IN THE SUPREME COURT OF NEW ZEALAND SC 25/2009

BETWEEN **THE COMMERCE COMMISSION**
Appellant

AND **CARTER HOLT HARVEY LIMITED**
Respondent

Hearing: 11 August 2009

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Appearances: A R Galbraith QC with JCL Dixon and N R Williams for the Appellant
R G Simpson with J S Cooper for the Respondent

5 **CIVIL APPEAL**

MR GALBRAITH QC:

10 If the Court pleases, I appear with John Dixon and Nick Williams for the Commission.

ELIAS CJ:

Thank you Mr Galbraith.

15

MR SIMPSON:

If the Court pleases, my name is Simpson and I appear with Ms Cooper for Carter Holt Harvey Limited.

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ELIAS CJ:

Thank you Mr Simpson, Ms Cooper. Yes, Mr Galbraith? I should say, thank you for accommodating us this morning. We would like to go through to one without a break, if that's all right.

MR GALBRAITH QC:

I hope to be finished before then. As Your Honours appreciate, there are three approved grounds of appeal. These grounds focus on the limitation period under section 43(5) of the Fair Trading Act which applies a three year limitation period to any application brought under section 43(1), for orders for refund or payment for loss or damages which are provided for under subsection (2) of section 43. Now I'll come back to those sections in due course but the first question, as Your Honours appreciate, is whether the Commission is bound by that limitation period contained in section 43(5), or whether that limitation period applies only to the loss-sufferer which is a term which is generally used in Court in relation to individual consumers who've suffered loss from the misdescription.

I just wanted, before I turn to the legal argument, just to talk briefly about a couple of contextual matters. I apologise to the Court in advance. The Court may well be well aware of these but just, they seem to me to be of significance and if I could just briefly talk about those. As the Court knows there's an admitted breach here. There was a misdescription under the Act and Carters have ultimately pleaded, accepted liability for that and there was a penalty imposed in the District Court. What's unusual factually about this case from the run of misdescription cases under the Fair Trading Act, is that the misdescription related to a quality of the timber which doesn't self-evidently give rise to a loss. The reason for that and my learned friend for Carters very helpful submissions describe what the issue was. The different qualities which timber can have and the quality which was misdescribed here was the stiffness of the timber, not the strength of the timber and so that meant that the quality issue which was mis-stated didn't, of itself, make the timber unfit for the end purpose for which it was used.

It’s true that had the quality deficiency, the stiffness deficiency, been known at the time, then the building safety standards may have required more of the timber to be used in, for example, a roof truss but the margin of safety built
5 into the building safety standards was such that it appears that safety isn't compromised by the fact that that additional timber wasn’t included in the roof trusses of the buildings which have been built. So there isn't, although the Commission for a time was concerned that there was, there isn't a safety issue and does not – and recognisable structural consequence as a result of
10 the misdescription for which Carters have accepted liability.

ELIAS CJ:
Is this relevant though? Because your claim is simply for any difference in price and presumably that’s a flat enquiry, irrespective of whether the different
15 quality was material in the particular application?

MR GALBRAITH QC:
It’s relevant Your Honour for a couple of reasons. One is that, I’ll come to it but I would say that the Court of Appeal tended to leap to the conclusion that
20 because there was a misdescription therefore there was a loss and of course the first way one might leap to that conclusion in something like this is the timber’s not suitable for the purpose for which it was being purchased and that turned out not to be true, that the timber was suitable for the purpose, albeit that had it been known more timber might be required.
25

The second reason, Your Honour, that it is relevant is that it doesn’t follow, as night follows day, that there was necessarily a difference in price that people would have paid for the timber because one, it was suitable for its end purpose and two, that depends upon what the timber would have been graded
30 at if it had been correctly graded and what the market response to that different grading would have been and for example, just to take a big picture view, if you’re in a situation where you’ve got a building boom on and you need timber for roof trusses, then a variant in stiffness may not have an impact on price and certainly that’s Carters’ position, that in fact when they

regraded this timber subsequently, they got the same price for it as they received under the misgraded grading. So these matters are of some relevance, we would say, Carters say differently but we would say they are of some relevance and, in our submission, they're matters that a Court ultimately
5 needs to look at, both in relation obviously to liability but also in relation to this issue of knowledge of loss or damage.

What the Commission now believes it can say is that on the one side the Commission would say, well having now investigated the quality of the timber
10 produced during this lengthy period by Carters, it would have been graded at a different grade, perhaps a new grade or one of the existing grades. That people or builders would have paid less for it and therefore as Your Honour rightly says, the Chief Justice rightly says, our claim is for that difference in price. What Carters say is no well, as I said before, we were
15 able to market this timber under a different marketing regime, a different grade, and we received the same price for this timber, regraded, as we had for it being misgraded, and that's the factual argument which of course is the nub of the damages claim but the damages claim at the moment is struck out.

20 Just one other comment that flows from that, because in my respectful submission, this is relevant also, because no structural issues apparently arise from the misgraded timber and its use in houses or in commercial buildings, the odds are that most people haven't got the faintest idea that they have timber in their roof trusses for example which was misgraded for two
25 reasons. One is there's nothing, they can't see anything and the second is, most people wouldn't have the faintest idea whether the timber in their roof trusses came from Carters, Fletchers or some other sawmill. It's not a matter about which most people would be conscious so while there is, there has been publicity about the breach, it doesn't mean because there's been
30 publicity that the bulk of the people who have this timber in their roof trusses or elsewhere in their buildings, have the faintest idea that it's misgraded timber they have and they might have therefore a claim in respect of pricing.

TIPPING J:
The fact of it being misgraded is material only to the question of the price. Is that the position?

MR GALBRAITH QC:
Yes Your Honour. And again I can't give you a precise number but round figures it's likely that this timber is part of the timber construction in around about 30,000 buildings throughout New Zealand over a period of time so there are 30,000 odd people out there of which probably 29,990 don't have the faintest idea that, if they've got misgraded timber somewhere in their building.

That's why it's of some considerable significance to the Commission whether as the High Court found, the Commission is not bound by section 43(5) or as the Court of Appeal found the Commission is bound by section 43(5) and obviously the Commission's position before this Court today is the High Court Judge was correct to hold the Commission wasn't bound by section 43(5) but that the loss-sufferers were bound by section 43(5) so if the people who have got this timber installed in this house did know it was Carters' timber, did know that there was a misgrading, then time would be running against them under 43(5). We would argue, well we argue that time doesn't run against the Commission under 43(5).

The position is that if the Commission is caught of course by 43(5), and that's what the Court of Appeal held and that's why the proceedings have been struck out at the moment, then Carters are protected by that limitation provision 43(5) from the Commission prosecuting the claim on behalf of 29,000 whatever it is loss-sufferers but they're, of course, not protected by those loss-sufferers themselves bringing those claims so you've got an asymmetry really in respect of how the proceedings can be maintained. So the question, all a question for the Court in this aspect –

ELIAS CJ:
But isn't that asymmetry part of the statutory scheme because it does permit loss-sufferers to bring claims as well as the Commission?

MR GALBRAITH QC:

Yes it does. It does but it raises the question, Your Honour, whether when Parliament enacted section 43(5) its purpose was to and as part of a context where it had allowed any person to bring a claim on behalf of a loss-sufferer and clearly the intention was that the Commission should generally be the only person who brought some claims, whether Parliament intended a limitation period to then prevent that beneficial process, if I can put it that way because of course you get situations and this is one, where the quantum of individual loss is tiny, I think I'm right in saying in respect of the average here, you're only talking a few hundred dollars and so the practicalities of an individual loss-sufferer bringing a claim, given the costs and logistics of trying to get to litigation in New Zealand are such that individual claims simply will not happen and so the question is, is section 43(5) intended by Parliament to be a block on a practical process for the people who have suffered loss and against who limitation does not run being prevented from putting their claim before the Court because that's the effect of 43(5) applying to the Commission.

McGRATH J:

So there's no suggestion that the knowledge of the Commission's attributable to individuals who suffered loss. No agency, argument or anything of that kind?

MR GALBRAITH QC:

No, Carters haven't argued that Sir.

TIPPING J:

Does the Commission when it wants to start proceedings make an application within the terms of section 43(5) because that would seem to be the only way you'd get yourself –

MR GALBRAITH QC:

There's two ways of getting there Sir and that's just what I was going to have a look at now.

5 **TIPPING J:**

Oh I'm sorry I anticipated.

MR GALBRAITH QC:

No Your Honour's right where I wanted to go. I don't know if Your Honours
10 have got, and I don't think we've put in the bundle unfortunately the actual part of the Act I'm not sure if its there, but this is to be found in Part 5 of the Fair Trading Act, these provisions.

ELIAS CJ:

15 I'm sorry I forgot to bring it to Court.

MR GALBRAITH QC:

Yes I'm sorry, we should have –

20 **ELIAS CJ:**

I'll try and get one. Would you like one too? Who wants one?

MR GALBRAITH QC:

Part 5 of the Act is the enforcement and remedy section of the Act and the two
25 ways, just taking up His Honour Justice Tipping's question, that you can get this issue of damages, loss of damages before the Court, is under section 43, subsection (1) and it provides where in any proceedings under this part, or on the application of any person the Court finds that a person has suffered or is likely to suffer loss or damage, we'll have to come back to those words in a
30 moment, but just talking about the route to get there, what it's been held that means, is that if the Commission for example, brings a prosecution in the District Court as happened here, then in the context of that proceedings, so where in any proceedings under this part, in the context of that proceeding, it can apply for any of the remedies which are appropriate which are provided

for under section 43(2) and of the remedies which are appropriate under section 43(2), the two which are relevant here are a remedy of refund, order of refund, or an order for payment of compensation for loss or damage. So what could have happened subject to another problem, which I will come to in a
5 moment, what could have happened was the Commission could've brought criminal proceedings to the District Court, which it did do and if it had succeeded in, if it had succeeded in that prosecution, it could've stood up at the end of the day when it came to sentencing, to say, "Now in addition to the penalties which we're asking to be imposed on Carters, we are also seeking
10 orders for a refund of payments made, if that was appropriate, or orders for payment for loss or damage suffered by these named individuals" you'd actually have to identify who it might be.

TIPPING J:

15 You're caught by a statutory bar if it's the same three years in the proceedings under the Criminal Proceedings aren't you?

MR GALBRAITH QC:

Yes, well that's a different statutory bar as Your Honour will see and it's one I
20 think Your Honour –

TIPPING J:

Well it would be a bit odd if they were caught by a criminal bar but not caught by a civil bar.

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MR GALBRAITH QC:

Ah well the civil bar – well that's certainly what these two Judges in the Court of Appeal felt Sir and if I could come back to that.

30 **ELIAS CJ:**

I'm sorry I'm in some difficulty about the statute and my associate is not opening her emails, I wonder whether the clerks might get two volumes of Volume 1, thank you. Thanks, could you give that to Justice Anderson, thank you.

MR GALBRAITH QC:

We've got one we can hand up if that's any help.

5 **ELIAS CJ:**

There'll be another coming through and I can share at the moment, thank you.

TIPPING J:

We think you're looking at section 40 at the moment aren't you?

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MR GALBRAITH QC:

40(3) Sir, 40(3) at the moment.

TIPPING J:

15 40(3), 40(3), which gives the criminal bar, time bar.

MR GALBRAITH QC:

Well yes, I hadn't come to section 40(3) for the moment, but could I just have a second at 43 just for one moment Sir and then come back to section 40(3).
20 The other problem or the other fact to just be aware of, I'm just describing what would happen in the course of criminal proceedings for the moment, in the course of criminal proceedings that's what would happen, you'd stand at the end of the day and you'd say, "Well I want these orders". Now there can be complications about that of course, you'd have to have evidence before the
25 Court as to whatever the loss was or, but the Courts have said, "That's all part of those proceedings and so if you've satisfied the criminal limitation bar, as His Honour Justice Tipping is referring to, then the civil limitation bar has stopped running against you once you've commenced those proceedings. The difficulty which arose in this case and which can arise, if you go across to
30 section 43(3), it's got a limitation of 200,000 on the jurisdiction of the District Court, so while you can stand up in the context of a criminal prosecution and ask for these orders, you can only do so if you're under $200,000 and in the present case that was – that wasn't the position as the Commission understood it at the end of the criminal proceedings, and so what

the Commission did was the alternative in section 43(1), it made an application to the High Court because it was within the jurisdiction of the High Court and that's the proceeding which has been struck out. So wouldn't have been a problem, we wouldn't be here if we'd only been talking under $200,000, we're only here because it's over $200,00 and an application, a separate application had to be brought in the High Court and there's no – while it would be nice to identify some process by which the criminal proceedings could have been transferred into the High Court and could sort have been said that the orders were then being sought in the High Court, there is no process contained here to do so, and the Commission felt that the only option it had was to start this separate application in the High Court.

ELIAS CJ:

But no impediment to running the two in parallel.

MR GALBRAITH QC:

They could've been run, yes, there's nothing to stop you doing that, that could've happened. Presumably what one would do in that circumstance, is stay the High Court proceeding because of course the High Court proceeding can't succeed unless you prove the contravention which one would think logically one would be doing in the District Court criminal proceedings and there is specific power in section 46 to, "That findings in the District Court" the defence findings, "are prima facie evidence of the fact and that finding can be proved by producing a document under the seal of the District Court". So what you could do is what Her Honour the Chief Justice has suggested, you could start your prosecution in the District Court, if you knew if was going to be over $200,000, you could file an application in the High Court but you'd then have to stay it in the meantime, or that would be what one would expect would happen.

BLANCHARD J:

The word "proceedings" at the beginning of section 43(1) –

MR GALBRAITH QC:

Yes.

BLANCHARD J:

5 Presumably means criminal proceedings, but it would also mean the proceeding under section 41 wouldn't it?

MR GALBRAITH QC:

I think it has to Sir because if you go back, sorry –

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BLANCHARD J:

The final words of section 43(1), it actually refers to the kinds of things that are done under section 41.

15 **MR GALBRAITH QC:**

Yes, it's strange Sir, I'm sorry I should have taken Your Honours to this also, if Your Honours wouldn't mind going back to paragraphs, sorry it's sections 37 and 38, you'll see under 38 which is the jurisdiction of the District Courts, that it says, "In accordance with this part, the District Court 20 should adhere to the following matters, (a) proceedings for offences against sections 40 and 40J", so that's how this got before the District Court because it was a proceedings for an offence under section 40. If Your Honours look back under section 37 you'll see the High Court has jurisdiction to hear appeals from those matters. "Appeals for proceedings for orders under 25 section 40A, (b) applications for injunctions under section 41" they use the term applications there, and also applications for orders under sections 42 and 43 which is, that's what we're under at the moment. But on the other hand, if Your Honour goes across to section 41 you'll see the heading is Civil Proceedings, so there's perhaps a looseness –

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TIPPING J:

The words, "Any proceedings under this part in section 43(1), must comprehend both criminal proceedings and proceedings for injunction"

because, as my brother has pointed out, lower down in 42(1) is a specific reference to whether or not it grants an injunction?

MR GALBRAITH QC:

5 Yes, I think Your Honour's right.

BLANCHARD J:

Then of course, the last words of section 43(1), link with subsection (2), so it's a mess because when you get to subsection (5), the bar only relates to an

10 application and not to something done in a proceeding.

MR GALBRAITH QC:

Yes.

15 **BLANCHARD J:**

But a proceeding seems to be capable of covering the orders in subsection (2).

MR GALBRAITH QC:

20 Yes.

BLANCHARD J:

It makes no sense at all, procedurally.

25 **MR GALBRAITH QC:**

I think that's probably something which we may all agree on Your Honour.

BLANCHARD J:

I was looking at this yesterday with Justice Tipping and we came to the

30 conclusion it might not be relevant to the present case but it's a mess that needs to be pointed out to the drafter.

MR GALBRAITH QC:

I don't want to necessarily put words into my learned friend's mouth but I think counsel probably do agree Sir, that it is unclear at least, put it that way and it could do with some attention.

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TIPPING J:

In any event, what you did here was an application?

MR GALBRAITH QC:

10 Was an application, I think we've got to accept that.

TIPPING J:

So, if you're not semantically able to remove yourself from subsection (5) –

15 **MR GALBRAITH QC:**

Well, I'd like to but I can't see I can.

TIPPING J:

You can't, no.

20

MR GALBRAITH QC:

I can't see I can Sir. We've looked at it, we've thought about, we've argued about it but I think we've made an application. So, the question is, does subsection (5) apply to us or not.

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ANDERSON J:

Might the answer have something to do with the fact that "proceedings" seems to mean District Court proceedings. The jurisdiction for the High Court to make an application is in section 37 clause C. The jurisdiction of the

30 High Court doesn't mention proceedings except at an appellant level.

MR GALBRAITH QC:

That's right.

ANDERSON J:

Section 38 does mention proceedings for offences and applications.

MR GALBRAITH QC:

5 It seems odd those, doesn't it, Your Honour's quite correct in the way they've used the language here, it just seems an odd differentiation, perhaps put it that way Sir. Just turning to this question, well does section 43(5) catch the Commission and it raises obviously the point that His Honour Justice Tipping made to me earlier on. The argument against it capturing the Commission is 10 not very complicated, it's simply an argument about reading the text in the context of the purpose. Carters obviously come along and say, in their submissions, that there are reasons of principle why limitation provisions should apply to bar stale claims and of course that's correct but that isn't what this limitation provision would do here if it applies to the Commission because 15 we all accept that section 43(5) applies to the loss-sufferers but as I described before, the odds are that 99 percent of the loss-sufferers at the moment aren't barred by limitation at all under 43(5) because they haven't got the faintest idea they've suffered any loss or damage.

20 So, if 43(5) applies, it doesn't apply to bar the claims which legitimately can be brought by the loss-sufferers, it operates to bar an efficient process of having those claims brought before the Court, that's what it bars. What it means is that Carters don't escape from these claims because there's been undue delay on the part of the people who have suffered the loss. Carters escape 25 because we have a legal system, I'm not criticising it, we have a legal system that means for three or four hundred dollars it's just not worth your time and trouble to come to Court. So, they escape from the consequences of their breach by a fact which is quite extraneous to Parliament's purpose in legislating section 43(5).

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ELIAS CJ:

I wonder whether that's not really over-egging it because they don't escape from the consequences of their breach, they are held liable under the criminal provisions. I'm not sure that it can be assumed that Parliament hasn't struck a

balance that's quite appropriate in preventing the publicly funded agency from running claims that individually might be uneconomic. I'm not sure that one can assume that the fact that there are a number of uneconomic claims, is such a bad result in terms of the policy of the legislation.

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MR GALBRAITH QC:
That's the issue Your Honour.

ELIAS CJ:
10 Yes.

MR GALBRAITH QC:
I mean, I will obviously debate a bit, or discuss a bit more but that is the issue.

15 **ELIAS CJ:**
Yes.

MR GALBRAITH QC:
I mean, what's Parliament's purpose in 43(5)? Is it to do just what
20 Your Honour has suggested possibly, is a policy matter, or is the policy in fact that when they introduced the ability of the Commission to bring such claims, that was for the purpose of overcoming the practical difficulties which there are individuals, under this consumer protection legislation because –

25 **ANDERSON J:**
Might be simpler than that. Might just be that it wants to bar applications, doesn't care, doesn't matter who brings them.

MR GALBRAITH QC:
30 Well yes, except I think, with respect Your Honour, once you differentiate between applications brought by a loss-sufferer and applications brought by any person which is permitted under the Act. I mean, if they want to, they do bar applications brought by loss-sufferers where there's been delay, the provision obviously does it. The question is, should it apply to somebody else

bringing the application on their behalf because, just to leap to perhaps the end of what one might say about this, it would seem odd if – I wouldn't have thought that the Doctrine of Maintenance and Champerty, for example, would stop the Commission now funding another entity to bring proceedings on
5 behalf of the loss-sufferers. It seems a very odd result therefore, that this provision should be used to prevent the Commission bringing proceedings as it itself but wouldn't prevent, I would have thought, another person funded and with the logistical support of the Commission, bringing proceedings on behalf of loss-sufferer. It doesn't –

10

ELIAS CJ:
Of a litigation funder?

MR GALBRAITH QC:
15 Or a litigation funder, yes.

McGRATH J:
What you're highlighting is that a limitation provision that works on reasonable discoverability is a very peculiar type of –

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MR GALBRAITH QC:
Yes.

McGRATH J:
25 Peculiar in the sense it's an unusual and very specific type of limitation provision which can allow very, very old claims to be brought by loss-sufferers.

MR GALBRAITH QC:
30 Yes, it's very different, well in my respectful submission, His Honour Justice Tipping raised with me, the limitation provision which applies to the prosecution of course, under section 40(3) which is when the matter – but again, they've changed that, so that's now when the matter is discovered –

TIPPING J:

They've changed that too. That's the *Eliza*.

