is the same in both the 1991 and 2004 Acts. The prerequisites to the long stop applying are:

(a) civil proceedings;

(b) relating to building work; and

(c) ten years or more elapsing from the act or omission on which the proceedings are based.

[108] Mr Goddard observed that it was common ground that the plaintiffs' claims are civil proceedings and that in many cases the relevant act or omission on which the claim is based occurred more than 10 years ago. The focus was on the meaning of the phrase "relating to building work". The other surrounding words were considered in relation to those words. There were no factual arguments presented in the course of submissions in relation to particular buildings, the particular act of supply, or other action upon which it could be said that the proceedings were based.

[109] Mr Goddard argued that the causes of action arose from the school buildings being constructed using the cladding sheets and cladding system that did not meet the standards of the Building Code and other requirements due to certain alleged defects. Mr Goddard submitted that, while the manufacture and supply of the cladding sheets did not amount to "building work", the manufacture and supply was "related" to building work and so the long stop applied.

[110] Mr Farmer disagreed. He submitted that there is a distinction made in the 2004 Act between the manufacture and supply of building materials and building work, and that moreover the long stop applies only to work done in relation to a particular building and not where building materials are produced and marketed which are not for any particular building but for the market generally.

Purpose and policy of the Act

[111] The purpose of the 2004 Act is to regulate building work, to set up a licensing regime for building practitioners, to set performance standards and to promote the accountability of "owners, designers, builders and building consent authorities …".[81] I consider it significant in assessing the ambit of the long stop that it is not a purpose of the 2004 Act to regulate and control suppliers of building products, as distinct from designers and builders. While I acknowledge that in setting performance standards for buildings the qualities of building components are relevant, the focus

[81] Building Act 2004, s 3.

of the Act is on those directly connected to the construction of a building. This is reflected in the definitions of "building work" that was in place in the 1991 Act and is in place in the 2004 Act.

[112] "Building work" is defined in both Acts in a similar manner. Section 2 of the Building Act 1991 defined "building work" as follows:

> **Building work** means work *for or in connection with* the construction, alteration, demolition, or removal of a building; and includes sitework:
>
> (emphasis added)

[113] There is a more extensive definition in s 7 of the Building Act 2004:

> **building work —**
>
> (a) means work—
>
> (i) *for, or in connection with,* the construction, alteration, demolition, or removal of a building; and
>
> (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; 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.
>
> (emphasis added)

[114] What is significant is that the focus is on work actually done to or on a building. The definition of "building work" confines work to that connected with the four listed activities of construction, alteration, demolition or removal. I agree with both counsel that the marketing and supplying of generic building products for subsequent use in unspecified and unknown buildings does not involve any of the four listed activities. Carter Holt, when it supplies cladding sheets and cladding systems indirectly, has not done any work in constructing, altering, demolishing or removing any of the school buildings, and it would require an extremely broad

interpretation to find that the manufacture of a generic product was "for or in connection with" such work. There is little evidence on the point, but it may be that any connection Carter Holt had with a particular job is a matter of chance, arising from decisions by designers or architects, or contractors or owners often at a point after manufacture and without contact with the component manufacturer. The suppliers of cladding are no more involved with such work than a manufacturer of nails or cement or roofing iron.

[115] It is to be noted that "building methods or products" are defined without reference to building work to mean "building methods, methods of construction, building design or building materials".[82] The 2004 Act differentiates between building methods or products and "building work". It has also been noted that the 1991 and 2004 Acts provide for a Building Code which sets out detailed requirements applicable to buildings.[83] The 1991 Act and the Building Code were enacted together and can be seen as part of an overall scheme. The Building Code is concerned with performance requirements for buildings and refers to specific requirements for "building elements" and other different requirements for "buildings" or "building work". "Building elements" are defined in the Building Code to mean:[84]

> Any structural or non-structural component and assembly incorporated into or associated with the building. Included are fixtures, services, drains, permanent mechanical installations for access, glazing, partitions, ceilings and temporary supports.

[116] Cladding sheets are building elements for the purposes of the Building Code and there are specific timeframes for their performance which provide for either 15 or 50 years.[85] So the legislative scheme distinguishes between building work and building elements.

[117] The meaning of an enactment must be ascertained from its text and in the light of its purpose.[86] Section 6 of the 1991 Act sets out the purposes and principles

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82 Building Act 2004, s 20.

