IN THE SUPREME COURT OF NEW ZEALAND SC 93/2015

[2016] NZSC Trans 5

BETWEEN **CARTER HOLT HARVEY**

Appellant

AND **MINISTER OF EDUCATION**

First Respondent

SECRETARY FOR EDUCATION

Second Respondent

MINISTRY OF EDUCATION

Third Respondent

BOARD OF TRUSTEES OF OREWA PRIMARY SCHOOL

Fourth Respondent

Hearing:	13, 14, 15 April 2016
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	D J Goddard QC, I M Gault and J A Wilson for the Appellant J A Farmer QC, N F Flanagan, K C Chang and B J Thompson for the Respondents

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CIVIL APPEAL

MR GODDARD QC:

May it please the Court, I appear with my learned friends, Mr Gault and Mr Wilson for the appellants.

ELIAS CJ:

Thank you Mr Goddard, Mr Gault, Mr Wilson.

MR FARMER QC:

Yes, if Your Honours please, I appear with my learned friends Mr Flanagan, Ms Chang and Mr Thompson for the respondent.

ELIAS CJ:

Thank you Mr Farmer, Mr Flanagan, Ms Chang and Mr Thompson, thank you. yes Mr Goddard?

MR GODDARD QC:

Your Honour, thank you. Might I just check before beginning what the planned sitting hours are for this morning so I don't trespass on the morning adjournment.

ELIAS CJ:

Yes, it's a bit complicated. We've got the Procurator General of China visiting us for lunch which will mean that the front entrance has to be clear so we'd like to adjourn at 12.30 and resume again at 2.15 but because of that earlier lunchtime we'd like to take the morning adjournment at 11.

MR GODDARD QC:

At 11?

ELIAS CJ:

Yes.

MR GODDARD QC:

Thank you Your Honour, that's very helpful. The Court will shortly have my customary road map in an attempt to keep myself on the straight and narrow and avoid drifting back into questions of issue estoppel or wool scouring, which I'm otherwise likely to confuse this case with given the last few weeks and I will be referring mostly to the material that the Court has in hard copy, but there are a few

things that have been provided to the Court in electronic form by the parties, but not I think in hard copy. I'll pause to check when I go to them whether it would be helpful to have hard copy separate copies of those as well.

GLAZEBROOK J:
I'll just have to get my iPad brought down if you're going to do that because I'm not –

ELIAS CJ:
What are you going to be referring to that's electronic?

MR GODDARD QC:
It first happens when, for example, I go to the old sections 396 to 399 of the Building Act 2004, which didn't make it into the version of the casebook because it's the current version in which those have been repealed, and then there are one or two other authorities I'll reach later. *Hotchin v The New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, for example, the Court may still have committed to memory, but there are two isolated paragraphs in that, that I want to go to, and a few other things.

ELIAS CJ:
Isolated paragraphs are always a bad idea. However, I think it might be helpful for us to get the, if you haven't brought your iPads in, to get –

GLAZEBROOK J:
Yes, I'll get mine sent down.

ELIAS CJ:
Thank you. Perhaps if I could get my email to work. It seems to be excessively slow.

MR GODDARD QC:
I promise not to reach anything electronic for at least half an hour or so.

GLAZEBROOK J:
One certainly hopes that it will open itself in half an hour.

MR GODDARD QC:
It should be enough time for an email to open and get all the way from here to Your Honour's chambers and back. So let me begin by outlining the argument that

I'm going to through over the next day, maybe day and a bit depending on how timing goes. Paragraph 1.1 of my summary achieves the unusual distinction of, I think, the uncontroversial for an introductory paragraph. I'll take the Court through the claim in some detail here, I think that's important, but in short this is a claim to recover the costs of remedial work on school buildings, that I think is uncontroversial, and the reason that remedial work is required, according to the plaintiffs, according to the respondents, is that those buildings were defective when they were constructed. It's not because something went wrong with them later. It's because at the time they were finished they were defective. The respondents say that those defects have caused gradual damage and deterioration over time to the wider building, and I'll come back to that, but the starting point of the claim is that the buildings are not weathertight. That the cladding needs to be replaced. That for some of the buildings, but not all in respect of which a claim is made, there has been damage to other elements of the building, as a result of the defective cladding, as a result of the lack of weathertightness in the cladding, and that also, they say, needs to be remedied.

The buildings to which this claim relates were built using cladding sheets manufactured by Carter Holt, CHH. Carter Holt manufactures the Shadowclad product and supplies them both through its own merchant division to building contractors, either contractors or subcontractors who then use them to build schools, and also to other chains of building supply merchants who in turn supply them to builders. Carter Holt's terms of trade with merchants and its merchant divisions, terms of trade with the builders it supplies place limits on the responsibility that Carter Holt accepts for the performance of its product, for their quality and for their suitability for use for particular purposes. And of course, and this much I think is not controversial, the builders who purchase Shadowclad, whether direct from Carter Holt or from intermediaries, in turn enter into contracts to construct buildings for customers including the respondents in this case. Now we're not concerned here with the sort of issue that arose in *Econicorp* about whether it matters that there is a division of ownership and responsibility for building projects between the Minister and school boards. Content for the purposes of this to treat them as if they were one, one single principle. No point is taken about division of ownership versus contractual relationships. So that issue I think is really a bit of a red herring.

And what one would expect to see in those construction contracts, and the Court has seen quite a few construction contracts over time, and of course Your Honours have

come across them in many other cases, Your Honour Justice Glazebrook in *Rolls-Royce New Zealand Limited v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) for example, Justice Arnold in *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450, [2012] 1 NZLR 36, all of you in many other cases, those contracts typically make provision for the allocation of risk for the liabilities that are and are not accepted by the builder for dispute resolution mechanisms, standard construction contract templates in New Zealand provide for arbitration, and what that means when we put it all together, 1.4, is a chain of contracts between Carter Holt and one or more of the respondents in respect of each building constructed using Shadowclad to which the claim relates. And the terms of each contract in the chain govern the allocation of risk between the parties to that contract in relation to issues such as the weathertightness of the building, the quality of the product, its suitability for use for particular purposes.

The next point to make is that building, and at one level this is obvious but it's important, can be constructed in a number of different ways. It can be designed and built not using plywood cladding. Obviously you can use some other materials completely, or you can design it and build it with cladding sheets, and if you build it with cladding sheets they may be either directly fixed on a building frame without a cavity, and when we talk about directly fixed that's really shorthand for directly fixed without a cavity, and I'll do that just to avoid being annoying, at least on that dimension today, or they can be built with a cavity for ventilation behind the cladding. This proceeding relates solely to buildings constructed with directly fixed Shadowclad cladding and what the respondents say is that Carter Holt marketed Shadowclad, including through its specifications and technical literature, as suitable for use as exterior cladding and in particular as directly fixed cladding. That was one of the purposes for which this produce was supplied, and that there are risk characteristics and effects in Shadowclad cladding sheets, and/or the cladding systems, this idea of the sheets together with the specifications and for some of the period in question, associated flashings, which result in buildings on which Shadowclad is installed as directly fixed cladding routinely failing to comply with recognised building standards, a term that's defined and I'll go to that, the Building Code, and in particular the familiar provisions E2, weathertightness, and B2, Durability, that have featured in a number of the cases before this Court, and the Building Acts.

In relation to the buildings that are the subject of this proceeding, unlike other school buildings, which have been the subject of claims against builders, *Econicorp* one

example, just one of many, in relation to the buildings that are the subject of this claim, the respondents are not pursuing claims under the contracts they entered into with the designers or with the builders who constructed the buildings, rather they're seeking to –

ARNOLD J:
The claims that settled were not contract claims, they were other tort claims were they?

MR GODDARD QC:
They were identical claims brought against manufacturers of different cladding products – the ones that settled in this proceedings, Your Honour?

ARNOLD J:
Yes, yes.

MR GODDARD QC:
So that those were, for example, claims against James Hardie in relation to its cladding product which is not a plywood, a cladding product, a different type of cladding. But they mirrored the claims that are presented here. And – so those also weren't contractual claims.

What is sought is to cut across the contractual chain in a range of ways. First and, in my submission, most controversially, and it's the issue that the Court will be concerned with later, in tort, also under the Consumer Guarantees Act 1993, there's a Consumer Guarantees Act claim, and under the Fair Trading Act 1986, and it's absolutely uncontroversial that the Consumer Guarantees Act exists for the very purpose of enabling ultimate consumers of a produce to sue not only their immediate supplier but also manufacturers, where the conditions specified in that Act are met and subject to a balance of obligations and protections provided for in that Act. Similarly, the Fair Trading Act is not confined in any way by the doctrine of privacy. But against that backdrop, against the backdrop of contract and specific statutory regimes – I should –

WILLIAM YOUNG J:

So is the Fair Trading Act claim premised on the basis that the brochures available and the fact of marketing of Shadowclad implied or, either expressly or implicitly, represented that it was fit for purpose?

MR GODDARD QC:
That it was suitable for the purpose for which it was intended to be used –

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
– and that it met certain quality requirements, for example, treatment with chemicals to certain standards.

WILLIAM YOUNG J:
So it's a huge overlap with the claim in tort –

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
– and perhaps, you know, to my way of thinking it may be a claim in tort anyway…

MR GODDARD QC:
From a private international law perspective, for example, because yes, it's a tort type claim, a delict as our civilian friends, our Scottish friends would say. But it's, one of the critical questions for the Court is going to be, given the contractual relationship and given the –

WILLIAM YOUNG J:
Why are those contractual relationships so significant where you've got this parallel claim under the Fair Trading Act that really picks up most of the elements in the tort claim?

MR GODDARD QC:
Precisely because you start with the backdrop, obviously, of being able to bring contract claims up the chain. But I say that to the extent that there are gaps in the

remedial framework under New Zealand law those have been filled by the Fair Trading Act and by the Consumer Guarantees Act, and by the deemed statutory warranties under the Building Act 2004 in a way which means that, put bluntly, there is no policy problem for tort to address and, conversely, there are in fact policy concerns about tort law applying in a way which, by definition, must be different, or there's no point adding it in, and if it's different then it's inconsistent with the balanced set of rights and obligations developed by Parliament. So I say first there's no suggestion that there is actually anything wrong with that regime, the respondents aren't saying, "Look, there's this problem, there's this gap in the statutory framework which means that it's not good enough to have that plus contract," but also very importantly I say that if there is a problem with that regime the right place for that to be fixed is Parliament, and Parliament can modify that regime to balance appropriately the rights and remedies available to draw the sort of lines in relation to liability, for example, applying a regime to dwellings only rather than to all buildings, that it's consistently chosen to do in relation to deemed warranties in the Building Act for example.

GLAZEBROOK J:
So is your –

ELIAS CJ:
Well –

GLAZEBROOK J:
Sorry. Is your argument that in terms of any product liability claim tort is gone now and it's just Consumer Guarantees and Fair Trading, because that would seem to have to be the, what you're saying?

MR GODDARD QC:
In relation –

GLAZEBROOK J:
And I must admit I hadn't taken that from your submissions.

MR GODDARD QC:
No, no. That goes further than my submission goes. I'm not suggesting –

GLAZEBROOK J:

Well, where do you stop though –

MR GODDARD QC:

I stop –

GLAZEBROOK J:

– if you don't go that far?

MR GODDARD QC:

I stop in relation to defects in quality, defects in suitability for use of a particular kind. The distinction I –

GLAZEBROOK J:

But that's any product liability claim, isn't it? Toothpaste.

MR GODDARD QC:

And if the claim is to recover a new tube of toothpaste in substitution for the one you've paid for then, yes, I say that is the province of those statutory regimes and contract. One of the themes that I'm going to be coming back to from time to time is that it's not enough to talk about a duty of care in the abstract, which is what the plaintiffs here do at a numbers of points in their submission, that reminder found for example in *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL), picked up by the New Zealand Courts in *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA), that a duty of care must be a duty of care linked to a particular type of loss which you have a duty to take care to save the defendant harmless from, we can't talk about a duty of care in the abstract. So I don't –

GLAZEBROOK J:

So your particular, just, I don't –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– think I got that down and I may have interrupted you with toothpaste. So what is it, quality – so what is excluded?

MR GODDARD QC:

What is excluded is a claim for the loss entailed –

WILLIAM YOUNG J:

Because something sold isn't as good as they thought it to be.

MR GODDARD QC:

Yes, yes. That isn't as good as it ought to be, and, let me go – this is the second point I was trying to make, Your Honour – and that as a result it needs to be replaced. So it's a claim to recover the lost value of the product.

ELIAS CJ:

Would that no-go area, the development of the common law where there is a statute in the field, would that, would that have applied to ancient statutes like the Sale of Goods Act 1908?

MR GODDARD QC:

The Sale of Goods Act is part of the picture, and the law of tort has not been developed in a way which is inconsistent –

ELIAS CJ:

Since 1908 it – oh, but it has developed.

MR GODDARD QC:

Yes, but not in a way which cuts across. The law of tort still doesn't result in compensation being paid for the types of loss against which, for example, implied terms in the Sale of Goods Act protect. So it's critical, you've got to take it back to the loss. So in –

GLAZEBROOK J:

So you can't get economic loss from product liability because it should have been in the Consumer Guarantees Act and wasn't?

MR GODDARD QC:

And is, no, it is. It's the whole point is that it is, and it is, subject to appropriate safeguards, and what we don't need is the law of tort coming in and disturbing those safeguards. It's essentially the same point that was made by the New Zealand

Courts, for example, in relation to the law of defamation in *Bell-Booth Group Limited v Attorney-General* [1989] 3 NZLR 148 (CA), saying that negligence is too clumsy a tool in this area where we have a more refined regime. And this argument, I should say, in the new edition of S Todd, *The Law Of Torts in New Zealand,* which came out a couple of weeks ago, just to complicate the logistics of arguing this, after describing the decisions in the Courts below and really not expressing a view either way on the argument about whether there was an adverse impact on the coherence of the law so far as contract is concerned, it goes on to suggest if there is an adverse impact on the coherence of the law so far as the Consumer Guarantees Act is concerned, so Professor Todd questions whether there should be an extension of tort into this area, given the nature of the loss claimed, because there is a developed statutory regime which strikes a balance. And this is not an unfamiliar line of analysis, it was applied in relation to contract law in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA), applied in relation to tort in *Bell-Booth* –

WILLIAM YOUNG J:

You see, just to come back to a point. If *Caparo* was, arose in New Zealand, wouldn't you just go straight to the Fair Trading Act and not worry about all this duty stuff?

MR GODDARD QC:

Yes, unless you had a limitation problem.

WILLIAM YOUNG J:

Okay. Is there a particular limitation problem here that, in relation to the Fair Trading Act, that doesn't apply in relation to the claims in tort? I know it's a three-year limitation period, but presumably there's a discoverability issue is there?

MR GODDARD QC:

Yes. I think that's probably a question for my friend. Obviously the longstop applies to all causes of action, so that doesn't distinguish –

WILLIAM YOUNG J:

Yes. But you don't seem to think the longstop applies to the Fair Trading Act…

MR GODDARD QC:

No, it does, Your Honour, and that is part of this application.

WILLIAM YOUNG J:
Oh, is it?

MR GODDARD QC:
The Court of Appeal misunderstood that, it was very clear in the application, I thought it was clear in the argument but obviously not clear enough and I've tried to make the point in here as well. So all civil claims under statute or at common law are barred by the longstop, if it applies, and I don't think that's controversial that if it applies it bars the statutory claims as well. And then of course the ordinary plain vanilla limitation periods operate within that. So I say here that the, all the civil claims are barred in relation to cladding installed more than 10 years before the date on which the proceedings were commenced in I think April 2013 and, in addition, that there are barriers to the tort claims.

One of the issues that I think it's going to be helpful to come back to when we delve into duty of care is this question. So if there is a disagreement between the parties about how this claim is best understood, whether it's a claim effectively for reduced value of the buildings, the sort of claim that in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) was acknowledged to be a claim for economic loss incurred at the time the defect, the latent defect, was discovered, and Your Honour Justice Young explored the evolution of the law on that in some detail in Your Honour's decision, judgment in *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 (*Spencer on Byron*), for example, it's also very helpfully discussed by Todd in the latest edition of his text. But if it's not an economic loss claim with the loss being incurred on discovery of the latent defect, when does the claim that's pleaded arise? If it is a *Donoghue v Stevenson* [1932] AC 562 (HL) claim, which is what my friend argues, when is damage suffered so that a cause of action comes into existence and time starts to run, because in relation to a very significant number of the schools to which this claim relates there's no allegation of damage to anything other than the cladding. In some cases there is – and I'll go to some examples in the schedule – but for many there isn't. So does that mean there's no cause of action in relation to those, or did a cause of action accrue at the time the building was completed because at that time on the plaintiffs theory of the case a risk to health and safety came into existence? If that's right, then we are wasting our time talking about the longstop because everything will be barred under

the ordinary six-year limitation rule. So there needs to be a theory of the claim, and the respondents so far really haven't set one out that tells us just what the damage –

ELIAS CJ:

Well, why should that be, why should that theory of the claim though be developed in a strike-out application? Because it turns on the facts as are still to be found.

MR GODDARD QC:

The theory of liability, theory of the case, needs, in my submission, to be identifiable from a pleading. There's an obligation to plead the elements of a cause of action that requires one to know what one cause of action is and what the essential facts are that establish it. And, in my submission, there are essential elements of a cause of action known to New Zealand law which are missing from this pleading, and that is an issue.

ELIAS CJ:

Oh, I see, so you're grounding it entirely on the pleading?

MR GODDARD QC:

Absolutely.

ELIAS CJ:

Yes, thank you.

MR GODDARD QC:

So the respondents – so we say that on, well, on the basis of what's pleaded, A, the claims are time-barred, and that's normally assessed by reference to, you know, a pleading, where it's a pleading of claim of a particular kind –

GLAZEBROOK J:

Or you, you don't strike-out if you can amend a pleading so –

MR GODDARD QC:

No.

GLAZEBROOK J:

– does that, you'd have to say it's unamendable to get to any, to get to any cause of action.

MR GODDARD QC:

The –

GLAZEBROOK J:

It's not really the cause of action because the cause of action has clearly set out what the cause of action is, but, so you're saying the facts necessary to –

MR GODDARD QC:

To establish it.

GLAZEBROOK J:

– ground that cause of action –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– are not there.

MR GODDARD QC:

Say for example –

GLAZEBROOK J:

So you wouldn't be amending to – amending to add facts is not changing the cause of action?

MR GODDARD QC:

No, but it might be to plead an essential element if it was currently absent and that's often the basis on which a claim is struck out. It's often possible to have a heading which identifies a course of action known to law but then when one looks at the facts pleaded they're simply incapable of establishing that cause of action and that's what the appellant says is the position here.

We see this, for example, in relation to issues like whether it was impossible for the respondents to contract with a head contractor or to seek warranties from manufacturers in respect of this sort of risk. I'll come to some of the articles by Professor Jane Stapleton who's helpfully explored –

GLAZEBROOK J:
But either that's important or it's not.

MR GODDARD QC:
Yes and so I'm going to argue as a matter of law that it's important and that because it's important it needs to be pleaded, and that would be an important conclusion for this Court to reach because it is not – in relation to two sample contracts, for example, which can be made available to the Court, I'll come back to that later – it's quite clear that it was possible to seek such protections and that they were, in fact, sought. But more generally if an inability to seek such protections because of market structure or some other factor is relied on as an essential element of the claim, and we say it would need to be something of that kind for liability to be imposed that cuts across the contractual chain, the special reasons referred to by the Court of Appeal in *South Pacific* that need to exist in order to do so, then that needs to be pleaded and it isn't, and that a finding that the claim would need to be amended to allege that in order to be a claim recognised by law would have enormous practical significance for this and other cases.

So looping back to my introduction, as I say at 1.7, the initial application to strike-out related to the tort claims, the claims of negligence, negligent misstatement and negligent failure to warn, the Consumer Guarantees Act claims and all claims in relation to buildings that were constructed more than 10 years before the proceedings and all claims including the Fair Trading Act, Your Honour.

The High Court declined to strike all of those out, although finding that one of the Consumer Guarantees Act claims couldn't succeed. Carter Holt appealed that decision. The Court of Appeal struck out the tort claim based on negligent misstatement but dismissed the balance of the appeal. This Court has granted leave on two issues to Carter Holt and there's a cross-appeal in relation to the statements. So the three issues before the Court are the application of the long-stop limitation provision, Carter Holt's appeal from the decision declining to strike-out the negligence claim, and the respondent's cross-appeal from the decision of the Court

of Appeal striking-out the negligent misstatement claim. One of the themes I'll be developing when I come to tort is that there's a real difficulty in reconciling where the Court of Appeal landed, in my respectful submission, on the negligence and negligent misstatement causes of action and especially on negligent misstatement and negligent failure to warn, given that the warning in question would have to be a warning before the cladding was installed. It's not suggested that a warning after it had been installed would have helped avoid any relevant loss, so both are about the information provided before a decision was made to purchase and install the cladding.

Now, I deal first in these submissions with the long-stop issue. I do that for a number of reasons. The first is that it's really a straight question of statutory interpretation. The second is that it was effectively finally decided against Carter Holt in the Court below. There's no way that that could be rerun at trial on the approach to the interpretation of the provisions taken. So this is effectively a final decision as between these parties on the interpretation of the long-stop and whether it can ever apply to a product manufacturer. The Courts below said it couldn't and because that's a final decision and therefore the answer "well, run it with facts at trial" isn't available it's very important that it be determined by this Court.

The other reason is a very pragmatic one. It's possible to talk more or less infinitely, although I promise not to, about duties of care and tort. There's a bewildering array of authorities that can be cited for almost any proposition one might imagine, and what has happened in the High Court and the Court of Appeal is that counsel and, to some extent I think the Court, have been seduced by the inherent complexity and interest of that subject, and the limitation issue's got squeezed a bit at the end of the argument. What I want to do here is, because of its practical importance to the case and because this is the last run at it –

ELIAS CJ:
Well, the longstop argument clearly had to get leave to come to this Court –

MR GODDARD QC:
Yes.

ELIAS CJ:

– it's important and, as you say, it's a final determination.

MR GODDARD QC:

Yes.

ELIAS CJ:

Might be debatable, whether leave should have been given on the interesting points.

MR GODDARD QC:

And that was how my application for leave was presented, with the longstop emphasised, and that's why I put it at the forefront and –

O'REGAN J:

How much of the claim does it, would a successful appeal on the longstop result?

MR GODDARD QC:

The, it would remove about 600 of the 890-something buildings, so it's around two-thirds, Your Honour, in terms of number of buildings. It's large, I've got the exact numbers in here somewhere but I just –

O'REGAN J:

No, that's all right, that's fine.

MR GODDARD QC:

– can't see them. It's about two-thirds. So again, very significant in terms of the scope of any future hearing of this matter, and obviously practically important at a range of levels in relation to the future of the proceedings.

So again, just outlining the argument on the longstop issue. The longstop limitation provision – and I'm going to focus on the 2004 Act, although as I'll not later some claims will have actually been barred under the '91 Act, because the claim goes right back to buildings built in 1991, and so they would have been time-barred under the '91 Act before the 2004 Act came into force. But both limitation provisions, they're very similar, apply to civil proceedings relating to building work, that's the scope of application referred to in, for example, section 393 of the 2004 Act, and what it then does is bar claims brought more than 10 years after the act or omission upon which

the claim is based. And what, in my submission, the Courts have said on a number of occasions here is that these are two separate questions. Your Honour Justice Glazebrook at first instance in *Klinac* – I'm not sure whether it's *Klinac* or *Klinac* – *Klinac v Lehmann* (2002) 4 NZConvC 193,547, and the Court of Appeal and this Court declining leave in *Gedye v South* [2010] 3 NZLR 271 (CA and SC), have approached this as a two-stage question: first, is it a civil proceeding relating to building work, and that doesn't depend on whether the defendant carried out building work, and, second, what is the act or omission on which the claim is based. The argument is, first, that as a matter of ordinary language this is a civil proceeding relating to building work. The essence of the respondents' claim is that the buildings, as constructed, were defective at the time construction finished, that is, a complaint that the building work was defective, that it did not comply, and this is expressly pleaded, with obligations in the Building Act, which apply only to building work –

ARNOLD J:

Not building products?