MR GALBRAITH QC:

5 Yes, that's right, it was Your Honour's decision in *Eliza* which was when it happened –

TIPPING J:

That's what caused all this amendment some time later.

10

MR GALBRAITH QC:

These amendments, yes Sir. Of course, what normally, well I say normally but often what Parliament does when it does a reasonable discoverability, it has a long stop cut off because otherwise, as His Honour Justice McGrath

15 quite correctly says, on the way this is worded here it goes on forever and a day but often there is a long stop, 10 years that's the end of it, or whatever else it might be.

McGRATH J:

20 I think you refer to one of those in the Commerce Act.

MR GALBRAITH QC:

Yes, yes, there is.

25 **BLANCHARD J:**

But it can't really have been intended that the Commerce Commission, assuming that subsection (5) would otherwise have applied, can simply say well, that doesn't apply to us, we can take years and years and years and then bring the claim.

30

MR GALBRAITH QC:

Well that would be the consequence Your Honour but they –

BLANCHARD J:

That just doesn't seem to me to be very likely.

MR GALBRAITH QC:

5 Well, the difficulty, well, the logic of it and I understand Your Honour's challenging the logic of it but the logic of it is, those claims have not been barred by section 43(5) and if they're not actually barred by 43(5) then why shouldn't those claims be able to be brought in an efficient manner.

10 **BLANCHARD J:**

Surely the logic of it is that if an applicant has the necessary knowledge, then the applicant has got to get on with it within three years, regardless of whether the applicant is a loss-sufferer or the Commission. It's reasonable enough perhaps, to allow a very long period of time for somebody who is a 15 loss-sufferer who doesn't know that they suffered loss but it doesn't seem to me to be particularly appropriate for the Commission to be placed in a situation where, if it does have the necessary knowledge, it can sit on its hands indefinitely.

20 **MR GALBRAITH QC:**

Well, as I said to Her Honour the Chief Justice, that's the issue Your Honour, whether – what Parliament's purpose was in respect to that and whether, in effect, loss-sufferers in practice lose their ability to claim even though they've got a legal entitlement to claim because they haven't got a champion left 25 who's able to go to Court for them.

TIPPING J:

I would have thought there was a pretty clear implication that the words were discovered or ought reasonably to have been discovered by the applicant, 30 because that would be conventional in limitation jurisprudence, and although this draftsperson has not covered themselves with a great amount of glory, surely that is the way it naturally reads, and that reflects both the natural reading and, I would have thought, in agreement with my brother, the basic

policy, that it's the applicant's mind that is relevant to this question of knowledge.

MR GALBRAITH QC:

5 As I say, it doesn't say that, one can imply that, and that's, in fact, what Justice Hammond – that was his approach to it.

TIPPING J:

I mean, you've got to read this in terms of what you might call traditional 10 limitation jurisprudence although the mindset of the drafter is looking, I mean, say it had said the plaintiff, it doesn't, it uses the noun application, but well, it's not a king hit, Mr Galbraith.

McGRATH J:

15 Traditional jurisprudence is usually concerned with people in force of their own rights.

MR GALBRAITH QC:

That's right, that's the point I was just going to make. That's what it's about, 20 and that's fine, then it's easy, but this isn't that, and so that's the difference which, with respect –

TIPPING J:

But why should you have longer? You see, the Commission is protected by 25 this "was discovered or ought reasonably to have to have been discovered." If it hasn't discovered it, nor ought it reasonably have discovered it, time hasn't started to run and then it's got three years. I mean, heaven help us, it's not as if this is terribly draconian from the Commission's point of view.

30 **MR GALBRAITH QC:**

Well it may or may not be depending on the circumstances Sir, is all I can say, that's all I can say.

TIPPING J:
Well fair enough, but in concept, it's not very draconian.

MR GALBRAITH QC:
5 No, I understand what Your Honour's saying.

BLANCHARD J:
I hope it's not because the Limitations Bill before Parliament has got the same three-year provision, not in this language, thank goodness, but it's the same
10 concept of giving you three years, although in that case, it's three years potentially beyond a primary period of six years, and with a long stop.

MR GALBRAITH QC:
But that, if I can with respect Sir, that makes some sense.
15

BLANCHARD J:
I hope so.

MR GALBRAITH QC:
20 Sorry, yes.

TIPPING J:
We shall see.

25 **MR GALBRAITH QC:**
At least I can understand the theory of that, but as Your Honour Justice Blanchard said, this isn't necessarily consistent, the way that this has been drafted. But that's the issue, this isn't your standard limitation situation where it's the loss-sufferer who has been barred, the loss-sufferer definitely is barred
30 or controlled by section 43(5), the question is whether the Commission should also be barred by that, and really that is a policy/purpose issue.

TIPPING J:

But could the Commission, let's assume the loss-sufferer is barred at the time the Commission makes its application, could the Commission recover for that person?

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MR GALBRAITH QC:

No.

TIPPING J:

10 No, well I'm glad you say no.

MR GALBRAITH QC:

Absolutely not.

15 **TIPPING J:**

Because that sort of redresses the balance a bit, doesn't it?

MR GALBRAITH QC:

Well it's really evens I think because, I mean, the same applies, if the
20 application was made in the course of a criminal proceeding, if, in fact, the loss-sufferer, the particular loss sufferer, could already be caught by section 43(5), so you might bring your criminal proceedings and still not be able to make a claim for a refund to that particular loss-sufferer.

25 **TIPPING J:**

Well I don't know, I don't think you would have a bar there because it's only applications that are barred. This is one of the curiosities of it.

BLANCHARD J:

30 Well wouldn't that all come out in the wash, as it were, when it came to the making of the orders and the Court was charged with properly exercising its discretion?

MR GALBRAITH QC:

I think the way the Court to date in *Direen* has approached it is that, effectively, the application made in the context of a criminal proceeding is an application, but it's made in a proceeding, and therefore you can make it
5 without filing a separate application, so in a sense, just what Your Honour has said, it's sort of been brought into the wash but if the –

BLANCHARD J:

Well it wouldn't be proper, at least in a civil proceeding, I haven't thought
10 about criminal, to make an order which effectively avoided the bar which had already arisen in the case of a particular loss-sufferer, and that's nice and simple.

MR GALBRAITH QC:

15 Yes, I agree with that. But the loss-sufferer themselves couldn't come along and bring their own claim.

TIPPING J:

I don't think they thought this out properly, frankly.

20

MR GALBRAITH QC:

I agree with that.

TIPPING J:

25 And I think we can't wrench it, they ought to go back and sort it out. If, what it appears to say, isn't what they meant.

BLANCHARD J:

But it can be made nice and simple by saying that the bar is on an applicant,
30 whether it's the Commission or a loss-sufferer, and so it would apply to the Commission and if there's any attempt to use the Commission as a vehicle to revivify, if I may use the expression, a claim by a loss-sufferer who is already statute barred, then the Court, in its discretion, should not make an order of that nature and that's nice and simple.

MR GALBRAITH QC:

Yes I accept that

5 **TIPPING J:**

Well I agree with that, I was really saying that, where in any proceedings under this part or on application, I think that is all very untidy and that needs to be sorted out, I agree with my brother that what he's just put to you is a simple, workable and seems to be pretty well exactly what this subsection is
10 driving at.

MR GALBRAITH QC:

I accept that, Your Honour. The issue about whether it affects the Commission or doesn't affect the Commission is simply a policy decision I
15 suppose for this Court, as to whether what it believes the purpose of Parliament was and we probably discussed that.

ELIAS CJ:

I'm sorry, I didn't have the statute in front of me when you were going through
20 the limits on the power of the District Court, am I understanding you correct, now that I do have the section in front of me, to say that the orders under subsection (3) can be made in criminal proceedings?

MR GALBRAITH QC:

25 Yes, Your Honour.

ELIAS CJ:

But why do they bar in the present case?

30 **MR GALBRAITH QC:**

Because we're over 200,000 Your Honour.

ELIAS CJ:

Because it's, well, an aggregate, but I thought you'd just told us that these were trivial amounts.

5 **MR GALBRAITH QC:**

The advice which the Commission has had to date is, not from me I hasten to add, is that those bars are aggregate bars because, for example, if you look at subsection (3)(c), "…make an order directing a person to refund money where the amount of money or the value of property exceeds $200,000." The advice

10 has been that that's an aggregate.

TIPPING J:

Well (d) must be an aggregate so that supports the view that the other ones –

15 **ANDERSON J:**

Well the findings were greater than the maximum for a single offence.

MR GALBRAITH QC:

Yes they were, 900,000 I think.

20

BLANCHARD J:

But in any event, the Commission is presumably not seeking an order for lots of little sums of money, it will be seeking a global sum which will have to be apportioned.

25

MR GALBRAITH QC:

Well, the Commission's going to have to identify each person on whose behalf it's seeking an order and it's going to have to identify in respect of each of those persons whatever amount it is that the Court on a balance of

30 probabilities can say that person has lost.

ELIAS CJ:

How long is it going to take the Commission to identify this?

MR GALBRAITH QC:
A long, long time.

BLANCHARD J:
5 That, with respect, is crazy.

MR GALBRAITH QC:
Do I have to comment Your Honour?

10 **BLANCHARD J:**
It would just become a nightmare for all concerned.

MR GALBRAITH QC:
I certainly agree.

15

BLANCHARD J:
Surely the Commission will seek some sort of global sum which it will have to justify and then it will do an apportionment in some way.

20 **MR GALBRAITH QC:**
Well that's what one would hope might be the outcome of, if the proceedings stay on foot that something like that happens.

BLANCHARD J:
25 How have they handled this in Australia, where they must have a lot of experience?

MR GALBRAITH QC:
I don't know the short answer to that. I don't know the answer Sir but I'll
30 enquire and try and inform the Court.

TIPPING J:
Well assuming –

McGRATH J:

They'll have to go and get the – if they want to do it in a complete, full way, they would go to the merchants and the question would be whether the merchant's records were available. If they were I wouldn't have thought it
5 would have been a –

BLANCHARD J:

I wasn't thinking of the claim in relation to the merchants, I was thinking the claim in relation to consumers.

10

MR GALBRAITH QC:

But I think what His Honour Justice McGrath is talking about Sir is that what will have happened for example is the timber will have been brought from a Placemakers or somewhere like that by a builder, put into a house –

15

McGRATH J:

Yes, that's right.

MR GALBRAITH QC:

20 – sold to Joe Bloggs and to find out who Joe Bloggs is you can hopefully track back by starting at Placemakers and going through the various steps.

ANDERSON J:

But what if Joe Bloggs sold at a profit in the meantime?

25

MR GALBRAITH QC:

That's another interesting question Sir. I'm, in this particular case I think we're all very conscious of the actual difficulties.

30 **ELIAS CJ:**

But does that affect it if the basis of claim is as in your statement in claim? That they would have got the timber cheaper?

MR GALBRAITH QC:

Yes but you've got to track through and see how much timber because if Joe Bloggs only bought one – sorry if Joe Bloggs as a builder only bought one packet of timber and Joe Bloggs gets whatever that is, if Joe Bloggs as builder
5 bought three packets of this timber and then they get something different so you actually have got, you've got a huge logistical exercise.

ELIAS CJ:

But it's a paper trail. It's just following through the invoices.

10

MR GALBRAITH QC:

Yes, yes.

ELIAS CJ:

15 That's the only way you can do it.

McGRATH J:

And price lists and matters of that kind.

20 **MR GALBRAITH QC:**

Yes, yes.

TIPPING J:

Well what's the next question assuming if you are bound by this –

25

MR GALBRAITH QC:

Right next question. Assume we've lost on this one, assume we've lost on this one and the Commission's barred.

30 **TIPPING J:**

Well not necessarily –

MR GALBRAITH QC:

No, no, no.

TIPPING J:
– but assuming, yes.

5 **MR GALBRAITH QC:**
Yes let's just assume that for the moment then the second question is what's the test under 43(5), that's what does it mean where it says, "An application … may be made at any time within three years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered
10 or ought reasonably to have been discovered." Can I just point out immediately that, or we have noted in our submissions in paragraph 5.5 that this wasn't much debated in the Court of Appeal because the High Court Judge had held that the likelihood of loss or damage referred to future loss or damage and there wasn't really much of a contest about that between the
15 parties before the Court of Appeal but the Court of Appeal certainly thought that that decision of the High Court Judge was incorrect and held that likelihood of loss or damage was reduced the standard of discovery or the extent of the knowledge that was required under the term "discovered." In our respectful submission that's incorrect for the reasons I'll come to but if I could
20 just ask Your Honours to first note that in subsection (5) it says, "After the date on which the loss or damage was discovered or reasonably to be been discovered." Then commas, or the likelihood of loss or damage. Now there's "the loss" in the first phrase and there's "of loss" in other words any or some loss in the second phrase and in my submission that has some significance
25 which I'll come to.

As I said the Court of Appeal held that the reference to likelihood was a reference to the standard of knowledge required and for example Justice Hammond talked about it being a minimal test for knowledge and
30 you'll find that at paragraph 141 of the Court of Appeal judgment and one perhaps asks the rhetorical question, which one really shouldn't, why Parliament, because this was part of an amendment to overcome the Eliza Jane problem, and I'm not blaming Eliza Jane for it but the wording that was there previously which said that if the matter arose then time ran from

that even though nobody knew that there'd been loss or damage so this was meant to be ameliorating that problem and so one might sort of ask why one might expect Parliament to have wanted time to start running at a minimal level of knowledge, which is the view which effectively the Court of Appeal
5 took.

TIPPING J:

Are there two issues here? What is, what degree of probability, if you like or what degree is inherent in likelihood and whether it's future looking or past
10 looking?

MR GALBRAITH QC:

The answer to the second one answers the first one, Your Honour, in our submission. I'll just explain why, there's two or three reasons for that. the first
15 reason is if one just looks back at the words again for a moment. If what Parliament was doing in using the term likelihood was to impose the standard of knowledge which was required then you wouldn't need all these words. You'd simply say three years after the date the likelihood of loss was discovered. You wouldn't have, as they have, on which the loss or damage
20 was discovered or the likelihood of loss or damage was discovered. You'd simply have three years after the date the likelihood of loss was discovered because likelihood includes certainty and so you wouldn't have this double wording.

25 **TIPPING J:**

Well "the loss" is specific.

MR GALBRAITH QC:

Yes, exactly.

30

TIPPING J:

"Likelihood" is generic.

MR GALBRAITH QC:

Exactly. Exactly, and the reason is this. That you're talking about two different sets of – two different circumstances. The first is where there's actual loss, "the loss". When was that discovered? When did the party know
5 they'd actually lost something, that's "the loss". The second set of facts is when does somebody discover the likelihood of loss in the future. They didn't know there was "the loss" but likelihood of loss, any loss, it's not "the loss" it's any loss which hasn't yet occurred, in our submission, it's something in the future and the reason that you've got this juxtaposition of these, in our
10 submissions, two different sets of circumstances, you can see when you go back to section 42. Section 42, sorry section 43(2) I'm sorry. Section 43(2) which sets out the orders which the Court can make.

Now the two subsections we're under at the moment are sub-paragraph (c)
15 and (d) of subsection (2) and if the Court wouldn't mind just looking at those you'll see that's, "An order directing the person who engaged in the conduct … to refund money or return property to the person who suffered the loss or damage." Past tense. Obviously you don't get money refunded unless you've suffered loss and damage. It's got to have happened. Under (d), "An order
20 directing the person … to pay to the person who suffered the loss or damage the amount of loss or damage." Again you don't get money unless you've suffered the loss or damage so we're talking about past tense, you've actually suffered. It's the actual loss. But if, for example, you go to subparagraph (a), "An order declaring the whole or any part of a contract made between the
25 person who suffered," past tense, "or is likely to suffer the loss or damage…" then the Court can void the contract ab initio or from any time up to the time you've arrived in court. So that's the sort of circumstance where you can come along to court and say look if these contracts are going to keep running then people are likely to suffer loss or damage out of it so the Court should fix
30 it by declaring the contracts void and letting people off.

ANDERSON J:

Clauses (e) and (f) just reinforce that argument?

MR GALBRAITH QC:

Yes just reinforce. So it's the juxtaposition between loss which has already been suffered, which is "the loss" referred to in section 43(5), has that been discovered, or loss which, a likelihood of loss in the future when the Court
5 then has the ability to take some preventive steps and, so you're discovering some loss, some possibility of loss in the future, quite different from the actual loss which has already been suffered.

BLANCHARD J:

10 And presumably in (b) it's the same as (a) because it's such a contract or arrangement which presumably means the contract or arrangement referred to in (a)?

MR GALBRAITH QC:

15 Yes we've left that out of our submissions but that's quite right Your Honour. And all the other subsections have this likely to suffer that subparagraph (e) and subparagraph (f) have too so it's not a different standard which is, it's the same standard applied to two different sets of potential circumstances and that's where, with great respect, the Court of Appeal did go wrong and the
20 High Court Judge was correct, that it's that, those different what's. What is it that you've got to discover that section 43(5) is directed towards. And so with respect to Carters' submissions which have picked up on the Court of Appeal judgment, and suggested that different standards now apply, that, with respect in our submission, isn't correct. the distinction is between what you've got to
25 know about, not how much you've got to know about it. And so that –

ELIAS CJ:

But in terms of what you have to know about, sometimes that maybe very complicated but in this case you're only claming for difference in price.

30

MR GALBRAITH QC:

Oh we are, yes, yes.

ELIAS CJ:

So it's not a complicated – once you've got to –

MR GALBRAITH QC:

5 Can I come back to that Your Honour because I do have to deal with that?

ELIAS CJ:

Yes, yes.

10 **MR GALBRAITH QC:**

Your Honour's quite right, but we first need to, have to get it correct –

ELIAS CJ:

Yes.

15

MR GALBRAITH QC:

– what 43(5) is talking about and, in my respectful submission, the Court of Appeal is wrong because they dropped this – the standard.

20 **TIPPING J:**

Well to read it the Court of Appeal's way you've really got to say or the likelihood of loss or damage having occurred.

MR GALBRAITH QC:

25 Yes, yes.

TIPPING J:

Which doesn't seem terribly likely if I may.

30 **MR GALBRAITH QC:**

No and it doesn't fit this 43(2), the remedies.

TIPPING J:

No.

MR GALBRAITH QC:

Because some of these losses won't have been occurred.

5 **TIPPING J:**

It would be a novel concept in limitation law that you've got those actual loss having occurred and likelihood of loss having occurred and then there would be no bar for the future type of loss.

10 **MR GALBRAITH QC:**

No and you couldn't bring your proceedings at the moment under (c) or (d), where you have got to have actually suffered loss because all you know about is likely that it might have occurred. That's not going to get you anywhere, you've actually got to know that you have suffered the loss. It can't be right to 15 say, with respect, Carters say that well, all you need to know is that you might have and therefore you've got to start investigating because if that's correct then you've simply scrubbed out the or reasonably part of the definition because what reasonably infers a period of time to find out.

20 So, my respectful submission is, once one gets section 43(5) correct and sees that the two different factual situations it's dealing with, then the next question is the one that Her Honour the Chief Justice just raised with me, what does discovery then mean, what have you got to discover –

25 **ELIAS CJ:**

Sorry but in your case, in this case, we're not concerned with the likelihood of loss or damage, we are concerned with loss or damage and at the time at which it was discovered, or reasonably to have been discovered. Is that –

30 **MR GALBRAITH QC:**

Yes, that's our submission, yes.

ELIAS CJ:

Yes.

MR GALBRAITH QC:

Court of Appeal different view but that's our submission. So then it's a question of well, what has to be discovered –

5

TIPPING J:

Can I just ask, amplification of that. The loss of damage that is the subject of discovery in the present case, is the loss suffered by paying too much for the timber?

10

MR GALBRAITH QC:

On our claim, yes.

TIPPING J:

15 On your claim. There's no futurity in it.

MR GALBRAITH QC:

No, no but, as I say, if you get 43(5) right then it focuses on what we say is the right question which is, had the Commission, assuming the Commission is 20 caught by 43(5), had the Commission discovered that loss, the loss, more than three years before it commenced the proceedings.

TIPPING J:

That presumably is a trial issue, is it Mr Galbraith?

25

MR GALBRAITH QC:

That's exactly my submission, that's what the High Court judge held but the Court of Appeal held no, they held they could decide that issue but the reason well, I think a couple of reasons why they did that. One was, they got the test 30 wrong because they thought likelihood was the test and so there was a minimalist test and if it's a minimalist test then it's much easier to say that you've failed or you did know that, so that was, in my respectful submission, their first error. In my respectful submission, their second error was they came to some factual conclusions which really you need to go to trial to

identify which is how much, what the Commission actually knew and reasonably, or reasonably could be taken to know at the time.

ANDERSON J:

5 When do you say time began to run for the Commission?

MR GALBRAITH QC:

It would be, in my submission, it would be after the search warrants had been executed and the Commission had in its possession and had some time to 10 understand the –

ANDERSON J:

Scale.