83 Building Act 1991, s 48; and Building Act 2004, s 400. The Building Code is set out in sch 1 of the Building Regulations 1992 (SR 1992/150).

84 Building Regulations 1992 (SR 1992/150), sch 1, cl A2.

85 Building Regulations 1992 (SR 1992/150), sch 1, cl B2.3.1.

86 Interpretation Act 1999, s 5(1).

of the Act and refers to providing necessary controls relating to building work and the use of buildings and for ensuring that buildings are safe and sanitary.[87] Section 3 of the 2004 Act contains a similar provision referring to "building work" and performance standards for "buildings".[88] Neither purpose provision makes any reference to those who supply components that can be used in building work.

[118] Both counsel addressed the Parliamentary materials that led to the original appearance of the long stop. Comments from the Parliamentary debates show that the key reason for introducing a long stop limitation was to limit Council liability for defects many years after a building had been built, and to enable building certifiers (a new role created by the 1991 Act) to obtain professional indemnity insurance.[89] The Hon Graham Lee, then Minister of Internal Affairs, commented that insurance was unobtainable for 15 year cover and that:[90]

> The reality is that without a realistic long stop on liability, insurance cover will not be available, and without insurance cover being available there will not be any building certifiers ...
>
> ... The benefits of having a long stop will *not apply just to building certifiers; the said benefits will also apply to territorial authorities, builders, architects, and engineers as they go about their daily tasks*.
>
> (emphasis added)

[119] Parliamentary debates confirm what is apparent from the definition of "building work" that the Act has deemed such work to be work connected to actual design and construction processes for or on specific buildings, rather than the supply of building components.

[120] Counsel presented extensive submissions on what if anything could be made of the fact that there had been a reference in the 1991 Act's long stop provision to "Authority determinations",[91] which were determinations of the Building Authority on specific matters such as whether to grant a code compliance certificate for a

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87 Building Act 1991, s 6(1)(a).
88 Building Act 2004, s 3(a).
89 See for example the comment of the Honourable Graham Lee (Minister of Internal Affairs): (31 October 1991) 520 NZPD 5304.
90 See (20 November 1991) 520 NZPD 5490.
91 Building Act 1991, s 91(3).

particular building or buildings.[92] It was suggested that this application of the long stop supported an interpretation that the long stop extended to building components and other generic supplies.

[121] I have not found the reference to "Authority determinations" to be of assistance in interpretation. As Mr Farmer pointed out, as originally enacted, s 91(2) of the 1991 Act referred to all civil proceedings and contained no reference at all to building work. The original reference to determinations was entirely consistent with such a broad categorisation. This broad definition was narrowed in 1993 with the more restricted "relating to any building work" narrowing the overly broad categorisation.[93] The "Authority determinations" clause is not in the 2004 Act because there is no longer a Building Authority.[94] There is a reference in the present section to determinations under Part 3 of the Act.

[122] The fact that the long stop relates to certain specific actions that are not specific to a building that are carried out pursuant to the provisions of the 2004 Act, does not make a case for a general extension of the long stop beyond building work as defined. As I read s 393 the long stop provision appears to focus on building work as defined and other specific actions carried out under the Act, and not on the manufacture and provision of generic building components that are not sold by the building component manufacturer to a specific builder.

[123] Do the words "relating to" in the long stop provision widen "for or in connection with" in the definition of "building work"? As I see it there are two specific textual issues that must be resolved. What is the meaning of the words "relating to", and what is the relevance of the reference to "building" in the singular in the definition section?

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92 Building Act 1991, ss 17.

93 Building Amendment Act 1993, s 19(2).

94 The role of the Building Industry Authority has been largely been taken over by the Chief Executive of the Ministry of Business, Innovation and Employment: see Subpart 1 of Part 3 of the Building Act 2004.

The words "relating to"

[124] It was Mr Goddard's submission that the addition of the words "relating to" before "building work" meant that the long stop provision could apply to some work that did not fall within the definition of "building work" in s 7 of the 2004 Act.

[125] The words "relating to" are by their nature imprecise. Dictionary definitions focus on the concept of a connection between, or having reference to.[95] In terms of meaning, it is perfectly possible to say that there is a connection between the manufacture and supply of building materials, and building work. But insofar as the materials are generic and not relating to any building, the relationship between the manufacture and supply and the actual building work as defined is distant. The actual building to which the components will be part of is not known to a component manufacturer who is not involved in direct supply.