MR GODDARD QC:

No. The only Building Act obligations relate to building work, and the only operation of the Building Code is as an obligation that must be complied with when performing building work. The respondents seek to distinguish between building work and elements, for example, but although the Code is expressed in terms of characteristics of both buildings and building elements – because it's performance based, it's about where you need to end up when you do building work. The operation provisions that bring it into play all relate to building work, there's no obligation to comply with the Code except when performing building work, that's what it's about, and that includes obviously both labour and materials, we think of that in terms of the familiar two components of a construction contract. What goes into building a building? Labour and materials. And those together are the building work that must comply with the Code by achieving the performance standards for the building and its elements set out in that Code.

ELIAS CJ:

How integral is it to the respondents' pleadings, the non-compliance with the Building Code?

MR GODDARD QC:

It's an essential element of it, in my submission, because –

ELIAS CJ:

Just give me the paragraph reference to the –

MR GODDARD QC:

I'm going to go through the pleading –

ELIAS CJ:

Oh, you'll take this to the pleading, all right. Yes, thank you.

MR GODDARD QC:

– in gruesome details, Your Honour.

ELIAS CJ:

Yes, all right.

MR GODDARD QC:

And I can promise Your Honour more of the pleading than Your Honour could probably ever hope for. But one way of thinking about it is that the plaintiffs have no interest in this cladding except insofar as it contributes to the performance of the end product, the building. If the building was weathertight and durable, if it complied with clauses E2 and B2 of the Code at the time it was finished, there would be no claim, because none of the loss claimed would arise. It's only if the respondents can show at a trial that the buildings, at the time they were constructed, were not weathertight and were not durable, that they have a loss that's recoverable, because they own the buildings, not the stacks of –

ARNOLD J:

So does that apply to a car? I mean, say a, somebody builds a, a manufacturer builds a car and a component supplier supplies the brake cylinders and hydraulic system for the brakes, and that is defective, the brake cylinder, that's all.

MR GODDARD QC:

Yes.

ARNOLD J:

Now installing it in the car makes the car defective –

MR GODDARD QC:

Yes.

ARNOLD J:

– and the only interest in the consumer is having a car that works properly, I guess. But the reality is it's defective because a particular component, a particular produce, was not fit for purpose.

MR GODDARD QC:

Yes, and so then one has to ask – and to come up with a parallel to this claim, what would then happen is that the defect in the brakes is identified, before there's been any accident, and a claim is brought to recover the cost of taking the defective brakes out and putting new brakes in. Now, obviously the owner would have a claim against their immediate supplier in contract, and under the Consumer Guarantees Act the owner would have a claim against the manufacturer under the Consumer Guarantees Act. If there had been an accident and we lived in a personal injury jurisdiction and someone had been hurt, they could sue and it wouldn't matter whether it was the owner or someone who has no contractual link, you know, it could be a pedestrian that could be mown down on our, well, walking into work in the morning, and if the car damages some other property because the brakes fail, then you'd be pretty well down the track if you owned that other property if –

WILLIAM YOUNG J:

It's exactly the same as personal injury, isn't it?

MR GODDARD QC:

Yes, it really is. But if we know that the brakes are defective, and what we're seeking to recover is the cost of taking those out, putting new in, the materials and the labour involved in that, or if it's not feasible to do that, you know, replacing the car completely, there's no authority that I'm aware of, none identified by the respondents for that loss being the subject of a duty of care and then recovered in a tort claim. So my friend used exactly that example in the CA, he said, "What about the defective brakes? Mr Goddard is failing to deal with the liability of the maker of the defective brakes." And that just takes me back to my point about duties don't exist

independent of the loss from which the duty to save the person harmless, *Boyd Knight* at paragraph 53, I've read it so many times I know, sadly, by heart where it is, citing a couple of very clear passages to that effect in *Caparo*. So we've got to focus on the loss, and Your Honour will see that in the pleading when, as threatened, we go to it, and it's, when one looks at that –

WILLIAM YOUNG J:

But isn't there a sort of technical expression for this parasitic loss, which I vaguely remember from the 1970s, that you put something bad in a bigger, in another product, and it causes deterioration to that product?

MR GODDARD QC:

Yes. And Your Honour dealt with that in the *NZ Food Group (1992) Ltd v Amcor Trading (NZ) Ltd* (1999) 9 TCLR 184 (HC) case –

WILLIAM YOUNG J:

Right.

MR GODDARD QC:

– the defective Supersocolate –

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

– that got mixed into chocolate products, and I'll go to that later, it's in our supplementary authorities, Todd spends some time on it because it's such a –

WILLIAM YOUNG J:

So Todd doesn't go much on it?

MR GODDARD QC:

No, Todd I think agrees with Your Honour that it's artificial to treat the end product as having been damaged by mixing a defective ingredient into it, and that's –

WILLIAM YOUNG J:

He didn't say he didn't go much on the Fair Trading Act approach?

MR GODDARD QC:

No, that was I think seen by Professor Todd as innovative in certain respects.

ELIAS CJ:

But he's very purist. You will have to take us to other authors if you are going to…

MR GODDARD QC:

Of course –

GLAZEBROOK J:

And I thought there also were cases relating to health issues, as being an exception for the, you don't get to replace the produce issues if there's an issue of damage to health. I just – because I know in *Rolls-Royce* we excluded those because there wasn't an issue of health.

MR GODDARD QC:

I mean –

GLAZEBROOK J:

Rolls-Royce or some other case, it may not be *Rolls-Royce.*

MR GODDARD QC:

No, I think Your Honour is thinking of *Rolls-Royce.*

GLAZEBROOK J:

Because there is that exception that says you don't just look at the product itself, but there was an exception to that exception in terms of health. Because, I mean, frankly to me this is just a fairly standard product liability claim.

MR GODDARD QC:

And in my submission it isn't, because of the nature of loss concerned and, even if it is, if it's a standard product liability claim, still we are now in a position in New Zealand where the meets and bounds of product liability –

GLAZEBROOK J:

No, I understand that argument but…

MR GODDARD QC:

Yes, so, yes. So –

ELIAS CJ:

But the loss is simply because it's economic loss, your submission?

MR GODDARD QC:

It's, it is because it's economic loss, but that of course is not decisive in New Zealand, it's "a" factor that goes into the mix, no more. And so the focus – and it's interesting how even when I try to do limitation we keep getting looped back into the interesting tort issues – but the question I think is best asked in terms of whether it's a loss that one would reasonably expect the parties to allocate by contract. So I think economic loss is a factor, but it's a little bit crude, it's not decisive, that's, the Courts have said that any number of times, and of course it's right.

ELIAS CJ:

Well…

MR GODDARD QC:

But then when you say, is this the type of loss that the parties could reasonably expect to allocate by contract and has the legislature intervened to deal with market failures where they could have but have failed to by imposing regimes, and they have here, in respect of defective buildings specifically, as we'll see, and more generally under the Consumer Guarantees Act, is there a place for tort, and in my submission, and it's a two-part submission, A, there is no problem, there is no policy concern for tort to solve, B, imposing tort liability itself gives rise to policy concerns and is not something that the Courts are well placed to do. So it's not just, because I had this discussion with Your Honour before, again, a crude argument that tort is about gap filling, it's –

ELIAS CJ:

Well, I am a little, you know, it does seem a bit groundhog-dayish to keep, given some of the decisions that have been made in this Court, to keep reverting to earlier decisions, particularly in the context of the strike-out application.

MR GODDARD QC:

The, as I'm sure my learned friend will confirm in the course of his oral submissions, the respondents have been insistent below that this is not a claim founded on *Hamlin,* on *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 (*Sunset Terraces*), on *Spencer on Byron* on that reasoning, so it's –

ELIAS CJ:

No, no, they say it's a product liability case.

MR GODDARD QC:

– yes, a case. And that means we need to look at the scope of liability for products, what is established, what is not, and again it's also accepted that it's a novel claim, one for –

ELIAS CJ:

You mean this case novelly raises a *Hamlin* moment for product liability?

MR GODDARD QC:

At a general level I'm content to accept that, while wanting probably to reflect over morning tea about what a *Hamlin* moment is…

GLAZEBROOK J:

Well, especially given *Donoghue v Stevenson*, aren't you suggesting that *Donoghue v Stevenson* is wrong?

MR GODDARD QC:

No.

GLAZEBROOK J:

Because no doubt there could have been contracts in any number of – leaving aside your Consumer Guarantees argument if we can for the moment.

MR GODDARD QC:

Yes. So this comes back to the question that His Honour Justice Arnold asked me. In *Donoghue,* if the drink had been poured into a glass and the snail spotted before anything had been ingested, and if the friend of Ms Donoghue who purchased it had

wished to recover the cost of a replacement bottle of ginger beer, then there is absolutely no suggestion in *Donoghue* that that could have been done in tort, indeed I think there are some explanations about why that, how important it was that that wasn't the nature of the claim. So I'm not at all suggesting *Donoghue* is wrong, the point I'm making is that if anyone was personally injured by consuming the snail, *Donoghue* bites, but that if before anyone's been injured at all you identify the defect, and what you're claiming for is a replacement product, then it has never been held that you can sue in tort across the contractual chain to recover the cost of the replacement product. And that's a significant further leap which the respondents are asking the Court to take, it's novel, and it's not –

GLAZEBROOK J:

Not in relation to the buildings that, the extra bits of the buildings that have been damaged though, is it?

MR GODDARD QC:

That depends on buying into the complex structure theory which Your Honour was, in my submission, rightly critical of in *Rolls-Royce*, and I will come back to that later.

GLAZEBROOK J:

All right. I mean, I have to say that I have always seen this Court as effectively having overruled *Rolls-Royce* even if it said it didn't, except in the very narrow sense of the very interesting and complex and specific choices that were made between the actual parties to the contractual arrangements not to enter into contractual arrangements with one another. Now I'm not saying that I would necessarily have come to the same decision as this Court, but this Court has come to that decision and that's it.

MR GODDARD QC:

I'm not sure is has, Your Honour, and –

GLAZEBROOK J:

Well, it certainly has come to a decision in *Spencer on Byron* that gets rid of what was one of the planks of the *Rolls-Royce* –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– in terms of sophisticated commercial parties looking after themselves –

MR GODDARD QC:

It does.

GLAZEBROOK J:

– and I would say that has gone, that distinction between commercial and residential has gone.

MR GODDARD QC:

It's gone in the building context where people are carrying out work to which the Building Act applies, and that was emphasised –

GLAZEBROOK J:

Well, it wouldn't have been my pick or reader of *Spencer on Byron* but –

MR GODDARD QC:

Well, I will come back to that. Because one of the things that was emphasised by I think almost all the members of this Court, or at least the majority, in *Spencer on Byron*, was that that objection to imposing liability that cut across the contractual chain and the difficulty of specifying a content for a duty of care, where you've got contracts imposing different quality standards, was removed in the context of performance of functions under the Building Act because that Act set a minimum standard of performance that had to be met by persons performing building work and by the local authorities responsible for supervising it. So the Court said we don't need to worry about specifying the standard of care because the statute does it and tort is not asking any more of these people than the Act already requires of them, and Your Honour Justice Arnold made the same point in *Econicorp* in fact, as well as this Court having said it very firmly in *Spencer on Byron*. But that's not available here, my friend accepts that. Building Act does not apply to what Carter Hold was doing, it had no duties under that statute. It was free to contract for whatever level of responsibility for the product it could reach agreement on with the people with whom it was dealing, it wasn't a minimum standard.

ELIAS CJ:

Well, I just really wonder how realistic that is. Perhaps I should wait until you get to the pleadings. Because one would have thought an exterior cladding, it was essential that it be weathertight. And whether that is reached via the Code and the standards it imposes or just is self-evident, seems to me a bit odd.

MR GODDARD QC:

We have been thoroughly seduced by the duty of care issue. The, what needs to be weathertight is the building as clad, and that's what Carter Holt supplies as an –

ELIAS CJ:

Well, that's under the Building Act.

MR GODDARD QC:

Yes.

ELIAS CJ:

But if we're looking at a product which is to be used in construction –

MR GODDARD QC:

But it's meaningless to describe the product as weathertight or not. A piece of cladding standing by itself in a field is not weathertight. It can only be weathertight when, according to a particular design, it has been attached to a building in a particular way with other components. So you don't –

ARNOLD J:

But if it's never capable of being weathertight because of an inherent defect, doesn't that change things? I mean, I take your point that it's not, you know, is it standing alone in a field? Well, no, but the point is, is it capable of being weathertight, and the allegation is that it's not.

MR GODDARD QC:

When used in a particular way to construct a building.

ARNOLD J:

Well, as I understand it, I mean, this case concerns directly attached ones, but as I understand it the same allegation would be made even if there were a cavity.

MR GODDARD QC:

Well…

ARNOLD J:

So it's basically being said, "This product doesn't work."

MR GODDARD QC:

Well, what the claim says, it doesn't work when it's used in this way, and where, for example – because the process is being undertaken in the moment of inspecting the 893-odd schools, and where on inspection it transpires that in fact the cladding has been constructed with a cavity the consistent approach of the respondent has been to take that building out of the claim. So it's quite clear, Your Honour, that this claim has been pleaded explicitly by reference to performance when directly fixed and that the allegation is not being made in this proceeding that it can't work at all, and that may matter. Again, if the allegation was this can never work used in any way, then that would obviously be a much more significant factual hurdle to overcome at trial if that was what was needed in order to have a defective product claim rather than, "No, you can use it in this way but not that." And again I come back to the fact that, you know, that –

ARNOLD J:

Well, can I just understand that? Are you accepting then that if the claim was that there is no way of using this form of cladding because it inherently is not weathertight? Do you accept that that would change the position that you'd be advancing?

MR GODDARD QC:

Not on either of the issues that's before this Court which is, first, does the longstop apply?

ARNOLD J:

Right.

MR GODDARD QC:

Which I do need to get back to at some stage.

ARNOLD J:

Yes, yes.

MR GODDARD QC:

And, second, on the question of whether you can recover the cost of replacing it in tort, as opposed to in contract or under the statutory regime. But obviously if it's unsuitable not just for use as cladding directly fixed but more generally, again the Consumer Guarantees Act bites subject to the limits and restrictions in that Act, and the question is what would tort be doing as well.

ELIAS CJ:

But it's also a dangerous product in those circumstances, because that's its purpose.

MR GODDARD QC:

Obviously the – well, the factual dispute between the parties is whether it is –

ELIAS CJ:

Yes.

MR GODDARD QC:

– defective in that way. Carter Holt says – and I mean it's important to be clear on this – Carter Holt says that it is a product that's been used on tens of thousands of buildings in New Zealand very successfully and that where it is fixed in accordance with the specifications, where the work is done properly, and it's incorporated into a properly designed and properly constructed building, it can perform and has performed well. So the whole dispute between the parties is indeed about the cause of the defects in the ultimate buildings, and that's –

GLAZEBROOK J:

But that's a trial issue so…

MR GODDARD QC:

It is a trial issue, but when we come to the longstop it's important I think to understand that –

GLAZEBROOK J:

No, no, I understand the argument.

MR GODDARD QC:

– because the ultimate, the loss that is complained of is that the buildings, the respondents say, need to be fixed, because as constructed they were defective, they weren't weathertight. The parties disagree about why. The respondents say it's because the cladding is defective, they say there may have been other failures as well but the cladding's defective, and Carter Holt says, no, the reason that some buildings have, in your list have weathertightness problems and others don't, is that it all depends on design and construction, if you use it properly it's fine, and that's important when we come back to – and I've got one minute before the morning adjournment – the longstop issue, which is is this a civil proceeding relating to building work? Because at the heart of this claim is the question of whether the buildings as constructed were weathertight?

ELIAS CJ:

But if you say that that's a matter of fact for trial, whether your contention that it's capable of performing if properly fixed is the answer, doesn't that mean that the question whether it's relating to building work is also inextricably tied up with the facts to be found.

MR GODDARD QC:

No Your Honour because building work embraces both the materials used and the labour so building work is labour and materials, and we'll see that very clearly in the legislation. So there's no doubt that what the respondents say that the building, and they plead this, that the building work did not comply with the Code. It failed to comply with section 17 of the 2004 Act, the requirement that applies to building work, not to anything else, just to building work, and via section 17 B2 and E2 and they say the reason that the building work did not comply was because of defects in the product. We say, no, actually it's, building work didn't comply for different reasons, but either way it's a claim relating to building work and the question is attribution of responsibility for the failure of the building work to meet the statutory standard, and that means it's a claim relating to building work. So that's the argument in a limitation context.

ELIAS CJ:

Yes.

ARNOLD J:

It seems sort of slightly counterintuitive to me just at the moment because as I understand it you say the Building Act doesn't apply to building products, except in the sense that you talked about earlier in terms of performance standards.

MR GODDARD QC:

It doesn't apply to the people who manufacture them. It applies to products –

ARNOLD J:

Oh, yes –

MR GODDARD QC:

But it doesn't apply to the process of manufacture any more, yes, than it applies for example to manufacturing kitset buildings, and I'll come back to that but –

ARNOLD J:

Yes, but then you go on to say as soon as the component is incorporated in a building, it falls within the notion of building work for the purpose of the limitation.

MR GODDARD QC:

Well that depends on the claim. It's the whole point, is that you've got to look at the claim and ask whether the claim, and I think it'll be clearer when I go to the pleading, is a –

ARNOLD J:

Aren't all the claims, I mean what the failure of a component will mean that the building is in some way defective –

MR GODDARD QC:

If.

ARNOLD J:

– whether it be the windows or the cladding or the nails, whatever. So won't you always end up in this situation?

MR GODDARD QC:

If the complaint is that a component used in the initial construction of the building is defective, resulting in the building being defective, then yes you do, and that is –

GLAZEBROOK J:

Well why just initial construction sorry?

MR GODDARD QC:

I'm trying to carve out the question of inflicting damage on it subsequently. I'm not suggesting that you can't have building work which happens, you know, when you extend it or modify it and that you don't have to apply that again, but I was just trying to park, for the time being, the question of a person who does some work on a later occasion and damages an existing building, which they're not otherwise, you know, constructing, which does raise separate issues. But again I think this will become clearer when I look at the pleading when I go through some examples of the line that this would draw, which is, in my submission, an artificial line, and a line that would produce some very unfair consequences. For example my friend's line means, just to pick just one of the examples, that if an architect designs a particular house, and is careless in doing so, they can invoke the longstop limitation provision. But if I design a generic environmentally friendly house, and just make those plans available, either for a small fee to anyone who wants to buy them later on, or on the Internet free, and if I've made exactly the same mistake, then they say because you're not performing building works, you're not working on a particular building, you can't invoke the longstop. With respect, that's nuts. It can't be the case that if you do exactly the same thing, make exactly the same mistake, the application of a longstop depends on whether you did it for one particular project or just generically, and yet the generic designer is in the same position as the generic manufacturer of kitset homes, the generic manufacturer of an input into the kitset home. I'll come back to that. I'm conscious I've gone five minutes over Your Honours.

ELIAS CJ:

We'll take the adjournment now for 15 minutes, thank you.

COURT ADJOURNS: 11.05 AM

COURT RESUMES: 11.23 AM

MR GODDARD QC:

I think I've more than covered everything in my introductory section and indeed gone some way down the track on some issues. So in terms of my road map what I'm going to do now is turn to item 2, the claim, rather than saying I'm about to take the Court to it, let me actually do that. The fourth amended statement of claim is in volume 1 of the case on appeal under tab 8.

ARNOLD J:

Sorry, give me the reference again?

MR GODDARD QC:

Sorry Your Honour, volume 1, tab 8 of the case on appeal.

ELIAS CJ:

Yes. We've all been looking at them, I think, electronically because there's just been so much to cart around, it might be more sensible just to –

MR GODDARD QC:

It's item 8 in the electronic authorities. It's consistent with the draft protocol, the tab numbers in the hard copy volumes correspond with the item numbers in the electronic, and, yes, I think one of my, the key lessons I've learned from having both available, hard copy and electronic, is that one needs, I think, to commit to one or other and then have all one's mark ups on one or other. I got myself terrible confused a couple of times by spreading them across both versions.

ELIAS CJ:

Yes, I think I might do it that way, thank you.

MR GODDARD QC:

And on this one I've decided to do the dinosaur thing and work mostly from hard copy but, so here I am with a physical volume open in front of me. Fourth amended statement of claim. The plaintiffs described in paragraphs 1 through 6, the fourth plaintiff, Orewa Primary School, I'll come back to because we now have been provided after the Court of Appeal hearing with the head contract for that school and, as pleaded at paragraph 6, that's the representative plaintiff, so I thought it might be helpful to the Court to have some extracts from that, especially as the respondents refer at a number of points in their submissions to the fact that the Court doesn't have

the benefit of having that contract before it, unlike in cases like *Rolls-Royce,* and I'll come back to that.

And then we have pleadings of various defendants, but it's only paragraph 10, the Carter Holt, initially the third defendant, that's still relevant, the others having settled. Perhaps just noting that there were, the others included both manufacturers of building products and also importers of building products. One of the point made in *Rolls-Royce,* which I think remains good law, Your Honour, is that in commercial matters there is much to be said for New Zealand law being consistent with the law of other similar jurisdictions in the absence of a good reason for it to be different, and that must apply all the more strongly where the products are traded across borders. So one could have a product made, for example, in Australia and brought into New Zealand. I'll come back to that.

And then there's some background pleadings in paragraph 15 and following, explaining how the boards of trustees work in commissioning work on schools as agents for effectively the Crown. 19 is worth noting: "All building works, including construction and subsequent renovations on the school buildings," so it's about the building works on the school building, unsurprisingly, were commissioned as follows by the second and third plaintiffs on behalf of the first plaintiff, that's the Minister, engaging design, building and other professionals to undertake the relevant building work and/or by the boards of trustees engaging building work professionals to undertake the relevant building works. And then we have a pleading about how the building work on the school buildings to which the claim relates was commissioned by the plaintiffs. And then a survey has been done of weathertightness issues, that's in described in paragraph 20 through 27, and the conclusion asserted is that as a result of the two surveys, one in Auckland and one nationally, the plaintiffs have identified, "Systemic defects in and/or characteristics of the cladding sheets and cladding systems installed on the school buildings," in the course of performing the building work pleaded back in paragraph 19. And then there's a pleading about cladding sheets and cladding systems on school buildings, the allegation at 29 that Carter Holt designed, manufactured promoted and supplied the cladding sheets and cladding systems specified in schedule 1. 30, "A cladding system is made up of cladding sheets designed to be installed with appropriate accessories and jointed with appropriate sheet jointing systems, and in some systems finished in appropriate paint or texture coatings together with specifications or technical literature describing the features of the cladding system and the installation process specifications.

Again, at the risk of stating the obvious, this is the point that I touched on in answer to a question from His Honour Justice Arnold earlier. The sheets are not a stand-alone product, it's not like a car that you then take out and use as a car, it's something which is consumed in the process of manufacturing the building. You cut it, you affix it, you paint it, you do stuff to it in accordance with the design pursuant to the specification with other components to produce a building, which either is or is not weathertight. It's meaningless to talk about a cladding sheet as weathertight. 31, "Carter Holt –

GLAZEBROOK J:
Were you referring to a particular paragraph when you were making that submission? I'm sorry, I just think I'm –

O'REGAN J:
30.

GLAZEBROOK J:
30, was it?

MR GODDARD QC:
30.

GLAZEBROOK J:
Thank you. I missed the paragraph number.

MR GODDARD QC:
Sorry, Your Honour. And 31 immediately after that, the pleading that Carter Holt supplied either directly or indirectly the cladding sheets and cladding systems to the plaintiffs, and it's been clarified through the defence in reply that there are no allegations at present of direct supply while the plaintiffs have reserved the right to plead them if there are any. But all the cases that have been identified to date are indirect supply basis.