15 **MR GALBRAITH QC:**

The scale of the offending and the actual quality, that's not the represented quantity but the actual quality of the timber which Carters had been producing over the three-odd years. Two reasons for that. One is that until you know the scale of the offending despite, with respect, what Justice Baragwanath 20 held, you can't say it's endemic, out of testing about seven and a half cubes of timber. They're producing 150,000 cubes plus a year, 7500 cubes given natural variability because timber is a natural resource, you can't leap to a conclusion that it was endemic. Now, Justice Baragwanath –

25 **ANDERSON J:**

You say that's a trial issue, do you?

MR GALBRAITH QC:

I say that's a trial issue Sir.

30

ANDERSON J:

There were six packets of timber tested, everyone of them said it was under grade.

MR GALBRAITH QC:

Three, I think, I think only three Sir.

ANDERSON J:

5 Three at the request of the Commerce Commission but three before that as well.

MR GALBRAITH QC:

Oh there were three, sorry, I'll just get my facts right. I'm told three altogether
10 Sir but I'll just confirm that –

ANDERSON J:

I may have misread it. The difficulty I have with this, is that every case depends on how you conceive of or define the loss in issue and the degree of
15 abstraction that one uses in defining it. What is said against you in effect, that by the time of the October affidavit, it was known that every test showed wrong marking and although the scale of that misrepresentation or unfair trading was not known, generically its occurrence was known.

20 **MR GALBRAITH QC:**

The difficulty Sir in that is that, can I just find paragraph 78 in Justice Baragwanath's judgment. What Justice Baragwanath said at paragraph 78 was, "Prior to the limitation that the Commission had certain knowledge that CHH had made a misrepresentation in relation to two packets
25 of timber from the Putaruru mill and one packet of timber from the Kopu mill. What knowledge can it be said that the Commission should reasonably have inferred from this information? In my view, the information was sufficient to constitute knowledge of endemic breach at those two mills." Well, with respect, as I said, timber is a natural resource, it varies in its qualities from
30 tree to tree obviously. Because of that, the grading standards allow for a variability also. The Commission went to a statistical expert who said, you can't statistically draw a conclusion from the information you have because the potential variances is far too great and that sort of conclusion, with the greatest of respect to His Honour Justice Baragwanath, is something that is

sufficient to conscious acknowledgement endemic breach, is really something that one needs evidence of, the sort of evidence that one would get at trial but even so, it's only the first step Your Honour in getting to the question about loss or damage because it's the loss or damage you've got to have, so it's the
5 loss of damage which has been claimed which is the price differential. So, the next step, having found out if there was an endemic breach, is to ascertain what the quality of the timber that they were producing actually was, not just in three packets but in their whole production and then to ascertain what they could have marketed as, if they couldn't market it as MGP10, what they would
10 marketed it as and then to go to the markets and ascertain from the nature of the market at the time, what the likely reaction in the market would be in respect of pricing. So, that's why I said Your Honour, that until at least the search warrants have been executed, they had the information as to Carters grading records over the period of some years, they could delve into, or they
15 could analyse those records enough to identify what grade it should have been marketed at and then make the enquiries they needed to make about pricing, they wouldn't have discovered the loss. It's got to be the loss which has to be discovered under 43(5). Now, it may be a trial that the Court would say well, they did know enough, having heard all the factual and expert
20 evidence but my respectful submission is that is a trial issue, not a strike out issue, where assumptions are being made about the extent of the knowledge based simply on, I shouldn't say simply but based largely on –

TIPPING J:

25 When you've got issues of discoverability or discovery, I would have thought in limitation context, the defendant would have to a real king hit to knock it out before trial because although they're inherently subjective issues that – well, the first one is, the second one is objective but nevertheless, is built very much out of the particular facts. It does seem here, that the position is well,
30 subject to what Mr Simpson is going to tell us, somewhat short of being a king hit.

MR GALBRAITH QC:

It's based on Mr Theobald's affidavit in support of the application for search warrant. I mean, naturally you can't get a search warrant unless you say you suspect or you believe that there may be some or other, otherwise you don't
5 get a search warrant. Mr Theobald said honesty, what he believed from the knowledge he had at the time but, in my respectful submission, the position that His Honour Justice Tipping has expressed, is the law and that is simply a trial issue.

10 **TIPPING J:**

Well that's *Murray v Morel* and *Matai* and all those cases isn't it? I mean, it's a factual issue here.

MR GALBRAITH QC:

15 It's a factual issue.

TIPPING J:

There can't be any dirt about the principle.

20 **MR GALBRAITH QC:**

No. And so –

TIPPING J:

Unless it's absolutely clear beyond argument, I would have thought the case
25 has to go to trial, with a limitation being a defence raised at the trial.

MR GALBRAITH QC:

Yes and we've got to face that at trial. That's our submission Your Honour and I'm not sure that there's anything more I should say at this stage.

30

TIPPING J:

Well I presume we'll hear what Mr Simpson says about why that's so clear –

MR GALBRAITH QC:

Yes.

TIPPING J:

5 And you'll have an opportunity to rejoin to that.

ANDERSON J:

Your concern is that an affidavit made for the purpose of getting a search warrant, it's now being treated as the only available evidence in the 10 case on the substantive issue of limitations.

MR GALBRAITH QC:

Yes, that's effectively it Sir.

15 **MR SIMPSON:**

Perhaps before turning to my written synopsis, there's just a few introductory comments that I could make in response to my learned friend's introduction. The first point he raised was about the timber being suitable for purpose, such that the loss we are concerned with in this case, the price differential was not 20 obvious. My learned junior Ms Cooper will take you through the evidence at an appropriate time but the price differential was the thrust of the original complaint put to the Commission by the Timber Association. So, right from the outset, they were told that the timber had been misgraded, that this had been going on for a long time and that there was a difference between the 25 market value of the timber correctly graded and its real grade.

So, right from the outset, the Commission was aware of the price differential issue that forms the basis of a loss and in due course we'll take you to what we believe is the king hit which is the affidavit of Mr Theobald, sworn in 30 support of the application for search warrants and the documents that are next to that affidavit which show from October 2002 and onwards, the Commission had knowledge of the endemic nature of the misgrading and the price differential. We say, if that knowledge is enough to activate the limitation

period then whatever other knowledge or evidence might be out there, is not necessary to get the time period running.

The second point I wanted to make is that its important to realise that under
5 section 43 the Commission has no special status. It's not a loss-sufferer or the Commission that can bring an application for relief under that section, any party can. So it includes an officious bystander and for that reason we say that our approach to the interpretation of section 43(5) is the preferred one. We also note that section 40(3) which is the alternative means by which
10 orders can be sought under section 43, includes the criminal proceeding which again has a statute bar which binds the Commission and we say that it's highly unlikely that Parliament would have intended the Commission to be bound by the statute bar in section 40 but not in section 43.

15 **TIPPING J:**

Well I raise that here and I've since been reflecting on it. It's perhaps not quite as straight forward as that Mr Simpson because the policy in the criminal arena may not necessarily be the same as in the civil arena, where there's a consumer redress if you like, focus, rather that just punishing someone. It
20 doesn't remove altogether the point, but it's perhaps not quite as strong a parallel as one might have first suggested.

MR SIMPSON:

It is still relevant though that Parliament has decided that the Commission can
25 be statute barred from it's own knowledge in terms of both that criminal provision and there's actually another one I'll come to, there are three limitation periods in the Act, two of them can only apply to the Commission and they do apply to the Commission and we say that because the Commission has no special status under 43(5) the same outcome should
30 apply.

TIPPING J:

Yes, I understand that point, yes, thank you.

McGRATH J:

Does the Commission have power under it's own Act to address these matters that specifically relate to the Fair Trading Act?

5 **MR SIMPSON:**

The Commission Act?

McGRATH J:

Yes, under the Commission Act.

10

MR SIMPSON:

No, no.

McGRATH J:

15 That's totally silent on this?

MR SIMPSON:

Yes. So then turning to my written synopsis, as Your Honours have already noted, the Act is not a model of good drafting, apart from the issues that this 20 case throws up, we raise in the High Court some issues about the ability of a Commission to bring a class action without the usual protections that would associate with a class action, and which exist in Australia for example. We are disappointed there is no long stop provision in the statute and we have some lack of clarity about the meaning of likelihood of loss as that phrase is 25 used in 43(5). Nevertheless we say that each of the Judges of the Court of Appeal correctly concluded that having regard to the affidavit evidence filed by the Commission, the Commission's claim is out of time. Now in 1.3 and onwards I summarise our position, but I'm taking those as read if –

30

ELIAS CJ:

Does that mean you're putting everything on the factual determination that there is a king hit? Are you not taking issue with Mr Galbraith in terms of the analysis of section 43(5)?

MR SIMPSON:
Yes, I am taking issue with that.

5 **ELIAS CJ:**
Yes, I had understood that.

MR SIMPSON:
In fact, perhaps I should just address that now. It was Justice Baragwanath
10 that took the line of likelihood of loss means possibility, or real risk of loss and it appears that Justice Hammond agreed with him, although Justice Hammond's judgment is quite short on the point. Justice –

TIPPING J:
15 Just before you move on to this. Is there anything more you were going to say about the question of the section as a whole, barring the Commission, or you've moved on from there?

MR SIMPSON:
20 I will come to that. No, no, I haven't. Not unless Your Honours want me to. I was going –

TIPPING J:
Well I personally don't particularly need you to, but I wouldn't want to deter
25 you from going beyond your written submissions, but that logically comes first.

MR SIMPSON:
Yes, I'm sorry I'm dealing with just the Chief Justice's comments.

30 **ELIAS CJ:**
If you want to deal with that point first, do so and then come on to the point that's bothering you.

TIPPING J:

I’m sorry I didn’t –

ELIAS CJ:

5 No, that’s all right.

TIPPING J:

I just wanted to be clear whether there was anything more coming on that front.

10

MR SIMPSON:

I’m still in section 1 of my submission so I haven’t – I think that point’s under section 3.

15 **TIPPING J:**

But really all you need to deal with is 1, that it binds the Commission and 2, this argument about likelihood.

MR SIMPSON:

20 There’s one other issue I think I need to address because if Your Honours find against Carters on likelihood of loss, there is then the issue of “What does discoverability mean?” In other words, what degree of knowledge do you need to have before time runs. Now in the Court of Appeal, Justice Baragwanath and Justice Hammond said it's just likely, is the loss 25 likely, then time runs. Justice Chambers took a more traditional approach following *Hamlin* and another, the only New Zealand case dealing with the limitation provision called *Hook* and he had a brief look at decision I do want to stress, similar lines called *Haward* out of the House of Lords, based on section 14 and 14(a) of the UK statute, so I have another issue there that we 30 do need to address because if it's not likely, then what is the test for knowledge, how much knowledge do you need?

TIPPING J:

All right, sorry but it seems to me logically the first issue is, does it bind them at all?

5 **MR SIMPSON:**

Yes it does.

TIPPING J:

Because they say it doesn't, and if that's the end of it, if they're right on that,

10 isn't it?

MR SIMPSON:

Oh, yes. Before I turn to those three issues, there are just a few factual matters that I think will be helpful to the Court when we take you through the

15 evidence. So if I can take you through section 2. Historically timber was visually graded, which meant there were operators standing over the timber as it passed, and they'd pick out timber with certain size knots, whether it was bowed, whether it had pith on the edge of it, and that was the old way of grading timber, and it's still a method used by smaller sawmillers, and timber

20 that had been visually graded was known as No 1 framing and until the early 90s that was the only method of grading timber in New Zealand. Mechanical stress grading was introduced in the mid 90s and under that process the timber runs through a series of rollers and is bent and measurements are taken. Now the key thing there is that a stress grader

25 actually sorts the sticks into piles according to their grades as they pass through and minimum settings are made into the – are programmed into the machine to try and achieve for the E value we're talking about here, the stiffness value, an average of 10 gigapascals, so you're setting a low level, a lower level than that, to try and set this average up, and what that means is

30 when we have three non-compliant packs from two different mills across three different years, as the FRI said, that suggests that the machines had been set incorrectly from the outset, which means that the entire population of timber had been misgraded, not just the odd pack.

So the information that the Commission received from the Timber Federation and from FRI during the course of 2002 was to the effect that the machines has been interfered with so that the entire population of graded timber was misgraded and that therefore this was an endemic issue.

5

ANDERSON J:
Where do we find that in the papers?

MR SIMPSON:
10 My learned friend Ms Cooper will take you through all of those exhibits, it should take about 30 minutes to do that.

Now, there are six characteristics of timber and they're set out in the table in 2.5, the one we're concerned here with is the modulus of elasticity, and that's
15 the stiffness, and the point I make in 2.9 is that there is no safety issue here, as my learned friend Mr Galbraith noted, and in fact, there's been no performance issue either, the timber is not bending so to create performance issues, and the company has agreed to honour any claims that arise out of that issue and there have been none.

20

Now, I think I can leave the rest to Ms Cooper to take you through.

There is one point I did need to pick up in 2.18 and that is in paragraph 148 of his judgment, Justice Hammond observed there was evidence that Carter Holt
25 had behaved in an aggressive and bullying way to scare off the Commission. I simply don't know where that came from, there was no evidence or even –

ANDERSON J:
It comes from Mr Theobald's affidavit.

30

MR SIMPSON:
Not in relation to the Commission, there's absolutely nothing to base that claim.

ANDERSON J:

I thought it came from the affidavit, albeit rather tenuously based.

MR SIMPSON:

5 There was a suggestion that perhaps a representative –

TIPPING J:

Apart from it being rather unhelpful to your client's reputation, has it got any relevance?

10

MR SIMPSON:

No, but it has been published and it has been observed in –

TIPPING J:

15 No doubt your client has made protestations about that Mr Simpson.

MR SIMPSON:

No, Sir.

20 **ANDERSON J:**

I thought it might have come from paragraph 38 of Mr Theobald's –

MR SIMPSON:

That related to an article published by the FRI well before any complaint was
25 made to the Commission and that's an allegation that's never been tested or even put to Carter Holt.

ANDERSON J:

I understand, I accept that. The only reference is tenuously based and relates
30 to someone other than the Commission?

MR SIMPSON:

Yes. Now, the legislative history can also be taken as read, up to 3.5 and there I note that it appears that, and this was a point that Justice Chambers

made, that when Parliament enacted the amendment to subsection (5), they were working on a false assumption that the Courts had interpreted the Limitation Act as having a discoverability element to it, and that the aim of this amendment was to bring the Fair Trading Act into line with the Limitation Act
5 and that may well be the cause of some of the poor drafting in subsection (5). In 3.6, I set out from *Haward* a good summary of the policy of limitation provisions and I think that too can be taken as read.

So then turning to issue 1, whose knowledge is relevant? In the Court of
10 Appeal, all three Judges held that the Commission's knowledge was relevant for starting a time running where the Commission was the applicant, Justice Baragwanath and Justice Chambers also held that the loss-sufferer's knowledge was relevant, even though it may not have been the applicant, and this addresses the point that Your Honour Justice Tipping raised. In
15 paragraph 26 of Justice Baragwanath's judgment, he said this, "Parliament has not expressly exempted applications by the Commission from the general bar in subsection (5) of late applications. In terms of section 5(1) of the Interpretation Act, its broad language tells against the Commission's submission. In terms of the policy to which that provision also refers, I am not
20 persuaded that the Commission's important function of implementing the Act may be assumed to override the important competing policy of limitation expressed in subsection (5). It may be that in the case of civil pecuniary penalties under section 80 of the Commerce Act, Parliament has imposed on the Commission a limit of three years "after the matter giving rise to the
25 contravention… ought reasonably to have been discovered", as well as the general similar limit in actions for contravention under section 82(2). The Commerce Act is to be construed in accordance with sensible business standards. The business tenet, that traders are entitled to close their books after a reasonable period for resolving disputes, does not permit the kind of
30 indefinite delay that the alternative argument entails. In the absence of clear language to the contrary, I decline to attribute to Parliament any acceptance of such delay."

Justice Chambers in 166 found in favour of Carters' argument that it's axiomatic that Parliament could not have intended one limitation period being the section 40(3) limitation to bind the Commission but a different provision, section 43(5), not to, so that the Commission could circumvent the criminal
5 bar on applications for civil remedies by issuing a civil proceeding.

4.7, we say that our interpretation of section 43(5) is consistent with both the policy and the text of the section. So dealing first with the text, although section 43(5) is silent as to whose knowledge is relevant for the purpose of
10 the limitation period, the text of the section contains sufficient pointers from which Parliament's intention can be inferred. It imposes a limitation period on applications under section 43(1), not on causes of action, and I cite there from *Searle* and also from *Ronex*, which both cases provide that it's not the cause of action that statute bar, but the application for relief. It's therefore logical
15 that the time bar commences from the discovery of the loss or damage by the applicant. In this case, that's the Commission and its power to exercising a statutory right, not the individual consumer's. The consumers are not parties to the claim and are not exercising any legal right, their identity is not even known and they have not been asked to consent to the action being pursued
20 for their benefit, so their knowledge seems somewhat irrelevant to the current application.

And then in 4.10, I have made reference to this already, this is the limitation period that binds the Commission under 43. The other is in 47J(3), which is a
25 six-month limitation period for failure to comply with a notice under 47G. 47G is a provision that gives the Commission statutory power to require a party to provide information to the Commission and 47J creates an offence where that party does not comply with a notice or provides information that is knowingly misleading, and there's a six-month limitation period and that's again from the
30 matter giving rise to the contravention was discovered or reasonably ought to have been discovered, and again in that context, it must be the Commission's knowledge that is relevant.

The next point we make is that section 43(5) does not expressly depart from the usual position that a discoverability requirement in relation to a limitation period is linked to the knowledge of a party issuing a proceeding or bringing an application. Now, Justice McGrath made the point that usually it's the
5 plaintiff who is both the loss-sufferer and the party bringing the proceeding, so you have those two parties brought together but one example where we note in footnote 4, is a situation where a trustee brings an action on behalf of a trust for the benefit of the beneficiaries and in that case, the trustee's knowledge can cause the trustee's right of action to be statute barred, even
10 though the beneficiaries will still have flexibility if they don't have the requisite knowledge to bring their own claim when they learn of it, and if I can just give Your Honours references to paragraphs 56 to 60 of the judgment, it's in the bundle at tab 2. That seems to be the only analogy that we could find where you have a split between an applicant or a proceeding bringer on the one
15 hand, and a loss-sufferer on the other.

Then dealing with purpose, while the overall purpose of the Fair Trading Act is consumer protection, the purpose of a limitation provision must also be given weight and that is to strike an adequate balance between giving applicants an
20 adequate opportunity to make enquiries and issue proceedings but on the other hand to protect traders from long exposure to the risk of litigation and to bring finality to litigation.

Now if the limitation period is dependent on the knowledge of the loss-sufferer
25 alone, the Commissioner will have an unlimited time within which to bring claims, regardless of its knowledge, provided the loss-sufferer remains unaware of his or her loss. The Commission suggests that this is of no consequence as the risk of proceedings being brought by an individual who is not time barred always remain. It's difficult to believe that that could have
30 been Parliament's intention, to just give the Commission an indefinite period no matter what knowledge it has. And that's –

McGRATH J:

But you do accept that the risk of proceedings by the loss-sufferer does remain?

5 **MR SIMPSON:**

Absolutely. Now, the purpose of the limitation period is to ensure that plaintiffs don't sleep on their rights and frankly that's as much in the interests of consumers as it is in Carter Holt's interest. It's not in the interests of consumers to permit the Commission to have an indefinite period to bring
10 claims and it is unfair and onerous on traders. The Commission may well be working on compiling a case and if the prospective defendant knows nothing about it, staff leave, records are destroyed and they are then put to significant disadvantage.

15 A point that Justice Baragwanath made at paragraph 26 of his judgment, this is at subparagraph (d), "If the Commission were effectively exempt from the limitation period this would be inconsistent with the principle that the Crown and its agents are subject to the same procedural rules as other parties to litigation." Perhaps not a big point but a point worth noting.

20

McGRATH J:

Looking at how strong that argument is, it's a state entity but it is acting on behalf of private individuals. So can you really equate it to the Crown and invoke that principle?

25

MR SIMPSON:

Well the Commission does. I mean, a thrust of the Commission's case here is that it's just too difficult for consumers to bring claims and it really needs to be a state entity with the funding and resources and the investigative powers that
30 has the mandate to bring these proceedings and for that reason it should have a longer limitation period than we say Parliament intended so that submission –

McGRATH J:

I understand that but Justice Baragwanath really brings this principle of interpretation in relation to the Crown into it. I don't really quite see that the analogy is absolutely correct when the Commission is acting really as a proxy
5 for others who are under limitations? I mean it's just, my point is confined to that particular argument you've developed.