[126] I am not satisfied that the phrase "relating to" does indeed widen the definition of "building work". Some connecting words in the definition were necessary as a matter of drafting to set out the relevant type of civil proceeding. Section 393(2) could not have read: "However, no relief may be granted in respect of civil proceedings building work if those proceedings ...". Words that grammatically connected the phrase "civil proceedings" to the "building work" had to be inserted. I see the words "relating to" as functioning as a grammatical link, and not adding any meaning or broadening the scope of the long stop.

[127] Authority determinations and building consents and code compliance certificates were included in "building work" before "relating to" was added in 1993, so the reference to them cannot be seen as extending the definition of building work as Mr Goddard suggests. Section 393(3) contemplates the long stop extending to claims brought against a territorial authority, building consent authority, regional authority or the Chief Executive in relation to the issue of a building consent or a code compliance certificate, or a determination.[96] That recognises the specific provisions in the 2004 Act relating to the actions of these persons and they fall with

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95 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 948.

96 Building Act 2004, s 393(3).

the extended definition of building work. Apart from those acts or omissions which are referred to directly in s 393, I do not see the words "relating to" in either their natural meaning or wider context as extending the definition of "building work".

Work on a specific building

[128] A building is defined in s 3(1) of the 1991 Act as any "temporary or permanent moveable or removal structure ...". The reference is to "building" in the singular. Similar words are used in s 8(1)(a) of the 2004 Act, and certain exclusions to what is a building are set out in s 9. Cladding is not one of the exclusions.

[129] It is not possible to ignore the fact that the definition of "building work" refers to work on a "building" in the singular. Although there is a statutory rule of interpretation that words in the singular include the plural,[97] in this instance it seems to me that the word "building" has been used in the singular for a particular reason. In other parts of the Act the word "buildings" in the plural is deliberately used.[98]

[130] In *The Grange* Blanchard J on behalf of himself, McGrath and William Young JJ stated a provisional view on whether a claim was "relating to building work" under s 393(2) where a Building Industry Authority (the BIA) report was issued in 1995 concerning the adequacy of the North Shore City Council's procedures in granting certificates of code compliance.[99]

[131] In that case the causes of action against of North Shore City Council (which joined the BIA as a third party) were that the BIA had been negligent in preparing and issuing the 1995 report, and in failing to alert the Council once it knew in 1999 there were problems with a particular building method. Blanchard J noted that the adoption of the long stop would mean that time had begun to run long before the causes of action against the Council had started to run, as a building consent was granted and construction commenced in 1999. Thus, because no loss could possibly have been caused to the Council by any conduct of the BIA before that latter time, it

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97 Interpretation Act 1999, s 33.
98 Sections 8, 16 and 100.
99 *The Grange*, above n 6.

seemed unlikely that Parliament would have wanted to produce such an unusual and unfair result. Blanchard J went on:[100]

> In fact, it seems plain enough that when "relating to building work" is read in the context of the whole of s 393, and especially subs (1), it does not extend to a claim made for what the BIA did in 1995. We say this because "building work" in subs (2) is surely the same as the building work referred to in subs (1)(a), namely work associated with "any building" – that is, any *individual* building. That is consistent with the definition in s 7 which also contemplates construction, alteration, demolition, or removal of "a building". It is in fact subs (1)(b) which is applicable to the position of the BIA, with its reference to "performance of a function under this Act or a previous enactment", but the words "relating to the construction … of *the* building" must be a reference back to the specific building in para (a). It is to be noted also that subs (3) is clearly dealing with a specific building when, for the purposes of subs (2), it makes the date of the act or omission in the cases with which it deals the date of issue of the consent, certificate, or determination. That could relate only to an actual building.
>
> It therefore appears that subs (2) cannot have any application to the BIA's performance of its functions (its acts or omissions) in 1995, since they were not related to The Grange.

[132] On the basis of this interpretation, the long stop does not apply as, at the point when Carter Holt did the relevant work, by manufacturing and supplying the cladding sheets and systems, this work did not relate to any specific building. Instead, the manufacture and subsequent supply of the cladding sheets was done for use in future unspecified buildings.