The allegation at 32 that Carter Holt advertised and promoted its cladding sheets and cladding systems in the New Zealand market by providing descriptions or representations about them in the specifications, which is what tells you how to use them in building work by marketing directly to consumers, architects and building

contractors, by publishing and supplying brochures and other promotional materials and by publishing and supplying advertisement, together with promotional activities. And then the purpose for which they are, were marketed and supplied, is pleaded at 33, said they were for use on school buildings. And again, there's a lot of reference to "use", and of course what that means every time it occurs here is, "use in performing building work", it can't mean anything else, and I don't think that should be controversial, they're not used for any other purpose. So, "For use in performing building work on B," what we're interested in here is school buildings, among other things, light buildings, "school buildings, light buildings," 34, 35, "Cladding sheets and cladding systems were purchased and installed on the school buildings set out in schedule 4," and I'll go to schedule 4 later.

But of course when we talk about "installing" them on the school buildings that's building work. So the allegation is that they were purchased and building work was performed, which involved installing these sheets on school buildings. 36, "At all material times Carter Holt knew or, as the designer, manufacturer and/or supplier of the cladding sheets and the systems ought to have known that the cladding sheets and cladding systems respectively were purchased to be used on the school buildings," and again "used" means, "used in carrying out building work on the school buildings. It's very important whenever we see "used" to bear in mind that packed into that is "used in carrying out building work". 37, "Cladding sheets and cladding systems are a plywood cladding system which includes the sheets," which are described in A and B, "together with a combination of flashings and rebated shiplaps at the sheet joints which are intended to be fixed in accordance with the relevant specifications over building paper or building wrap onto the framing of the building." So again, what is it? It's something which you use in performing building work in particular ways.

Defects in the cladding sheets and cladding systems. It's an allegation that the cladding sheets contain defects in schedule 2, and I'll come back to the schedules actually, let's get the run of the claim first. And 39, "Carter Holt's cladding sheets and cladding systems, when directly fixed on a building frame without a cavity of a light building, contain and contained each of the inherent defects set out in schedule 2, including the cladding sheets defects, cladding systems defects." So first of all there's an allegation about the sheets in 38, and then an allegation about the sheets and systems, and that's made by reference to their use when directly fixed on a

building frame, when used not only in carrying out building work, which applies to all of this, but when used in carrying out building work in a particular way.

"As a result of the cladding sheet defects and cladding system defects, Carter Holt Harvey's cladding sheets and cladding systems respectively when directly fixed on a building frame without a cavity of a light building do not routinely achieve compliance with." So what we have now in 40 is an allegation about how the sheets and systems perform when used in building work by directly fixing them to a building frame. What don't they comply with? They don't comply with, A, recognised building standards, including those listed in schedule 6, and I'll come back to that later, (b), the functional and performance requirements of schedule 1 of the building regs, in particular B2, Durability, and E2, External Moisture – and just pausing there to speak of them – complying with those is to speak of building work complying, because that's what B2 and E2 apply to, and then explicitly in C the Building Act 1991 or the Building Act 2004, and the particulars are then provided, the Code provisions E2 and B2. Which provisions of the Building Acts have not been complied with? Section 7(1) it's alleged, of the '91 Act, and sections 16 and 17 of the Building Act 2004, and when we go to those what we'll see is that those are statutory requirements in relation to building work. So the complaint is that there's non-compliance with statutory obligations that apply to building work. And then 3, "When directly fixed on a –

ELIAS CJ:
But using those as a measure of the deficiency in the product…

MR GODDARD QC:
Well, the pleading goes beyond that, and it says that when you use the product to perform building work then the outcome is a breach of an obligation that applies to building work.

ELIAS CJ:
Yes, but that can be a standard that is after all the minimum standard –

MR GODDARD QC:
For building work.

ELIAS CJ:

Well, yes, but it's also, it may be treated as a description of a deficiency in the product, if it's not capable of meeting that standard.

MR GODDARD QC:

Only of course if it is supplied for that purpose and subject to –

ELIAS CJ:

Well, I understand that argument about building work, but I'm just querying whether this necessarily is invoking the statutory regime because it can be simply used as a shorthand since it is a minimum standard for breach.

MR GODDARD QC:

Yes, and I think that is more or less how the Court of Appeal described the relevance of the statutory framework –

ELIAS CJ:

Yes.

MR GODDARD QC:

– to the claim, but critically, in my submission, when we look at the claim and we look at the statutory framework, what we see is it's meaningless to talk about a cladding sheet achieving or not achieving compliance with the Code requirements, even as a standard, you have to ask when you use it in a particular way do you or don't you get there, and in particular when you use it for performing building work do you get the desired outcome from building work, and what that means is it's a claim relating to building work for the long stop purpose. We'll come back to that in more detail when I go through the limitation argument.

GLAZEBROOK J:

Well, that's a statutory interpretation point, isn't it?

MR GODDARD QC:

Yes.

GLAZEBROOK J:

Because loosely obviously it's related to building work because it's related to the building of a building. So the question is whether loosely it's related to building work as a matter of statutory interpretation is enough, or whether you actually need something more.

MR GODDARD QC:

Well, that's perfectly right. We're doing statutory interpretation so we have to look at text and purpose. As Your Honour I think has just said to me, clearly the text can be read to include this.

GLAZEBROOK J:

But we don't need to go through the statement of claim to know it's related to building work, do we? Why are we looking – really the question is, why are the particular details of the statement of claim important?

MR GODDARD QC:

I think they are –

GLAZEBROOK J:

Because nobody's going to say, "I've got some cladding that I'm never going to use –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– and, oh boy, it was deficient and here's my, here's my loss."

MR GODDARD QC:

Well, they might of course, but they couldn't bring a –

GLAZEBROOK J:

Well, in terms of an exchange they may –

MR GODDARD QC:

– claim in tort for it.

GLAZEBROOK J:

– because they may say, “I’ve paid good money for something that’s hopeless and I can’t on-sell it” –

MR GODDARD QC:

Yes, or, “I can’t –

GLAZEBROOK J:

– if you're a retailer, but it wouldn't be at that stage a tort claim, would it?

MR GODDARD QC:

Or, “I can’t use it in future to build a building.”

GLAZEBROOK J:

No, no, absolutely, so as a retailer –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– I can’t sell to someone to use in a building.

MR GODDARD QC:

Or as a builder I’ve built it but I can’t use it, or as a consumer –

GLAZEBROOK J:

No, no, I understand that. All I’m saying is mostly it will be relating to building work no matter what the statement of claim says.

MR GODDARD QC:

When – obviously a claim by a retailer to recover the cost of cladding they’ve bought and can’t sell is not a claim relating to building work, that's a step too far away.

GLAZEBROOK J:

No, no, I understand that.

MR GODDARD QC:

Yes, but –

GLAZEBROOK J:

All I'm saying is that as soon as you've bought it and intend to do anything –

MR GODDARD QC:

Used it.

GLAZEBROOK J:

– and used it anyway –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– then it's a claim related to building work, in a loose sense, no matter what the statement of claim says, isn't it?

MR GODDARD QC:

Yes, and –

GLAZEBROOK J:

I'm just asking why we're going to the statement of claim I suppose.

MR GODDARD QC:

I –

GLAZEBROOK J:

What is it about the statement of claim that makes it more related to building work than just the obvious sense that it's put on a building?

MR GODDARD QC:

I think that's most of what I want to achieve for the purpose of the first issue before the Court, the longstop argument. Understanding the nature of the loss and how it's said to arise is more important for the second part in relation to duty of care, and that's why I'm going to continue on through it now.

GLAZEBROOK J:

Oh, okay.

MR GODDARD QC:

So –

GLAZEBROOK J:

No, because I must say that in your submissions I didn't quite get the, I didn't quite understand the criticism of the Court of Appeal not understanding the claim as against the statutory interpretation argument. And so I thought we were going through the claim for the longstop, but I, if we're going through it for the loss then that's fine.

MR GODDARD QC:

It's for longstop, but Your Honour at any rate is way ahead of me on that and understands what I'm saying about the fact that really we have to think about the purpose of the longstop provision in order to understand whether to read it to include this claim or whether to read it more narrowly. But I'm also just investing in one-off run-through of this as the foundation for both my arguments now.

GLAZEBROOK J:

That's fine, that's absolutely fine. And so my not understanding the difference that you were suggesting the Court of Appeal fell into is actually –

MR GODDARD QC:

A statutory interpretation argument.

GLAZEBROOK J:

– a statutory interpretation argument rather than –

MR GODDARD QC:

Absolutely.

GLAZEBROOK J:

– to do with the claim?

MR GODDARD QC:

Absolutely, Your Honour.

GLAZEBROOK J:

Okay. Thank you.

MR GODDARD QC:

In my respectful submission the Court of Appeal misunderstood the argument I was making –

GLAZEBROOK J:

All right.

MR GODDARD QC:

– about the statute and misunderstood the statute.

GLAZEBROOK J:

Okay, that's fine.

MR GODDARD QC:

So I don't think I need to spend time on the particulars of that allegation, but again – and what we see here is a – yes, if we look at 41, again we've got an allegation that the cladding systems, "Contain inherent characteristics which mean that when directly fixed on a building without a cavity of a light building," and this is important, "In order to mitigate failures they must be installed to a very high degree of precision, which doesn't make allowances, adequate allowances, for real world building design and construction conditions in practice," and then the way in which the cladding sheets would be used in carrying out building work is described, and there's this abbreviated term in the particulars, "real world building conditions and practices", which is about the circumstances in which building work are performed using cladding sheets. Then the level of precision required to install them so as to achieve compliance where the relevant standard is beyond that specified in the specifications, so then how you carry out the building work with them. It must be very precise, is the complaint, because of alleged inadequacies in the specifications, in the instructions for carrying out building work using this product. This is explicitly a complaint about the adequacy of instructions, about performance of building work using the product. "In order to mitigate failures must be maintained to a standard and frequency which is

impractical," together risk characteristics. So these are characteristics of the cladding systems –

GLAZEBROOK J:
Or is it saying in the real world you couldn't give instructions because they wouldn't be – and if you did they wouldn't be complied with in that way?

MR GODDARD QC:
Yes, what it's saying is that in the real world quite a few builders are going to fail to achieve compliance.

GLAZEBROOK J:
Yes, yes.

MR GODDARD QC:
Yes…

GLAZEBROOK J:
So it's not suitable for purpose –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
– because if you're having a building product it has to be suitable for real-world builders, not negligent ones, but just ordinary ones?

MR GODDARD QC:
Ordinary ones, yes.

GLAZEBROOK J:
Yes.

MR GODDARD QC:
And so again that's quite a nice illustration of the nature of the claim and the response to it, because of course the defence is that these products are suitable for use and achieve the intended outcome if you do it in accordance with –

GLAZEBROOK J:

Yes.

MR GODDARD QC:

– the specifications, and ordinarily competent builders can do so, you don't need to be super builder.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

So I think it's common ground that, you know, there are buildings constructed using Shadowclad as directly fixed cladding that are weathertight, Carter Holt says tens of thousands throughout New Zealand, but if we look at the pleadings in relation to the particular schools we see that for some of them there's no suggestion of moisture ingress, even though the cladding's been on for years, no suggestion of any damage. And so he question is, is that achievable by ordinary builders or only super builder?

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

Of the schools? Are all schools that have been clad in Shadowclad listed?

MR GODDARD QC:

All schools that are clad in Shadowclad with, as directly fixed cladding, that's my understanding, Your Honour.

WILLIAM YOUNG J:

And what percentage of those are defective in some way?

MR GODDARD QC:

Well, the respondents say they're all defective because they all have these risk characteristics –

WILLIAM YOUNG J:

Yes, yes. So, but –

MR GODDARD QC:

– and so they want to strip them all –

WILLIAM YOUNG J:

Okay.

MR GODDARD QC:

– and re-clad them all.

WILLIAM YOUNG J:

So what percentage of the schools have manifested damage or deficiencies?

MR GODDARD QC:

I haven't got a percentage to hand. We can do a, and I will go to the 4 schedule shortly and we can do an unscientific survey, and I might ask my learned juniors if they can come up with something more concrete – I'm getting some encouraging nodding so they're obviously capable of doing that. Your Honour will see how it's laid out in a way which sheds some light on that. Some are yes, some are no, and we'll see that some they don't know because of the nature of the claim.

So, and then what's said in 42, "As a result of the risk characteristics the cladding systems are likely to cause the buildings to fail to comply with the standards, the Code, and the staff and students," and this is an important part of the claim as advanced by the respondents, "staff and students of buildings," I think that must be, "of schools with buildings," on that, but it doesn't really matter, "on which they are installed, to suffer interference with education, interference with health and safety." It's pleaded at 43 that Carter Holt, "Failed to undertake any or adequate testing to ascertain the weathertightness of cladding system in practice and whether it would routinely comply with building standards, Building Code and the Building Acts," obviously when used as cladding. Then there's a pleading about what was said in the course of promotional activities, that, "Carter Holt Harvey provided descriptions or representations about its products which would lead a reasonable person to believe that the cladding sheets and cladding systems when directly fixed on a building frame without a cavity of a light building, in accordance with the specifications," so, "and when used for building work in a particular way would achieve compliance and would be tolerant to real world building conditions and practices," and so on, together representations, and these are representations which form the basis of the negligent

misstatement, cause of action, that was struck out in the Court of Appeal. so these are representations about the suitability of the cladding sheets and cladding systems when used in a particular way and their ability to achieve certain outcomes when used in that way in the performance of building work. Then there's reference to publishing within specifications, descriptions and representations in schedule 3, which would lead a reasonable person to believe that the cladding sheets and cladding systems, when directly fixed on a building frame without a cavity of a light building, would correspond to and meet those descriptions and representations.

Then what's said is that, "As a result of the cladding sheets defects, the cladding systems defects and the risk characteristics, those promotional activities were false, misleading or deceptive." Why? Because the sheets and systems, "When directly fixed on a building frame without a cavity of a light building routinely do not achieve the outcomes as described," so again that's when you use them for building work it's too hard to achieve weathertightness, if it can be done at all only a super builder can do it, and then there's an allegation in 46 of failure to address the cladding sheet and cladding system defects, described at the foot of that paragraph as, "Failures to address problems." 47 – we're almost there – "Due to the cladding sheets defects, cladding systems defects and the risk characteristics, it was routinely not possible and/or unreasonably difficult to install the cladding systems on the school buildings, taking into account real world building conditions and practices so as to achieve compliance with the relevant standards, including the Code and Act," so again that's about how hard it was to use them in building work and achieve the desired outcome. And then we get to the pleading of loss, and this is spread across paragraphs 48 and 49, and it's the same loss that's sought to be recovered across all the causes of action, and it's important to the second half of my argument. So, due to the cladding sheet defects, the cladding system defects and the risk characteristics, "The school buildings have failed or will fail to achieve compliance with the recognised building standards, Building Code requirements and the Building Act as particularised at 40 above," the failures, so failures again to meet standards applicable to construction of the buildings and failure to achieve the performance outcomes required of building work.

Nature of loss. What's the loss sought to be recovered? "As a result of the failures as defined, that is, the failures of the buildings to meet the applicable standards for their construction, the plaintiffs have suffered and will suffer the following loss: (a), the cost of repairing and replacing the cladding sheets and the cladding systems on

the school buildings." So it's not tied to the fact that they've suffered any damage other than simply having defective cladding. This is a claim – coming back to Your Honour Justice Arnold's question – that says, "We can recover the cost of replacing the brakes, now that we know they're defective, from the manufacturer," and the answer to that is it depends on the cause of action, under the Consumer Guarantees Act you may well be able to.

So, then, (b), the cost of repairing and replacing structural elements, including building framing of the school buildings that have been damaged by moisture ingress behind the cladding and within the school buildings, and decay to timber framing or corrosion of steel framing and the presence of mould and/or fungi," and that is said to apply to some buildings but not others, and we'll see that in the schedule. "Costs of preventing staff and students suffering interference with education and health and safety, that being the cost of doing remedial work," that's the way in which those costs are identified. "Diminution in value of the school buildings," a building's less valuable if it's defective, it's the most obviously economic of the losses, and that's easiest to see if one thinks of relocatable buildings, for example. If you say you've got a relocatable building that you could sell – and they are sold from time to time – if there's in a defect in it you're going to get less for it when you sell it.

"The cost of providing replacement administrative and staff facilities and additional resources on account of interruptions to the operation of the schools," while you do remedial work and pending doing remedial work, and if, related to that loss, "Lack of access to and use of portions of the schools while necessary repairs and remediation works are being undertaken." So the loss claimed is the cost of repairs to buildings by re-cladding them and consequential loss of various kinds or, in the alternative, and it's been confirmed that it's in the alternative, the loss of value of the buildings. The reason for that of course because the buildings are defective. If the buildings were not defective, if the construction of the buildings was not defective, there'd be no loss, none of these losses would exist, and there'd be no claim. And I'll come back to the question of whether there's a duty to take care to save the plaintiffs harmless from these losses.

The other question that I think it's helpful to bear in mind as we work through both limbs of the argument to limitation and duty of care is so when did damage first occur? Was it when damage of the kind described in 49(b) first occurred? That can't be the case, because there are many buildings in respect of which a claim is made to

which (b) doesn't apply, and yet it's said there's a cause of action which enables recovery of the type of loss described in 49(a), so it can't be when damage to some other item occurs. Is it when damage to other parts of the building and/or harm to health and safety is a risk? If so, time starts to run when the building is constructed, and we're wasting our time talking about the longstop because everything's going to be barred long before that. If it's some intermediate point in time, what is the damage that is the essential element of the cause of action and when does it occur? And the impossibility of answering this in a sensible way, in a satisfactory way, the sort of knots that the Courts tied themselves into in *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, [1983] 2 WLR 6 (HL) and other similar cases, trying to treat damage to one part of a structure as physical damage caused by another part are one of the reasons in my submission why a duty of care of the kind alleged would be incoherent, would be unprincipled, wouldn't work.

Then we have the causes of action that are pursued against Carter Holt. The first is the straight negligence claim, and the duty of care alleged at 51 is that at all material times Carter Holt owed a duty of care to plaintiffs to design, manufacture and supply cladding sheets for use on the school buildings that complied with recognised building standards, the Building Code requirements and the Building Acts. Now, there are multiple difficulties in understanding what's alleged here. It doesn't identify what loss is said to come within the scope of the duty, and obviously a little bit confusing to talk about, "To manufacture cladding sheets that complied with these various requirements when they apply to building work and the buildings constructed through that building work." But what I think is important, especially for the limitation point, is that the duty relates to design, manufacture and supply of cladding sheets, "For use on school buildings," and "use" of course means "use in performing building work". So the duty that's pleaded is a duty relating to the suitability of this product for use in building work, and we come back to ask whether it's a claim relating to building work, obviously here is the duty squarely is a duty to make something for use in building work, can't use it in any other way, it's not much use. Could come up with many silly requirements but that would be a waste of time into uses.

What does the duty of care arise out of? Specialist expert –

GLAZEBROOK J:
Can I…

MR GODDARD QC:

Of course.

GLAZEBROOK J:

For limitation purposes or the longstop limitation purposes, does it matter when it arises, because doesn't it arise from the building work?

MR GODDARD QC:

It arises from the act or omission on which the claim is based, Your Honour's point in *Klinac*, and so you're right, when the cause of action –

GLAZEBROOK J:

But if it's not based on building work then the longstop doesn't apply, but if it is based on building work then doesn't it apply…

MR GODDARD QC:

Yes, it doesn't depend on when the cause of action accrues, Your Honour's exactly right.

GLAZEBROOK J:

All right, well, good, because I was actually, I couldn't understand why a failure to plead, whatever that is, actually affects the longstop provision.

MR GODDARD QC:

Oh, I'm not –

GLAZEBROOK J:

Or even how a failure to plead whatever it is affects negligence, it still escapes me, but you'll know that because I said that earlier, but…

MR GODDARD QC:

And the question of when the cause of action accrues is wholly irrelevant in relation to the longstop argument.

GLAZEBROOK J:

All right, good.

MR GODDARD QC:

We're on exactly the same page, Your Honour, on that.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

It is an important question to ask when we come to the existence of a duty of care, and I'll endeavour –

GLAZEBROOK J:

And you'll have to explain that more to me later, yes.

MR GODDARD QC:

– to explain why – yes.

So then we get, so we've got in 52, where does this duty of care come from, "Specialist expertise and knowledge on the part of Carter Holt," in (b), "Carter Holt Harvey designed, manufactured, promoted and supplied the cladding sheets for use in building work." So again right at the heart, as one would expect, given the nature of the duty, of the source of the duty, is that it's for, the product is for use in building work.

GLAZEBROOK J:

Sorry, I then missed that paragraph number.

ELIAS CJ:

52(b).

MR GODDARD QC:

I'm sorry, Your Honour, 52(b).

GLAZEBROOK J:

52(b), thank you.

MR GODDARD QC:

And again in (c), that, "Carter Holt produced and supplied specifications which set out guidance for the installation of cladding sheets," in other words, guidance for the performance of building work, that's what "installation of cladding sheets" is. Promotional activities, "Carter Holt knew or ought to have known that its cladding sheets would be used on light buildings, including the repair of school buildings," and again "used", "used to perform building work", it can't be used for anything else. "Reasonably foreseeable that if the cladding sheets failed to comply with the various standards the buildings would suffer damage or will suffer damage in the future." "Reasonably foreseeable that if they complied with those occupants would suffer interference with health and safety," it's said that the plaintiffs, "Relied on Carter Holt's expertise to design, manufacture and supply the sheets that complied with the various standards and that that reliance was inherent in the plaintiffs purchasing the cladding sheets and/or allowing the cladding sheets to be installed on the school buildings," that's the reliance pleading that we'll need to come back to when we come to negligent misstatement. There's no pleading of reliance by the plaintiffs on particular statements or particular specifications. What is said –

WILLIAM YOUNG J:

Sorry, I missed that, where is the reliance pleading, what are you saying?

ELIAS CJ:

There isn't.

MR GODDARD QC:

It's in 52(h).

WILLIAM YOUNG J:

52(h).

MR GODDARD QC:

We'll come back to it.

WILLIAM YOUNG J:

I see, okay, yes.

MR GODDARD QC:

Yes. But this is the sort, this is the reliance that's pleaded, it's not we looked at particular statements or we were informed by particular statements, that we relied on those, it's that the reliance was inherent in –

GLAZEBROOK J:

But this is negligence, not negligent misstatement.

MR GODDARD QC:

Yes, but we'll come back to – the same reliance is pleaded –

GLAZEBROOK J:

All right.

MR GODDARD QC:

– I just want to pick up that…

ELIAS CJ:

So it's general reliance?

MR GODDARD QC:

It's a form of general reliance, effectively on the product being on the market –

ELIAS CJ:

Yes.

MR GODDARD QC:

– as an exterior cladding product.

ELIAS CJ:

Well, it doesn't really add much to –

MR GODDARD QC:

Negligence.

ELIAS CJ:

– proximity considerations.

MR GODDARD QC:

I mean, that's essentially right, and of course when it comes to reliance on information what the Courts have consistently said is that when thinking about proximity the requirements identified in cases like *Caparo* and *Boyd Knight* are simply how you get proximity in the context of statements. It's not a separate test, it's a way of applying the proximity text to the provision of information.

ELIAS CJ:

Yes.

MR GODDARD QC:

The Court of Appeal emphasised that in *Attorney-General v Carter* [2003] 2 NZLR 160 (CA), for example, these aren't two different rules, two different approaches. And over the page in (i) it's said that Carter Holt knew or ought have known of the plaintiffs' reliance. Again, this is in the general sense that it should have known that people were relying on the suitability of the product for use in this way. And it said that, "By designing, manufacturing and/or supplying the cladding sheets with the defects, the cladding sheets' defects as defined, Carter Holt breached its duty of care to the plaintiffs," a duty, it says, as particularised at 48, but I think there's something gone wrong with a cross-reference, yes, possibly, must be 50 I think. Then there's a reference to the acceptable standard, which I don't think we need to get into for now, and then at 55 it's pleaded that, "As a result of Carter Holt's breaches of its duty of care the plaintiffs have suffered and will suffer the loss," and the Court will remember that's the "loss" as pleaded back in 49, in all cases the cost of re-cladding, and in some cases downstream loss, what Your Honour Justice Young referred to as "parasitic loss" although it's not the term I have used.