MR SIMPSON:

It's not a killer point from Carters' perspective. I've made the point I –

10

McGRATH J:

Well it wasn't your point, I suspect, originally.

MR SIMPSON:

15 No, no it wasn't. No, the Commission makes much of the point that the judgment under appeal undermines the consumer protection policy but we do so, we note that the Commission filed the criminal charges well inside the time limit and no satisfactory explanation has ever been provided by the Commission as to why it did not file civil proceedings on time. In fact
20 Carter Holt was convicted, pleaded guilty and was convicted and sentenced inside the limitation period but it took the Commission another three months to get the civil proceedings out and we say by that stage it was too late.

The point that Justice Chambers made, as I noted in 4.15(a), whether a
25 regulator can also sue on the loss-sufferer's behalf depends on the regulator getting off its tail and bringing a proceeding within three years of its discovery of the loss. There is, in my view, no unfairness in that result. And in (c) I've also referred to the judgment of Justice Fisher in the *Roche* decision where His Honour noted that, while the consumer protection element has to be given
30 due weight, that doesn't mean that the policy behind limitation should be ignored. That too must be given due weight otherwise the limitation period will be defeated.

Now the next section of my submissions deals with an argument that I don't think my friend is pursuing so I can ignore that and we then turn to issue 2 unless Your Honours have any questions remaining on issue 1? Now my learned friend observed that in the Court of Appeal, Carters did not pursue the
5 likelihood of loss point. That is correct. We ran it in the High Court, were unsuccessful and did not pursue it in the Court of Appeal. But having reflected on issues that were really brought to our attention by Justice Tipping in the *Eliza* judgment, there are difficulties with the likelihood approach being confined to future losses and so I thought that it was appropriate to press this
10 issue at the Supreme Court level and get a ruling on it. I think –

ELIAS CJ:
Is it on this point that you're going to engage with Mr Galbraith's argument that we're not – that likelihood of loss is not relevant in this case?

15

MR SIMPSON:
No we say likelihood is relevant but we say likelihood of loss means real risk of present or future loss.

20 **ELIAS CJ:**
So you're going to deal with the analysis that he took us to?

MR SIMPSON:
Yes.

25

TIPPING J:
So you say it isn't solely future looking?

MR SIMPSON:
30 No. And so in that sense the subtlety in the wording between discovered "the" loss and discovered a likelihood of "a" loss is not material because if you only know – sorry. Sorry likelihood of a loss. likelihood of existing or future just means real risk and so you can't have a likelihood of "the" loss, it could only be "a" loss.

ELIAS CJ:

I don't think it was so much the subtlety that grabbed me, it was more the analysis of the orders.

5

TIPPING J:

The parallel, the sort of relief sections was I thought, in agreement with the Chief Justice, Mr Galbraith's primary focus.

10 **MR SIMPSON:**

And that was the primary focus in the High Court and probably the reason that Justice Asher rejected that argument but perhaps I can take you straight to the issue to cut to the heart of it and if we go to page 18, 511, "The Commission claims that the phrase "likelihood of loss" applies in relation to
15 claims for non-monetary relief for future loss and that in all other cases the discovery of likelihood of loss is insufficient."

ELIAS CJ:

Sorry, where are you at?

20

MR SIMPSON:

511 on page 18. And that's founded on the use of a future tense in the phrase likely to suffer in 43(1) and 43(2)(a)(e) and (f). Now, Carter Holts accepts that this phrase is intended to allow relief to be sought in
25 circumstances where phrase has not yet been – sorry, loss has not been suffered but is foreseeable, such as a loss arising from the enforcement of contractual obligations in the future, and the objective of such relief is to prevent such loss from occurring. However, in mounting that contention, the Commission has erroneously conflated the phrase "likely to suffer" as used in
30 43(2) and likelihood of loss in 43(5) and that creates problems which we say are irrational and cannot be correct. So the problems are these. It creates an arbitrary distinction between the levels of knowledge required for applications in relation to existing loss, actual knowledge of existing loss required, and for

applications in relation to future loss where only knowledge of likelihood of future loss is sufficient. This leads –

ELIAS CJ:

5 I understood Mr Galbraith to be disavowing any reliance on distinctions between levels of knowledge. He says it's not about that.

MR SIMPSON:

No he's saying that in relation to existing losses, those losses need to be 10 discovered at one level of knowledge, but in relation to applications for future knowledge, all you need to know is that the loss is likely to be suffered in the future, in other words a real risk and that must create –

ELIAS CJ:

15 Future loss.

MR SIMPSON:

– different levels of knowledge.

20 **TIPPING J:**

I thought he expressly said he wasn't maintaining a different standard, he was simply pointing out that it's a different category of loss.

ANDERSON J:

25 The same discovery applies in each case, it's just a different animal that you have to discover.

TIPPING J:

One is actual, the other is potential.

30

ANDERSON J:

Which you can't be certain about, therefore you can only do it on the basis of probability –

MR SIMPSON:

And that, in my submission, is a different level of knowledge. If I discover something actually exists, I have one level of knowledge, certain knowledge. If I have discovered something is likely, that's a much lower standard of knowledge.

ANDERSON J:

When you can discover that Pluto existed before it was actually seen, you can discover something on a, by making assumptions, without knowing until you get to a certain level of knowledge.

MR SIMPSON:

Yes, but apparently it turns out that Pluto's not a planet Sir, so there's an example of where –

ANDERSON J:

Doesn't mean it doesn't exist.

MR SIMPSON:

No, it does exist, but apparently –

TIPPING J:

I thought you were referring to a different Pluto.

MR SIMPSON:

You see if we take a situation, let me, I've set out a couple of examples which I hope are helpful. So if the Commission has sufficient knowledge to appreciate that future purchases of houses constructed of Laserframe are likely to suffer loss, the limitation will begin to run in relation to applications bought on their behalf. So at any point when the Commission is tipped off about this, we have a stream of timber in the system, so there's been timber at the factory, there'll be timber with merchants, there'll be timber with builders, and houses under construction, and there'll be timber actually in houses that have been sold to consumers. So if we take the timber that is at

the merchant, eventually that timber is going to find its way into a house and a consumer is going pay for it at a higher price and suffer loss in the future. So that's an example of likely future loss, a real risk that one day, if this timber has been misgraded and there is a difference in price, there's a real risk that a
5 consumer will suffer loss in the future. Now the Commission says however, when we look at a consumer who's already bought a house, you actually have to have discovered that knowledge, you have to know a lot more information about that before time starts to run and we then get a perverse situation where, if there are different, if they start at different times, claims by future
10 consumers will actually be statute – sorry, claims for future losses will actually be statute barred before claims for existing losses.

ANDERSON J:
In respect of that applicant.

15

MR SIMPSON:
Or in respect of applications brought by the Commission on behalf of all consumers, yes. So all the –

20 **BLANCHARD J:**
There won't be monetary claims at that point, will there, because no one's suffered any loss?

MR SIMPSON:
25 Well that then raises the issue –

BLANCHARD J:
The monetary claim arises when there's actual loss.

30 **MR SIMPSON:**
Yes, and that raises the second, another problem comes out of *Eliza*, which is –

BLANCHARD J:

I think this just supports Mr Galbraith's construction frankly.

TIPPING J:

5 Isn't the scope of the limitation provision designedly matched with the nature of the relief sought? Do you understand what I'm endeavouring to say?

MR SIMPSON:

I do understand.

10

TIPPING J:

Because the idea of –

BLANCHARD J:

15 It's actually overkill to have a limitation period in relation to non-monetary claims, but that's perhaps a lack of understanding on the drafter's part of some of the subtleties of limitation proceedings, limitation defences.

TIPPING J:

20 Because it's very unconventional to speak of loss or damage obviously having occurred and then go on to say, "Likelihood of loss or damage having occurred".

MR SIMPSON:

25 Yes and the point that Your Honour made in *Eliza* was that creates different limitation periods for different sorts of relief and I think Your Honour described that as unlikely and unconvincing.

ELIAS CJ:

30 Well except, maybe they've done it here.

TIPPING J:

Maybe, yes.

ELIAS CJ:

Just going back to the standard, isn't there only one standard here in relation to claims for loss or damage and that is that it was discovered or ought reasonably to have been discovered? Likelihood doesn't really enter into it at
5 all, but if you have a likely loss rather than a loss, which is not the position here, then you have different remedies available.

TIPPING J:

And in that context the word "discovered" is probably not entirely apt, it's
10 realised that you had the likelihood of suffering loss, but they've chosen to use the same word discovered for both, but a strict literalist might have chosen a different word, but then you'd have had a rather messy sentence.

MR SIMPSON:

15 Yes. It is difficult but this interpretation will create the risks that we've set out in 5.12 of different limitation periods of existing losses, future losses, because for future losses there are still the other remedies available under 43(2) and you'll have different limitation periods for different remedies.

20 **ELIAS CJ:**

I'm not sure that it is a different knowledge even then. It still has to be, it still runs from when it was discovered or ought reasonably to have been discovered, that's the likelihood of loss, it's just that we've not in that case. We're not in a case of future loss. We might have been in that case if the
25 Commission had been attempting to recover some compensation for the fact that buildings might fall down in the future or something like that, but we're not in that case here.

MR SIMPSON:

30 Well, we aren't in that case but that doesn't mean that the problem doesn't exist. So –

ELIAS CJ:

Well we don't need, you know, sufficient unto the day. We don't need to deal with that.

5 **TIPPING J:**

Well the problem for you Mr Simpson is that the Judges have all said that the case is a king hit on a premise that is under serious threat, that's your problem isn't it?

10 **MR SIMPSON:**

Well I do have a second string to my bow, which is the way Justice Chambers –

TIPPING J:

15 Yes I know, you may have, but the reason –

ELIAS CJ:

But you've got the factual string to your bow as I understand it also which does meet the – but on the interpretation point –

20

TIPPING J:

I think the Court of Appeal with respect, may have misdirected themselves by using this likelihood as part of the standard of awareness, ergo, their finding on the facts may be vitiated by an error of law and although they've clearly 25 found on the facts that the Commission was aware, or should have been aware of the likelihood of loss having occurred, they've misdirected themselves, they should've directed themselves to whether or not the Commission was aware of the actuality of loss having occurred. I just put that to you because it seems to me that you're much weaker on the facts in relying 30 on the Court of Appeal's findings if they haven't correctly applied the law.

MR SIMPSON:

Yes, and if they haven't correctly applied on the law, then I'm going to have to take Your Honour to the facts and try and persuade you that –

TIPPING J:

Are you going to try and persuade us de novo on a correct application of the law?

5

MR SIMPSON:

Yes. Regrettably I'll have to do that, but the evidence is compelling, this evidence is not contested evidence, this is the Commission's own evidence and if I can demonstrate that the evidence shows the knowledge, there is no
10 need to go to trial because –

TIPPING J:

Well that's the point.

15 **MR SIMPSON:**

Once you have the knowledge, whatever evidence that might exist elsewhere is not relevant. We're not relying on an "ought reasonably to have been discovered", we're relying on a discovered sequence.

20 **TIPPING J:**

What I'm concerned about at the moment Mr Simpson, is that the – there are two subjects in subsection (5). One is loss or damage, and the other is likelihood of loss or damage, they are both subject matters of which there has to be discovery or ought reasonably to have been discovered. There is
25 nothing in the concept of likelihood that informs the issues of discovery, or ought reasonably to have discovered. It is what you have to discover, or ought reasonably to have discovered. Not the level or degree of knowledge. I'm just putting that to you for your comment, because it seems that that really was, I understood it to be one of the fundamental parts of Mr Galbraith's
30 argument.

MR SIMPSON:

Sorry, could Your Honour just repeat that again?

TIPPING J:

What it is that has to be discovered or ought reasonably to have been discovered, is either loss or damage, or likelihood of loss or damage. The concepts of discovery or ought reasonably to have discovered are not
5 informed in any way by the concept of likelihood It is the subject matter of what you have to discover not the process of discovery, if you like.

MR SIMPSON:

Yes.

10

TIPPING J:

And that seems to me, on the face of it, to be exactly what it says and what it must mean because otherwise you're setting up a very awkward concept of degrees of discovery if you like.

15

MR SIMPSON:

Well I'm going to do that shortly anyway I'm afraid.

ELIAS CJ:

20 Well otherwise what's the use of the words "was discovered" or "ought reasonably to have been discovered"?

TIPPING J:

You either discover an apple or a pear or ought reasonably to have
25 discovered the same. The apple is loss or damage and the pear is the likelihood of loss or damage.

MR SIMPSON:

The point I was making, I'll make this and I'll move on I think, is that if I
30 discover something that exists, I have a greater level of knowledge than if I discover something that is at risk of existing whether now or in the future. And my submission that I was making in 5.12 was that is going to result in different limitation periods. Now it may not in this case because the Commission is only suing for existing losses but it will create problems, in my submission, in

other cases and I think, with respect, those were the issues that Your Honour was raising in *Eliza*. Parliament may well have done it anyway but we've got a problem and at some stage it will need to be addressed either by amendment or however, but –

5

ELIAS CJ:
Well I don't know that there is such a problem because if you have a likely loss as opposed to a loss you have different remedies.

10 **MR SIMPSON:**
Yes but the time – once you have knowledge, time is starting to run and what I'm saying is that for – it would be easier for a Commission to have the necessary knowledge and for time to start to run for future losses and for existing losses and that can result in the irony of future loss claims being
15 statute barred.

ELIAS CJ:
Well this case illustrates that's not right. It's much easier to know that there's a different price, which is what the – than the building might fall down in the
20 future perhaps.

MR SIMPSON:
Well this case doesn't really concern a claim for future loss so it's –

25 **ELIAS CJ:**
No, that's the point.

MR SIMPSON:
It's not illustrative. Yes, but if we take October 2002 when the TIF people
30 came and saw to the Commission, they said timber has been misgraded and it's being sold at a higher price than it should be. Now I would say at that point the Commission should have appreciated that if it didn't do something to stop it consumers would in all likelihood continue to suffer loss in the future. So I would say time then started to run on the Commission. But they say we

didn't have enough knowledge as to whether existing consumers had suffered loss for time to start to run so in relation to existing losses time hadn't yet started to run. Now Your Honours are going to have to decide whether that's right or not but if it is right –

5

ELIAS CJ:
Well do you accept that the test for that was whether they knew or ought reasonably to have known?

10 **MR SIMPSON:**
Yes. Whether there was a loss or a real risk of loss is what I say it means.

ANDERSON J:
I have difficulty with your proposition that there's going to be a problem if an
15 application is statute barred in respect of likely loss in the future sense. Because if they're statute barred and no loss occurs, there's no problem. But if they're statute barred for future losses and those losses eventually do occur, then it'll be an application to recover losses that have occurred.

20 **MR SIMPSON:**
And that creates the problem that was identified in *Eliza* a few – you have two different limitation periods for the same application depending on whether they're –

25 **ANDERSON J:**
But different forms of remedy.

MR SIMPSON:
Yes but that's unusual in itself.

30

ANDERSON J:
The Act is leading an unusual situation. Certainly in 1986 it was considered pretty radical in New Zealand.

MR SIMPSON:

I sort of feel I'm trying to defend the Court of Appeal and not really run the argument that I want to run and I –

5 **ELIAS CJ:**

Run the argument you want.

MR SIMPSON:

I think Your Honours have made it clear I'm not getting anywhere with this
10 argument and I think there's a better way to go and I think it's important way to go.

BLANCHARD J:

Well let's go there.

15

MR SIMPSON:

That's great. So if I pick up at 5.14, and this doesn't involve the word likelihood of loss, this is all about discoverability. What does it mean to discover, what degree of knowledge do you need to start time running, and
20 then I think it's important to realise that when Parliament enacted this amendment they were working on the assumption that they were just helping the Fair Trading Act to catch up with their erroneous view of what the Limitation Act provided and therefore they would have been working on the assumption that cases like *Invercargill* v *Hamlin* and *Searle* represented the
25 current state of the law so I want to look at those, but also I want to look at a line of UK authorities which you'll see from the Court of Appeal judgment that the Court of Appeal wasn't particularly impressed with and didn't really give much time to, which was surprising because throughout the hearing they were very interested in it and I had no sense that it was going to be rejected. But
30 the reason I think it's even more important now is because we have a Bill before Parliament in the form of a new Limitation Act that in many respects, and in the material respects here, closely models the UK statute, in particular the two sections upon which these English cases were decided. In my submission, it would be a mistake for New Zealand law not to then follow in

the footsteps of the UK jurisprudence with these types of sections and what they try and develop is the degree of knowledge. Now let me say up front that the sections under consideration in the UK were quite different from our sections in that they have a different prescription of what you need to know
5 about. So in our Act, we're talking about you need to know that there is loss or damage and in the UK –

ELIAS CJ:
As a result of a breach?
10

MR SIMPSON:
As a result of a breach, and in the UK sections you needed to know different things depending on different sections but it would be the name of the defendant, the fact that you've suffered substantial injury or significant injury,
15 that there's a link between the injury and the matter that you're now alleging is negligent, various things like that. What the UK statutes do not do is prescribe the degree of knowledge you have to start time running, so it tells you what you need to know but not how much knowledge you need to have. And it was the case law, in particular the House of Lords in *Haward* where the House of
20 Lords said, this is the degree of knowledge you need to start time running and it's that line of authority which is consistent with *Hamlin*, consistent with *Searle* and we say is the approach that the Supreme Court should adopt in interpreting the Fair Trading Act to workout when does the Commission have enough knowledge that time starts to run against it.
25

ELIAS CJ:
But it isn't about know, I mean, there's the fact of knowledge, just looking at the wording of subsection (5), there's the fact of knowledge or that there's whether knowledge ought reasonably to have been obtained.
30

MR SIMPSON:
I'm just focusing on the fact of knowledge.

ELIAS CJ:
Well why do we need to go beyond the fact?

MR SIMPSON:
5 Because the – all of the cases that I've just referred to say that knowledge, you have enough knowledge when it would be reasonable for a person in your position to start the investigations that lead to the issue of proceedings. That's when time starts running. Not when you know everything you need to know. The question here is, the Commission says we didn't have enough 10 knowledge until we'd executed search warrants, collated evidence and could prove our case, that's when we had enough knowledge. We say, no, you had enough knowledge when a reputable industry body supported by a Crown entity, the Forest Research Institute, came to you and said they're misgrading, it's endemic, they're overcharging. And we say at that point the Commission 15 relied on that complaint and started investigation, that's when time started running and they then have three years to complete their investigation and issue proceedings. Time did not – time is not deferred until a point when they've completed their investigations and know everything they need to know to issue proceedings.

20

TIPPING J:
Is that equivalent to saying that when they get a complaint they are on notice, so to speak, and time starts to run?

25 **MR SIMPSON:**
Well it depends on the sort of complaint –

TIPPING J:
Well that's the problem.

30

MR SIMPSON:
– the credibility of the complainant.

TIPPING J:
That's exactly the problem.

MR SIMPSON:
5 Yes.

TIPPING J:
I mean in one case you may get what appears on the face to be very reliable information and in another it's not so reliable but the first one might turn out to 10 be, I mean –

MR SIMPSON:
The cases all deal with that Sir. That's the thing, they've all been addressed. The UK Courts have dealt with all of those issues.
15

TIPPING J:
Well why do we have to put glosses on simple words like "discover"? Why don't we confine ourselves to deciding on known facts whether something was discovered or ought reasonably to have been discovered? You see, I'm 20 always a bit anxious about laying down prescriptions, if you like, or interpretations in the absence of specific facts.

ANDERSON J:
And very abstractly.
25

TIPPING J:
And very abstractly, as my brother said. It's essentially a question of fact, whether you have discovered something, and you may be able to elaborate on it to some extent, but you're asking for some sort of binding ruling from this 30 Court that's going to be a prescription for all future cases.

MR SIMPSON:
Perhaps I'm overstating what I'm asking for, I don't think I'm going quite that far. But even when one talks about discovery, in other fields of science for

example, there is still a recognised test as to when you've discovered something and when you're still investigating it.

ELIAS CJ:

5 This isn't about those sort of truths, this is about whether there was loss.

MR SIMPSON:

Exactly.

10 **ELIAS CJ:**

And the loss alleged is that you paid too much, that's the only loss that's alleged.

MR SIMPSON:

15 Can I ask Your Honours to be patient with me for 20 minutes while I take you through this, and I think you'll see there is actually good policy.

ELIAS CJ:

Tell us where you're heading with it, tell us what you say we should be

20 deciding is the requisite degree of knowledge for discovery, is that the point that you're making?

MR SIMPSON:

Yes.

25

TIPPING J:

How much do you have to know before you can be said to have discovered something, that sounds very philosophical to me.

30 **ANDERSON J:**

I'd rather look at the facts and the value that they amount to.

MR SIMPSON:

I think it's actually going to be more efficient if I take you through three cases.