[133] Mr Goddard noted that Blanchard J's statement was obiter and he placed reliance on an observation by Elias CJ who dissented. The Chief Justice observed that she had had the opportunity to read the provisional view taken by Blanchard J. The Chief Justice stated that she:[101]

> … preferred to express no concluded view on the application of s 393 to the claims in the present case. Since my opinion is a minority one, the claims will not proceed and the question of application of s 393 is now moot. My tentative view is that the third party claims, like the claim of the owners against the territorial authority on which they are parasitic, arise out of building work (as is made clear in relation to the owners' claims against the territorial authorities by s 393(3)) but that the relevant "act or omission" is the continuing and uncorrected representation that the Council's procedures were adequate at the time The Grange was constructed. On that basis, the third party notice is within the limitation period of 10 years.

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100 At [209] and [210].
101 At [90].

[134] This comment was not necessarily intended to express disagreement with the reasoning of Blanchard J and I note that the Chief Justice's conclusion was that the third party notice was within the limitation period. Blanchard J's view, supported as it was by McGrath and William Young JJ, while not binding, must be given weight by this Court. Moreover, with respect, I find the reasoning persuasive for reasons set out in my earlier analysis. The 2004 Act is concerned with work "connected" to a particular building job, and insofar as the long stop applies to work "related to" building work, it still must relate to specific buildings, save where the long stop extends it to the actions of persons who have duties under the Act.

Other cases

[135] There are a number of specific decisions of this Court which support the proposition that the long stop was not intended to apply to proceedings relating to the design, manufacture and supply of building products.

[136] In *Thomson v Christchurch City Council* Gendall J considered whether the long stop applied to the supply of plaster casting together with accompanying specifications.[102] The Judge considered that there was a distinction between building work and building products provided for use in a building, and stated:[103]

> The question of what is building work, or for that matter design work, within the meaning of the section must be a fact specific issue and entirely dependent upon an assessment of all the surrounding circumstances. At one end of the spectrum design of integral parts of a building such as elevators, staircases, lift wells, windows, would clearly come within that category. Obviously, architectural design of a building to be constructed or altered, is building work. At the other end of the spectrum there may be products provided for use in a building, designed for a specific purpose, yet not being performed "in connection with" the design, construction, etc of the building.

[137] Gendall J dismissed the strike out application as it was arguable that the proceeding against the cladding supplier did not relate to building work and that therefore the long stop did not apply. This is a case entirely on point (while of course not binding).

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[102] *Thomson v Christchurch City Council* HC Christchurch CIV-2010-409-2298, 28 March 2011.
[103] At [45].

[138] A distinction between building work and building products was also recognised by Associate Judge Christiansen in *Body Corporate 192346 v Symphony Group.*[104] The Judge refused to strike out third party claims against a cladding supplier on the basis that it was arguable that the supplier owed a duty of care to a property developer. In considering the meaning of the phrase "building work", the Judge noted:[105]

> The [property developers] have pleaded breaches of clauses B2 and E2. A reading of those clauses reinforces my view that beyond considerations of building work the Code is concerned with materials and components used in construction methods ...
>
> Accordingly, there are particular standards affecting "elements", "components" of a "building system" which are regulated, as opposed to the regulation of building work.

[139] A similar approach was adopted by Associate Judge Doogue in *Deeming v EIJ-Ansvar Ltd* where the Judge refused to strike out a claim relating to an engineer's report prepared on the geotechnical characteristics of a piece of land that had been subsequently built upon.[106] While there was no question that the house could not have been built without the engineer's report, the causal connection was held not sufficient to invoke the long stop. The Judge stated:[107]

> … the intention of the Act was not to extend the ambit of the expression ["building work associated with … any building"] no matter how remote it was from the actual building of the house so long as a causal connection between the two events could be traced.

[140] It is correct as Mr Goddard points out that the Associate Judge did not deal in a specific way with the arguably broader phrase "relating to building work" but as I have stated I do not consider the different wording material. The three cases all indicate that the long stop does not extend to indirectly supplied building components.

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104 *Body Corporate 192346 v Symphony Group* HC Auckland CIV-2004-404-232, 3 November 2005.
105 At [29]–[30].
106 *Deeming v EIG-ANSVAR Ltd* [2013] NZHC 955.
107 At [41].

[141] Mr Goddard relied on the decisions of *Klinac v Lehmann*[108] and *Gedye v South*[109] and comments in those cases to the effect that the purpose of the long stop was to restrict the litigation of faulty building claims. It was submitted that the indication in those cases was that the statutory intent was to prevent all building-related claims and not just some of them from being litigated more than 10 years on.