And then we have an alternative pleading, and we see this structure repeated through the statement of claim. The pleadings we've seen so far relate to the cladding sheets, and now we've got essentially the same allegations in relation to cladding systems. I'm not quite sure why it's been done in that way, it does make the claim a lot longer. But there's no material difference in these paragraphs in the duty of care one, and after –

WILLIAM YOUNG J:

So cladding systems are the specifications and advice as to –

MR GODDARD QC:
Yes, Your Honour, and –

WILLIAM YOUNG J:
– how to fix them?

MR GODDARD QC:
– where supplied, which they were – flashings and things like that –

WILLIAM YOUNG J:
Okay.

MR GODDARD QC:
– it's common ground that for some of the period to which the claim relates Carter Holt manufactured and supplied flashings, other parts it didn't. But the system is the sheets, the specifications and, where relevant, bits. And what's claimed is an inquiry into loss and we're obviously, what we're talking about is the paragraph 49 loss and the question that's the, one of quantification.

Then we get the second cause of action based on the Consumer Guarantees Act, and I just want to notice this briefly because it's an important backdrop when we get to the tort issue. The claim is brought under three provisions of the Consumer Guarantees Act, sections 6, 9 and 13. Section 6 of the claim is pleaded at paragraph 66 and following. Section 6 of the Consumer Guarantees Act is the guarantee of acceptable quality, and what is alleged at 66 is that, "As a result of the cladding sheets' defects the sheets were not and are not," and then some specific limbs of section 6 are pulled out, "fit for all the purposes for which cladding sheets are commonly supplied, including the purposes set out in the representations, free from minor defects, safe and/or durable." So those are all requirements that make up the concept of acceptable quality under the Consumer Guarantees Act, and it said that they didn't apply.

And at 68 it said that, "Accordingly, in designing and manufacturing the cladding sheets Carter Holt failed to comply with the section 6 guarantee." And then we see a parallel pleading in relation to cladding systems, which we can move over. Just above paragraph 72 there's a heading, section 9, "Guarantee that goods comply with description," and then what we see is a pleading that Carter Holt represented that the

cladding sheets and, further down, cladding systems, “Would comply with the representations and particular descriptions as defined earlier,” it said that they didn’t and that that resulted in a breach of 74, for example, the guarantee in section 9, “To manufacture goods that correspond with their description,” so another obligation under the Consumer Guarantees Act is to supply goods that comply with their description, that correspond with their description. And then section 13, “Express guarantees as manufacturers,” it said Carter Holt gave express guarantees, “Including those specified in schedule 3,” and it said that those included at 80, “Guarantees the sheets would comply with the Building Code requirements for the periods specified in schedule 3 and with further representations,” and that, “Because of the defects those guarantees have not been complied with,” and it said that's a breach of section 13 of the Consumer Guarantees Act.

So the Consumer Guarantees Act provides machinery for bringing claims against both immediate suppliers and manufacturers in relation to, “The failure of a product to be of acceptable quality, the failure of a product to comply with a description by reference to which it is sold, and the failure of a product to comply with any express guarantees provided by the manufacturer.” All of these are statutory mechanisms for leaping over the contractual chain and providing a carefully tailored set of statutory remedies which are not exactly the same as the remedies that would have been provided in tort, and subject to certain to certain limits and safeguards, which were seen as appropriate in that context. And 86 and 87, over on page 159 of the bundle, 21 of the pleading, “Carter Holt Harvey’s failure to comply with the guarantees in all or any of sections 6, 9 and 13 were of a substantial character,” that's designed to ensure that there can be a claim for damages rather than a request to take remedial action, and as a result of those breaches the plaintiffs, it’s said, have suffered and will suffer the loss.

Then we get into the third cause of action, which was struck out by the Court of Appeal, negligent misstatement. The duty that is pleaded here at 89 is, “Carter Holt,” it said, “owed the plaintiffs a duty to take care not to make false, misleading or negligent statements in relation to the cladding sheets that would result in damage to the school buildings.” And so as I understand it that's a pleading that there’s a duty to take care to save the plaintiffs harmless from the loss associated with the buildings being damaged. But when we get to “damage” it turns out that includes just having a defective cladding sheeting, we know there’s no other damage. There’s circumstances out of which that duty of care is said to arise, track the

circumstances referred in the negligence cause of action – and I was getting a little bit ahead of myself earlier – but what the Court will see in paragraph (f) is the pleading of reliance in this context, "The plaintiffs relied on representations made by Carter Holt in relation to the cladding sheets, including representations and particular descriptions in Carter Holt's capacity as design and manufacturing suppliers." Again, the plaintiffs' reliance was inherent in the plaintiffs allowing the cladding sheets to be installed on the school buildings, so it's that general reliance point that Your Honour the Chief Justice drew out earlier in relation to the identical provision in the plain vanilla negligence cause of action. And as particulars go, the particular under that is, would win prizes I think for adding nothing to the allegation that it's said to particularise…

GLAZEBROOK J:

Are they, the ones in capitals, where are they defined?

MR GODDARD QC:

The terms "representations" and "particular descriptions", Your Honour?

GLAZEBROOK J:

Yes.

MR GODDARD QC:

"Representations" was back into the 30s, from memory, let's have a look. I think 44 – I'm grateful to my learned junior. So "representations" is defined in paragraph 44(a) and "particular descriptions" is defined in 44(b).

GLAZEBROOK J:

Just to shortcut that, does that include the specifications, because you said they don't say they rely on the specifications? Yes, they do say –

MR GODDARD QC:

No, it does include the specifications. I don't think I said they didn't rely on –

GLAZEBROOK J:

All right, I misunderstood you.

MR GODDARD QC:

Yes, yes. My learned friend, Mr Farmer, reminds me, there are a lot of defined terms in here, and to help us with those, if we look at page 167 of the bundle, page 29 of the pleading, all the defined terms are listed alphabetically and the paragraph in which the definition is found is identified, so that's quite helpful for steering around this.

So I was, I think, over at page 160 looking at the – partway through the negligent misstatement cause of action, and at 92 we see a bit more about the plaintiff's reliance. It's said at paragraph 92 that the plaintiffs allowed the use of the cladding sheets on the school buildings and reliance on the representations but when we see that all that's done is to say, well, they were used on the school buildings in schedule 4. They were first used in or around the year of supply as identified in that schedule, that the plaintiffs or their agents received representations and particular descriptions in or around the year of supply and relied on them by purchasing the cladding sheets and/or allowing the cladding sheets to be installed on the school buildings and there's no suggestion that in relation to any of the buildings currently pleaded the plaintiffs relied by purchasing the cladding sheets direct from Carter Holt but obviously they purchased the building incorporating that input and obviously someone somewhere in the chain purchased cladding sheets.

It is said that as a result of the misleading representations Carter Holt breached its duty of care and over at 94, as a result the plaintiffs have suffered the loss as defined in paragraph 49. Then we have an alternative pleading again in relation to the cladding systems which ends up at 101 where they claim for the same loss to that same structure, sheets, then systems.

Then fourth cause of action, and this is the other cause of action that's the subject of the negligence claim that's the subject of the application to strike-out but which wasn't struck out below, it's said at 103 that at all material times Carter Holt knew or ought to have known that its cladding systems had the risky characteristics which made them prone to cause the buildings on which they were installed to fail to comply with recognised building standards, Building Code requirements in the Building Act and to cause damage to the school buildings.

Then the duty of care pleaded at 104, at all material times Carter Holt owed the plaintiffs a duty of care, to warn the plaintiffs of the risky characteristics which Carter

Holt knew or ought to have known could or would cause damage to the plaintiffs' buildings.

Just pausing there, what we'll see is that the consequence of that failure to warn is said to be that the cladding sheets/systems were required and used on the school buildings. So this is about exactly the same set of issues as the negligent misstatement claim. It's about the provision of information about a product before it's purchased and used. It is a little difficult to see how the negligent misstatement claim could be struck out as it, in my submission, appropriately was because there could not be and was not, in fact, reasonable reliance on information provided but omissions in what was said failed to give rise to those claims when the warning is suggested to be that it won't do some of the things that the representation said it would do. It really must stand or fall, I think, with the negligent misstatement claim.

Then we get to the last cause of action, the fifth cause of action, breach of section 9 of the Fair Trading Act, and there's never been any suggestion that this could be struck out in its entirety. The application never related to this. Obviously, Carter Holt is required to comply with the Fair Trading Act in carrying out its activities in trade. It says it has. The issues here will be whether it, in fact, has and the limitation and two layers of limitation here, like everywhere else, the limitation provision inherent in the Fair Trading Act itself, at section 43, which is basically three years from reasonable discoverability and in addition the long-stop limitation which applies to all civil proceedings regardless of the cause of action.

If we just look at the schedules that matter now, we don't need to worry about schedule 1 which defines the cladding sheets and cladding systems as the Shadowclad sheets and Shadowclad system.

Schedule 2 pleads the defects and says that the sheets take in and retain more moisture and protection of it by preservative treatment would otherwise allow for various reasons that it fails to incorporate adequate drainage paths and drying, that it tends to transfer and absorb moisture to adjacent timber framing and protect building papers, that it's not adequately durable because of the levels of preservative. Five, issues about the edges being prone to moisture absorption, in particular by capillary rise. It's true of anything you make of wood. And then six, prescribe detailing of the interface between Shadowclad sheets and other components intolerant to real world conditions, so hard to incorporate in it. Then some issues about the joints which

again relates to relationship with other parts of the building structure, flashings and installations.

I don't think we need to get into the glorious details of horizontal flashings. The idea is just that there's various components.

Perhaps worth just pausing to look at 14 and the particulars. They complained about the specifications but they failed to prescribe a method for installing a cladding system in a manner that takes into account real world building conditions and practices, b) failed to provide installation detailing which will result in a cladding system which routinely complies with building standards and coding and this is all about the specifications providing inadequate instructions about how to perform building work using the product.

Schedule 3, the misleading descriptions. The specific specifications and installation instructions and other publicity material relied on are listed in considerable detail. I don't think the detail matters for present purposes. The allegation is the statements were made about the suitability of the product for use in this way and it's said that they were not right. Schedule 4, school buildings, is a separate schedule. I'll go to that just before the break. Schedule 5, specifications. The different specifications that applied over different periods to which the claim relates are set out on schedule 5.

Schedule 6, recognised building standards. The Court will remember that the complaint is that the buildings don't comply with the Building Code, the Building Act and these recognised building standards. What are the building standards? Well, first of all we see item 1, NZS3604 timber framed buildings. This is a requirement about timber, use of timber products in buildings. Number 2, again, NZS3602, timber and wood-based products for use in building. Again, it's for use in building, use in performance building work. MPE3640, chemical preservation of round and sawn timber. Painting of buildings in 4 and then various other standards. All standards that are not, don't have the force of law in and of themselves but that are published by standards organisations and one could imagine contracting for a requirement that such standards be met with the product you purchase. One could imagine regulatory instruments requiring that certain items used in performing the building work comply with certain standards and all of those things happen. But just worth noting that they have no legal force in and of themselves, these things.

Schedule 7, real world building conditions and practices. This is basically – and item 3 nicely captures what Your Honour Justice Glazebrook was putting to me, the level of precision and performance reasonably achievable by average competent builders when working with standard building materials. Can ordinary builders make this work? I said that they can't. So that's the framework of the claim.

GLAZEBROOK J:
I think I missed your point on failure to warn. You said it stood or fell on negligent misstatement and you couldn't see how the two weren't struck out together. I don't understand that submission or was that not what you said?

MR GODDARD QC:
In this case, I say that they are the same because –

GLAZEBROOK J:
But why would that be the case?

MR GODDARD QC:
Because the warning was a warning that is said to have been omitted is a warning that the products can't be used in the ways that it was represented they could be used, so it's really the flip side of the representation.

WILLIAM YOUNG J:
It's very particular, isn't it? I mean, it can't be a duty to warn. A failure to warn may be a breach of some other duty. So it's a slightly irritating pleading.

MR GODDARD QC:
Yes.

GLAZEBROOK J:
Aren't they just saying that Carter Holt knew that this was a risk to health and should have warned that it was a risk to health? I'm truncating slightly.

MR GODDARD QC:
But if you hadn't marketed the product for use on buildings in this way –

GLAZEBROOK J:

Well, it doesn't really matter whether you had marketed it or not. I mean, you'd marketed the product that was going to be used by someone and if it couldn't be used without that, it didn't matter how you, whether you marketed it in any way. If you say, "Here's a product and it's a risk to health and there's a duty," there may be a duty to warn. What I can't understand is why it relates to the representations and in particular why it relates to reliance because negligent misstatement may go because of no particular reliance but there may be a duty to warn whether or not there's reliance because it's a danger to health. Product recalls, for instance.

MR GODDARD QC:

As a general proposition, Your Honour is of course right. It can be different things. But in this claim, the obligation to warn is said to arise out of the fact that the products were marketed for this use and it wasn't suitable for this use and you had to disclose that. Otherwise you'd get the downstream risks and dangers. So they're one side of the other. It's that positive claims had been made. It's been sold for a particular purpose. But the caveats that were required, the warnings that were required, were not included.

GLAZEBROOK J:

All right. I thought I better check because I didn't understand it but I think I understand it now.

MR GODDARD QC:

So that's one aspect of it, is that it's the flip side of what information was and was not provided. The other reason that it's different from a product recall, Your Honour, is if you imagine a situation where people have bought a dangerous heater, for example, and they've got those heaters sitting in their home, you warn them because the loss that you're trying to protect them from is that the heater will catch fire, say, and cause harm downstream. But if we look at the loss claimed here, and the consequences of the failure to warn is said to be buying it in the first place, putting it on in the first place, so it's not the ongoing use sometime after buying it. All the loss that's claimed is said to have been incurred as soon as you put it on the building. So it's those two reasons why they're really mirror images of each other.

So if we go then to volume –

GLAZEBROOK J:

Well, yes, but because of the future consequences isn't it – and the danger to health, the danger to the rest of the building, the failure of the product itself, so I'm not sure that's a difference. I understand why you're saying that because of the issue about what the loss actually is in negligence, but I'm not, I don't really myself see that much difference between the heater and the other one apart from the issue of whether it's a damage to other property or whether it's a damage to the property once it's been attached. That I understand the difference.

MR GODDARD QC:

And that's –

GLAZEBROOK J:

Sorry if that wasn't put very well but I think –

MR GODDARD QC:

No, no, I understand what Your Honour is saying. I guess it goes to the purpose of the warning. Even after you've bought a heater, you warn people about a defect and to stop using it, because that in itself could cause a loss. There's no suggestion here that any loss would have been averted if a month after the cladding had been installed you'd warned. You take the hit.

WILLIAM YOUNG J:

Well it might have but I mean it's, because they might have pulled it off and replaced it with decent cladding.

GLAZEBROOK J:

Or put a cavity.

MR GODDARD QC:

Except that that's not what's claimed. There's no allegation that they would have acted earlier, and we see the same claims being made in respect of building that have and haven't suffered loss. There's no distinction drawn. There's no, yes, you know, I mean that's probably the best way to deal with it because we're looking at striking-out in that context is, is there a pleading on additional loss being suffered as a result of a failure to warn sometime after the initial installation, and there's not. There's no claim to that effect.

Let me go lastly to volume 4 of the schedule of buildings. It's an attractive pale purple colour.

GLAZEBROOK J:
Small was it?

MR GODDARD QC:
Yes, it's quite little, and it's purple. Volume 4. One needs two things I should say to consult this. One needs the book and one needs one's very best glasses, or to hold the iPad very, very close.

GLAZEBROOK J:
Ca we pull it up on the iPad?

MR GODDARD QC:
Yes you can.

GLAZEBROOK J:
So it might be better to look at it there.

MR GODDARD QC:
Yes it might be, so it's tab 19 on the case on appeal, and I'm just going to go to a couple of examples. So if we turn to the very first page of it, it's page 503 of the case on appeal, and we look at the first two schools, what we see is years of supply 1997-2002, so in both cases more than 10 years before the proceeding was filed, and when we look at all the rest of the columns, including the first one, damage, yes/no. It's just blank. So there's no allegation at this stage that there is any other damage, it just hasn't been filled in, and that's presumably because whatever inspections are necessary to form a view on that have not taken place.

If we come down to the next one, Amisfield School, Block E classroom, classroom is 9 and 10, it's in the central North Island, South Waikato district, clad with Shadowclad, year of supply 1998. That's another example of a claim that relates to work done, cladding installed, substantially more than 10 years before the proceedings were filed, and then if we trundle across, this is one that has been looked at, damage, yes/no, no. So there's no allegation of any damage to any other

part of this structure. So this school's a good illustration of the question, two questions, what's the loss claimed? The cost of re-cladding, it's not suggested that there has been any other damage, it's just to replace the defective cladding.

WILLIAM YOUNG J:
What are the defects? Defects 7, 9, 10, 11, 12, 13 –

MR GODDARD QC:
Those are the defects pleaded back in schedule 2. So if Your Honour goes back to the fourth amended statement of claim in volume 1, tab 8, beginning at page 169 of the bundle, there are some 14 defects listed. Some of them are said to be present in all cases, but some may or may not be, because they depend on the method of construction.

WILLIAM YOUNG J:
I see, so defect 7 through to 13 are the ones that are variable?

MR GODDARD QC:
That's my understanding, yes. So for example it's alleged that defect 1 is present in all, Your Honour, that's why we don't see a column for defect 1. But if we go down to 7, 7 is, vertical sheet joints are formed with shiplap over and under rebates which is prone to water penetration. So the question is, do you have these vertical sheet joints formed in this way, and 8 is something about the weather grooves and so do you have weather grooves of that size. It's getting lots of encouraging nodding from my learned juniors so – I'm venturing slightly out of my comfort zone but so far I haven't done anything obviously –

WILLIAM YOUNG J:
What's the, a bit further down, what's the sort of purple yes/no by Awahono School?

MR GODDARD QC:
I don't know why that yes is purple and I'll come back to that after the break since I think the Court is about to have to go in one and a bit minutes.

ARNOLD J:
And the start and end dates in the very last column, do they refer to the start of building and completion or?

MR GODDARD QC:

That's my understanding Your Honour.

ARNOLD J:

Right.

MR GODDARD QC:

So you've got the year of supply which is specifically of the cladding. Does Your Honour have that earlier?

GLAZEBROOK J:

Yes.

MR GODDARD QC:

In the row?

ARNOLD J:

Yes.

MR GODDARD QC:

About a third of the way across the page, but then the start date and end date, as I understand it, are the whole building project, and again my learned junior Mr Wilson who knows this like the back of his hand is nodding. But Amisfield School is a good example because what we see is it was, the year of supply was 1998. There's no suggestion of damage on anything else and again if we come over to the column moisture ingress behind cladding, yes/no, no. Any corrosion of steel framing, NS, which I think means not seen.

GLAZEBROOK J:

Not what sorry?

MR GODDARD QC:

Not steel, oh, not steel. Not steel. So obviously that's not going to be an issue. You can't corrode steel that's not there. Mould fungi, no, and then some stuff about whether the acceptable standard was or was not relevant. So this is a good example of school building in respect of which a claim was made, even though all that's alleged is that the cladding is defective. There's no suggestion of any damage to

anything else having occurred. So what is the loss that means there is a cause of action and when did it occur, and the one other school I was going to go to, how tight is the Court's timing?

ELIAS CJ:
Pretty tight.

MR GODDARD QC:
Right, it's just one more row but I think I should stop because I'm never as quick as I imagine I'm going to be.

ELIAS CJ:
Yes, that would be helpful. That's fine, we'll take the adjournment now, we'll resume at 2.15 and we'll go through until 5.

MR GODDARD QC:
Will Your Honour take the normal High Court…

ELIAS CJ:
We'll take an adjournment at 3.30, yes.

COURT ADJOURNS: 12.30 PM
COURT RESUMES: 2.19 PM

MR GODDARD QC:
Your Honour.

ELIAS CJ:
I'm afraid I have to change the arrangements too, there's a appointment I must keep at quarter to five. So if we could stop at quarter to five we'll do that.

MR GODDARD QC:
Quarter to five or 4.30, Your Honour, to make –

ELIAS CJ:
No, I can nip across the road fast, thank you.

MR GODDARD QC:

I was just going to finish off dealing with the schedule of buildings to which the claims relates, which is in volume 4 of the case on appeal, tab 19 if you're working with it electronically. I'd given by way of illustration Amisfield School, and the Court will see a whole range of other permutations of allegation in here, if we go down to the next one, Arakura School, it's alleged that there is damage, if we come across it's alleged that there's moisture ingress behind cladding but there's no allegation of decay to timber framing, that's blank, it's not steel, and there's an allegation that there's mould and fungi. If we come down a couple to Ashbrook School we see that there is an allegation of damage, no allegation of moisture ingress, but allegations of decay to timber framing and mould again, and then a whole lot that just, in this version of the claim, are not filled in, and that's because there's, as I understand it, a rolling programme of inspections and the schedule is being updated informally as between the solicitors with our new versions being filed all the time. That also explains the shading that the Court asked me about beforehand, it's not material to the substance of the claim, it's just a technique being used between the two sets of solicitors to keep track of what's changed from previous informal versions. And the only other thing I was going to note was that – and this is actually covered in my main submissions in paragraph 2.8, that the buildings referred to in the schedule appear to have been constructed between 1991, the earliest buildings, and there's an example of that for example on page 514 of the schedule, Hukanui School, which was, has year of supply 1991 through to 2014. The vast majority, as I said in answer to a question from His Honour Justice Young earlier were constructed more than 10 years before the claim was filed, and here are the numbers that I was looking for: of the 880 buildings to which the claim relates only 293 were built with cladding supplied in 2003 or later, and some of those of course will have been constructed in the first third of 2003, so will also be time barred, so something less than –

ELIAS CJ:

Sorry, where's that?

MR GODDARD QC:

It's 2.8 of my main submissions, Your Honour –

ELIAS CJ:

Oh, right, sorry. Yes.

MR GODDARD QC:

– rather than the road map, sorry.

The informal ongoing updating of the schedule means that we've only got a partial response to the question from, again, Your Honour Justice Young, about the number for which there's damage. In the version before the Court, the version that's filed, 303 are coded yes for damage, 93 are coded no for damage and, by my maths, that leaves almost 500 that are uncoded in this version, but there are versions which continue to be exchanged between the solicitors in which there is movement in all of those categories.

ELIAS CJ:

Sorry, so how many do they allege damage? Ninety…

MR GODDARD QC:

303 of this version –

ELIAS CJ:

Oh, 303.

MR GODDARD QC:

– are coded yes for damage, and my understanding is that that number has increased as more have been coded, and 93 coded no for damage, and obviously the blanks are being gradually addressed.

ELIAS CJ:

Yes.

MR GODDARD QC:

My learned friend tells me that in the latest informal version as 1 December 2015 there are some 712 which are coded for damage, that's about 80.9 percent.

ELIAS CJ:

703?

MR GODDARD QC:

712? 712, which suggests –

ELIAS CJ:

That's a bit, that's the plaintiffs' –

MR GODDARD QC:

The plaintiffs' –

ELIAS CJ:

– assessment –

MR GODDARD QC:

– assessment –

ELIAS CJ:

– and not – yes.

MR GODDARD QC:

Yes. And what that means is, something that's also been the subject of correspondence that's not before the Court, what is the threshold that's being applied. But that's the allegation.

ELIAS CJ:

Yes.

MR GODDARD QC:

And that's what the Court's concerned with, obviously what's alleged. So still a substantially number coded no where the allegation is just that the cladding is defective. And as we saw with one of the ones we just looked at, a yes for damage may be because there's mould or fungi, not necessarily because there's damage to framing behind it, as I understand the schedule. Anyway, so a wide range of allegations made, which is important when I come back to the question, what is the loss and when does a cause of action arise, but that's not relevant to the longstop issue that I want to reach first.