ELIAS CJ:

Well we have read your submissions and so we are aware of what these cases say, what would really be helpful to know is what you say we should be saying about this.

TIPPING J:

What do you want us to say, exactly, I mean, you want us to elaborate on the concept of discovery, or discovered, don't you?

MR SIMPSON:

Well Your Honours are going to have to, even if you were to make a factual finding at trial, a decision still needs to be made as to how much knowledge one needs before one has knowledge, so if I receive a complaint from a regulator or a forest research institute that's credible and I rely on it and act on it, did I have knowledge at that point in time? Now, that's not a factual finding, because those facts are not contentious, we're not going to know any more about that at trial than we do today, so the decisions Your Honours have to make is, is that enough to be discovered? Or does the Commission need to execute search warrants and be in a case where it could prove it to a criminal standard?

TIPPING J:

Well that's a factual evaluation on what you say are incontrovertible facts, it's not an exercise in elaborating on the concept of discovery. You may be able to address us saying, well, look they clearly knew this, this and this, that must amount to discovering on any meaning of – that would be an understandable approach, but an idea that one's going to gloss or elaborate a word like "discovered" in the abstract, doesn't sound to me, at least, to be a very attractive proposition.

MR SIMPSON:

It is an approach that was followed in *Hamlin*, and it is the approach that's been followed in a number of UK cases including the House of Lords in

Haward, it's the way the UK is going and all I'm saying to this Court is, could you please look at it with me and –

TIPPING J:

5 Well of course we will, we just want to know where you're heading and what are you actually going to ask us to say?

ELIAS CJ:

Is it 5.27, is that what you –

10

MR SIMPSON:

Well 5.16 is probably quite good, it concurs with Justice Chambers, that discovery occurs when the plaintiff has knowledge of the essence of the loss as it is alleged or sufficient knowledge for it to be reasonable to make further
15 investigations.

ELIAS CJ:

What, into whether there is loss, further investigations into whether there is loss?

20

MR SIMPSON:

To proving, to collating, to proving that belief, sorry, that knowledge. So if you look at the next paragraph in *Hamlin*, the Privy Council held that a negligent cause of action relating to a latent building defect occurs when the cracks
25 become so bad or the defect so obvious that any reasonable home owner would call in an expert. In other words, times begin to run when the home owner knows enough that they ought reasonably to begin to investigate.

ELIAS CJ:

30 But that's an investigation of an existing loss. Oh, I see, yes, you say it is, you're accepting it's an existing loss?

MR SIMPSON:

Yes.

TIPPING J:

Well there you have cracks plainly before your eyes, so if you aren't aware that you've suffered some damage, you're a lunatic.

5

MR SIMPSON:

Well you've got, with respect, that's a little unfair though Sir, you can have cracks in some concrete without knowing they're anything more than just a few cracks, that doesn't necessarily mean that the house is doomed or there 10 are substantial defects, I mean, that could just be a bit of earth settlement, but it's enough to get you started.

TIPPING J:

It's the whole idea, Mr Simpson, of extrapolating from physical damage to 15 economic loss that I find unrewarding.

MR SIMPSON:

Well *Haward* was an economic loss case.

20 **TIPPING J:**

Well let's go to an economic loss case.

ELIAS CJ:

I'm just trying to think, what are you saying in the context of this case? It was 25 enough if they knew what?

MR SIMPSON:

They knew that the Timber Federation had said to them, "Carter Holt's misgrading, we've tested two packs over two periods, they are both 30 misgraded, non-compliant" and the report that accompanies the complaint from the Timber Association includes a report from FRI which says this is endemic.

ELIAS CJ:

Don’t they have to – what, the opinion, based on the two packs?

MR SIMPSON:

5 Yes.

ELIAS CJ:

Don’t they have to go beyond that?

10 **MR SIMPSON:**

But remembering –

ELIAS CJ:

To establish whether or to get some sense of whether it is endemic, the
15 assertion that it's endemic is right.

MR SIMPSON:

But what the FRI did was they went on to, remember I talked mechanical stress grading and how you set the machine up with a certain minimal setting
20 and so that you know that there are consistencies between the packs, and so what FRI said, and they certainly dealt with this in a third pack that was tested in May 2003, at the request of the Commission, they came and said, “Right we’ve now looked at three packs, three years, two mills, all non-compliant and the way that mechanical testing works we have assurance that all packs are
25 consistent.”

ANDERSON J:

Well that might show, that might amount to discovery of a breach, but time doesn’t run from the discovery of breach, it runs from the discovery of loss.

30

MR SIMPSON:

But –

ANDERSON J:

Attributable to breach.

MR SIMPSON:

5 Yes, but back in '02, when the TIF people came to the Commission, they said, "Here's the price of an MGP10 pack, and here are the prices you charge for No 1 Framing." And this is really No 1 Framing, so there's a mismatch in prices and they also talked about the fact that there are – that timber manufacturers are incentivized cheap, and that there are millions of dollars 10 involved and that it is serious for the industry and for consumers.

ANDERSON J:

It's not No. 1 timber, it's timber that – it's equivalent to No 1 but it hasn't been ionometered it's been tested, so it may be analogous to No 1 timber, but it's 15 not actually No 1 timber. That makes a potential for a price differential for a start.

MR SIMPSON:

That doesn't matter Sir, that's a degree thing, it's not – as long as it's not – if 20 you've got MGP10 up here and No 1 Framing down here, whether it's No 1, or if there was an intermediate grade, one up, what we do know is that it's not MGP10 grade and it shouldn't have been charged at the MGP10 price and that's what the Commission was told on day one. So they knew from the outset, now what they didn't know was how much timber did each consumer 25 buy, who were the consumers and perhaps even what that differential is, but they knew that they were paying too much, and I say that's knowledge. I say, you don't need to know the precise details of consumers' individual losses to get time running, it's enough that I know that I know the essence of the claim, Carter Holt's –

30

BLANCHARD J:

Enough to know there was some loss?

MR SIMPSON:

Yes. It's the essence Sir, it's knowing the essence of the loss that they are overgrading and overcharging. Now the detail of that, that's for later, that's for trial, that is not what you need to get time running.

5

ANDERSON J:

Some of this timber was equivalent to MGP8.

MR SIMPSON:

10 No, there's no such grade as MGP8, there's a grade called F5, so you may recall that Mr Galbraith said that once the search warrants were executed and senior people in Carter Holt found out what was going on, they stopped producing MGP10 and they moved to this grade F5 which they could produce in a compliant matter and they sold that, but they are different. There'll be an 15 issue at trial, Carter Holt says that arguably you could sell this F5 timber at the same price and so we would say, well you could do F5, but the Commission's never bought into that argument and their view has always been that comparative timber grade is only No 1. That's the way they're running their – that's the pleading and it's on the basis of the pleading that you have to work 20 out whether time's running under the limitation period.

ANDERSON J:

Not that it's No 1 but its value is equivalent to No 1.

25 **MR SIMPSON:**

No, it has been visually graded, so it is No 1. It's at least No 1 because it goes through the mechanical test and then it's visually graded in the same way that No 1 Framing's graded.

30 **TIPPING J:**

Would it be helpful after lunch if you were able to articulate for us exactly what they knew to be, then followed by a submission supported to whatever extent you need from the English cases et cetera, that that is sufficient to amount to a fact that they had discovered it, never mind ought to have discovered.

MR SIMPSON:

I think that would be helpful.

5 **ELIAS CJ:**

Well from my own part, I really wonder whether going into the tests is going to be particularly helpful because it does seem to me that the submission you're making is one of fact, and that we're not likely to improve on the approach that you have indicated, which is that it's, in your submission, enough that the
10 Commission knew that there was some loss.

MR SIMPSON:

With respect Ma'am, I don't agree in that –

15 **ELIAS CJ:**

All right, that's fine then, you can develop that.

MR SIMPSON:

But I think it would be helpful if Your Honours knew what the evidence was to
20 put this in a better context, and then I think as I go through the UK cases, I think Your Honours will see why I say it's relevant even whether or not you agree with me, is another issue.

ELIAS CJ:

25 Well I was really not at all sure that the UK cases are going to help us very much but if it really does come down to the question of knowledge and the facts of that.

MR SIMPSON:

30 But they are the only jurisprudence we have as to what knowledge means in a limitation context.

ANDERSON J:

Very abstract until we look at the facts, because I mean I'm a fan for, get the facts and then see what the law is.

5 **BLANCHARD J:**

Is it you or your junior who is going to take us through the facts?

MR SIMPSON:

My junior.

10

ELIAS CJ:

Well I think it might be sensible to have her go first and we'll hear you afterwards on the test if that's –

15 **MR SIMPSON:**

That suits me.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.20 PM

20 **ELIAS CJ:**

Thank you. Yes, Ms Cooper.

MS COOPER:

I'd like now to take Your Honours through the affidavit evidence filed by the
25 Commission. Firstly, Mr Theobald's affidavit which is at tab 10 volume 3 of the case on appeal. This is the affidavit filed by the Commission in support of their notice of opposition to the plaintiff's strike out application. So, it introduces Mr Theobald who is a senior investigator with the fair trading branch of the Commerce Commission. It explains, at paragraphs 3 and 4,
30 how on 14 October 2002, the Commission received a complaint from Wayne Coffey who is the executive director of the New Zealand Timber Industry Federation which we've been referring to as TIF.

The complaint was received first of all by telephone and the record of that telephone call is set out at tab A of the affidavit. If you turn to tab A there, you can see the details of the enquiry, the date received was 14 October 2002, it
5 was received by telephone. The complaint description refers to two reports prepared by Forest Research, one published and one confidentially commissioned by TIF. At the third line it explains that, "The complaint is about allegations that stress grading machines were being tampered with in order to achieve a higher grade out turn and therefore a better commercial outcome.
10 The traditional practise in the timber industry is to visually grade structural timber. Machine grading was introduced as a way of insuring grade accuracy. Often timber which may be visually outside grade, if put through a machine can actually pass. This theory works in practise providing the machine settings are not fraudulently tampered with. There are strong commercial
15 incentives to do this. The evidence gathered by Forest Research indicates that CHH timber which was represented as MGP10 was actually only MGP8. In fact, 72 percent of the timber failed when checked in a laboratory to meet the grade MGP10."

20 The notes goes on to say, "It is likely this is not an isolated example. C…" which I assume means complainant, "…says they suspect tens of millions of dollars of MGP10 which does not meet the grade represented, is now out in the market." He says, "The results are very serious for the timber industry and timber consumers in particular." He goes on to explain why it's detrimental to
25 the industry if machines are tampered with. Then a couple of lines further down explains, "Engineering MGP10, as in the grade MGP10, is more expensive than No 1 Frame MGP8." Mr Simpson noted earlier, there is technically no such grade as MGP8 but I think it's used loosely to refer to timber within an E value of eight rather than 10 which is what MGP10
30 requires. It also goes on to explain that, "MGP10 is used in trusses in public buildings such as schools, halls, et cetera, the difference being $10 to $15 on small sizes," that's presumably price difference, "rising to $50 on 250 millimetres to 300 millimetres wide."

So, that was the initial telephone complaint and then that was followed by a letter which is at tab B which is in almost identical terms and presumably Mr Coffey had the letter in front of him when he spoke to the Commission. Again, it explains that, "He encloses two reports prepared by Forest Research, one published and one commissioned by TIF." Explained that, "They'd become aware of allegations that machines were being tampered with to achieve a higher grade out turn." It goes on to talk about the FRI results. At the bottom of that first page, again it says, "It is likely this is not an isolated example, we suspect tens of millions which does not meet the grade is now out in the market." Then again it states, "The results are very serious."

Then at tab C is the first of the two reports which were enclosed with the complaint from TIF and that is an article from Sawmilling magazine from May 2002. This is an article published by Forest Research Institute, the Crown Research Institute that carries out research on timber and explains the results of some testing they've done. So, if I could take Your Honours to the second paragraph on the right-hand column of the first page, where it starts, "To determine the quality of the machine stress graded timber available on the New Zealand market, three packets of 100x50 kiln dried and plain engaged radiata pine were purchased on the open market from three different suppliers." It explains, "All the timber was tested for stiffness and 30 pieces were tested for bending strength." Then below the bullet points, the next paragraph down explains, "Table 1 lists the results of the bending strengths and stiffness testing. In terms of bending stiffness, sample one achieved the required stiffness, with samples two and three timber falling well below the code value. In terms of bending strength, none of the supplies achieved the code value. Sample one produced the highest strength timber with sample two having the lowest strength timber."

Then you can see in table 1, they've set out "Estimated true grade proportions from the as-supplied MGP10 timber, based on bending stiffness only and graded by MOE." You can see under the MGP10, the third column along, sample one 78 percent was MGP10, sample two 38 percent and sample three

30 percent. FRI subsequently confirmed to the Commission that one of those failing samples was Carter Holt Timber.

At the top of the next page, the report carries on, "Analysis of the data from 5 the three suppliers indicates that some suppliers of structural timber are not ensuring that the machine graded timber produced meets code specifications." So, that's what is referred to as the first FRI report. The second FRI report is at the next tab, D. This is the report that was confidentially commissioned by TIF, from FRI. The first page, under the 10 heading "Material", it explains that, "One packet of Laserframe 90x45 kiln dried 5.4 long MGP10 timber produced by Carter Holt Harvey was purchased on behalf of TIF through Benchmark Building Supplies in Rotorua." The next few pages explain the testing that was undertaken.

15 If I could just take Your Honours to the third page of the report which is page 322 of the volume, is a graph showing the plotting of the results. Underneath it states, "Observations. The average stiffness for the CHH timber is 8.7 gigapascals whereas for MGP10 it should be close to 10 gigapascals." Then they also tested a Fletcher Timber pack for 20 comparison and it notes, "The average stiffness for that was 11.28 gigapascals which is greater than is required for MGP10." Then the third bullet point they note, "In theory, one batch of MGP10 should be broadly similar to another as this is what machine stress grading aims to achieve. There should not be this sort of difference between the two suppliers."

25

If you look at that graph, it's a little hard to read but the – going along from the left-hand side, the first set of diamonds, at the bottom on the left-hand side, the first set of diamonds is the Carter Holt timber. The set to the right-hand side is the Fletcher Timber. The very dense line to the left is Nationwide No 1 30 Framing. Well, it says, "No 1 Framing, No 2 Framing, box mix," so that's some kind of collective group of non-machine graded timber. Over on the next page again under "Observations", the FRI reports, "In terms of bending stiffness, the CHH timber did not achieve the MGP10 characteristic bending stiffness grade stress. The FCF did achieve the characteristic bending grade

stress." Again in the table there, the relevant numbers there are the ones in the left-hand three columns at the bottom, where it says, "EKGPA," so that's characteristic MOE by gigapascals. The Carter Holt figure is 8.56, the Fletcher's figure is 10.2 and the code value is 10. So again, that's showing
5 that the timber was not compliant. Then over on the next page, they did some tests to extrapolate from the data they were producing what the grade threshold on the machine stress grader was that had been used to produce the timber. And so halfway down that paragraph on page 324, they say "In this parameter, which is minimum MOE, on which this machine grader
10 operates is approximately 4.5 gigapascals. Our data indicates that this value should be set at nearer 7 gigapascals." So this is the minimum threshold where the machine decides whether the timber goes into the pool of timber that is graded as MGP10, or is rejected and classified as a lower grade. And that threshold needs to be set to ensure that the average MOE required by the
15 standard, which is 10, is achieved.

So the FRI explains, "Setting this value lower…", that's the machine grader threshold, "…does result in more timber being upgraded to MGP10, but it lowers the characteristic values below the code values. These effects are
20 demonstrated by this testing.

If you turn over to the next page, beneath those tables, there's a heading "How Representative Are These Results Of The General Production?" and the FRI explains, "Without access to the quality assurance records for each
25 supplier, this question is difficult to answer. However, one of the advertised benefits of machine stress grading, is that between-packet variation is meant to be a minimum. In terms of the average stiffness, we would expect this to be similar between packets. The primary reason why there would be a difference in stiffness would be a change in the grade thresholds. Changing
30 the grade thresholds is normally done to ensure grade stresses are achieved." So that's the information the Commission received on the day after it had the telephone call from TIF, so it received all of that with the letter from TIF on the 15th of October 2002.

Now, following that, the Commission decided to interview Mr Coffey, the chief executive of TIF, and there's a note of that interview at the following tab in the bundle, tab E, so this interview took place on the 27th of November 2002, and explains the background, the first testing that brought to light the problems
5 was the article in Sawmilling. It explains that Sawmilling is a publication of the FRI. Mr Coffey explains that FRI is a Crown body and is recognised as the world leader in research in respect to radiata pine. He explains how he understood that the timber that felled in that report was Carter Holt's and that subsequent to that, they commissioned Forest Research to carry out further
10 testing in 2002. Then it goes on in the next paragraph to explain that the two major framing suppliers have identified a market advantage by creating the capacity to grade timber mechanically and have promoted their ability to do so. He complains that they are giving a hundred percent guarantee that the wood is to a certain mechanical strength and now we find from the testing that
15 is incorrect, because the machine settings appear to have been altered, and he says, "We have had repeated reports of it over the last two years."

It goes on the next few paragraphs, gives some background about timber production, visual grading, kiln drying, and then the fourth paragraph on the
20 second page, he talks about the price difference, or the profits, and he says the profits would be 10 to 15 dollars on 90 x 40 millimetres, up to 50 on 250 to 300 and a few paragraphs down, he simply notes, "I have been concerned about the grading issue for the last 12 to 18 months", then on the next page he notes, "The Commission is welcome to have our reports and any other
25 correspondence that they consider necessary for their investigation." And then in the next paragraph, the last sentence, he sums up, really, what is the nub of the issue, he says "In essence, inferior quality timber has been graded and sold as better quality", which is really the essence of what this case is about.

30

Now there are a couple of further communications from TIF which are not in Mr Theobald's affidavit. They were provided to Carter Holt under an Official Information Act request, and they're annexed to the affidavit of Mr Short, which is in volume 2 of the case on appeal, and if I could just very briefly take

Your Honours to those. So the first is at tab H of volume 2. So at tab H, we have an email from Kevin Hing, who is clearly at NZTIF as shown by the email address. This is on the 15th of October, so the same day that the written complaint was received, addressed to Diane Gibson at the Commerce
5 Commission, "Diane, you were enquiring with Wayne Coffey about the uses of visual and machine stress graded timber." He explains that "Visually graded timber in New Zealand is designated engineering, No 1 Frame and No 2 Frame. Machine stress graded timber is designated MGP12, MGP10, MGP8 and MGP6." He explains, "all MGP timber is normally kiln dried", gives
10 a bit more background, "engineering and MGP10 are equivalents, having nominal E values of 10, No 1 Frame, kiln dried, and MGP8 are equivalents having a nominal E of 8 GPA." And explains that, "These products are used in the main in timber frames and trusses in domestic light timber frame construction."

15

Then if you go backwards one tab to tab G, these emails are in reverse order, there's a further email on the same date explaining, although it refers to the email of last evening, but they appear to have the same date, "Further to my email of last evening, engineering MGP10 is used where longer spans are
20 required, particularly in trusses and light commercial industrial and public buildings such as schools and halls." And in the second paragraph, he says, "Engineering MGP10 is more expensive that No 1 Frame MGP8, the difference being about 10 to 15 dollars on small sizes, rising to $50 on larger inceptions, these price differences are per cubic metre x mill. If you have any
25 queries, please contact me."

And then back again one tab to tab F, and Mr Coffey has sent a follow up email to the previous one just to say "Diane, these figures demonstrate the significant commercial incentive to brand this timber MGP10 rather than
30 MGP8." So that was all I wanted to take Your Honours to in that affidavit.

Coming back to Mr Theobald's affidavit, following the meeting with Mr Coffey, the next thing the Commission did was meet with the Forest Research Institute, and there's a note of that meeting at tab F of volume 3. So this

meeting took place in December 2002, so a couple of months after the initial complaint. There's not too much I need to point out to Your Honours in this, but there's a bit of discussion about where to get the timber, what it costs, and the third paragraph down, halfway through that, the second line of that
5 paragraph, FRI explains, "We have to assess wood on a packet basis, not on single pieces. Testing would take about three days. I will put a quote together for you to have the testing done." And they note, "This is not a life-threatening issue, buildings will not collapse because of this. Most builders that use the timber don't really notice this timber being misgraded."
10 And there's a bit more background in there about the different grades and different grade markings, but I don't think I need to take Your Honours through that.

So the next document at tab G, is a letter from Mr Theobald to Doug Gaunt in
15 January 2003 asking him to undertake testing on a further pack, and then at tab H –

ELIAS CJ:
Is this the third pack?