[142] In those cases the Courts went on to find that the relevant act or omission of the defendant on which the proceeding was based was the giving of the warranty or the making of the representation, not the physical or on-site activities. I do not consider that these two cases assist either party. They concerned a breach of warranty in an agreement for sale and purchase, warranting that "building work" on the property had been carried out to a certain standard. The essence of those decisions was that the warranties in each case were referable to building work, and therefore the proceedings related to building work. There was no doubt that the warranties related to specific buildings.

Overview

[143] It is necessary as a matter of legislative interpretation to draw a boundary around the meaning of the phrase "relating to building work". On the one hand it cannot have been the case that the manufacture of anything that was designed to be in a building could be treated as "relating to building work". If that were so not only would nails, paint, glass and other materials that are generally on the market be included, but also, theoretically, so could certain chattels and fixtures such as internal lightbulbs and internal security systems designed for buildings.

[144] It is not possible to propose any neat phrase or cut-off line which could apply. However, there is a natural distinction between work, design and products intended for a particular building and generic products that are available on the general market and are not destined for a particular building, which would include cladding and cladding systems.

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[108] *Klinac v Lehmann* [2002] 4 NZ ConvC 193, 547 (HC) at [16] and [22].
[109] *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271 at [35].

[145] I am satisfied that these proceedings do not relate so much to the installation of the cladding. They relate to the qualities of the cladding itself. The reference to "systems" in the statement of claim appears to add little. The allegations are that the product is prone to certain types of fungus which break down the internal structure of the product,[110] that the product is prone to losing tensile strength and bracing capacity,[111] that it shrinks when it dries and can rupture,[112] and that it has insufficient levels of preservatives.[113] The problems do not relate in any direct way to the process of construction of the building.

[146] Carter Holt argued that it was unjust for product manufacturers to be treated differently from the building professionals who were responsible for the building work under the 2004 Act, as they would not be entitled to join such parties if a claim was brought against them more than 10 years after the relevant acts or omissions. However, statutory limitations by definition have bright line boundaries, and they can often lead to imbalances. Moreover, it is to be noted that a 15 year long stop limitation period now applies to all civil proceedings for monetary relief, under the new Limitation Act 2010 and consequent amendments to the Limitation Act 1950.[114] There is therefore a limit on liability further out in time.

[147] It is of particular significance that the 2004 Act, at least until the 2013 amendment, has not been concerned with the manufacturer of the building components that are used by builders in buildings. There have been no provisions directly relating to those suppliers, and they do not fall within the range of persons mentioned in the 2004 Act. It would be surprising if a long stop within the 2004 Act was designed to cover claims by those persons who did not do work covered by the 2004 Act. The long stop could be expected to be limited to the work that comes within the ambit of the 2004 Act. That work does not include manufacturing or supplying building components.

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110 Claim at Schedule 2, [1(a)(iv)], [1(b)(iv)], [1(c)(iv)], [3(a)(iv)] and [3(b)(iv)].
111 Claim at Schedule 2, [1(a)(iv)(d)], [1(b)(iv)(d)], [1(c)(iv)(d)], [3(a)(iv)(d)] and [3(b)(iv)(d)].
112 Claim at Schedule 2, [1(a)(c)].
113 Claim at Schedule 2, [2(a)(iv)(a)]
114 Limitation Act 2010, s 11; and Limitation Act 1950, s 23B.

[148] For the reasons I have given, the work of Carter Holt in manufacturing and supplying cladding and cladding systems was not building work as defined in either the 1991 or 2004 Act, or work "relating to" building work. I also consider that any such work must be in relation to a particular building and not the manufacture and supply of generic product for unspecified buildings throughout New Zealand.

[149] I conclude therefore that the long stop does not apply.

Summary of conclusions

[150] The claims in negligence are finely balanced in relation to the issue of whether there was a duty of care, but it cannot be concluded that no duties of care will be found to exist.

[151] The CGA claim involves issues of fact that cannot be resolved at this point. Given that Carter Holt is a manufacturer, the pleaded guarantees under the Act may apply with the exception of the guarantee under s 8 of the CGA which only applies to suppliers.

[152] The 10 year long stop does not apply to the duties of care as the supply of cladding is not building work, and does not relate to a specific building or buildings.

Result

[153] The application to strike out by the third defendant Carter Holt Harvey Ltd is dismissed.

[154] Costs are reserved. The plaintiff is to file submissions within 14 days and the defendant within a further 14 days.

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Asher J