Before I turn to that, in my road map I'm at item 3, I refer there to strike-out principles, those need not I think take up any time, there's no dispute about them, summarised briefly in section 5 of my submissions. I refer in section 5 to the affidavit of Ms Newfield, the Chief Executive of Carter Holt's New Zealand Woodproducts

division, which exhibits some sample contracts, sample terms of trade, on which Carter Holt supplies the cladding product, either through its merchant division or to other merchants. Until, at the time this application was filed Carter Holt, the defendant, didn't have any head contracts, it isn't involved at that step of the activity, and none were provided by way of initial disclosure or because, I think, of the way in which the plaintiffs conceive their claim. The appeal – there were two appeals before the Court of Appeal, one related to the provision of particulars, and that was resolved by the provision of some sample contracts. I've suggested that it might assist the Court to have just two examples of head contracts entered into by the respondents, in particular the one relating to the representative plaintiff Orewa, a primary school, not least because it I think helps the Court to put in context the observations made by my friend in his submissions that the Court doesn't have the benefit of those contracts, unlike the Court, for example, in *Rolls-Royce*, and also because there are some submissions made by my friend about the inherent implausibility of seeking manufacturer warranties which seemed, on its face, a surprising submission contrary to what one might expect in this field, and I think, again purely by way of illustration, two examples are helpful. And my friend tells me that the respondents oppose, even by way of illustration, the provision of this material to the Court. I am reluctant to take much time on this now and really whether the Court needs them or not depends on whether my friend is pressing –

ELIAS CJ:

Well, it depends rather on the argument that he wants to advance.

MR GODDARD QC:

Yes.

ELIAS CJ:

And if he's saying that it's implausible then two illustrations might illustrate, but two out of so many, I suppose the question is whether they're representative. But if it's to exclude the inference that it's implausible, I, well, we'll hear from Mr Farmer in due course, but one would have thought that that's not terrifically compelling. But do you want to take us to – I think what we should do is take de bene esse, let Mr Farmer speak about it. But do you want to take us to them or do you just want to leave them there as illustration?

MR GODDARD QC:

I was going to go to two pages of one of them by way of illustration, and I'm very happy for it to be dealt with de bene esse. As Your Honour said, it depends. I haven't thought that it was necessary to give them to the Court until I saw my friend's submissions and realised that submissions were being made that, at least on their face, were difficult to reconcile with the limited information we had about this –

ELIAS CJ:

Well, why don't –

MR GODDARD QC:

So can I perhaps –

ELIAS CJ:

– why don't we just leave the argument, park it for now, and you can return to it if need be?

MR GODDARD QC:

Thank you, Your Honour. Well, to – the other thing I was about to give the Court was the, a hard copy version of the old sections 396 to 399 of the Building Code. Might it be convenient for Madam Registrar to have those, and the two extracts, and then my friend can address on whether the Court should formally receive them or not, so I'll provide all of those –

ELIAS CJ:

Do you want to be heard on that?

MR FARMER QC:

Not at length Your Honour, only just to say because they're not representative of the fact, that they go –

ELIAS CJ:

That's your problem, isn't it, that they're not representative, they're only two, is that it?

MR FARMER QC:

We would need to put in this.

ELIAS CJ:

Yes, yes, but if they are proffered simply to indicate that it's not implausible that there could have been such provisions in contracts, and they're not being relied upon as indicating that these are common, is there a problem with that?

MR FARMER QC:

Well it goes further than that, Your Honour, and when you in fact look at them you would see that they don't actually provide for the sort of bounties that my learned friend says could have plausibly been provided. For example there's a, in one of them there's a general requirement to provide a guarantee for weathertightness for two years, that's all it says. That's a very different proposition from saying, oh, by the way, you have to go specifically to the provider, in this case Carter Holt Harvey, and get a 15 year warranty from them, and we say that of course is implausible particularly because as the Court of Appeal noted, Carter Holt Harvey had said they would not provide such warranties. That's actually in the Court of Appeal's judgment. So this could go in, this material could go in, but we won't be any further advanced because the very document that my learned friend wants to rely on doesn't actually displace the submission of implausibility.

ELIAS CJ:

But you can simply make that submission, can't you?

MR FARMER QC:

I've just made it now.

ELIAS CJ:

Yes, exactly, and you can –

O'REGAN J:

He got the retaliation in before the…

MR FARMER QC:

But I probably really want to say well look, you ought to have a look at these two because –

ELIAS CJ:

Well you may have to put –

MR FARMER QC:

These are the typical contracts.

O'REGAN J:

You could say it, but it may not be that well received.

ELIAS CJ:

I'm just anxious that we shouldn't waste time.

MR FARMER QC:

No, we're anxious for that too, and that's why we, initially I think my learned friend wanted to have a preliminary argument before this, before today, and we said, "Oh look, the Court's not going to be very attracted to that." So we decided to try and deal with it on the hoof, as it were, which is what we're doing now, but I don't know whether we're…

ELIAS CJ:

Right, well it may not actually save much time, but perhaps the sensible thing, Mr Goddard, is for you to just tell us what are the provisions that you're asking us to take particular notice of and then Mr Farmer can make his submissions as to why it's not representative and anyway doesn't meet the point.

MR GODDARD QC:

I'm very happy to do that Your Honour.

ELIAS CJ:

But you probably don't need to take us to them.

MR GODDARD QC:

Right, I can make the submission I want to make by reference to my road map 3.1 and really paragraphs A and B. I was going to provide them to illustrate the ability of a building owner to contract for warranties from the head contractor, and there's the warranty that my friend just referred to. A two year general warranty of weathertightness given by the head contractor in relation to Orewa School, and of course if you can contract for two, you can contract for five, you can contract for 10, but you'd expect to pay more if it was longer, and then that same contract reveals a list of trade warranties sought from manufacturers and suppliers, for example a two

year warranty for aluminium windows and doors, 20 year warranty for sun roofing products, a manufacturer's standard "warranty". I put quote marks in but I also put an apostrophe in manufacturer's because I couldn't bear not to have one there. For other roofing products and a short point was that it is, as one would expect, the case that for some products a principal calling for tenders asks for warranties from some but not all product suppliers for varying terms, and the head contractor goes out and gets those.

ELIAS CJ:
So you haven't put in here the clauses in the – these agreements are annexed to the affidavit, are they?

MR GODDARD QC:
No, these ones –

GLAZEBROOK J:
These are the ones that have come in –

ELIAS CJ:
Oh, they're the ones that have come in, so just tell us what clauses you're referring to so we can take a notice, take note?

MR GODDARD QC:
Absolutely so probably if we focus on the Orewa West Primary School, the pages that I would be asking the Court to look at in relation to 3.1A are pages 85 and 86, clauses 2.25 to 2.28.

ARNOLD J:
We haven't got it yet, have we?

MR GODDARD QC:
No, I'm just about to.

ELIAS CJ:
I'm just noting the, yes.

MR GODDARD QC:

And then the toing and froing about whether those would be provided and for how long they could be provided are found on pages 61, 64 and 72. So that was all I was going to refer to in relation to A as an illustration of the two different ways in which this issue could be tackled.

GLAZEBROOK J:

Just to be clear, in relation to your road map A is that –

MR GODDARD QC:

3.1A, yes, exactly Your Honour.

GLAZEBROOK J:

Yes, that's what I thought, I just thought I better…

MR GODDARD QC:

And then even less surprisingly I'm pointing out that the contracts contained dispute resolution provisions including submissions to arbitration that is found in my 3.1B and I've just lost the arbitration clause in the Orewa School one, oh, it's on page 412, clause 94, provides for arbitration of these disputes. And I don't need to say that these are representative and I'm not seeking to do so. I'm simply seeking to address the question, are there contractual mechanisms for seeking protection A, from the head contractor, obviously there are and the more you seek the more you'll pay for. B, directly from a manufacturer, again obviously there are mechanisms, and I'll come back to what happens where a manufacturer wants further payment for providing further direct assurance or won't provide it.

That's all I think I need to say about those for now. Can I just clarify, Your Honour, is it helpful then to provide those de bene esses so that the Court has –

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes, I'll ask my learned junior to do that, and also to do the Building Act provisions just to save time so that Madam Registrar's not leaping up and down. While that happens I can move on to the building legislation and perhaps ask the Court to get

out volume 1 of the authorities in order to go to both the 1991 and 2004 Building Acts. Again, the Court is very familiar with these so I'm not going to dwell on them at great length, but there are some particular provisions to which I should draw the Court's attention. The Building Act 1991 is under tab 2 and because it's no longer in force, and not available on the Government's website, I'm afraid it's a horrible computer database printout, that's the best available.

ELIAS CJ:

Sorry, what do you say, that it's not available?

MR GODDARD QC:

On the legislation.govt.nz site anymore because, the Building Act 1991, because it's not in force Your Honour.

ELIAS CJ:

But they should keep it online, surely? Anyway.

GLAZEBROOK J:

I thought they – they are going to, I think, aren't they?

MR GODDARD QC:

Yes, so things which made it into the system after it went live, I think they're going to stay on, Your Honour.

ELIAS CJ:

I see.

MR GODDARD QC:

But the point is that it was repealed in 2004 before the current system was fully operational.

ELIAS CJ:

Yes, well, they could load it.

MR GODDARD QC:

Anyway, I don't think it's going to, except aesthetically I don't think it's going to hinder us, and I'd like to begin on page 11 of the bundle, and I'll work from those numbers

which are at the top centre of the page, with the interpretation provision. Because we're concerned with the longstop which relates to, which applies to civil proceedings relating to building work, it's important to pause and look at the definition of "building work" on that page, "Work for or in connection with a construction, alteration, demolition or removal of a building, and includes sitework." So that's building work, and it's common ground that the manufacturer of cladding sheets and the supply of cladding sheets, is not building work as defined here.

Then over on page 14 of the bundle, "Part 2, Purposes and Principles," familiar provisions in relation to the purpose of the Act being to provide 6(1)(a), "Necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire." And it's not suggested that the provisions on dangerous, unsafe and unsanitary buildings are the relevant ones here, those are, as the Court knows, the fallback provisions for particularly defective buildings. It's the necessary controls relating to building work that's engaged.

And then when we turn over to section 7, which is one of the provisions identified as not having been complied with as a result of the use of the cladding on the school buildings, 7, "All building work to comply with the Building Code. All building work shall comply with the Building Code to the extent required by this Act, whether or not a building consent is required in respect of that building work." So the only operation, the only legal force of the Code, the point at which it bites, is when you do building work.

Turning over to page 16 of the bundle and happily skipping large parts of the 1991 Act that aren't relevant here, we –

ELIAS CJ:
Could you just pause a moment. Yes, carry on.

MR GODDARD QC:
Part 8, accreditation of building products and processes. This is relevant because we'll see when we come to the longstop provision in the Act that it's explicitly contemplated that the BIA may be liable in respect of a negligently granted accreditation. Accreditation of building products and processes obviously is a generic activity engaged in by the BIA, it says, "If you do this is will comply with

clause so-and-so of the Code," it's generic, it's not connected with a particular building, and obviously in granting such an –

WILLIAM YOUNG J:
So what's the section you're relying on in particular?

MR GODDARD QC:
I'm referring to the whole of Part 8 –

WILLIAM YOUNG J:
Okay.

MR GODDARD QC:
– but in particular, if one looks at 58(1), "The proprietor or the proprietor's agent may apply to the Authority for the accreditation of any proprietary item, being a material, method of construction, design or component relating to building work," and then 59(1), Your Honour, "After considering any report; and recommendations obtained by the Authority, the Authority shall accredit the item if it is satisfied that the item, if used under the conditions specified in the appraisal, will comply with specified provisions of the Building Code," and as – yes. And then those must be taken into account by anyone making a decision about compliance with the Building Code, and if you rely on one of those you can't be liable, if you're a local authority for example. So accreditation is accreditation of a birthday product or process sought by a proprietor a manufacturer or a designer, it confirms that if the item is used under the conditions specified it will comply with specified provisions of the Building Code. And this generic regulatory activity of the BIA – which obviously itself is not building work, it would be fanciful to describe it as such – as we'll see is treated by the Act, rightly in my submission, as an activity which the BIA can be sued in respect of, Your Honour the Chief Justice made that point in *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 (SC) (*The Grange*), for example, in relation to liability of the BIA –

ELIAS CJ:
I thought it was decided that it couldn't be sued.

MR GODDARD QC:

It couldn't be sued in relation to its failure to provide information about weathertightness to local authorities and in relation to its auditing of local authorities. But the whole, the Court all noted that it could be sued in relation to accreditations –

ELIAS CJ:

Oh, in relation to accreditation.

MR GODDARD QC:

– and Your Honour said, "Which suggests that it's not generally immune from negligence," and the other members of the Court said, "Which suggests it can only be sued for that," basically. So the same starting point was then a prompt for two quite different lines of reasoning. But the starting point was common ground.

ELIAS CJ:

But your point is that the Act treats it as related to building work, is that right?

MR GODDARD QC:

It treats a claim against the BIA in relation to the grant of an accreditation as a civil proceeding relating to building work, even though –

GLAZEBROOK J:

So where's that?

MR GODDARD QC:

I'll get to that.

GLAZEBROOK J:

You're getting to that?

MR GODDARD QC:

Yes. But I just thought I needed to explain why –

GLAZEBROOK J:

Yes, yes – oh, no, no, that's fine.

ELIAS CJ:
Yes.

MR GODDARD QC:
– we were looking at accreditation at all.

Turning over to bundle page 17, we get Part 9, legal proceedings and miscellaneous provisions, after the happily irrelevant provisions in relation to dangerous and insanitary buildings, we can turn through to page 25, the cross-heading, "Civil proceedings and defences." Section 89, another provision that featured in *The Grange*, there's a protection against civil proceedings for members and employees of the authority, but not the authority itself, the authority enjoyed no immunity from suit. We don't need to worry about 90, "Civil proceedings against building certifiers," but then 91, this was the longstop provision that was introduced in the 1991 Act and, as the Court knows, introduced partway through the legislative process.

So first of all subsection (1) confirms the application of the normal limitation provisions, "Except to the extent provided in subsection (2) the provisions of the Limitation Act 1950 apply to civil proceeds against any person where those proceedings arise from, (a) any building work associated with design, construction, alteration, demolition or removal of any building or, (b) the exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition or removal of that building." So that's normal limitation rules apply both to building work and to the exercise of functions under this Act, so at least on the face of it subsection (1) is treating those as distinct, which is natural, you wouldn't normally think of a council as performing building work, and you certainly wouldn't think of the BIA as performing building work when it sits in its offices in Wellington and assesses and documents and issues accreditations, it would be surprising if whoever did that said that they were off to the office for another hard day of building work.

And then we come to subsection (2). It's short and it's essentially the same form in the current Act, "Civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based," so two elements for that to apply. First, the civil proceeding must relate to building work and, second, one then identifies the act or omission on which the proceedings are based in order to count 10 years. There's

some helpful illustrations of how this works in particular contexts. Subsection (3) makes it clear that the phrase "civil proceedings relating to building work" includes civil proceedings against, "Territorial authorities and the authority and certifiers." So for the purpose of subsection (2), if civil proceedings are brought against a territorial authority, a building certifier or the authority and, (b) the proceedings arise out of the issue of a building consent, building certificate, code compliance certificate or an authority determination, the date of the act or omission is the date of issue of the consent or certificate or determination. So for those regulatory Acts it's implicit in that provision that subsection (2) will apply to such proceedings, that where any authority issues a determination for example, it's a claim against it for having negligently done so will be a civil proceeding relating to building work, and what subsection (3) is doing is just helpfully pinning down the start date of accounting, the 10 years, and it says rather than leaving it open for to argument about whether it's the date of inspection or some other date, it's the date of issue of the relevant regulatory instrument.

And then subsection (4) is particularly illuminating, I think, in terms of what Parliament understood the scope of subsection (2) to be. (4), "For the purposes of subsection (2) of the section, if civil proceedings are brought against the authority and the proceedings arise out of the issue of an accreditation certificate, the date of the act or omission is the date at which the accreditation certificate was relied on." So what does that tell us? That tells us first of all that the legislature when it enacted subsection (2) and applied a longstop bar to civil proceedings relating to any building work, understood that phrase to relate to a civil proceeding against the BIA in relation to the issue of an accreditation certificate.

GLAZEBROOK J:
Well, why wouldn't they, when it says so explicitly in subsection (1)?

MR GODDARD QC:
Yes.

GLAZEBROOK J:
Isn't the other way of looking at it that "relating to building work" is a shorthand for the two different types of building that's related in subsection (1)?

MR GODDARD QC:

In my submission it shows that it's at least as broad. The question is whether it's confined to subsection (1) –

GLAZEBROOK J:

Well I understand that but I don't know that you get much out of subsection (4) by saying well if – because clearly the legislature must have understood it applied to both things in subsection (1) because it says so in subsection (1). So –

MR GODDARD QC:

And yet the Courts below didn't accept that.

GLAZEBROOK J:

And it's not going to repeat, especially now, when we do try not to repeat idiotic phrases ad nauseum, or definitions when you don't need them. It's not going to repeat (a) and (b) in subsection (2) is it?

MR GODDARD QC:

Absolutely Your Honour, so it seems to me obvious from the scheme of this provision that subsection (2) applies at least to everything referred to in subsection (1) even though, and this is the point that wasn't accepted by the Courts below, even though some of those activities, and I have in mind particularly the issue of an accreditation certificate by the BAA, is not itself building work and is not an activity relating to building work on any one building.

GLAZEBROOK J:

Well no but it says explicitly the exercise of any function, so it includes in building works the exercise of any function under the Act as sensibly one would expect –

WILLIAM YOUNG J:

I suppose the point you're making is it's referable –

O'REGAN J:

But it's still relating to one building.

WILLIAM YOUNG J:

– to that building. It's exercise of a function in respect of that building.

O'REGAN J:

Yes, relating to the construction of that building.

GLAZEBROOK J:

Well it will be because you will be applying the generic to a particular building, won't you?

MR GODDARD QC:

But, Your Honour, the BAA doesn't exercise a function in relation to any particular building. Issues and accreditation certificate remains in force for years and years and years and years –

GLAZEBROOK J:

I see, is that what – but that doesn't apply to councils, does it, it's just the BIA that that submission applies to or…

MR GODDARD QC:

Yes.

ELIAS CJ:

Well what is relying on the certificate. Is it purchasing the stuff?

MR GODDARD QC:

It will be the decision-maker granting a building consent or issuing a code compliance certificate in reliance on the accreditation certificate.

ELIAS CJ:

Oh.

MR GODDARD QC:

So for example –

ELIAS CJ:

No, no, that's fine, I understand that.

WILLIAM YOUNG J:
Would include solution.

ELIAS CJ:
Yes, yes.

MR GODDARD QC:
So section 50, which I'm afraid, yes, Your Honour, that's another good example.

ELIAS CJ:
Yes, no, I recall section 50, yes.

MR GODDARD QC:
So section 50, which is not in here I'm afraid, establishing compliance with code a territorial authority shall accept the following documents as establishing compliance with the provisions of the Building Code and accreditation certificates are included in there, like approved, you know, acceptable solutions sorry.

ELIAS CJ:
Well was there, I'm now confused. Were there accreditation certificates in respect of this?

MR GODDARD QC:
Not in respect of this product. There were accreditation certificates. There weren't in respect of Shadowclad.

ELIAS CJ:
Right, I just wonder what that means really because there's a safe path through for everybody if they, if there is an accreditation certificate in place, except for the BIA.

MR GODDARD QC:
Yes, except for the BIA.

ARNOLD J:
Well it's not an entirely safe path because doesn't the Consumer Guarantees Act still apply under the, even though you've got an accreditation?

MR GODDARD QC:

Absolutely and the Fair Trading Act would still apply and of course any contractual rights that went beyond mere compliance with the Code.

ARNOLD J:

Yes.

MR GODDARD QC:

Well actually even just required compliance with the Code. If it turned out the accreditation certificate had wrongly been given so that in fact the building work did not comply with the Code, and you had a warranty that it did, you could sue on that and it would be completely irrelevant to that contractual action, strict liability claim, for non-compliance, that the BIA had got it wrong.

ELIAS CJ:

So there's a doubling up of responsibility?

MR GODDARD QC:

No, because if an accreditation certificate is issued, then the other regulator must accept it and has no discretion anymore.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

So the whole –

ELIAS CJ:

I'm thinking of the manufacturer's liability remains under the Consumer Guarantees Act.

MR GODDARD QC:

And the Fair Trading Act and contracts –

ELIAS CJ:

And, and, yes.

MR GODDARD QC:

Yes.

ELIAS CJ:

And also the BIA is potentially liable.

MR GODDARD QC:

If they're negligent but we're slipping into the duty of care space.

ELIAS CJ:

No, I'm just quite intrigued about this accreditation.

MR GODDARD QC:

Well it's a way of –

ELIAS CJ:

Really whether it –

MR GODDARD QC:

Well Your Honour will remember that one of the problems we have, however many territorial authorities we currently have through New Zealand was 80 something I think at the time this was first enacted, 70 something now, it's hard to keep track, but it is shrinking rather than growing these days, and one of the objectives of the, before the 1991 Act every local authority was responsible for its own bylaws.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

And so you had this extraordinary range of ways of doing things, there were –

WILLIAM YOUNG J:

Same Building Code.

ELIAS CJ:

Yes.

MR GODDARD QC:
There was no Building Code.

WILLIAM YOUNG J:
Yes.

MR GODDARD QC:
So one of the purposes of the ’91 Act was to produce more national uniformity. First of all, a single Building Code, but you still had all the different territorial authorities assessing compliance with it. One of the ways that the costs of doing that was supposed to be reduced and more uniformity achieved was through acceptable solutions, which would be generic, not product specific approvals of ways of doing things, and then accreditations, which were proprietary ones, so it was entirely voluntary, but if I had come up with some exciting new roofing material, Goddard Roofing, and I wanted to encourage its use and reduce the compliance costs for builders using it through the 80-odd territorial authorities in New Zealand, I could seek an accreditation certificate and then, as long as it was used in a way that was specified, in my specifications that were referred to in the accreditation certificate, councils would have to accept that as complying with the Code, and that was basically the scheme. So it was optional, but it was a way that in theory you could encourage people to use your product and reduce the costs of doing so.

The critical thing for my purpose is that although, is that what this shows is that civil proceedings relating to any building work are broader than the two limbs of subsection (1) – Your Honour’s taken me ahead of where I was going at this stage – but what we have got here is not, the BIA when it issues such a certificate is not carrying out building work associated with the design, construction, alteration, demolition or removal of any building, that's common ground, it’s also not exercising a function under the Act relating to that building, a particular building, and this Court has said, well, suggested obiter, in, let me get this range, *The Grange*, that building work must relate to a particular building and that the, one of the indications of that is the “that building” in paragraph (b) that generic work is not building work, and what that shows is that when you read the phrase in subsection (2) “civil proceedings relating to any building work” you're talking, yes, about everything in subsection (1) but you're also talking about other things, and coming back to Your Honour Justice Glazebrook’s question, how broadly do we read this, it’s a signal about how broadly Parliament understood it.

GLAZEBROOK J:

Well, they understood it included the BIA. It is a signal that they thought it included every man involved, every man and dog involved in anything that you might generically say is building work?

MR GODDARD QC:

And I'll have to come back to that when I deal –

ELIAS CJ:

Or used in birthday work.

GLAZEBROOK J:

Or used in building work.

MR GODDARD QC:

And, in short, I say that first that's a natural reading phrase, it certainly can't be excluded simply because it isn't connected with a particular building, we can see that, in relation to the BIA, and that there would be –

ELIAS CJ:

What's the policy of limiting it if there is no remedy under the Building Act.

MR GODDARD QC:

Well, there was never a –

ELIAS CJ:

Well…

MR GODDARD QC:

– remedy under the Building Act, Your Honour, there were always remedies in contract and in tort and under various other statutes. The Act didn't create –

ELIAS CJ:

No.

MR GODDARD QC:

– any remedies. So it's not a case of a statute creating some remedies against certain people then limiting those remedies, this is not the Fair Trading Act –

ELIAS CJ:

No.