20

MS COOPER:
Yes, that's correct Your Honour, so the first pack is the one where the results appeared in the *Sawmilling* article, the second is the report by FRI for TIF, the third is this one that was conducted for the Commission, that's correct. So the
25 Commission initially received the results of this testing in May 2003, but didn't receive a finalised report until I believe it was June 2003 – sorry, July 2003, and that report is at tab H, and turn through the first couple of pages to the first substantive page and there's a summary, at paragraph 4 of the summary, "In terms of ASNZS4063", which is the relevant standard, "the timber failed to
30 achieve the bending stiffness or bending strength requirement of the MGP10 grade." And at paragraph 5, "It would appear the MGP10 lower grade threshold is set too low and hence significant quantities of the timber should be graded into a lower grade."

TIPPING J:

Does that mean, is that a reference to the machine?

MS COOPER:

5 Yes, to the cut-off of the machine. So the machine effectively applies a pass/fail to the timber, to determine whether it goes into the MGP10 or is downgraded.

The heading there beneath the summary ”Machine Stress Grading
10 Introduction” and just the first sentence of that states, “Machine stress grading provides one of the most economical and reliable methods of sorting timber into different grades for structural purposes”. And then the report goes on to set out more details about how the grading process works, the marking, details of the materials used, how the testing was conducted, but I think, and
15 I’ll just take Your Honour to – yes well perhaps actually sorry Your Honours, the page I was on before with the heading ”Machine Stress Grading Introduction”.

ELIAS CJ:

20 What page?

MS COOPER:

Page 334. So the final paragraph on that page explains how a series of grade thresholds are set in the machine stress grader and these determine which
25 colour/grade is sprayed. So what happens is as each piece of timber goes through the machine, it's measuring its stiffness or elasticity and marking on the timber in paint whether it passes or fails. So there are different colour markings, depending on the properties of the timber. So generally the colour markings for MGP10 are black, there may also be green which is actually
30 MGP12, which is a higher quality or there may be red, and the red timber means it falls below the threshold and that’s the signal for the people in the mill to pull those pieces out that have red markings on, and either cut the red bits out so the rest of the stick can be graded MGP10 or put the entire piece into a different grade.

So, this goes on. The thresholds set upper and lower limits for the MOE, the upper limit is equal to the lower limit of the next highest grade. If the quality assurance results show that timber properties be below that specified for the grade, then usually the lower grade threshold is adjusted upwards. This adjustment should then remove some of the poorer timber from that grade.

Then on the next page there's more detail about machine stress grading. If I could ask Your Honours to turn over to page 338. There's a table 1 on page 338 shows the results and again the bottom line there is characteristic E, and it's got the Carter Holt MGP10 timber 7.89, MGP10 code values 10. And then underneath it says, "In terms of bending stiffness the CHH timber did not achieve the MGP10 characteristic bending stress grade 10 of gigapascals. And then the paragraph below, "The stiffness result can be linked back to the MSG and the grade thresholds, i.e. increasing the lower thresholds will remove the lower stiffness pieces and raise the average.

Then, the next paragraph below explains that the timber was also tested for its minimum MOE at the lowest machine grade colour nearest to the trailing end and worst defect to give an indication of the lower MSG cut-off used for grading this MGP10 timber.

The results of that are shown in the figure on the next page, 339 and beneath that graph it states, "In this case the black MGP10 MOE value on which the machine grader operates is approximately 4.5 gigapascals. Our data indicates that this value should be set higher. Setting this value lower does result in more timber being upgraded to MGP10 but it lowers the characteristic values below the code value. These effects are demonstrated by this testing. So there the FRI's drawing an inference from its testing about how Carter Holt is grading its timber and the machine settings it's using.

Then on the next page it sets out its conclusions on re-grading the timber and says, "Only 40 percent of the timber was re-graded as MGP10 or better, 54 percent of the timber should actually be graded as MGP8 with 5 percent as

MGP6. And then there's a heading, "How representative are these results of the general population?" And the FRI says, "Without access to the quality assurance records, of the sawmill, this question's difficult to answer. However, one of the advertised benefits of the machine stress grading is that 5 between-packet variation is meant to be a minimum, in terms of the average stiffness we would expect this to be similar between packets of the grade or the same grade mix." So that's the same comment they made in an earlier report.

10 Now the Commission asks FRI to prepare a report collating all the testing they had done on the two different packs, and that's the report at tab I, it effectively brings together all the results from the previous tests, so –

ELIAS CJ:

15 Again the testing of three packs?

MS COOPER:

Yes.

20 **ELIAS CJ:**

From how many mills, two?

MS COOPER:

Two. So Carter Holt produced MGP10 from three mills, there was Nelson, 25 and Kopu and Putaruru. The FRI testing was two packs from Putaruru and one from Kopu I believe. So they didn't test any timber from Nelson.

ELIAS CJ:

And the acknowledgement that you couldn't be confident of extrapolating out 30 these for – without going and checking the records, the production records.

MS COOPER:

Yes, so they acknowledged the production, yes, but they're saying, I suppose what they're saying is you can, you would need to check the grade records

perhaps to know for certain, but you can draw some inferences and they're saying – they're asserting that they can tell what the grade threshold was and draw conclusions about that as to what the quality of the timber that was produced overall was.

5

ELIAS CJ:

Well that if the machines were not altered between some of these batches, you'd expect them to be all similar?

10 **MS COOPER:**

Yes, that's right. So just looking at the summary of this, the third FRI report which is at page 348, so that explains all the timber was ordered and supplied as MGP10 over a period of 21 months from September 2003 to May 2005, so we've got packs from two mills and also spread out over that period. It 15 explains the markings showed the packs to be MGP10, and then it says, "Three samples failed to achieve the bending stiffness or bending strength requirement of the MGP10 grade. At paragraph 4 it would appear the MGP10 lower grade threshold is set too low, and at paragraph 6, all right, paragraph 5, they note the stiffness properties of the three packets are very similar with 20 the Kopu one being slightly better which can be explained by a hypersensitive green and purple spray marks.

And then at paragraph 6, "In terms of the machine stress grading threshold settings there is virtually no difference between the three packets which 25 indicates the similar machine set-up. The similarity of the three packets coming from two different machine graders over a 21 month period, and possibly from at least two possible forest resources demonstrates one of the known benefits of MSG timber, that being uniformity of product.

30 The report goes on in very similar format to the previous ones. On the next page it details the timber that was tested, so – I'm sorry Your Honours, it was two packets from Kopu and one from Putaruru. It explains the testing again on the next few pages, and then on page 535, table 3 shows the results of each pack, again shows that each of them failed to meet the code values for

characteristic E, and the observations “In terms of bending stiffness, none of the three packets of timber achieved the MGP10 characteristic bending stiffness, grade stress of 10 gigapascals”. And then the third bullet point notes. “These results show the three packets of timber to be very similar.
5 And then I think that’s all I need to take Your Honours to in that document.

And then at paragraph – sorry at tab J, which is the next exhibit to Mr Theobald’s affidavit, is the – he has exhibited the –

10 **ELIAS CJ:**
So are these packs of timber, they will all have been processed at the same time will they?

MS COOPER:
15 The three packs that were tested Your Honour?

ELIAS CJ:
Yes.

20 **MS COOPER:**
No, no they were years apart.

ELIAS CJ:
No, no, there were three at different periods, and that’s, I think, set out at
25 page 349, but within each pack they are batches produced at the same time are they?

MS COOPER:
Yes Your Honour.
30

ELIAS CJ:
So you have a snapshot over a 20 month period of about 117 planks?

MS COOPER:

That's correct, Your Honour. So Mr Theobald's affidavit that was sworn in support of the application for the search warrants is the next document which is at tab J, and this, the first few paragraphs sets out the background, explains
5 the processes of machine graded pine, which I don't think I need to take Your Honours through, on the next page it talks about the Forest Research testing.

ELIAS CJ:

Sorry, what page are you on?

10

MS COOPER:

Sorry, I'm on page 368. I don't propose to take Your Honours in detail through the opening sections in Mr Theobald's affidavit because it largely covers the introductory material which I think we've dealt with. So on page
15 368, he explains that the FRI is a Crown research body, regularly carries out timber testing, talks about the testing that was done on the various packets, carries on for the next few pages, and then on page 371, paragraph 27, Mr Theobald simply sets out the results, from the results of the three sets of tests undertaken by FRL, it is apparent that a large proportion of the timber
20 purchased is not of the quality represented. An average of all three test results established that only 33 percent of the timber tested was of the represented quality, MGP10. Of the remainder, 61 percent was of MGP8 quality, and six percent was of MGP6 quality, both being inferior to MGP10.

25 And then over on the next page, it talks about the Tadpole software programme, and he explains at paragraph 32, "In January 2003, FRL made the Commission aware of a Carter Holt Harvey business operation called Straight Edge that markets a product called Tadpole. Tadpole is a computer software programme that monitors and collects the data produced by the
30 stress grading machines used at the Putaruru, Thames, that's Kopu, and Nelson sawmills. Straight Edge has represented in promotional material that the Tadpole software automatically logs and analyses the grade determining machine values and combines them with manual and other test data to provide the necessary information on grading accuracy. FRL advised the

Commission that it received marketing material about the Tadpole product. According to FRL, this material appears to confirm that Carter Holt Harvey's stress grader operations do not produce timber with the correct properties. FRL's analysis of the statistics produced in this programme indicates to FRL that except for a few months in 1999, over a four year period from 1997 to 2001, the quality of timber being stress graded as MGP12 fell below the required standard. An example of this was in a particular diagram, the mean E target was .83 when the required standard was 12.7. This suggested to FRL that the timber product graded is well below the required stiffness for that grading of timber." Then it carries on, "In the FRL testing commissioned by the Commission, it was established that the ratio was .87 which was also a failure to meet the standard." I think perhaps that should be 8.7. "Further the Tadpole statistics identified the cut-off settings –

TIPPING J:

In both, one should be 8.3 shouldn't it, and the other should be 8.7?

MS COOPER:

I think that's correct Your Honour, yes.

TIPPING J:

Otherwise it's ridiculously low.

MS COOPER:

I think it wouldn't be timber but straw. Concludes that paragraph, "Further, the Tadpole statistics identified the cut-off settings for the different grades. The setting for MGP10 is reported as being 4.5 gigapascals, which is again below the standard requirement." And I think 4.5 gigapascals was the result the FRI had previously found when they'd tested what they thought the minimum setting had been.

And then the next heading half way down that page is "Financial Gain." Mr Theobald states, "Commission enquiries have established that there is a substantial financial benefit to be gained by selling timber of an inferior quality

as if it is of a higher grade. Retail pricing enquiries by Commission staff at Benchmark, Lower Hutt, on 10 October 2003 established that a 600 lineal metre pack of Laserframe MGP10 costs $3822 including GST. The costs of an identical length packet containing MGP8 and MGP6, stated to be the old
5 No 2 Framing timber, was $1566 including GST. A mill to trader price comparison has not yet been sought, as it would arouse suspicion as to the reason for the Commission enquiries.

Then he goes on in the next paragraph to talk about volume. "A volume of a
10 packet of timber described in paragraph 36 above is approximately 2.5 cubic metres. Confidential Commission enquiries have established that Carter Holt Harvey produces approximately 150,000 cubic metres of Laserframe MGP10 every year." I believe those figures are probably in Carter Holt's annual report as well. "While there is an established difference between mill to trader
15 pricing and trader to retail price, it is clear that a substantial financial benefit has been accrued."

Then he goes on to talk about Carter Holt, the physical surveillance that the Commission has carried out at the mills, and then on the next page, 375,
20 reasons for the warrant, and he explains that the requirement for obtaining a warrant must be a reasonable suspicion that a breach of the Act has occurred or is occurring, and under the heading "Reasonable Suspicion", he goes on to say, "As a result of the enquiries made and information received by the Commission to date, I believe that Carter Holt Harvey and its offices et cetera,
25 has engaged in or is engaging in conduct that constitutes or may constitute a contravention of sections 10 and/or 13(a) of the Act." And he sets out the relevant parts of the Act, and at the top of page 376, he says "For the reasons detailed in paragraphs 1 to 40 above, I suspect that Carter Holt Harvey may have set its stress grading machines in such a way that the machines grade
30 timber higher than is, in fact, the case. This conduct is liable to mislead the public as to the timber's characteristics and suitability for purpose."

Then below, beneath where he's set out section 13, Mr Theobald says, "I suspect Carter Holt Harvey may be making false representations that timber is

of a particular grade or has certain characteristics when this is not in fact the case." Then he goes on to set out the information they're seeking, which is essentially quality control records and financial documents. Then a couple of pages on, page 378, the last paragraph on that page, paragraph 53, "As the
5 stress grading machines being operated at both the Putaruru and Thames sawmills appear to be set to grade timber higher than is in fact the case, it is highly probable that the same is the case at the Nelson sawmill." And he refers to an allegation that a member of Carter Holt staff was directed to tamper with the stress grading machines and that had come from Carter Holt's
10 head office, but there has never been any evidence produced of any tampering, the allegation is that the machines were set too low.

So Mr Theobald's affidavit in support of the search warrant is obviously highly relevant, as that provides a very clear and useful snapshot of what information
15 the Commission possessed immediately three years before the proceedings were filed. So if the knowledge that the Commission possessed at the time Mr Theobald provided that affidavit, constituted discovery, then the Commission is out of time.

20 **TIPPING J:**
The date of the commencement is what, can you just remind me?

MS COOPER:
Well the question is, the Commission's claim is out of time if they had
25 knowledge on any date before 26 October 2003. And this affidavit, this is an undated draft, but the affidavit was I believe sworn no later than the 24th of October 2003.

ANDERSON J:
30 I think we know because the search warrants were executed before the 26th.

MS COOPER:
Well they weren't executed Your Honour but they were issued.

ANDERSON J:

Issued I mean, yes.

MS COOPER:

5 Yes, correct.

ELIAS CJ:

Sorry the date of the affidavit is the, oh it's not dated?

10 **MS COOPER:**

It's not dated, but I believe it was the 24th of October Your Honour.

ELIAS CJ:

2003?

15

MS COOPER:

2003 and these proceedings were filed three years and two days later. Yes Your Honour, Mr Theobald's other affidavit in opposition to the strike out at paragraph 30, confirms he swore this affidavit on the 24th of October 2003.

20

TIPPING J:

Is it essentially the information, or the statements in this affidavit sworn on the 24th of October 2003, that your client is relying on as constituting evidence that it had been discovered?

25

MS COOPER:

Yes Your Honour –

TIPPING J:

30 Both the breach had been discovered and –

MS COOPER:

The loss.

TIPPING J:

– the loss in the sense of the general character of the loss, as opposed to sort of precise dollars and cents?

5 **MS COOPER:**

That's correct Your Honour. So, we would say, it's the evidence in this affidavit but you can also take into account what Mr Theobald says in his affidavit –

10 **TIPPING J:**

Yes, of course.

MS COOPER:

– other affidavit and the exhibits to that.

15

TIPPING J:

But the key point is that you say, from this affidavit one can infer to a high level of confidence that they (a), knew of the breach and (b), knew that some loss must have been suffered as a result.

20

MS COOPER:

Yes Your Honour. I think on any reasonable interpretation, that is what this affidavit demonstrates.

25 **TIPPING J:**

That is what you're submitting?

MS COOPER:

That's correct.

30

ELIAS CJ:

What are we to make of para 45?

MS COOPER:

That the Commission requires further information, that's the correct paragraph?

5 **ELIAS CJ:**

"To ascertain whether Carter Holt Harvey is in fact engaging in conduct and the nature and extent and independent information to corroborate the information it's received from informants, et cetera."

10 **MS COOPER:**

Well Your Honour, I would interpret that paragraph against the purpose of the affidavit which was to obtain a search warrant. So, the Commission needed to show that it needed further information and obviously, in preparing the prosecution, the Commission wanted to have as complete evidence as it

15 could obtain. I don't think it would be correct to say that the Commission didn't have independent information because it did have the complaint from TIF and even if you regard TIF as being an industry participate and therefore in some way interested, the FRI as the Crown research institute, I think, has to be regarded as independent.

20

ELIAS CJ:

But isn't this really the critical question of fact which would have to be determined in order to make out the limitation defence? I mean, the real question which is arguably a matter for trial, you really have to get over this

25 statement that we haven't yet ascertained whether there's breach.

MS COOPER:

I completely agree with Your Honour, yes we do and I think we can. I think a mere statement by the Commission that it requires further information can't

30 simply be taken at face value and accepted as the conclusive position. I think if Your Honours look at what information the Commission did have and compare that to what the Commission has alleged in its statement of claim. Essentially, what it is alleging, is precisely the same as what it knew or

believed at the stage that Mr Theobald gave his affidavit. It may well have acquired more detail –

ELIAS CJ:

5 Or it may have verified the position that it suspected?

MS COOPER:

Well, indeed Your Honour and that comes back I suppose to the question of –

10 **ELIAS CJ:**

What's discovery.

MS COOPER:

– what does discovery mean and what level of certainty is required and

15 perhaps that's the convenient moment for me to hand back –

ELIAS CJ:

Is that as far as you wanted to take this review of the material?

20 **MS COOPER:**

Yes Your Honour, I think that's the only material that is relevant because anything that happened subsequent to that date can't affect the position regarding limitation.

25 **ELIAS CJ:**

Yes.

BLANCHARD J:

Wasn't there something about the Commission getting statistical advice?

30

MS COOPER:

Yes, I apologise Your Honours, I should have taken you back to Mr Theobald's affidavit in respect of that. So that is in Mr Theobald's affidavit at paragraph 26.

ELIAS CJ:

What page?

5 **MS COOPER:**

Page 306. So there's no report from – it says, "The Commission engaged the services of Professor Tony Vignaux of Victoria University in Wellington, to assess the statistical probability that the three tests were representative." His verbal advice was that, "There are real difficulties in relying upon the data the
10 Commission possessed at that time" but there's no further detail given.

BLANCHARD J:

Isn't he really saying, you haven't got a case of endemic breach based on the material that you've got now?

15

MS COOPER:

Well, it's not clear exactly what he said. We're simply told that there was verbal advice and that there were real difficulties.

20 **BLANCHARD J:**

Real difficulties in relying on the data the Commission possessed at that time?

MS COOPER:

That may also be influenced by – at the time, the Commission of course was
25 looking at bringing proceedings which it did which would have a different standard of proof. So, it's not clear how the question was put to Professor Vignaux.

BLANCHARD J:

30 Well, in that case, doesn't this have to go back to trial?

MS COOPER:

Well, I think that is one piece of evidence that needs to be weighed against all the evidence in the round and the fact that there were the FRI reports and the

FRI testing and the FRI clearly saying that they thought you could draw conclusions to a certain extent. I suppose it does come back again, to this issue of how great a degree of certainty is required before loss has been discovered.

5

TIPPING J:

They seemed in the affidavit in support of the search warrant, leaving aside for a moment the passage the Chief Justice referred to, to be asserting as a fact. I think the witness said, "It is apparent that" or something, that there
10 had (a), been a breach and there had been –

MS COOPER:

Commission enquiries have established financial loss as well I think, yes.

15 **TIPPING J:**

The really tricky issue is, is whether that's enough if you like, to say that they discovered whatever it is that they have to discover.

BLANCHARD J:

20 It's not enough to show loss, it has to be loss resulting from a breach. It seems to me that this is highly relevant to whether there was a breach.

MS COOPER:

I think it's clear that there was a breach Your Honour. The question is, what
25 was the extent of the breach?

BLANCHARD J:

Well, I'm not sure about that.

30 **ELIAS CJ:**

What is it, false and misleading?

TIPPING J:

If there was some timber – what I find a little difficult at the moment is why they had to produce evidence that this was endemic. That might have made it a great deal worse but once you could show that there was a breach of some
5 kind, it seems self-evident from what they already had, then presumably they were trying to make the case even worse saying well, we've got these individual incidences and it's a matter of probability if you like, this is going on all over the place all the time. Now, what relevance is there in trying to enhance the case in that way to the limitation point. I think that's close to the
10 point –

ELIAS CJ:

It's meeting the Fair Trading Act standard. It's not just the endemic thing. Was it misleading and deceptive conduct?

15

TIPPING J:

It appears, at least on the face of it, it was in relation to the stuff that was tested. How much wider it went than the stuff that was tested no doubt goes to questions of –

20

ELIAS CJ:

Well, was it faulty?

BLANCHARD J:

25 Wasn't the concern that the Commission had at the time, whether these were just three stray instances which couldn't properly be shown to demonstrate a pattern and that it might be necessary, in order to demonstrate a breach, that there had to be some sort of pattern to what was going on?

30 **MS COOPER:**

I think that's right Your Honour. I think what the FRI was saying is that because of the way the timber grading process works and the way the machines are set and the fact that we have these packs that come from two different mills over several years, they're clearly indicating they think that

some conclusions can be drawn. Against that, there is the evidence that some statistical was obtained that suggested that that wasn't sufficient. Again, it does beg the question of what threshold of certainty the Commission was trying to achieve and was not necessarily the same threshold of certainty
5 that Your Honours may apply in determining whether discovery has occurred. I mean, I suppose the –

McGRATH J:
Professor Vignaux was talking about statistical probability, wasn't he?
10

MS COOPER:
Yes.

McGRATH J:
15 Which seems more in tune with an evidential threshold.

BLANCHARD J:
To take the analogy of the crack in the building, couldn't it be said that this was a situation equivalent to one where the expert is called in to look at the
20 crack in the building and says "Hmm, there could well be a problem here, it does not look good but I can't be sure without further testing whether there actually is a defect in the building or whether this is just a harmless crack."

MS COOPER:
25 Well I wonder if it's more, I mean I wonder if the expert who comes in to look at the crack isn't the FRI who has a look and says, "Well we've tested these three cracks and they look, you know, it appears to us they're all bad, we suspect the other cracks are bad as well" and then you get a statistician in to say whether that's a valid inference to draw, I think that's more the analogy
30 and then the question is, well do you go with the FRI or do you go with the statistician?

ELIAS CJ:

Well isn't it really a question, do you have a breach of the Sale of Goods Act, or do you have conduct being engaged in that is deceptive and misleading and the incidence of error will be highly relevant to that it seems to me. I
5 mean you've clearly got substandard stuff, you've got something that's not what it was represented to be, that's your Sale of Goods Act breach, but is it, is it deceptive and misleading? It does seem to me to tie in to the statistical inquiry and the inquiry that's being sought based on the investigation of Carter Holt Harvey's own documentation.

10

MS COOPER:

Well I think it's clear that in relation to the, well there's clearly an issue with the three packs of timber and to the extent that they were sold, mis-sold or sold as a grade that they weren't, then there was a breach of the Fair Trading Act in
15 relation to those packs of timber, but I accept that there's an issue as to the extent of it.

ELIAS CJ:

But I think what this really does demonstrate is that Mr Simpson is correct that
20 the test to be applied is probably critical.

MS COOPER:

Yes.

25 **ELIAS CJ:**

If it's a suspicion that may be one thing, but if it's something higher than that it may be more difficult.

MS COOPER:

30 Yes, I think that's correct Your Honours.

MR SIMPSON:

Just a couple of follow on points coming out of that the learned Chief Justice raised the question of whether there's a breach of the Fair Trading Act as

opposed to Sale of Goods. Of course the Fair Trading Act doesn't require negligence of fraud, it's an innocent representation, so if Carter Holt holds our timber as complying with the MGP10 standard and it doesn't, that's it, it's a breach, you accept that?

5

ELIAS CJ:

Yes, that's right, yes I accept that.

MR SIMPSON:

10 There's two other things –

BLANCHARD J:

But does this mean that every time you sell something that on an isolated basis it doesn't comply with the standard it's supposed to comply with, you're
15 committing a breach of the Fair Trading Act?

MR SIMPSON:

No, I don't think it does. Not in relation to this product. I think it will vary from product to product, but the problem we have here, is that we have a timber
20 standard designed by engineers for producing timber effectively being turned into a criminal code by the Fair Trading Act and the, unlike a criminal statute which has hopefully careful drafting so one knows where the lines are, we have a pretty ordinary drafted series of timber standards with quite some differences of interpretation as to what they mean at any point in time and how
25 you're supposed to establish whether you've got compliance, but what you are supposed to do is to carry out continuous and periodic testing in the timber you're producing to make sure that the packs coming out on a batch daily run and one other basis, I can't remember now, there is a third basis, you're supposed to test them and if they don't come up to standard then you need to
30 adjust your machine settings upwards until you are getting compliance and –

TIPPING J:

If you're selling timber as MGP10 when it's not, which seems to be the fact here, at least in these instances, you're in breach of the Fair Trading Act aren't you?

5

MR SIMPSON:

You are. Well you are, but it doesn't guarantee that necessarily every pack will comply, so you can run it – if it's on a batch basis, as long as when you test the batch, sample the batch by testing the sticks coming through, then the fact that one fact may not comply is all right, and that's why there's so much redundancy built into the engineering designs but you do have a positive obligation to be carrying out that periodic testing and satisfying yourself it complies, if you haven't done that, then you're in breach.

15 **TIPPING J:**

You're in the ironical position aren't you of having to submit that your client's breach was so obvious and so egregious that they should have tumbled to it.

BLANCHARD J:

20 Did the Commission at this stage know that Carter Holt Harvey hadn't been doing it's internal testing?

MR SIMPSON:

Well I think that's where you've got to come back to, if I could just take you back to page 372, because I sense that Your Honours are focussed on the fact that we've got three isolated packs, albeit across two mills in 21 months, but paragraph 34 is pretty important. This Tadpole was a database, it collected all of the data out of the machine stress graders and what it's saying, is except for a few months in '99, over a four year period, from '97 to 2001, the timber fell below the standard, now that's a different grade, it's MGP12 but there's real evidence there of continual non-compliance and then the other critical factor –

ELIAS CJ:

It's very odd that this should be in marketing material given, is this part of the material that the Commission is seeking to substantiate?

5

MR SIMPSON:

I don't know what they will rely on a trial but I assume so.

ELIAS CJ:

10 No, no, I mean in the – when they apply for their warrant, because this looks very odd really.

MR SIMPSON:

Sorry, why is that Your Honour?

15

ELIAS CJ:

Well, FRI has said that the marketing material provided to it by Carter Holt Harvey, demonstrates that it was not meeting its grading standards.

20

MR SIMPSON:

That's because they were marketing a product which had the data, Carter Holt's production data still in the Tadpole system so the people could see how it worked and when you looked at the data you could tell they weren't

25 complying with their own standards.

ELIAS CJ:

They were selling Tadpole, were they, they had something else buried?

30 **MR SIMPSON:**

This is selling Tadpole, this is what we do to ensure that we're compliant with the standard and the very thing they're using as a marketing tool demonstrates that they weren't.

BLANCHARD J:

They deserve to be convicted of incompetence.

MR SIMPSON:

5 Well certainly some of them within the organisation, that's possibly right Sir. So that's the critical thing, and the other, there's two other points, the other is that in relation to the FRI testing, you've got to also look at the way that how they could back test what the settings were and they said the settings were set at 4.5 instead of up around the 7 point something mark, so they could also 10 tell that the machines had been set too low. And then the last point –

BLANCHARD J:

And so you're extrapolating from that, that the Commission would have appreciated that it's unlikely that a setting would be isolated?

15

MR SIMPSON:

Well that's what FRI told them.

BLANCHARD J:

20 It is extremely unlikely isn't it?

MR SIMPSON:

No, no.

25 **BLANCHARD J:**

You wouldn't have the machine set for a particular batch too low and then it was okay for all the others, until you get to the next one and then it's set too low again.

30 **TIPPING J:**

That's such a long shot as to be observed.

BLANCHARD J:

That might be your best point.

MR SIMPSON:

That's what I'm – that's exactly right. And in fact these settings aren't, it's not a dial, these are hard wired-in settings with a chip you put in the machine. If
5 you want to change it, you actually pull the chip out, you –

BLANCHARD J:

So it has to be a deliberate act to change it?

10 **MR SIMPSON:**

And in fact there is some evidence here and we don't know what will come of it, but in the affidavit for the warrant, there's a reference to somebody from FRI talking with an employee from Carter Holt had been told to play with the settings. Oh sorry, it's 35 on page 373. "An employee of FRI covertly
15 questioned a Carter Holt staff member". No it's not that one, sorry, 53, oh it's 30, sorry to jumble you around. "Confidential information received by the Commission has identified a Jeff Alexander as being a former chief executive officer of the Thames sawmill. Mr Alexander was employed by Carter Holt in the last three years, the Commission's foreman has stated that Carter Holt's
20 head office directed Mr Alexander to tamper with the machine stress grader at Thames sawmill so that an inferior quality of timber would be graded higher". Now, we know nothing about that, that's the Commission's evidence but taking it at face value, certainly they are told there that this is not innocent or an oversight, that this was intentional tampering.

25

TIPPING J:

But isn't there expert evidence to the effect that these machines must have been set too low?

30 **MR SIMPSON:**

Yes.

TIPPING J:

And unless you're going to set them too low just to encompass the isolated occasions, which is ridiculous.

5 **MR SIMPSON:**

Isolated occasions across two mills and just happen to be the very periods within that 20 month period that the FRI took samples and tested.

TIPPING J:

10 But they were set up to deliver.

MR SIMPSON:

It's not an example where we have five packs tested, two pass and three fail, this is three out of three, and that's significant. The other point that did seem
15 to be of concern to at least Justice Baragwanath was the fact that no testing was done in Nelson, and I do need to address that, and I think with respect, Justice Chambers handled this very well in paras 195 and 196 of his judgment, so it's at 103 of the case on appeal, he says at 195, "The only comment I would make is this. Justice Baragwanath has placed great
20 emphasis on the fact that CHH produced timber from three mills and has been concerned to address whether each of the mills has been implicated in the alleged misrepresentations prior to the limitation date. For the reasons he gives, he is so satisfied. I acknowledge that as one way of looking at the problem but it is not the only way. It is certainly not the way the parties
25 analyse the question. The Commission, for instance, did not, either in its pleadings or in its submission, draw a distinction between the different mills. It pleaded Carter Holt's wrongful is wrong as a single course of conduct over a period, drawing no distinction between timber from North Island mills and timber from Nelson mill. In my view, the Commission was right to draw no
30 distinction between them, as such a distinction would be irrelevant for the purposes of the Fair Trading Act claim. To my mind, all that matters is that Carter Holt was making false claims about some of its timber as the Commission well knew prior to the limitation date. It is true that the Commission did not know by that date who had suffered loss (other than

generic groups), or the quantum of such loss, but that did not matter. Nor did the Commission fully know exactly what the circumstances were that were leading CHH to make false claims. Was there one cause or several? Was it intentional or innocent? None of that matters for a fair trading claim." And
5 that's the key thing, there's no breach by Carter Holt in producing non-compliant timber, it's a natural product, it comes off the logs, you cut it up and it is what it is. The breach is in marketing it as compliant. And so it doesn't matter whether non-compliant timber came from one mill or three mills, if you're selling non-compliant timber, you are breaching the Act and it is
10 just a matter of quantum, about how much of the timber was compliant and what price profit did you make at the expense of consumers by your actions? The rest is detail and that's not required for knowledge, in my submission.

ANDERSON J:

15 You have to draw a distinction, don't you, between the concept of discovering something and then setting up the case to win?

MR SIMPSON:

That's, I think, the difference between where my submissions are going and
20 where Justice Blanchard was going before, yes a statistician said you can't rely on the three packs for statistical purposes and you certainly couldn't to run a criminal trial, but is that the test for knowledge? And in my submission, it's not, because on that basis, probably even today the Commission doesn't have knowledge. They don't know who the consumers are, they don't know
25 what each of them has suffered by way of loss, they still need to do an extensive investigation and discovery, does that suggest that time hasn't begun to run even now? And in my submission, that just cannot be right and certainly in the UK line of authorities that I'm about to come to, it was accepted as not the right position.

30

Before I turn to *Haward*, I think I should draw your attention to the one New Zealand case, it is only a High Court case, but I think, bearing in mind it's another financial loss case, and it also involved both the Commerce Act and the Fair Trading Act, and if we ignore the likelihood of loss point, the

Commerce Act limitation period is similar in that it talks about discoverability or ought reasonably to have discovered. So this is at tab 6 of the small bundle of authorities of Carter Holt. Tab 6, and if I could take Your Honours to paragraph 3 to begin with.

5

The plaintiff, Mr Hook, became interested in participating in exploiting opportunities for the America's Cup regatta in 2000. He was particularly interested in acquiring use of land at the Gulf Harbour complex, in which he hoped to house some syndicates and at 3 it notes he ultimately entered into a
10 number of commercial arrangements for which he incorporated several companies. And in paragraph 5, the business didn't prosper, he says those controlling Gulf Harbour made misrepresentations to him. He complains he was given to understand a number of racing syndicates would be housed at Gulf Harbour, in the end they all went to the Viaduct Basin and he lost his
15 money, and brought a claim, amongst other things, under the Fair Trading Act and the Commerce Act.

If we go to paragraph 41, where it starts off with the Commerce Act, but because of the overlap in the words used, we'll need to look at the Commerce
20 Act provision, because much of it is just taken into the Fair Trading analysis. So he says section 82(2), as it now stands, incorporates the reasonable discoverability test, couched, as is usual, in partly objective terms. Further down, the test is to be applied in determining whether a matter giving rise to a contravention "ought reasonably to have been discovered", and it was
25 discussed by the Court of Appeal in *Amaltal*, following a discussion of authorities, the Court concluded that what is required is reasonable diligence, not exceptional diligence. Further, the test is to be applied by considering how a person carrying on a business of a relevant kind would act if he had adequate but not unlimited staff resources and was motivated by a reasonable
30 but not excessive sense of urgency, if the discovery or reasonable discoverability of the facts which triggers the running of time for limitation purposes, not the legal consequences of those facts, and then in 44, there's a reference to the Fair Trading Act. And in fact, the cause of action here straddled both the old version of 43(5) and the new.

And then in 46, "Accordingly, in the present case, the cause of action brought in reliance on the Fair Trading Act will be barred if it can be shown that either it was barred under the pre-amendment provision, prior to 3 May `01, or that the plaintiff had discovered, or ought reasonably to have discovered, loss or damage or the likelihood of loss or damage prior to 14 December `02."

Then if we turn through to 68, "Central to those causes of action with which this judgment is concerned, is an allegation that the September `97 agreement and the November `98 agreement breached section 27 of the Commerce Act. Irrespective of the position pre-amendment, causes of action founded upon that allegation would be statute barred under s 82(2) as it now stands, unless Mr Hook had not discovered, and ought not reasonably to have discovered, the matter giving rise to the contravention prior to 14 December."

And in 69 and 67, His Honour refers to several press articles, and said well he may not have seen those, and then in 71, "The Kensington Swan letter of 27 May `98 is, in my view, pivotal. Acting on Mr Hook's instructions, Kensington Swan complained to Gulf Harbour of the agreement "…to prohibit any America's Cup Syndicate being based at Gulf Harbour…". It is incontrovertible that Mr Hook knew at least by that date of that letter that a deal now alleged by him to be anti-competitive, had been done between Gulf Harbour and those involved in the Viaduct Basin development."

And then he goes on to say, "Mr Judd submits that although Mr Hook may have been aware, in a broad sense of what had transpired, he did not have the agreements themselves, and could not have been expected to appreciate the legal significance of the arrangements entered into between Gulf Harbour on the one hand, and the eighth and ninth defendants on the other. In support of that argument, he refers to the fact that although Mr Hook was represented by several solicitors over a period of several years, none appears to have appreciated the possibility that a breach of the Commerce Act had occurred. The simple answer to that submission is that the present inquiry

must be as to the knowledge of the plaintiff of the relevant facts, or discoverability of those facts; the legal consequences are irrelevant."

And then it goes on in 73, "For a considerable period prior to 14 December
5 `02, Mr Hook had sufficient information to enable him to issue proceedings if necessary with the assistance of documents obtained following pre-commencement discovery. Moreover, in anti-trust cases, the Court is alive to the fact that the bulk of the evidence required by a plaintiff in order to prove his or her case, will often be obtained on discovery; the Court will
10 hesitate to strike out a statement of claim even when the allegations are initially scanty. In my view, Mr Hook ought reasonably to have discovered the matters giving rise to the alleged contravention well before 14 December. Indeed it may be fairly said that he had in fact discovered them, even though the agreements themselves were not seen by him until late 2004, in the
15 course of discovery."

In 77 and 78, he applies the same approach in relation to the Fair Trading Act. What we see out of that judgment is knowledge but not the sort of assurance and absolute knowledge that the Commission's now suggesting. In this case,
20 the plaintiff had knowledge that there were some agreements that were a problem for him but he didn't see the agreements until quite a long time afterwards, yet nevertheless, he was held to have knowledge as required under this section.

25 I'm conscious of time Your Honour, so if I could take you then through to *Haward*. One of the things that we've included in the bundle that Your Honours have got in your hands, tab 3 which is section 14A of the UK statute because based on submissions made in the Court of Appeal, I can assume my learned friend will be saying well, *Haward* is based on a very
30 particular statute and it's of no real assistance to us here. So, I think we do need to look at 14A and just test that proposition. This provision is very similar, in many respects, to what's in our Limitation Bill. So, 14A deals with an application –

McGRATH J:

Sorry, can you just tell me exactly where you're at. I'm sorry, I was looking at something else.

5 **MR SIMPSON:**

Tab 3 of that small bundle, tab 3 and it's section 14A of the UK statute. It deals with actions for damages for negligence other than personal injury and subsection (4) say that, "The limitation period is the longer of six years or three years from the starting date, as defined by subsection (5)" and the 10 starting date is the date for reckoning the period of limitation, "Is the earliest date on which the plaintiff or any person in whom the course of action was vested before him, first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such action." Then, subsection (6) defines knowledge to mean, "Knowledge of the 15 material facts about the damage in respect of which damages are claimed and of the facts relevant to the current action mentioned in subsection (8) below."

Then those facts are in (8), so these are that, "The damage was attributable to the actions of the defendant for which it is now alleged there is negligence." 20 The identity of the defendant, I don't think we need to worry about C so much. You'll see, from subsection (9), you don't need to actually know that the action is negligent, you just need to know the action that you're now attributing is the negligent act.

25 **TIPPING J:**

This has been criticised as being extraordinarily convoluted and complicated, hasn't it?

MR SIMPSON:

30 It has, it is. The other only point I wanted to make before I actually turn to the case, is *Haward* relies on about six other decisions, five of which are English Court of Appeal and I think all five are personal injury cases where there's a different limitation provision and it's a much more straight forward and simpler

provision and unfortunately, I haven't given it to you but if I could just tell you what's in it because I think that that is helpful before we get to *Haward*.

Under that provision, so this is for personal injury, "The knowledge is of these facts. The injury in question was significant, the injury was attributable in whole or part to the act or omission which is alleged to constitute negligence and the identity of the defendant." So that's all it requires, those three things. So section 14 simply says, "To have time running, you need to know those three things." It, in no way, describes the degree of knowledge, just what you need to know. The reason I emphasise this is although they are different sections, all they do is prescribe what you need to know, they don't prescribe the degree of knowledge and that was left by Parliament, up to the Courts to work out and that's what *Haward* and the cases upon which it relies, seeks to do.

Haward is I think relevant, particularly because it's a financial loss case. So, that's at tab 17 of the second bundle of the appellant's authorities. It's a decision of the House of Lords in March 2006 and it concerned a plaintiff whom invested 60,000 pounds to acquire a controlling interest in a company which failed four years later. The claimants had been advised throughout by the defendant firm of accountants and by December '98 the claimants knew that the monies they had injected into the company had been lost and that the company was insolvent. In the first claim it believed that the losses were to be explained by a variety of economic factors. December 1998 was three years before the proceedings against the defendants were issued and thus the date at which the defendants' knowledge failed to be considered for the purpose of section 14A.

The knowledge required for bringing an action for damages in respect of the damage meant knowledge both of the material facts about the damage in respect of which damages are claimed and of the other relevant facts to which I've referred, such as the identity of the defendant and the facts that are now alleged to have been negligent facts.

If we can start by looking at page 501, the judgment of Lord Nicholls. After setting out the requirements of the section in the policy of the Limitation Act, he starts at paragraph 8 under a heading, "'The Degree of Knowledge Required.' Two aspects of these knowledge provisions are comparatively
5 straight forward. They concern the degree of certainty required before knowledge can be said to exist and the degree of detail required before a person can be seen to have knowledge of a particular matter. On both these questions, Courts have had no difficulty in adopting interpretations which give effect to the underlying statutory purpose. Thus as to the degree of certainty
10 required, Lord Donaldson gave valuable guidance in *Halford v Brookes*." So this is a section 14 personal injury case of the Court of Appeal.

He noted that, "Knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to
15 justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. Suspicion, particularly if it is vague and unsupported, will indeed not be enough but reasonable belief will normally suffice. In other words, the claimant must know enough for it to be reasonable to begin to investigate
20 further. Questions about the degree of detail required have mostly arisen in the context of the need for a claimant to know that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence. Consistently with the underlying statutory purpose, Lord Justice Slade observed in *Wilkinson*..." that's another personal injury
25 case under section 14, "...that it is not necessary for the claimant to have knowledge sufficient to enable his legal advisors to draft a fully and comprehensively particularised statement of claim."