MR GODDARD QC:

– and it's all civil proceedings, including proceedings under other Acts, like the Fair Trading Act, including tort, you know, including contract, although that's not often going to be practically important because of the six-year from accrual rule. So it's quite clear that this was supposed to apply to all civil claims of whatever kind, provided only that they related to any building work, and the policy in short is that although the introduction of this was driven by particular concerns about indefinite liability of local authorities, building certifiers, the Courts dealt with that on a number of occasions, and certain participants in the construction industry, Parliament then had a choice to make. They could either just introduce a longstop for those categories of person, or Parliament could proceed on the basis which, in my submission, it proceeded, which is to say it would be unfair to protect some people who have contributed to defective building work from liability after a lapse of 10 years, but leave others who have contributed to it exposed, and so Parliament did was say that it's civil proceedings relating to the building work that are barred after 10 years, after that time you can't bring civil proceedings relating to that building work and Parliament didn't go down the course of giving that protection only to some but not to others which would produce perverse results, for example in relation to contribution. And also some very odd results in relation to who would and would not be protected. If Your Honour remembers, for example, my illustration of an architect designing one building for me and an architect designing exactly the same sort of building for, you know, a multiple home producer or for sale of plans. My business model is to sell plans to builders –

GLAZEBROOK J:

But if it's going to be used in a particular building, I don't myself have much difficulty in saying just because you're providing plans that are going to be used in 15 buildings it's not actually a plan relating to a particular building because it does relate to each particular 15 building, which would be the same sort of analysis I'd apply to the BIA.

MR GODDARD QC:

Then we come to the manufacture of, for example, kitset buildings and you manufacture kitsets. You're not carrying out building work. That's pretty clear. But is it the case that you make lots without a particular customer in mind you are not protected by this but if you make one for a particular customer you are, and as soon as you accept, as I think one must, that the manufacturer of kitset buildings without designated purchases, designated sites, is protected by this. A claim against them for a defect in the kitset which means that it leaks is a civil proceeding relating to building work. Then in my respectful submission there's no sensible dividing line between someone who attaches the cladding to the framing in the factory and sells the kitset and someone who sells a part of that for use in the same way. They're all civil proceedings relating to building work because in every case the complaint by the building owner is the same. "The building work is defective. You have contributed to it. I want compensation required to remedy the defects in the building work."

GLAZEBROOK J:

So your argument is that you look at, when you're saying is it related to building work you look at the compensation sought?

MR GODDARD QC:

You look at two things. You look at the nature of the – you apply ordinary words but a claim relates to building work if you're complaining that at the time that construction of a building was finished it was defective. That's a claim relating to building work. You will normally see in that context that what is claimed is remedial costs, so they are two sides of one coin. But what you have – if you have a claim that says "on the day this building work was finished it was defective" then that's a civil proceeding relating to building work. It doesn't matter who you're blaming, whether it's the BAA or the –

GLAZEBROOK J:

I'm still slightly puzzled about this "on the day" because often it's not on the day. I suppose it can be but often it's because something breaks. So if you have something that on the day is perfectly fine but then shatters as we've had with glass in this courtroom, so I'm not quite sure what you mean.

MR GODDARD QC:

Again, what I'm trying to exclude is the idea of some subsequent external event that causes a shattering of the glass, Your Honour, for example. If a disgruntled litigant goes past and throws a stone at the glass, obviously –

GLAZEBROOK J:

But nobody would suggest that was building work in any sense of the word. But it's not just if it's defective when it's first there. It's perfectly all right for five years but it shatters after five years or 50 percent of them shatter after five years and you would normally expect that it would last the life of the building.

MR GODDARD QC:

But the complaint then is that it was defective on day 1 because it wasn't durable. It didn't have the properties that would ensure compliance. That's what I mean by "on day 1".

GLAZEBROOK J:

All right.

MR GODDARD QC:

So it includes latent defects which will result in a failure over time to – and the Building Code is very carefully constructed in that way to include both performance objectives in the various clauses other than B and then in clause B, Durability to deal with how long all those others have to be –

GLAZEBROOK J:

Yes, that's all right. I'm still having some trouble with it.

WILLIAM YOUNG J:

You still may get on to this but say you sought to join the building in relation to one of the schools.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

The limitation – and you lose on the limitation argument here, the builder would be in trouble, too, because the Law Reform Act, or would have sued in time so there's no limitation defence available to the builder in the contribution claim.

MR GODDARD QC:

But there would be under this because what the Courts have repeatedly said is that section 91 and the current section 393 bar contribution claims as well.

WILLIAM YOUNG J:

Have the Courts said that?

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Which Court?

MR GODDARD QC:

Certainly the – I think the Court of Appeal. Let me come back to you on that.

WILLIAM YOUNG J:

That's not far from obvious to me because the language of section 17 of the Law Reform Act is "would have sued in time".

MR GODDARD QC:

That's the argument that has been had and there were different views in the High Court. I'm sure that's been resolved at Court of Appeal level but I'll have to come back overnight with the names of the cases on that. What was said –

WILLIAM YOUNG J:

We'll come down to what was said, whether there was the same damage. If the limitation drops away it'll come down to whether it was the same damage but that might actually support your argument.

MR GODDARD QC:

There's a paragraph of Your Honour's judgment which says exactly that and which I was going to go to. I'll come back to it but it basically says that the reasoning of the English Courts on this subject was problematic because at least in New Zealand if a building as constructed is defective you can bring proceedings against the builder and the designer and other people and they're liable for the same damage for the defect in the building.

Paragraph 201, and there's a similar observation in the joint judgment of Justice O'Regan and Justice Arnold at 329, which again presupposes that it's the same damage, it's the same sort of idea in a building context, tackling that vexed question.

ELIAS CJ:

Sorry, I'm behind now. What is the point that you're making in relation to contribution?

MR GODDARD QC:

I was – so my argument is that it's inherently implausible that Parliament left some contributors to a defect in a defective building exposed after 10 years and not others.

GLAZEBROOK J:

But that falls away if, in fact, Parliament didn't because section 17 actually says, well, it doesn't matter whether you were sued in time.

MR GODDARD QC:

Yes, that would be right. And I probably need to go to those cases tomorrow as well.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

But one might still think that the natural approach of Parliament in trying to draw a bright-line against claims by certifiers because linked to insurance, as the Court will remember, that you're insured for 10 years but after that they wouldn't be worth the candle but there was this expectation they could get liability arising insurance for a 10 year period which proved wishful thinking. The sensible way to do this was to say after 10 years from the construction of the building people who contributed to that,

directly or indirectly, can't be sued in relation to defects in the building to a claim that the building work at the time it was completed did not comply.

Now, the other thing I want to take from subsection (4) is that a reference to the date of the act or omission on which the proceedings are based is not necessarily a reference to an act or omission of the defendant and that obviously if the BIA could say, "It's 10 years after we issued an accreditation certificate. No one can sue us in respect of that accreditation certificate," that would be a pretty outrageous result because someone might build a building 10 years after an accreditation certificate had been issued in reliance on it and time would have run before you could ever bring a claim. That's not the position. What is implicit in subsection (4) is that the date of the act or omission on which a proceeding is based may be an act or omission of someone else, and in particular – and this comes back to my answer to a question from Your Honour the Chief Justice earlier – the reliance on an accreditation certificate is something that's done by a local authority, they rely on it to make a decision. So in fact neither the defendant who issued the accreditation certificate nor the council in relying on it to make a regulatory decision is carrying out building work as defined in the Act, although the council probably comes with 91(1)(b), BIA doesn't. so that I think is an important stepping stone in my argument in relation to limitation.

I do need then to come on to the 2004 Act, which is in the next tab, tab 3, and I can move I hope faster through that because there aren't too many surprises in what I'm going to say, can go first to page 53 of the bundle, purpose and principles, and what we see is purpose (a), "To provide for the regulation of building work," this is all about regulating building work, "the establishment of a licensing regime for building practitioners, setting performance standards for buildings to achieve certain outcomes," and, (b), "To promote the accountability of owners, designers, builders and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code."

Then coming over to page 59 of the bundle, and illustrating the tendency of the legislature to add more words rather than remove words over time, the definition of building work is now about eight centimetres long rather than occupying two lines, but it basically still says the same thing: building work means, "Work for or in connection with the construction, alteration, demolition or removal of a building and on an allotment that affects the extent to which an existing building on that allotment complies with the Code," includes site work, includes design work relating to building

work, that's restricted building work, and in Part 4 has a broader meaning, we don't need to worry too much about that for present purposes. I should perhaps note immediately above it, "Building method or product," has the meaning given to it by section 20 and we'll look at that section in a second. I can then jump forward –

GLAZEBROOK J:

And you still accept under this Act that a manufacturer doesn't come within the definition of building work?

MR GODDARD QC:

Doesn't perform building work, I do. Obviously if they did they'd also obviously fall within the limitation provision.

GLAZEBROOK J:

Yes, exactly, exactly.

MR GODDARD QC:

I don't need to spend time the definition of building, so I think we can go over to page 79. Page 79 contains a subpart which was added in 2012. It wasn't in the Act for the period to which most of the claim relates, but it is I think helpful –

GLAZEBROOK J:

Sorry, what page is it?

MR GODDARD QC:

I'm on 79, Your Honour, of the bundle, 53 of the Act. So, subpart 4, section 14A, "Outline of responsibilities under this Act," and again, just to pin down what these provisions are and are not doing, because both parties refer to them in their submissions. Sections 14B to 14G, "(a) are not a definitive and exhaustive statement of the responsibilities of the parties but are an outline only, (b) are for guidance only, and in the event of any conflict between any of these sections and any other provision of this Act the latter prevails and, (c), do not reflect the responsibilities of the parties under any other law or enactment or any contract that may be entered into between them and are not intended to add to the existing responsibilities of the parties." So as I understand it, what this is really say is these are informative, perhaps hortatory, but don't have any legal consequences.

Then we have the point, 14B, responsibilities of owner, that the owner is responsible for obtaining consents, approvals and certificates and insuring that building work carried out by the owner complies with the consent or, if there is no consent, the Code. 14D –

ELIAS CJ:
Sorry, I've lost the page.

MR GODDARD QC:
I'm sorry, I was still on page 79 I've just flicked over to 80.

ELIAS CJ:
Yes, thank you.

MR GODDARD QC:
14D, responsibilities of designer, and 14E, responsibilities of builder, "The builder," in subsection (2), "Responsible for ensuring the building work complies with the building consent and the plans and specification and ensuring that building work not covered by a consent complies with the Building Code." Obviously that responsibility extends both to the materials used and to the way in which the work is carried out, where the builder is responsible for ensuring the building work complies with the Building Code, that's a responsibility for both materials and methods, what's used and what's done. 14F deals with the responsibilities of the building consent authority, and there's in particular the responsibility in (a)(ii) for each type of building consent to ensure that, "Building work has been carried out in accordance with the building consent for that work," it's all about building work.

Then we have 14G. 14G was not included in the original Part 4A, it was added on November 2013, and if it was in force when any of these buildings were built it can only have been a tiny handful, because almost all of them were earlier than this, and of course we know it doesn't affect the law. But it's interesting to see what the responsibility of a product manufacturer or supplier was, I understood by Parliament to be, because there are a number of respects in which the duty contended for by my friends goes beyond it. So, "In subsection (2), 'product manufacturer or supplier' means a person who manufactures or supplies a building product and who states that the product will, if installed in accordance with the technical data, plans, specifications and advice prescribed by the manufacturer, comply with the relevant

provisions of the Building Code," and then (2), "A product manufacturer or supplier is responsible for ensuring that the product will, if installed in accordance with the technical data, plans, specifications and advice prescribed by the manufacturer, comply with the relevant provisions of the Building Code." Now that was inserted by the Building Amendment Act 2013. As we'll see, the warranties, the deemed warranties in relation to materials, which were inserted in new Part 4A of the Building Act 2004, they begin on page 129 of the bundle and I'll go to them shortly, were inserted by the Act. So the same Act inserted both this non-binding statement of responsibilities and dealt with the question of what warranties in relation to materials should be deemed to be included in building contracts and available, not only to initial owners but to subsequent owners, and it didn't impose any warranty from a product manufacturer or supplier in favour of anyone in relation to materials, it very deliberately provided only for the head contractor to give that deemed warranty, which is relevant to whether the Courts should impose obligations owed by different people with different and in some respects more far-reaching content or would, in my submission, be a surprising thing to do.

Turning over then to page 82 of the bundle, Part 2, "Building," Section 15 provides the helpful outline of the part including, (a), "That all building work must comply with the Building Code," and, (b), "How compliance with the Building Code is to be established." We –

GLAZEBROOK J:
Just going back to the 14G, it's really dealing only with a product supplier who makes a representation, isn't it?

MR GODDARD QC:
Makes a claim that, "If you use my product in accordance these specs –

GLAZEBROOK J:
Exactly, that's –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
So it is only a – well, I'd say representation, but a statement.

MR GODDARD QC:

It's saying –

GLAZEBROOK J:

So if you just say, "Here's the product," then it actually doesn't apply to you, that section doesn't apply at all.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

And I know it's non-binding as well, so it's probably beside the point but…

MR GODDARD QC:

Yes, Your Honour's exactly right. It's only –

ELIAS CJ:

What's "non-binding"?

GLAZEBROOK J:

Well, that's because of 14A that says it's –

ELIAS CJ:

Oh, yes.

GLAZEBROOK J:

– not actually related to anything.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

You wonder why you'd put it in if that's the case.

MR GODDARD QC:

Indeed, Your Honour. Yes, it's slightly odd to enact something as a law after carefully announcing that it has no legal force. But we are used to –

ELIAS CJ:

Well, is that what 14A says?

MR GODDARD QC:

It's a – I think that that's a reasonable summary of what it does. It says it doesn't either create any new obligations or reduce any existing ones, so it's not obvious what it's doing.

ELIAS CJ:

Well, except it's –

GLAZEBROOK J:

Well, I'm not sure, I think it probably is a statement of that, but if it conflicts with any of the other obligations in the Act then it's not to be taken as that. But in any event, 14G only applies if you say it complies with the Building Code, and I'm not sure just saying, "This is a good product to put on a building" –

MR GODDARD QC:

No…

GLAZEBROOK J:

– is quite to that standard.

MR GODDARD QC:

You'd have to make a more specific –

GLAZEBROOK J:

I would have thought, but…

MR GODDARD QC:

– claim. But I think it would be fair to say, let me be clear, that the allegation is that Carter Holt does go that extra step –

GLAZEBROOK J:

Yes, I understand.

MR GODDARD QC:

– it publishes details specifications for how the product should be used in order to achieve compliance –

GLAZEBROOK J:

Yes.

MR GODDARD QC:

– with the Building Code. So –

ELIAS CJ:

Where are – will you take us at some stage to the specifications?

WILLIAM YOUNG J:

They're in the schedule, aren't they? They're set out –

MR GODDARD QC:

Yes, they're in the case on appeal.

WILLIAM YOUNG J:

Schedule 5 or –

ELIAS CJ:

Oh, yes, yes.

MR GODDARD QC:

They're pleaded in the schedule and they're also in the yellow volume 3 in the exhibits, Ms Newfield attaches a range of specifications as well as a range of contracts, so they're available to be looked at, I hadn't really intended to go to them because they're not the most gripping reading and time is precious, but I'll reflect over –

GLAZEBROOK J:

And, to be fair, none of us would probably understand them in any…

MR GODDARD QC:

Well, I certainly wouldn't, which would make it challenging to explain them. There are some areas in which I think I understand the subject matter of the proceedings, but anything that might involve hammers is not really one of them.

GLAZEBROOK J:

Yes, well, I must say, having had to do a case on flashings, I know I didn't understand them at the time but I know also I certainly do not now understand them in any way that would enable me to read a specification.

MR GODDARD QC:

Well, if I can avoid having to attempt to re-explain flashings, Your Honour, I'd be very grateful, so we'll see if we can work on that basis.

So back to the Building Act 2004, page 83 of the bundle, subpart 2, the Building Code. The 2004 Act of course, as the Court knows, repealed the 1991 Act, but the Code, which was included in regulations made under the '91 remained in force, and I'll go to it in a moment. The purpose of the Building Code, 16, "The Building Code prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use." What does it derive its legal force from? From section 17, and that's the provision pleaded as not having been complied with by the building work on the school buildings, "All building work must comply with the Building Code to the extent required by this Act, whether or not a building consent is required in respect of that building work."

So what the Code does is set obligations that must be complied with by building work, it does it by reference to the characteristics of the building and the building elements because it's a performance-based code, but it's fundamentally wrong to suggest, as the respondents do, that building work and building elements, for example, are separately regulated by this Act. The Act deals with building elements only for the purpose of imposing a performance requirement in relation to building work, and I don't think that should be controversial.

Section 18 makes the point that building work's not required to –

GLAZEBROOK J:

You might have to explain that a bit more to me, sorry. But maybe it will become clearer a bit later.

MR GODDARD QC:

The Building Code is not a code that buildings are required to comply with by law. So, for example, if I have an existing building there's no requirement that it –

GLAZEBROOK J:

Oh, okay.

MR GODDARD QC:

– comply with the Building Code. The only point at which the Building Code has any legal bit is when I do building work.

GLAZEBROOK J:

Yes, all right.

MR GODDARD QC:

Yes, that's all I'm saying, and –

GLAZEBROOK J:

All right, no, I understand.

MR GODDARD QC:

At 19, how compliance with the Building Code is established. "A building consent authority must accept any or all of the following as establishing compliance with the Building Code," one of those, (b), is, "Compliance with an acceptable solution." So if you comply with an acceptable solution, which will be issued by now the Chief Executive, who's replaced the BIA, then that must be accepted as illustrating compliance. (ca), another important provision, potentially. A current national multiple use approval issued under section 30F if every relevant condition in that national multiple use approval is met, this is another simplifying amendment to the building legislation. Instead of having to get a consent for each separate building, for certain standard types of building that are built through different areas in New Zealand you can just seek one national multiple use approval and then rely on that. So for your big national building companies, for example, that simplifies things.

And then (d), a current product certificate issued under section 269 if every relevant condition in that product certificate is met. A product certificate is a bit like the old accreditation certificates. It establishes compliance with the Code of the building work that uses that product and in fact in the transitional provisions of the 2004 Act somewhere I think accreditation certificates continue in force as if they were product certificates.

Then there's a reference to certificates relating to energy work issued under the Electricity Act 1992 and the Gas Act 1992. I'll try to come back with those very briefly.

Section 22 deals with the Chief Executive issuing acceptable solutions and verification methods which are among the things which can be used to demonstrate compliance. The specific provisions which my friends refer to, so let me go to it now, over on page 87, section 26 and following, one of the new powers the Chief Executive has is to issue warnings about or ban the use of building methods or products, and we can only wish that that power had existed under the '91 Act and had been exercised in relation to certain methods of building. Life would have been much simpler.

This is a particular power that can be used to ban methods or products and then those can't be used when carrying out building work. It's relied on by my friends to suggest that building methods and products are something different from building work, but that's misconceived in my submission. That's quite clear from the scheme of the Act. I'm not going to spend more time on that now. I'll come back to it in reply if I need to.

Turning over to page 92, we have national multiple use approvals which went in in 2010. Section 30A, national multiple use approval establishes compliance with the Building Code. National multiple use approval establishes that the plans and specifications to which it relates comply with the Building Code and then there's provision for how to apply to those and what the Chief Executive considers in order to grant it and over on page 95 section 30F we see that the Chief Executive must issue a national multiple use approval if he or she is satisfied on reasonable grounds that certain requirements are met, the fees are being paid, and the application doesn't involve the use of a building method or product which has been banned.

And then (e), critically that, "If building work were properly completed in accordance with the plans and specifications that accompanied the application, that building work would comply with the Building Code."

What paragraph (d) illustrates, and I thought it was fairly trite, is that when you're issuing an approval to confirm that certain building work will comply with the Code one of the things you take into account is the building methods and building products provided for in those designs. What products you're going to use is part of the specification of the building work.

So those are generic approvals issued in advance. I don't think I need to spend time on code compliance certificates so we can jump over to page 125, product certificates. As I said, product certificates are sort of the modern equivalent of an accreditation certificate but there's one important difference and we see that from section 268 which is a proprietor of a building method or product may apply to a product certification body for certification of that building method or product so you don't go to the BIA any more and you don't go to the Chief Executive who's the central Government replacement for the BIA. We have these separate animals, product certification bodies, that issue product certificates for building methods and –

ELIAS CJ:
So what is the submission?

MR GODDARD QC:
I'm going to link this into the longstop and make the submission if there's been a negligently-issued product certificate that's a claim against the person for issuing that as a civil proceeding relating to building work even though it's done ex ante, even though it's generic and doesn't relate to a particular building, and that the relevant act or omission obviously again is going to be the reliance on it, just as with accreditation certificates. So it goes to my submission about the breadth of the longstop.

ELIAS CJ:
Yes. We'll take the adjournment now. Thank you.

COURT ADJOURNS 3.31 PM

COURT RESUMES ON THURSDAY 14 APRIL 2016 AT 9.08 AM

ELIAS CJ:
Yes, thank you, Mr Goddard, I'm sorry about the delay.

MR GODDARD QC:
Thank you, Your Honour, it's a great pleasure to have some Judges.

ELIAS CJ:
I think this case is fated.

MR GODDARD QC:
It's nice though that we live in a country where when the Court doesn't reappear we know it's a technology problem not a constitutional crisis. It's reassuring.

I'm conscious of time. What I propose to do is to finish, and I've got just a couple of minutes left of my review of the legislation, then turn to the limitation issue and my road map and submissions, section 6, I'm going to focus on that, and then I'm going to deal with the tort duty of care issues very much at a level of principle, without going to a lot of cases, because it seems to me that the Court ultimately is going to need to deal with it at that level, and that's what's going to be most helpful in the time available. But of course if the Court wants to explore specifics I'm very happy to do so. I'm just trying to work out what the most efficient use of the –

ELIAS CJ:
Well, it's your allocation of time, Mr Goddard.

MR GODDARD QC:
Yes.

ELIAS CJ:
I must say, I'm really wondering if we're being invited to take a first principles look, whether we don't need a bit more assistance than that and whether we should have given leave on that, on those points. But anyway, you carry on as you see fit.

MR GODDARD QC:

I hoped at least to persuade Your Honour that not only were you right to grant leave but that there are indeed strong reasons for finding that this is not a place to which the Courts should go or which should be decided only after a trial, that the lines are brighter than that, essentially the reasoning that the Court of Appeal undertook in *South Pacific,* for example, saying, "We can find that where you have these relationships and that imposing a duty of care and negligence would cut across balances struck by other parts of the law, it is actually not only possible but necessary in the interests of the coherence of the law to adopt a particular approach," I'll come to that.

So, back into the Building Act 2004, it's in volume 1 of the authorities, the pink volume under tab 3, and when we broke, as we thought for afternoon tea yesterday, we were on page 125 of the bundle. I'd just taken the Court to the provisions on certification of building methods of products and drawn to the Court's attention 268 and 269, which provide for the issue of product certificates by a product certification body. This is the substitute under the replacement, perhaps I should say under the 2004 Act, for the accreditation certificates that were issued by the BIA under the 1991. And just to land on what these product certification bodies are, if I take the Court back for two seconds to page 122, section 261, the Court will see that the Chief Executive, the central government regulator who has replaced the BIA for most purposes under the Act, appoints one or more persons as a product certification accreditation body, and those bodies then in turn, section 263, "Accredit persons or bodies to perform the functions of product certification bodies," and that's the product certification bodies that grant the product certificates referred to in section 268. So –

WILLIAM YOUNG J:

As matter of interest, does Shadowclad have a product certification certificate?

MR GODDARD QC:

I actually don't know.

WILLIAM YOUNG J:

Now, I know. I know it's now, not then.

MR GODDARD QC:

Yes, I don't know. I'll find out, Your Honour.

So we have now product certification, product certificates, and I mentioned, but without providing a reference, and let me do it, the transitional provision in relation to accreditation certificates, it's not in this extract from the Act but it's section 447 of the Building Act 2004, which provides that, "Certificates of accreditation issued under section 59 of the 1991 Act are now treated as if they were product certificates issued under section 269," and one can see from the register that some still are in force today. So these are the same thing but issued by a different body, no longer a Government body but a certification body.

We can turn over then to page 129 of the bundle. The new part I mentioned, Part 4A, consumer rights and remedies in relation to residential building work, that was inserted by the Building Amendment Act 2013, the same one that inserted the statement of responsibilities in relation to product manufacturers.

GLAZEBROOK J:
Just to be clear, those are the ones that were supposedly non-binding is that, or is a shorthand?

MR GODDARD QC:
Yes. And this was just one of them, Your Honour. Your Honour will –

GLAZEBROOK J:
No, I understand –

MR GODDARD QC:
– remember that – yes.

GLAZEBROOK J:
– I understand there were a number.

MR GODDARD QC:
Yes. So most of them went in in 2012, I think –

GLAZEBROOK J:
Oh, okay, that one was the one.

MR GODDARD QC:

– and then there's just that one –

GLAZEBROOK J:

That's right, that's right.

MR GODDARD QC:

– that got parachuted in one year later.

GLAZEBROOK J:

Thank you, yes.

MR GODDARD QC:

And what we see the part doing is described in section 362A, it protects consumers in relation to residential building work by requiring certain information to be provided, "Prescribing minimum requirements for residential building contracts" and, (c), importantly, "Implying warranties into residential building contracts," and providing remedies for breach of those warranties. There are definitions in 362B which narrow the concept of building work in this context to exclude design work and define the concept of residential building work, which is where you're building household units. But B importantly does not include a subcontracting agreement between a building contractor and a building subcontractor. So the contracts into which these warrants are implied are just head contracts, not subcontracts. 362C makes it clear that nothing in this part limits or derogates from the provisions of the Fair Trading Act or the Consumer Guarantees Act. This is an example of Parliament taking into account other regimes and legislating in a way which Parliament sees as complementary to and consistent with those other regimes.

Then we don't need to look at the provisions on pre-contract information but if we turn over to page 133, we see the heading "implied warranties". 362H, when the provisions apply they apply to any of the following contracts entered into on or after the date on which this section comes into force. A residential building contract, written or oral, or a contract for the sale of one or more household units by or on behalf of an on-seller, and they apply despite any provision to the contrary on any agreement or contract.

Then what are these implied warranties? They are in 362I. They're implied warranties for building work in relation to household units. This is also helpful just to respond to the suggestion that building work doesn't include materials and quality of materials made by other respondents. So in every contract to which this section applies, the following warranties about building work to be carried out under the contract are implied and are taken to form part of the contract. A) that the building work would be carried out in a proper and competent manner in accordance with the plans and specifications and in accordance with the relevant building consent. B) the materials one, that all materials to be supplied for use in the building work will be suitable for the purpose for which they will be used. So, for example, will be suitable for use as exterior cladding, will be suitable for use as directly fixed cladding and, unless otherwise stated in the contract, will be new. C) that the building work will be carried out in accordance with and will comply with all laws and legal requirements including without limitation, this Act, and the regulations, so a warranty of compliance with the Code including its provisions on weathertightness. D) reasonable care and skill. So a promise to carry out the work with reasonable care and skill implied into the head contract. Suitable for occupation, E and F if the contract states the particular purpose for which the building work is required or the result the owner wishes the building work to achieve so as to show the owner relies on the skill and judgement of the other party to the contract, that the building work and any materials used – so again, a promise in relation to materials implied into the head contract will 1) be reasonably fit for that purpose or 2) be of such a nature and quality that they may reasonably be expected to achieve that result. 2(1) has effect despite any provision to the contrary in any contract or agreement and despite any provision of any other enactment or rule of law. So these are non-excludable statutory protections in relation to the quality of materials and its suitability for purpose.

ARNOLD J:

Just going back to (f) on page 135, that one does draw a distinction between building work and materials, doesn't it?

MR GODDARD QC:

It deals with –

ARNOLD J:

The building work and any materials used in carrying out the building work will be.

MR GODDARD QC:

I understand that to be a promise in relation to a specific aspect of it rather than drawing a distinction and it's difficult –

GLAZEBROOK J:

Sorry, I think I need to – page 135, not 362F.

MR GODDARD QC:

Yes, on page 135.

GLAZEBROOK J:

Okay. Thank you.

ARNOLD J:

All I'm saying is that it refers to them separately.

MR GODDARD QC:

It does, Your Honour. The way it's described – and that's consistent with emphasising in particular that the materials have to meet those requirements but if we look, for example, back up at paragraph (b) it's clear that the materials are used in the building work and (c) is particularly important. When there's a promise that the building work will comply with all laws and legal requirements obviously that includes a promise that the building work – which comprises both the materials used and the work done to assemble it – will ultimately – if I were trying to argue before this Court that (c) did not include any commitment at all in relation to the materials, I don't think I'd get very far. I think Your Honour would be pressing me quite hard on that.

So then we come over the page to 362J. We see the way in which, again, Parliament has turned its mind to successive owners and dealt with that issue, which was one of the issues that in other contexts.

WILLIAM YOUNG J:

Does it deal with limitation other than by the Limitation Act in section whatever it is?

MR GODDARD QC:

No, Your Honour.

WILLIAM YOUNG J:

So the Limitation Act presumably starts when the building is complete. The limitation period starts?

MR GODDARD QC:

Yes.

ELIAS CJ:

Sorry, what was that?

WILLIAM YOUNG J:

I'm saying that the limitation – the six year limitation period would start running at the conclusion of the building.

MR GODDARD QC:

They're deemed warranties so they're treated in the same way as any other contract provision for limitation purposes.

WILLIAM YOUNG J:

As opposed to a cause of action arising when the second buyer buys the building. That's the point I was interested in.

MR GODDARD QC:

I think because of the way this is structured that it must be the case that you effectively are treated as if you've taken an assignment of the warranties. I think that drops out of 362J and 362L but if we just have a look at those quickly, 362J makes it clear that an owner of the building or land in respect of which building work was carried out under a contract to which this section applies may take proceedings for a breach of any of the warranties whether or not that person was a party to the contract. So they're taking a proceeding for breach of the warranty. That doesn't directly answer Your Honour's question of when that accrues but it sounds as if they're stepping into the shoes of –

GLAZEBROOK J:

362K probably does assume that because it says you can't give away…

MR GODDARD QC:
The benefit.

GLAZEBROOK J:
Yes.

MR GODDARD QC:
So – which is, again, a non-exclusion provision and then 362L talks about a person who has the benefit of an implied warranty, so either the original owner or a successor has the remedies set out in 362M to P, which again suggests that who has them may change but the remedies begin on a particular –

GLAZEBROOK J:
Well, it would be a bit odd if you flipped every year and thereby kept increasing the limitation period as against you held on to it and your limitation period was only six years.

MR GODDARD QC:
It would, Your Honour.

GLAZEBROOK J:
So it would be exceedingly odd.

MR GODDARD QC:
It would. It would make it indefinitely subject, of course, to the longstop which is why it's not quite so impossible.

GLAZEBROOK J:
You could keep doing that if, in fact, it doesn't – oh, no, because it's from the time of the work, isn't it?

MR GODDARD QC:
Yes.

GLAZEBROOK J:
So it might not matter.

MR GODDARD QC:

In this context, it might matter a bit less than in others.

GLAZEBROOK J:

Yes. That's right.

ARNOLD J:

It would matter if warranty about materials isn't caught by the longstop.

GLAZEBROOK J:

No, that's a different point though because that's just an exclusion from the Act generally.

MR GODDARD QC:

I think it's very difficult to see how the implied warranty about quality and suitability of materials given by head contractor – either voluntarily in a contract before these provisions or deemed to be given here – if sued on wouldn't then, a claim for breach of contract must be a claim relating to building work.

GLAZEBROOK J:

Obviously, but I was just saying that I think that Justice O'Regan's point was that it would matter in terms of products if you could keep renewing it up to six years and it wasn't included in the longstop but if it is included in the longstop then …

MR GODDARD QC:

I understood His Honour perhaps to be going further and saying that if materials were something separate from and outside building work so that a claim that materials were defective was not a claim relating to building work which is one of the respondent's arguments. Then you'd have a problem and what I am suggesting is –

GLAZEBROOK J:

I'm not sure you'd have a problem under this, would you, because the warranty could still be warranties under the contract and you'd still have a limitation.

MR GODDARD QC:

But not the longstop limitation.

GLAZEBROOK J:
No, no.

MR GODDARD QC:
What I am suggesting is that to think that the longstop doesn't apply in relation to contractual obligations relating to materials although the circumstances in which it will matter will be limited would be a bit, I think, surprising.

And then 362M, remedies of breach of warranty, can be remedied, fix it, and 362N, remedies of breach of warranty cannot be remedied or breach is substantial. This is a concept that we find also in the Consumer Guarantees Act, the same idea that you fix it if you can, but if it can't be remedied or if it's substantial then you can recover damages or, in certain circumstances, cancel the contract and recover certain consequential damages, as in section 3, and then substantiality and cancellation dealt with over on page 139, section 362Q, building contractor or on-seller must remedy defect notified in one year of completion and then over on 141 exclusion of liability for event not attributable to fault of building contractor or on-seller and then there are certain matters that are carved out from that liability.

So what we see there is a very carefully-developed regime imposing liability for defective materials that result in defective building work, non-compliant building work, being laid out by Parliament which has turned its mind to what the obligations should be, the class of contracts to which they should apply and be non-excludable, and who should owe them, which is the head contractor. That's hardly an accident in the context of an Amendment Act that was also dealing with non-binding responsibilities and manufacturers. I've actually gone to some trouble to explicitly spell out that it's only the head contractor who's liable in relation to these non-excludable warranties. Those provisions replaced the –

ELIAS CJ:
What's the significance of it being confined to the head contractor?

MR GODDARD QC:
That Parliament has deliberately structured these remedies to be available against a particular participant in the industry and has not seen it as necessary to go further. It's left the question of manufacturer liability to the Consumer Guarantees Act which was explicitly preserved. So Parliament has basically looked at when manufacturers

of goods and other items used in building work are liable and said, “We’re happy with what the Consumer Guarantees Act does on that, but we’re going to add some extra provisions in relation to head contractors,” and in my submission there’s a strong inference that having looked at this just a few years ago Parliament did not see the sort of gap in the available legal remedies that my friends are seeking to suggest exists.

ELIAS CJ:

But it could also be said does it not counter your submission that this is a careful and comprehensive system?

WILLIAM YOUNG J:

I mean, it’s all piecemeal. The problem with it all is that it’s just piecemeal reform, an Act that’s growing like topsy but isn’t really grappling with the central issues.

GLAZEBROOK J:

And it’s very much consumer residential protection, isn’t it, and possibly at a time – I’m not sure of the timing – where they thought it was a commercial/residential split in terms of liabilities. Do you know the timing with *Spencer on Byron*?

MR GODDARD QC:

It would be much the same time. I’m not sure. But of course it wasn’t –

GLAZEBROOK J:

But there is a consumer protection issue and I’m not sure that you can infer from consumer protection and easy remedies for consumers a scheme that says, “Well, that means that excludes all of the commercial matters as well.” That seems to be what you’re saying. You’ve got this special scheme and Parliament decided that that was it. But it’s a special scheme that’s in the context of consumer protection, not even thinking about big people who can look after themselves.

MR GODDARD QC:

Rather than not thinking about it, my submission is that this shows a conscious decision that big people can look after themselves and didn't need these protections. That’s why it’s consumer-focused and that to –

WILLIAM YOUNG J:
Or that the Courts will look after them.

GLAZEBROOK J:
Yes.

MR GODDARD QC:
Well, the idea that the Courts will look after the big people but won't look after the little people, so you need to legislate for the little people would be a very odd approach.

GLAZEBROOK J:
No, the Courts do look after the little people but, as everybody knows, it's difficult going through these Court cases with the experts and things so these are things that just gives them a quick jump in. Of course, the Consumer Guarantees Act is totally useless because if you've bought a $5 thing there is absolutely no way to enforce whatever the Consumer Guarantees Act says because it was cost you in the Small Claims Tribunal about $50 or whatever it is in order to enforce your $5 right. But it was intended to be something that would be easily pointed to by consumers instead of having to go through a Court or Tribunal process.

MR GODDARD QC:
It still involves access to the normal Courts if you have to enforce the rights.

GLAZEBROOK J:
Yes, that's the point about it.

MR GODDARD QC:
That's why the $5 thing doesn't work so well, based on experience.

GLAZEBROOK J:
But it does have a – because shopkeepers know they should comply with it, in fact, it does have that voluntary compliance thing in which case it does increase consumer protection. But it's a different regime, is what I'm saying.

MR GODDARD QC:
Yes.

GLAZEBROOK J:
And it doesn't say that you don't have the other remedy so it gives you a quick and easy way into it.

ELIAS CJ:
It's overlapping.

MR GODDARD QC:
What it does make clear is that Parliament has turned its mind to who is seen as vulnerable and in need of protection that they may not contract for, protection that they may not turn their minds to seeking in their own contract. That's what this is about. When you deem warranties to be included in contracts, what you're saying is that we're not confident that these people have sufficient resources and knowledge to be able to seek these protections for themselves or to successfully obtain them in the market, and so we're going to deem them to be included and prohibit their exclusion. But what is also clear from this is that Parliament did not consider that it was necessary to prescribe that such terms would be included in other head contracts. Rather, it left it to the parties to decide and that, I think, is a line that we can see has been drawn here. That tends to point us back to the contracts being determinative of the rights and obligations.

GLAZEBROOK J:
So this is not designed at the longstop? It's been a bit confusing because we've talked about longstop and we're not entirely sure when you go on negligence and when it's – so it's slightly unhelpful just going through things without explaining why you are.

MR GODDARD QC:
Sorry, Your Honour. I should, in relation to particular points, say why I'm there. What I said I would do – but it has proved a little bit confusing – is go through the Act in one run as a platform for both arguments. But I should situate particular paths.

GLAZEBROOK J:

Yes. For myself I never find it helpful, somebody going through something and then telling me afterwards why they've been going through it. If they tell me beforehand it's much easier to understand the point.

MR GODDARD QC:

So these provisions we are looking at as a platform for the duty argument later.

GLAZEBROOK J:

All right.

MR GODDARD QC:

I think having looked at those I should also note, but I'm not going to go to them, that I handed up yesterday the predecessor provisions sections 396 to 399, I think it was, of the 2004 Act. So there was a residential dwelling unit deemed warranty regime from the inception of the 2004 Act but what has happened is that in fact Parliament's gone back to it and developed it in more detail in 2013 but still without any suggestion that it should roam more widely. I've provided that regime which also included express warranties in relation to materials and their suitability for use. So since the inception of this Act there has been that statutory consumer protection, as Your Honour described it, regime, not leaving things to contract.

I think what I can then do is move to Part 5 of the Act, which begins on page 144.

ELIAS CJ:

Sorry – because I haven't been through the sections that you've handed up, you can't mount anything like the argument that you've developed on Part 4A from the terms of the provisions as originally enacted, I assume?

MR GODDARD QC:

No I do, I can.

ELIAS CJ:

Well in a sense that there are warranty provisions.

MR GODDARD QC:

But also in relation specifically to materials. Perhaps I should go to them briefly then because I did make the same argument below before these provisions were enacted. I thought it was most helpful to take the Court to the current provisions.

ELIAS CJ:

Yes.

MR GODDARD QC:

Because it shows Parliament coming back to this recently and not doing effectively what the respondents are asking the Court to do but if we go to those old provisions, what we see in section 396 is that they apply to building work in relation to one or more household unit. So it's that same household focus and –

WILLIAM YOUNG J:

So where is this?

ELIAS CJ:

This is in the hand-up.

MR GODDARD QC:

Yes it's in the handout yesterday, it's also in the miscellaneous folder in the electronic materials under item 8.

ELIAS CJ:

Sorry these are the provisions you addressed the Court of Appeal on?

MR GODDARD QC:

Yes.

O'REGAN J:

Which have now been repealed.

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes and in my submission all that the new provisions do is reinforce my argument by showing by showing not only that Parliament had one go at this but that Parliament came back to it.

GLAZEBROOK J:

So they weren't in the 1991 Act?

MR GODDARD QC:

They weren't in the 1991 Act.

GLAZEBROOK J:

Okay, right.

MR GODDARD QC:

But they were operative from 1 December 2000 and – well actually I'm not sure which – they're operative from 2004 and they applied to household units and the implied warranties were in 397, it included not only that the building work would be carried out in a proper and competent manner in accordance with plans and specifications but B that, "All materials to be supplied for use in the building work will be suitable for the purpose for which they will be used and unless otherwise stated will be new" and C, "The building work will be carried out in accordance with and will comply with all laws and legal requirements including this Act and F, the same purpose provision that we've seen in the new warranties. If the purpose for which the building work is required has been identified, a warranty that the building work and any materials used in carrying out the building work will be reasonable fit for that purpose and be of such a nature and quality that might be reasonable be expected to achieve that result. And again the ability in 398 for the –

ELIAS CJ:

Sorry and do these provisions similarly apply to head contractors, to the head contractor?

MR GODDARD QC:

That was not clear under these provisions. On the face of it it applies to any contract which provides for building work to be carried out in relation to one or more household units which could include subcontracts and so one of the changes that

was made in moving from these provisions to the new Part 4A was actually to make it absolutely explicit that it's only head contracts because –

ELIAS CJ:

Well you say to make it more – to make it absolutely explicit but on one view it's a new restriction.

MR GODDARD QC:

Change, yes. It's either a new restriction or a clarification. Either way what it shows is Parliament actually deliberately choosing to narrow the class of persons who would be deemed to assume these obligations.

ELIAS CJ:

So what's the legal submission in terms of –

GLAZEBROOK J:

Actually I think it has to be a new restriction because I just can't read any sort of restriction into these provisions.

MR GODDARD QC:

That's my reading of it as well.

GLAZEBROOK J:

Well especially because the owner is deemed to be a party to it which would have to not only include a subsequent owner but a subcontractor I would have thought because they're building work on residential – depending on what the subcontractor was doing I suppose.

MR GODDARD QC:

Yes. That's I think the more natural reading of it Your Honour.

GLAZEBROOK J:

It certainly seems to be.

MR GODDARD QC:

But it doesn't matter for my purpose.

GLAZEBROOK J:
No, no so it's a new restriction?

ELIAS CJ:
But what's the argument you address us in terms of our interpretation of the – and application of the longstop provision and also in relation to the development of the common law from this subsequent amendment? How are you saying we use it?

MR GODDARD QC:
It doesn't affect the longstop argument.

ELIAS CJ:
Right.

MR GODDARD QC:
It effects the duty of care argument and the argument is that the common law should not be developed in a way which not only overlaps with but is actually inconsistent with a carefully developed framework of liabilities introduced in 2004 and refined in 2013.

GLAZEBROOK J:
What you're going to have to do is to explain to me at least why it would be a development of the law rather than what one might call a bog standard product liability claim.

MR GODDARD QC:
Absolutely that's the key point that has to be reached.

GLAZEBROOK J:
Because I can understand the submission in terms of the development of the law that this might be but in terms of saying you have to pull back on the law because of a subsequent amendment then I'm in the Chief Justice's camp.

MR GODDARD QC:
That would be much harder yes, exactly. I absolutely accept that that's a key challenge to my argument and –

ELIAS CJ:

Well just though picking up on this point of developing the common law inconsistently, you say it shouldn't be developed against the careful system that Parliament has adopted. If that's really a submission you're pinning a lot on, don't you have to demonstrate to us that this really is a careful system and wouldn't we want to look at the legislative material which show that it wasn't simply blundered into.

MR GODDARD QC:

I don't think that the Courts reach different views about –

ELIAS CJ:

Well when you first put this argument to us you said that this was a clarification. You have now slightly shifted to say that you accept that it is a new restriction and you're asking us to take it as a restriction that is a warning shot across the bows of the development of the common law.

MR GODDARD QC:

No, I'm not –

ELIAS CJ:

No?

MR GODDARD QC:

It's not the restriction I'm relying on Your Honour, it's the existence of the whole warranty regime which –

WILLIAM YOUNG J:

But there's a huge – the whole thing is incoherent. I mean you've got a common law regime that's shifted and changed over the years and beside that you've got a Parliamentary system that has shifted to some extent in response to Court decisions. There's no overall, overarching approach which would actually have been quite helpful.

MR GODDARD QC:

Yes, it certainly would and Your Honour has explored that in *Spencer on Byron*.

WILLIAM YOUNG J:

I don't excuse the Courts for all of this but I mean the legislature has some responsibility as well.

MR GODDARD QC:

Yes I think if one were to ask and conduct a contribution enquiry, no one would end up with 100% but to say at the same time that it's so incoherent that we no longer need to worry about the coherence of the law is in my submission a counsel of despair and all I need to say and what I do say on the duty argument in relation to these provision is that we actually see Parliament turning its mind to whether the contractual framework for providing assurances to building owners about the quality and suitability of materials is adequate and concluding that it isn't adequate in the context of contracts for the construction of household units and that that is for a Court that seeks to develop the common law in a way that's sympathetic to the statute and that is conscious that if statutory regimes are to be modified because there is a gap in them that's often best left to Parliament, that can –

GLAZEBROOK J:

So we should get rid of – and I mean I would probably be in this camp if I were a legislature, we should get rid of liability in respect of residential buildings altogether apart from as provided in Act. Because your argument equally applies to residential, you say we'll they've done all this stuff for residential so why have the tort still there because residential people are looked after under the Act. Of course they're not because the head contractor could under, the product liability people could go under and for some reason we're incredibly wedded to spreading liability in respect of bad buildings among all ratepayers and those who rely on ratepayers, such as those paying rent.

MR GODDARD QC:

Your Honour would have a strong constituency among authority members if Your Honour were to run for legislative office in the light of that but –

GLAZEBROOK J:

But I mean the point is there is that incoherence and the same argument can be made there, the Courts have not fallen into that and one can understand in terms of the Courts not wishing to dip their toes into that given the long history in New Zealand.

MR GODDARD QC:

There are two things I think we need to bear in mind on this and I will come back to them in more detail later. One is that there is a difference between – that the effect of a legislative scheme like this differs depending on whether there is existing liability, that's not explicitly removed and it's the point Your Honour made to me earlier, made harder to suggest that introducing something like this implicitly does away with a common law liability framework that already exists and its implications for something that doesn't yet exist, which is why I need to deal with Your Honour's question, is this already part of the landscape or is this something new?

ELIAS CJ:

Is the submission more than "be careful if you're developing the law, the common law"?

MR GODDARD QC:

Be careful, be sympathetic to the statute book, and bear in mind which things are better done by Parliament.

ELIAS CJ:

Yes.

MR GODDARD QC:

And the other point I was going to make, which ties into that quite neatly, I think, Your Honour, is that – and this comes also under the observations of His Honour Justice Young – is that the way that legislation and common law have evolved in this area has, to some extent, been interdependent with each making assumptions about the other and so, you know, that concept of path dependency certain bites here, and one has to wonder whether if the existing statutory regime had been in place 40 years earlier we would have seen the same common law developments. The Courts have noted, for example, the importance to the different turn that the English Courts took of the statutory insurance regime there. His Honour Justice Young, in a couple of judgments, has noted – and Justice Arnold as well, actually – the recommendations made by the Building Industry Commission back in 1990 for a defective homes guarantee fund, liability fund, and have said, "If we'd gone there, the common law might have not needed to fill the gap in the same way." So yes, there has been a measure of path dependency and that does mean that it's not a completely tidy picture that we're looking at now, but it doesn't take away the force of the argument

that before the common law takes yet another step we should pause and ask whether it really makes sense in terms of the wider legal landscape or whether that is a step that is unnecessary having regard to where we've got to.

ELIAS CJ:

Well, I think that's an open door, really, that you're pushing against because of course the Court is going to – if it is a question of extending the common law look at it in the context of the statute but there's no silver bullet in this legislation, it seems to me, and we should – perhaps the real argument, apart from the longstop argument, the real argument on negligence is simply whether this is a further step.

MR GODDARD QC:

Yes and that's what I'm going to deal with.

GLAZEBROOK J:

And even if it is or isn't whether it should wait for trial.

ELIAS CJ:

Yes.

MR GODDARD QC:

Which goes to the *South Pacific* question, are we sufficiently confident about the landscape in this area that we can decide it now and is it in fact necessary in order to avoid a lot of cases going to trial, all of which ultimately, for good reasons, would be expected to fail, which is not in anyone's interests, that we draw a line.

GLAZEBROOK J:

Well, the line would be drawn after the first of the cases went to trial, wouldn't it?

MR GODDARD QC:

Depending on how fact-specifically it was drawn. It may or may not help in the future.

GLAZEBROOK J:

Well, exactly. If it's going to be fact-specific it should go to trial. If it's not going to be fact-specific then one can make generic statements but it's only if one is absolutely

confident it is in no way fact-specific which, for myself, given there's a lot of balancing involved – I know the Chief Justice hates that term so I take it back.