I've dropped down five lines, in a clinical negligence case of *Hendy*,
30 Justice Blofeld said, "A plaintiff may have sufficient knowledge if she appreciates in general terms that her problem was capable of being attributed to the operation, even where particular facts of what specifically went wrong, or how or where a precise error was made is not known to her. In proceedings arising out of the manufacture and sale of the drug Oprin,

Lord Justice Purchas said that what was required was knowledge of the essence of the act or omission to which injury was attributable. There's two other English cases, English Court of Appeal cases referred to, *Nash* and *Spargo*, where Lord Justice Brooke referred to a broad knowledge of the essence of relevant acts or omissions. To the same effect, Lord Justice Hoffman said, section 14(1)(b) and that's the section that requires knowledge of the facts that are attributed to be loss causing, requires one should look at the way the plaintiff put his case, distil what he is complaining about and ask whether he had in broad terms knowledge of the facts on which the complaint is based.

Over the page, "Attributable has been interpreted by the Courts to mean a real possibility not a fanciful one, a possible cause of the damage as opposed to a probable one, thus paraphrasing, time does not begin to run against a claimant until he knows there is a real possibility that this damage was caused by the act or omission in question." So the test there seems to be real possibility. Over at 503, paragraph 20, three lines down into that paragraph, "Stated in simple and broad terms, his claim is that Mr Ostrong did not do his job properly. Time did not start to run against Mr Haward until he knew enough for it to be reasonable to embark upon preliminary investigations into this possibility. There may be cases where the defective nature of the advice is transparent on its face. It is not suggested that was so here. So for time to run something more was needed to put Mr Haward on enquiry. For time to start running there needs to have been something which would reasonably cause Mr Haward to start asking questions about the advice he was given."

Then switching to 513, Lord Walker, about three lines down into paragraph G in 513. "As numerous reported cases show, the starting date may occur at a time when a claimant's knowledge about this claim is far from complete. Enquiries and investigations may have to be made and expert knowledge may have to be obtained as to how the claim should be pleaded and how special damage should be quantified. A claimant may have the requisite knowledge even though he may not yet have the knowledge sufficient to enable him or his legal advisers to draft a fully and comprehensively particularised statement

of claim. But by that time, often years later, that the limitation issue comes to be decided whether as a preliminary issue or at trial a claimant's case will have been pleaded and the defendant's act or omission which is alleged to constitute negligence will have been clearly identified."

5

Then 533, Lord Mance at 112, also dealing with a degree of certainty of knowledge required under section 14 was considered by Lord Justice Purchas that knowledge here clearly does not mean no for certain and beyond possibility of prediction and he proceeded on the basis that knowledge is a
10 condition of mind which imports a degree of certainty and that the degree of certainty which is appropriate for this purpose is that which for the particular plaintiff may reasonably be regarded as sufficient to justify embarking upon the preliminaries to the making of a claim for compensation such as the taking of legal or other advice."

15

And then there's a reference there to Lord Justice Hoffman in *Broadley* reparaphrase the purpose of section 14 has been to determine the moment at which the plaintiff knows enough to make it reasonable for him to begin to investigate whether or not he has a case against the defendant." That was
20 taken up by Lord Justice Brooke and I probably already covered that passage, "all such formulations seem to me relevant under section 14(a) provided that it is to be remembered that under subsection (8)(a) the requisite knowledge must be of attributability in whole or in part –" I don't need to cover that.

25 And then on 535, paragraph 119, on the other hand as counsel for the claimant's accepted in his note to the Judge a claimant cannot postpone the running of time almost indefinitely by reference to detailed factual points which often only become known in the course of investigation of a possible claim or during the litigation itself. The Court of Appeal was right in *Broadley v Guy* to
30 disapprove of the test adopted in *Bentley* insofar as it would have required a claimant to know all factual matters necessary to establish negligence or to draft a fully and comprehensively particularised claim.

And then lastly on 538, subparagraph F, "Actual knowledge within (a) involves knowing enough to make it reasonable to investigate whether or not there is a claim against a particular potential defendant. Constructive knowledge within (b) involves a situation where although the claimant does not yet know
5 sufficient for (a) to apply he knows sufficient to make it reasonable for him to acquire further knowledge."

And then down, four lines from the bottom, "The question is when Mr Haward actually knew both enough of the acts or omissions now alleged to constitute
10 negligence and that the loss suffered was capable of being attributable there to, to make it reasonable for him to begin to investigate whether or not the claimants had a claim against Fawcetts. That would be a case taking a reasoning in *Hallam* v *Merrett*. Once he realised that he had prima facie cause to complain of unsoundness from the outset of the investments, this would in
15 turn suggest unsoundness in the advice given or not given by the Fawcetts."

Now we do accept that effectively the way these limitation periods work the onus is on the plaintiff to show that they don't have knowledge whereas clearly the knowledge here is on Carter Holt applying to strike that out but
20 that's just an issue of the burden of proof here in my submission. This is the principle that should be applied. It is the principle I think will inevitably be applied if the Limitation Bill is passed to the knowledge extensions and reasonable discoverability sections of that Bill and in my submission we should follow a consistent approach under the Fair Trading Act.
25

Now I'm conscious that neither my learned friend nor I have addressed the third point but it seems to me a redundant one and if I haven't persuaded you on two there's no point me arguing three and if I win on two then effectively I've won on three as well but I'm certainly willing to take Your Honours through
30 that if there was perceived to be a need to.

BLANCHARD J:

What's your best point for saying that the Commission must have known at the time when Mr Theobald made the application for the search warrants, that

some loss had been caused as opposed to some additional profit from Carter Holt Harvey?

MR SIMPSON:

5 Well, in my submission, Carter Holt cannot make a profit without somebody incurring a loss.

BLANCHARD J:

So it's simply the correlative?

10

MR SIMPSON:

If I've sold you something as A class and it's B class and there's a $10 difference then I've made $10 at your expense. I think it is as simple as that. And that's – it's as simple as that in the Commission's claim. That's how they

15 pleaded their case and in my submission that's how the limitation issue should be analysed.

TIPPING J:

They pleaded their case on the basis if the difference between its value as

20 represented and its value in fact?

MR SIMPSON:

Yes. And their case is currently based on what's informally called MGP8 although that's not a formal standard. It's No 1 Framing. That's the current

25 test they're applying.

ANDERSON J:

The damage doesn't necessarily have to be quantified initially. If you can see it conceptually then you can see damage. It might be said that someone has

30 suffered damage if they've paid for A and got B.

MR SIMPSON:

That's right.

ANDERSON J:

Because they haven't got what they paid for.

MR SIMPSON:

5 And we all know that often a plaintiff doesn't finally quantify their claim until about a month before trial when they have to produce an accountant's brief that finally for the first and last time, quantifies what their claim is. I mean most complex pieces of litigation of course – the issue of quantum is just a nominal number, a good estimate, but that's all sorted out at trial where you've 10 got accounting experts who can look at the evidence from both plaintiffs and defendants with factual findings to form the basis of assumptions on which the quantum is based. My concern here is that if the Commission is right, time is not yet running against them. Those are my submissions.

15 **ELIAS CJ:**

Yes thank you. Yes Mr Galbraith.

MR GALBRAITH QC:

Just very briefly on this last issue. Just a couple of comments in relation to 20 my learned friend.

ELIAS CJ:

I should have asked you Mr Galbraith, would you like an adjournment, or do you?

25

MR GALBRAITH QC:

No I'll be very quick. My learned friend referred Your Honours to the marketing material about the Tadpole product which you find behind tab J in Mr Theobald's affidavit, that was filed in support of the application for the 30 search warrant. I just draw your attention to paragraph 35 where, if I advise that they covertly questioned a Carter Holt staff member who'd said that material was not accurate, it was simply created for the purpose of marketing and they impressed their scepticism –

BLANCHARD J:

I'm sorry Mr Galbraith, I'm not quite –

MR GALBRAITH QC:

5 I'm sorry Sir. Page 372, paragraph 34, was the material – was the paragraph that both Ms Cooper and my learned friend referred to about the marketing material and then page 373, paragraph 35, I say, well the Carter Holt person said that report actually wasn't real. It was just generated for the publication of the marketing material. FRI says that explanation doesn't make a lot of 10 sense but the point is that there was nothing certain about that information at that stage as being accurate or inaccurate. It was odd that Carters would publish marketing material which showed they were in breach. On the other hand perhaps it was right, perhaps it wasn't right, and that was obviously part of the need for the search warrant, to find out whether that suspicion was right 15 or wrong. The second point, just taking up what – the evidence from the bar –

ELIAS CJ:

This hasn't been cleared up yet, presumably?

20 **MR GALBRAITH QC:**

Well I think ultimately when the search warrant was executed and the quality control material was identified, I'm not sure that this particular information was precisely identified, but the fact that there had been endemic breach was established, yes. Once they got to the –

25

ELIAS CJ:

Yes.

MR GALBRAITH QC:

30 – quality control material they could establish that.

ELIAS CJ:

No I just meant this Tadpole report which –

MR GALBRAITH QC:

No I'm not sure –

ELIAS CJ:

5 – does seem very odd.

MR GALBRAITH QC:

Yes I'm not quite sure what the answer to that is. Just taking up this question about adjusting machine settings. It's correct, as one would accept, what my 10 learned friend Mr Simpson said, that it's not just a question of flicking a switch and you get a different setting. The fact is, as my learned friend Mr Simpson also told the Court, that there is meant to be a constant monitoring of the output, if I can put it that way, of the machine testing with the obvious requirement that if the machine testing that is being done is not matching or is 15 not producing what it should be producing, they're to change the machine settings. So machine settings aren't cast in stone, they're meant to be monitored hourly, daily, weekly, monthly, all the time and they should be adjusted at that time so one can't presume just because there was a packet got through at the beginning of 2002, another packet is tested in 2003, the 20 machine settings stayed the same between the two times. They shouldn't have because there will be variability and one of the variabilities which in fact is referred to, you'll see it at page 348 of one of the FRI reports, is you get variability in forest resource. You take trees from a higher altitude, you'll get different results than trees from a lower altitude because they grow differently. 25 You take trees from a warmer place as against a colder place, again they grow differently and so the stiffness and those other qualities will be different and so it's not – there is no homogeneousness in a forestry resource. It varies from spot to spot.

30 **ELIAS CJ:**

I don't understand that argument really because what –

MR GALBRAITH QC:

All I'm saying is that you can't say because you've tested a packet of timber in January 2002 that if you, if the, that necessarily that means that the next lot of timber that went through well –

5

ELIAS CJ:

Well we're not really talking about the timber. We're talking about the machines?

10 **MR GALBRAITH QC:**

You're talking about them but you'll see, you'll see sorry, if we just go to 348 to see what I mean. 348 is that report where they, where FRI talked about the three tests which have been done and you'll see under the summary on page 348, item 5, they say, "The stiffness problem in three packets are very similar.
15 The Kopu 1 packet is slightly better which can be explained by harvesting of green and purple spray marks, more high stiffness timber. Possibly at the time this timber was going through the sawmill a batch of higher stiffness logs was being processed." So the machine doesn't determine the stiffness of the timber. The machine measures it as being above or below a certain
20 parameter. If you've got a lot of high stiffness logs going through then you'll get better than the machine's testing or the machine cut-off point. If you get a lot of low stiffness logs going through then they'll all end up with another colour slapped on.

25 **TIPPING J:**

The problem in this case seems to be that there is fairly cogent evidence that the machines were set so as to misread?

MR GALBRAITH QC:

30 Well it is only evidence – well that's the ultimate evidence once you've got the quality control information but at the time they tested three packets, all you could say was, that for those packets to have been turned out in the way they were, that the presumption was that the machine testing was at a level of 4.5 which wasn't sufficient for the quality of that timber that was going through at

that time. But, see what you'll get in a packet, you'll get some timber going through which is effectively could be an MGP12 packet. You'll get some going through which could be a MGP6 packet. What you're meant to get out of your spread is an average of MGP10s.

5

ANDERSON J:

The setting will be made to ensure that the least reasonable amount of superior timber –

10 **MR GALBRAITH QC:**

Exactly.

ANDERSON J:

– goes through.

15

MR GALBRAITH QC:

Exactly. Because you don't want to have your selling of MGP10s and you've actually got 90 percent MGP12s in there so that's what – you're trying to strike the average balance and that's why as my learned friend also correctly said, 20 you can easily get a packet of timber, because they're doing this on a run of course, not stick by – when they get packaged up it comes out of a whole run of timber which has gone through. You get one packet which is actually only MGP6s and in the next packet could be all MGP12s. I mean that would be unlikely but it could happen just depending on –

25

ELIAS CJ:

But the packet will be graded. It won't get a black streak.

MR GALBRAITH QC:

30 No what will happen is that as these things go through they get a colour slapped on them depending on what's their lowest, what's their lowest say vending parameter. But because you can have in a packet some MGP6s, some MGP10s and some MGP12s which gives you an average of MGP12, when they actually put the packet together they don't go and say, well one

green one, one red one, one blue one, because the machine picks them up and dumps them into a packet. Now the machine may dump a whole lot of MGP6s in together in one packet and a whole lot of MGP12s in the next packet. The entire run should have an average of MGP10 but it's a blind
5 accident if every packet is spot on average MGP10.

BLANCHARD J:

It's bad luck for you if you just happen to buy that packet.

10 **MR GALBRAITH QC:**

Exactly, exactly. And that's the point that was also made in the FRI reports. Most builders wouldn't have the faintest idea, they don't use the term faintest but they say idea, wouldn't be able to pick whether they've got all MGP10 or not and that's why there's a safety standard built in because you're not going
15 to always get – every stick of timber is not going to be MGP10. It's not required by the standard.

ANDERSON J:

But it might be required by the Fair Trading Act.

20

MR GALBRAITH QC:

Well probably not Sir because MGP10 and MGP8 and MGP6 are standards which are written to say you've only got to have an average.

25 **BLANCHARD J:**

Where do we find the standard?

MR GALBRAITH QC:

I don't know if it's in the material before Your Honours is it?

30

TIPPING J:

I would've thought you were entitled to a better average than this case demonstrates Mr Galbraith.

MR GALBRAITH QC:

No, look I accept that. All I'm saying is –

ANDERSON J:

5 It might have been random.

MR GALBRAITH QC:

It could be random and it's the point that I think my learned friend also very fairly made that this is, once you're into timber which is variable, you're not in 10 the same situation you would be for some misrepresentations where you've either got it or you haven't got it. This is a bit more on the blurry side of things and so while it's fair to say that the Commission, and that's what Mr Theobald says, the Commission thought because it had these three packets tested and they – all of them had failed, that it was likely, to use that term, it was likely 15 that there was a problem here. The extent of the problem, whether it was endemic or not, they didn't know because as FRI said, and you'll see it says it in several places, you see at 340 for example, in one of their reports, under the heading "How Representative Are These Results To The General Production?" and the immediate answer is, without access to the quality 20 assurance records for this sawmill, this question is difficult to answer. You can't answer it. They then say however, because machine stress grading is meant to keep variation between packets to a minimum then you'd expect it to be similar between packets of the grade but they could have adjusted the machine the next half hour or the hour following that.

25

ANDERSON J:

Well they'd adjust it for whatever run they were trying to achieve.

MR GALBRAITH QC:

30 Yes, yes and so that's why the Commission wanted the quality assurance records because until it got the quality assurance records it couldn't answer that question. It could suspect, it did suspect, no argument about that, it suspected that there was something wrong here but it didn't, it didn't know, it

hadn't discovered there was until it could get these quality assurance records and then it could look at those records and say, "Yes –

ANDERSON J:

5 Would you equate discovering as being not suspecting but having reasonable grounds to believe?

MR GALBRAITH QC:

Yes I think that's true. Well it's enough grounds that you could issue your 10 proceedings if I could put it that way.

TIPPING J:

Well the English cases seem to suggest it's a somewhat lower threshold.

15 **MR GALBRAITH QC:**

They do, they do but I, and my respectful submission is, I think one's first got to look at section 14 and just see the wording of that, but if you have any authority which is going to, and a public authority which is going to issue proceedings, it shouldn't responsibly issue those proceedings unless it 20 believes that the allegations it's making are provable, are correct.

ANDERSON J:

The English authorities are not really the same as this type of proceeding.

25 **MR GALBRAITH QC:**

No they're not.

ANDERSON J:

They indicate a single event, a single bit of advice, that type of thing, not a 30 continuing conduct with perhaps consequences.

MR GALBRAITH QC:

Or the person, take the personal injuries, the different section which applies to personal injuries where the person has been hurt –

ANDERSON J:

Run over.

5 **MR GALBRAITH QC:**

Run over, thinks the boss did it to them deliberately or whatever else it might be and, you know, can issue the jolly proceedings and then see if they can find some eye witnesses, but –

10 **ANDERSON J:**

I think the English tests tend to reflect the way we approached matters back in the days of personal injury claims here.

BLANCHARD J:

15 Well I'm not so sure about this. Bear in mind, we're only talking here about the beginning of the three year period, no one's saying you actually have to be able to issue proceedings at that stage, you've got three years to do your investigations.

20 **MR GALBRAITH QC:**

Well that's true, that's obviously correct Your Honour, except the reason I mentioned the issuing proceedings, and that's sort of the way that the English in the case seemed to be talking about it, but normally for limitation, you are in a position at the time the limitation starts running against you that you can 25 issue proceedings and you have three years to actually issue your proceedings, not three years to investigate whether you can issue your proceedings or not. Otherwise, the reasonable discoverability part of it goes out the window, because you're meant to, under the section, either have discovered the loss or, what's the words, ought reasonably to have discovered 30 it, which allows for you to go in and have investigations but if you say that the time starts running from the time that you ought to begin investigations, then you've lost the period which you're meant to have about ought reasonably to have discovered.

BLANCHARD J:

Well it may be that there's a distinction in the English statute but they seem to really be proceeding on the basis that time starts running when you're put on enquiry.

5

MR GALBRAITH QC:

Yes, they do.

ELIAS CJ:

10 In those personal injuries cases though, at least you've got the fact of damage.

MR GALBRAITH QC:

Yes, you know you've been run over.

15

ELIAS CJ:

In fact, I think one of them was saying something like "Well you must have some clue that it was caused by the conduct of the doctor", or whatever.

20 **MR GALBRAITH QC:**

Well *Haward* is the same, because certainly in *Haward*, they knew they'd lost the money, the money had gone.

TIPPING J:

25 The problem with *Haward* is that there are different nuances in a number of the different phrases used by Their Lordships and it's very hard to pick a common thread.

MR GALBRAITH QC:

30 But there's quite a bit of emphasis in some of the judgments on the personal injuries cases, and then there's at least one of Their Law Lords which says I don't think these are, *Dobbie* for example, isn't an appropriate comparator. So, and you've got every Law Lord having a crack at it so it obviously wasn't

blindingly obvious was the test was but by the High Court it was – well, in any case.

TIPPING J:

5 Start asking questions.

ELIAS CJ:

Well I don't know, it’s a challenge to us.

10 **MR GALBRAITH QC:**

I’m sorry, I’m sorry, I wasn’t meaning to do that. In any event, I think Your Honours are aware of the – well I’m sure –

TIPPING J:

15 Well this is a pretty important level of the threshold isn’t it, because reasonable discoverability is a kind of a concession, isn’t it, to, in one sense, as against the old stricter law, so we don’t want to make it too, there’s got to be some degree of robustness in it, otherwise it’s going to extend things out very substantially. It is already said to be capable of doing that.

20

MR GALBRAITH QC:

Well I think my first answer is that, is really, if I can, with respect, adopt what His Honour Justice Blanchard said previously, that this needs rewriting and there should be a long stop in here, among other things, which I would

25 suggest needs rewriting.

TIPPING J:

Well that may well be so but we’ve got to treat it as we find it.

30 **BLANCHARD J:**

Well there’s no indication so far that statutes like this and the Building Act will be assimilated into the Limitation Bill. They’re left to stand or fall by themselves.

MR GALBRAITH QC:

Yes, but some perhaps gentle advice, might be worth someone having a look at it perhaps could help in the future.

5 **BLANCHARD J:**

No doubt you'll be making a submission.

MR GALBRAITH QC:

I think that would fall on totally deaf ears Sir.

10

ANDERSON J:

You could always write to the Law Commission.

MR GALBRAITH QC:

15 Yes, well perhaps the Law Commission. But that's the issue which – and it does include that consideration, which His Honour Justice Tipping has just referred to, where do you draw the line between their suspicion and discovering or having sufficient knowledge?

20 **TIPPING J:**

Thank you Mr Galbraith.

MR GALBRAITH QC:

I'll leave it at that.

25

ELIAS CJ:

Is that it?

TIPPING J:

30 That's it.

ELIAS CJ:

Well thank you counsel.

MR SIMPSON:

Sorry, there was just one matter, it's not a reply to reply, but just a factual matter. I think that Your Honours may have got the impression that Carter Holt's producing lots of different grades and every other day they're turning
5 the dial or changing the settings, that's not the case. MGP10 is all they produce through the stress grade, it's the only grade, so I think that's an important factor.

ELIAS CJ:

10 Well thank you very much for your submissions, we will take time to consider our decision. Thank you.

COURT ADJOURNS: 4.05 PM