ELIAS CJ:
No, no. Leave it in.

GLAZEBROOK J:
It may well be that it is fact-specific that the web of contracts, for instance, might be very decisive in one case and not so decisive in another case depending on the nature of the web of the contracts involved, such as in *Rolls-Royce* where there are conscious decisions to contract in that particular way with subcontractors in the gap, et cetera.

MR GODDARD QC:
Effectively one of the things I'm arguing and then this is an illustration of how seductive that duty argument is –

GLAZEBROOK J:
Well, you were the one who took us to the legislation partly with duty and partly with longstop.

MR GODDARD QC:
I'm at least 80 percent responsible for where we are now. One element of my submission is that we do see and can expect to see exactly the same sort of choice being made in this context about who it is and it is not seeking direct rights against. So the submission I made yesterday as a matter of principle and by reference to the Orewa sample contract that you contract, of course, with your head contractor for the protections you want but that it's also absolutely orthodox, all the standard building contract templates that New Zealand provides for this, that you will seek warranties to be obtained by the head contractor from specified subcontractors and specified material suppliers for specified lengths of time. So you do make that choice in the construction context just as it was done in *Rolls-Royce*, Your Honour. You decide who –

GLAZEBROOK J:
This was a specific choice in the context of a complex contract but we can talk about *Rolls-Royce* when we get there.

MR GODDARD QC:

Yes, we'll talk about that later but I say the same argument is available in this context.

GLAZEBROOK J:

I understand that that's what you say.

MR GODDARD QC:

Okay. So if we turn, then, to the last part of the Act that I need to go to, Part 5, miscellaneous provisions. Turn over to page 145 of the bundle. I need to draw the Court's attention to this provision because I didn't in my written submissions and I actually think there's one aspect in my written submissions that might not be right, having focused on it. So let me just flag this.

ELIAS CJ:

What paragraph of your written submissions are you referring to?

MR GODDARD QC:

I think where I talk about the liability of the Chief Executive in relation to national multiple use approvals in 6.23 and 6.24. It would have been more helpful if I'd also noted section 390. I don't think it's a complex point but let me just flag it. So I talk about – I've already addressed the Court on the potential for claims against the BIA in relation to the accreditation certificates. I suggest in my submissions that the same issue arises in relation to claims against the Chief Executive for national multiple use approvals. But actually when one looks at section 390, which gives the Chief Executive quite a broad protection from liability for acts done in good faith, it seems to me that that issue is not very likely to arise and in particular you couldn't get a negligence action against the Chief Executive in relation to a national multiple use approval which was the implicit assumption, in my submission, and which I think was wrong. So I just wanted to flag that for the sake of completeness.

But the exact same submission is still made under the 2004 Act in relation, for example, to product certificates granted by a product certification body. So the argument works. It's just that I picked the wrong defendant.

ELIAS CJ:

Who does it work against?

GLAZEBROOK J:
The certification body.

MR GODDARD QC:
The certification body, which is not one of the animals listed in 390.

So coming over to the provision I did want to spend time on, of course, it's on page 147 at section 393, limitation defences, there's a note in the Limitation Act 2010 applies to civil proceedings against any person if they arise from that same structure we saw in the '91 Act. A, building work associated with the design, construction, alteration, demolition, or removal of any building or the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building. So again there's that explicit flag that you still look at the Limitation Act 2010 in relation to civil proceedings arising from either building work or performance of functions under the Act, which suggests a dichotomy between the two, in relation to the building – singular – like that building back in the '91 Act – but again what we then see in subsection (2) is broader language. It's not limited to the two categories referred to in (1)(a) and (b). However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based. So again that broad language, civil –

WILLIAM YOUNG J:
Doesn't that suggest – I know you disagree but because this is a reference to *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 – but doesn't that suggest that the language relating to building work encompasses (1)(a) and (1)(b)?

MR GODDARD QC:
By civil proceeding that complains that a building as constructed is defective, is a civil proceeding relating to building work whether the person you bring it against to perform building work or whether they were responsible for checking that building work, or whether they were responsible for granting some other commission, and I think that must be right under the '91 Act because we see it in relation to the BIA which clearly is not performing building work and it must be true here unless one were to conclude, which would be surprising, that a product certification body couldn't

invoke the longstop here. So that's a good question to ask oneself, I think, in order to reflect on the scope of subsection (2). A product certification body certifies some roofing, and it does so negligently. In fact the roofing attached in accordance with the manufacturer's specifications will not achieve compliance with the Building Code. You sue the roofing manufacturer, you sue the council, and you sue the product certification body. The council has a defence because it relied on the product certificate that follows from section 392(1)(c) –

ELIAS CJ:
If there was a product certificate.

MR GODDARD QC:
I'm assuming there was one, so in my example we've got a roof for which –

GLAZEBROOK J:
This is the same argument you made in relation to the BIA, isn't it, under the 1991 Act?

MR GODDARD QC:
And accreditation certificates, it is.

GLAZEBROOK J:
So it's just a repeat of that argument?

MR GODDARD QC:
And I was going to take it to the next level, yes, but –

GLAZEBROOK J:
Is there a next level for the argument? Sorry, it seems to me to be exactly the same argument. Is it exactly the same argument or is there a strengthened argument under the 2004 Act?

MR GODDARD QC:
It's exactly the same, I admit –

GLAZEBROOK J:
All right.

MR GODDARD QC:

– I was –

GLAZEBROOK J:

Go through it again by all means, it's just I wanted to make sure it was the same argument I thought it was.

MR GODDARD QC:

It is the same argument. I was about to go through it in more detail but actually there's a more logical time to do that which is when I zip very quickly through section 6 of my submissions, so I'll do that by reference to both provisions then. What, again, we see in –

ELIAS CJ:

Sorry, I'm now getting a little confused. Are you contending that subsection (2) is a standalone provision?

MR GODDARD QC:

I am submitting, and I think this is uncontroversial, that it is broader than the scope of the matters referred to in subsection (1). That's absolutely clear under the 1991 Act because we know that it applies to accreditation certificates which we know do not fall within subsection (1) of that Act, and the structure is exactly the same here, and the logic is the same here.

ARNOLD J:

It's very odd to start it with however though, isn't it? I mean "however" implies an exception to something that you've just stated, or a limit.

WILLIAM YOUNG J:

It's an exception to subsection (1). So "however" is not so good for plaintiffs as the Limitation Act because –

ARNOLD J:

Yes.

MR GODDARD QC:

And it doesn't work very well like that because it's also an exception to the limitation provision in the Fair Trading Act for example so it's also a qualification. No one has ever suggested that subsection (2) does not apply to a claim under the Fair Trading Act in relation to building work. It's obviously a civil proceeding relating to building work but the Limitation Act 2010 has nothing to do with claims under the Fair Trading Act. So the relationship between the two provisions is a little unsatisfactory on any view and –

GLAZEBROOK J:

Yes, we have to – I mean the trouble is we sort of assume Parliament actually knows about these things when it's enacting these things and takes them into account, in terms of coherence, and that often isn't quite the case.

MR GODDARD QC:

And often isn't quite the case. And that means that we have to look both at text and draw what inferences we can about that –

GLAZEBROOK J:

Absolutely.

MR GODDARD QC:

– and also purpose and I'll come back to the purpose element in particular because that's critical where you have texts that can be read more or less broadly as Your Honour emphasised yesterday. There's no other provisions I need to go to in the 2004 Act. In my road map I also refer to the Building Code. It's in my friend's volume 1, but I'm not proposing to actually go to it. The Court's very familiar with E2 and B2 of the Building Code which essentially say that, as discussed yesterday, the requirements relating to building work and what they require is that the building be weathertight and that it remain weathertight for the period required by B2, which depends partly on whether it's structural, a structural issue or not.

What that means is that – on the provision I should just draw the Court's attention to in my section 6 of my main submissions on page 15 is 6.27 where I just list quickly the other important elements of the statutory context, the Fair Trading Act 1986 obviously, the Consumer Guarantees Act 1993, very importantly and the Contracts

Privity Act 1982 which deals with the circumstances in which someone other than a party can take the benefit of promises in a contract.

That enables me to come on to section 7 of my submissions, claims barred by the longstop. I should perhaps just pause and check what Your Honour had in mind for sitting hours this morning?

ELIAS CJ:
We thought we'd go through to 11.30 if that's convenient.

MR GODDARD QC:
Yes. So looking then at claims barred by the longstop, the paragraph 6 of my roadmap and section 7 of the submissions and just quickly jumping through a few points in the roadmap. As I say in 6.1, it's the 2004 Act that's relevant for most claims but it's just worth bearing in mind that some claims would have been barred under the 1991 Act and obviously it's most unlikely that they were revived by the 2004 Act and so we do actually need to look at both provisions. Second –

WILLIAM YOUNG J:
Sorry just run that past me. So the 1991 Act applies to claims commenced – when did the 2004 Act come into effect?

MR GODDARD QC:
These provisions came into effect in latish 2004 I think.

WILLIAM YOUNG J:
Okay, so are we looking at when the act or omission occurred or when the proceedings were filed?

MR GODDARD QC:
The way – it seems to me we must be interested in the passage of 10 years from the relevant act or omission because if it was impossible under the 1991 Act to bring a proceeding in relation to something that occurred in 1992, if that had become barred under that Act, it would be very surprising if the effect of the repeal of that Act and the enactment of the 2004 Act was to apply a new test.

WILLIAM YOUNG J:

Was it not addressed?

MR GODDARD QC:

It wasn't addressed explicitly, unhelpfully.

ELIAS CJ:

Is there no transitional provision that bears on it?

MR GODDARD QC:

No. The 2004 Act, section 393 that we were just looking at, talks about performing functions under the previous enactment but obviously those – so for example –

GLAZEBROOK J:

Oh I see, yes, yes.

MR GODDARD QC:

So it clearly does intend to apply to some things that were done before it was past.

GLAZEBROOK J:

Which makes sense in terms of new buildings presumably if you've got –

MR GODDARD QC:

Yes, well suppose that a building was built in 2000.

WILLIAM YOUNG J:

Say it straddles, say the building straddles – I mean the obvious cases where it straddles the –

MR GODDARD QC:

Yes, will where it straddles, you just look at one I think because all your – but if you built something in 2000 and an accreditation certificate was in play in that then clearly that wouldn't have become time barred before 2004, so you could only rely on the 2004 Act but it does apply to the performance of functions under the previous enactment and it seems to me that the position in relation to an accreditation certificate must remain the same in terms of when time starts running under the 2004 Act, even though the provisions that explicitly provided effectively for the avoidance

of doubt when that was, have been dropped. So there's no equivalent to the old 91(4) and I suspect that's been done because there were no accreditation certificates anymore so they thought of we don't need to deal with this anymore but if in, you know, this year for example someone were to launch a proceeding against the Attorney-General as successor to the Building Industry Authority in relation to the negligent issue of an accreditation certificate in 1999 that had been relied on five years ago, you'd be looking at the 2004 Act, it would be a claim relating to building work because you're saying that the building as constructed was defective and it's the BIA's fault and the relevant act or omission would be the reliance on that accreditation certificate and that just follows from the general language of section 393 without the need for the clarification.

ELIAS CJ:

Sorry where do you get that from? That it is the relevant act or omission is reliance?

MR GODDARD QC:

I get it from, I think a natural reading of the current provision, what is the act or omission on which the proceeding is based? I get it from, of 393, I get it from if you like a presumption that – I mean the structure is almost identical to 91, it would be weird if the act or omission had changed as between the two. All that's happened I think is that additional explanatory material has been omitted and also from common sense, it would be profoundly unfair to plaintiffs if you could start counting from when the accreditation was issued. So that long before it was used for a particular project, all claims in relation to it could be barred. So this is, I think, a plaintiff friendly common sense submission supported by continuity between the two regimes.

WILLIAM YOUNG J:

So why wouldn't the claim be barred before if it's on an old product certification? Because the act or omission must be the certification of the goods.

MR GODDARD QC:

That's not how it worked under the '91 Act. It was very clear, you know, will remember that –

WILLIAM YOUNG J:

Oh yes but –

GLAZEBROOK J:

It's not an old – I think you're not saying an old one, you're saying one that was made and was current at the time it was relied on, aren't you?

MR GODDARD QC:

Yes.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

No but I'm talking – sorry I'm looking at the 2004 Act.

MR GODDARD QC:

But even under the - Your Honour will remember that accreditation certificates were continued in force as if they were product certificates under 2004 Act. So things that were issued as accreditation certificates are still in force today.

WILLIAM YOUNG J:

All right and say the accreditation certificate is issued in late 2004, the product is used in a building in late 2015 and it fails, wouldn't that claim be statute barred under the longstop because the certification is the act or omission relied on and that occurred more than 10 years earlier?

MR GODDARD QC:

No Your Honour, in my submission if one asks and it's exactly the same analysis that Her Honour Justice Glazebrook undertook in relation to contractual warranties, for example in *Klinac* you say what really is the act or omission that is relied on here, what is the foundation of this claim and it's the fact that it was relied on in connection with this building.

GLAZEBROOK J:

And applied to that particular building.

MR GODDARD QC:

Yes applied, exactly Your Honour.

GLAZEBROOK J:

In terms of the 1B.

MR GODDARD QC:

And that was explicit under –

WILLIAM YOUNG J:

Act or omission does rather look like it's the act or omission of the defendant, not something is done by a third party.

MR GODDARD QC:

We saw explicitly in the 1991 Act that that wasn't the structure of identical language.

ELIAS CJ:

For accreditation certificates.

MR GODDARD QC:

But that's an illustration of a more general proposition.

ELIAS CJ:

Well where does that come in apart from for accreditation certificates?

MR GODDARD QC:

It would apply to any information or representations that were made and that remained operative in the market and in respect of which a claim could be brought.

ELIAS CJ:

But there's no statutory language that you hang that submission on.

MR GODDARD QC:

No.

ELIAS CJ:

So that is a submission, has it been determined?

MR GODDARD QC:

Effectively *Klinac v Lehmann* decides that and I'm going to go – I'm not going to go to many cases.

ELIAS CJ:

You will take us to that because I'm not familiar with it.

MR GODDARD QC:

And *Gedye v South.*

GLAZEBROOK J:

And I've forgotten or so – well I had forgotten before now.

MR GODDARD QC:

I'm afraid that's a memory that's going to be recovered.

ELIAS CJ:

Well it's just that in terms of the statutory interpretation argument and the carryover of the policy behind subsection 4 of section 91, one can understand why section 91(4) was a specific provision to deal with accreditation certificates but it's not entirely clear to me why it's transportable in its terms.

MR GODDARD QC:

Well let me say two things about that. First, as I said a moment ago, accreditation certificates remain in force.

ELIAS CJ:

Yes.

MR GODDARD QC:

But if a claim is brought now, the barrier is derived from the 2004 Act. So let's suppose that an accreditation certificate was issued in 2000, that a house was built in 2008 in reliance on it and the territorial authority was required to accept it as decisive, so you can't see the counsel just accepted the certificate and that proceedings are issued today. Obviously in relation to that proceeding, we're looking at the 2004 Act and when we ask whether it's barred by the longstop, the question is first is the civil proceeding against the BIA or its successor, a civil proceeding relating to building

work, plainly so in my submission. It was before, it still meets the same phrase now. It would be odd if it was one under the 1991 but wasn't now and so we look at the 10 year longstop and we say okay it is a civil proceeding relating to building work, so what is the act or omission on which the proceeding was based? If it's the issue of the certificate, the accreditation certificate, it's time barred, even though the house wasn't built to 2008. If it's reliance on it –

GLAZEBROOK J:
And in reliance on a current certificate as against an expired one.

MR GODDARD QC:
Yes, so if the act or omission is reliant on a current certificate in 2008, then that is the act or omission on which the proceeding –

WILLIAM YOUNG J:
But the act or omission almost – I mean it would be absolutely extraordinary if act or omission doesn't refer to the act or omission of the defendant.

MR GODDARD QC:
And yet we know that it didn't in the '91 Act.

WILLIAM YOUNG J:
But it always does I mean there's criminal law as the whole –

MR GODDARD QC:
And in the Limitation Act 2010, that's how it's structured and in the Law Commission report, that's what was in mind and the Court of Appeal looked at this in *Gedye* as we'll see in a moment but –

GLAZEBROOK J:
Well the act or omission may well be the omission to withdraw the certificate at the 2000 and – when did you build the house sorry?

MR GODDARD QC:
2008.

GLAZEBROOK J:

At the 2008 time, so the omission may be the not withdrawing the product certificate in 2008 because you should have done if it was a defective product certificate as would be the argument. So you have to – it's a continuing, it's a continuing – you put it out in 2000 and that was an omission at the time you did it because you should never have put it out but the omission will be not withdrawing it, having put it out, you should actually have a continuing obligation, it might even be an omission to do it in accordance with an obligation to withdraw it because you should only have one out there if it is actually a safe product or comply with the Building Act.

WILLIAM YOUNG J:

But I mean that's a sort of an argument that people often raise in relation to the Limitation Act. You know, you're wrong but then you should have told me you were wrong. So there's a breach that carries on but I'm actually more interested in your argument that act or omission doesn't mean – isn't a reference to what the defendant did.

MR GODDARD QC:

So if we go back –

ELIAS CJ:

It certainly is in 91(4).

MR GODDARD QC:

No it's not Your Honour.

ELIAS CJ:

Well is it not because it's about the authority's act or omission in granting the accreditation certificate isn't it? And there is a specific provision making it clear that it's the date at which it's relied on. So it's to bridge that gap about it, not withdrawing it. So you can quite understand that context and there must be some transitional provision relating to the BIA's liability which –

MR GODDARD QC:

They're transferred to the Attorney-General but that's all it says.

ELIAS CJ:

Yes but it must maintain in terms of accreditation certificates, the scheme of liability.

MR GODDARD QC:

There's no explicit transitional – let me just check a suggestion from my friend.

WILLIAM YOUNG J:

So the point is fairly and squarely addressed in 91(4) of the '91 Act but it's simply not addressed in the current Act?

MR GODDARD QC:

That's right Your Honour and the assumption built into 91(4) of the old Act is that the act or omission may not be the act or omission of the defendant because the relying on of the certificate is not an act of the BIA.

ELIAS CJ:

But it's in proceedings brought against the Authority in which its act is or omission, well the omission may be not withdrawing the certificate but –

MR GODDARD QC:

But its act is issuing it.

ELIAS CJ:

Yes.

MR GODDARD QC:

But the relevant act or – so it is sued for issuing the certificate negligently but 10 years runs from someone else's act or omission.

ELIAS CJ:

Well I don't know that that's particularly relevant because subsection (4) sets up a specific legislative requirement of what you're looking at for the purposes of limitation but it doesn't affect the fact that it's the act or omission of the Authority for which it's being sued.

MR GODDARD QC:

Oh no of course it's being sued for what it did but the whole point of subsection (4) is to say that in the limitation context time may start running –

ELIAS CJ:

From use.

MR GODDARD QC:

- from an act or omission which is an act or omission of someone other than the defendant, yes.

ELIAS CJ:

Yes but that –

MR GODDARD QC:

Yes.

ELIAS CJ:

Yes.

MR GODDARD QC:

But that's all I need for my argument.

ELIAS CJ:

Well why, because it's a specific provision relating to the liability of the Authority in respect of accreditation certificates on one view and it has nothing to the general –

MR GODDARD QC:

But that's why I was saying so let's now imagine we're suing in respect of an accreditation certificate that remains in force in 2008.

ELIAS CJ:

Yes.

MR GODDARD QC:

And we're apply the –

ELIAS CJ:

And is there a transitional provision that deals with it?

MR GODDARD QC:

No there's not, my learned friend was referring to section 448 of the Act but all that talks about is – it says that certain proceedings that have been commenced but not completed before the date of commencement of that section must be continued and completed in all respects under the former Act as if this Act had not been passed but those are proceedings of a particular kind which do not include civil proceedings in tort or a contract claim, those are not –

ELIAS CJ:

Sorry what's the provision, I'll have a look at it?

MR GODDARD QC:

448.

ELIAS CJ:

Okay, thank you. Well we should probably stop interrupting you.

MR GODDARD QC:

No, no my friend is suggesting another provision as well. I'll have a look at that. I thought I had read carefully for transitional provisions.

GLAZEBROOK J:

Section – oh that's the transitional provision is it, sorry?

MR GODDARD QC:

Yes.

GLAZEBROOK J:

I need to catch up.

MR GODDARD QC:

No that doesn't help with this at all. I think I will just focus on what I'm trying to say for a bit. So I also wanted to suggest that the alternative reading of act or omission as necessarily the act or omission of the defendant would produce some surprising

consequences that would be very harsh for plaintiffs, unless you could run that sort of continuing breach argument and that would apply obviously not only to accreditation certificates but to, under the 2004 Act, product certificate. So let's take a product certificate.

GLAZEBROOK J:
Can I – we're not going have to decide this are we, so what relevance does it have to anything we do have to decide?

MR GODDARD QC:
The Court needs to decide what – yes the Court needs to decide how the longstop provisions apply to conduct that is engaged in by someone like Carter Holt that is not referable to a particular building, to the provision of information for the production of materials and both are an issue here, as Your Honour has seen from the claim, that may take place sometime before the construction of a particular building in reliance on that information and/or using those materials. So the first question is, if there is a claim that a building as constructed is defective and that is the result of materials that were defective or specifications or other information that was incorrect, is that a civil proceeding relating to building work and if so what is the point in time from which the 10 years run and this Court does need to decide that and so understanding how that works as against other defendants is obviously, in my submission, helpful information.

GLAZEBROOK J:
All right, I understand. So it's assuming we agree with you on limitation we have to decide from when it arises.

MR GODDARD QC:
And when Your Honour is deciding whether to agree with me on limitation one of the things that you will necessarily think through –

GLAZEBROOK J:
This might be an argument, to say that the longstop doesn't apply because of these very difficulties that you're putting forward because I don't have a problem with a continuing obligation in respect of regulatory people but it becomes perhaps slightly less easy in respect of other people but anyway.

MR GODDARD QC:

And so understanding exactly how it works is part of Your Honour's thinking through what the purpose is likely to have been.

GLAZEBROOK J:

Because you almost need reliance on use added into longstop by someone else in order for your argument to work, otherwise the limitation arises, just the ordinary limitations arise in relation to outside of the Act.

MR GODDARD QC:

Yes. Another possibility is that it is a claim, a civil proceeding relating to building work and 10 years runs from the last act or omission of the defendant but that would mean that in some circumstances –

GLAZEBROOK J:

That would be very unfair, as you say.

MR GODDARD QC:

That would have the potential to operate harshly and that's not what I'm contending for. So I'm trying to address, if you like, anticipate the argument that that would be unduly harsh.

GLAZEBROOK J:

So this argument is – I'm with you now. Again it would be helpful to have the proposition before you have the detail because then one understands why you're doing the detail.

MR GODDARD QC:

Yes. So let me then slightly belatedly make the point that the argument here is that this is a civil proceeding relating to building work and that the 10 years starts running when the materials are used or when specification or information is relied on as providing guidance for the construction of the house. That is directly analogous to the position in relation to the BIA and accreditation certificates under the '91 Act and to the position of product certification bodies and product certificates as well, of course, as ongoing accreditation certificates under the 2004 Act. We shouldn't be surprised by it working in that way.

The key issue obviously is, is this a civil proceeding relating to building work? It's a civil proceeding. Does it relate to building work? Importantly, the way subsection (2) was expressed was not tied back to a person who performs building work. It would have been a simple matter to say a civil proceeding against a person who performs building work may not be brought. But that's not what was done. The broader language a civil proceeding relating to building work was used. In my submission, what that was intended to capture was a claim that relates to – in the language of Your Honour Justice Young at paragraph 201 – a claim that relates to the defective state of the building as constructed. Your Honour was considering whether the damage was the same when you sue a builder, when you sue a designer, when you sue a council and whether contribution would be available. The answer was yes because the damage to which the claim relates is the defective state of the building as constructed. That was what I was slightly clumsily trying to get at in the points about the day on which the work finishes that Your Honour Justice Glazebrook pressed me on yesterday and Justice Young said it better than I did.

GLAZEBROOK J:
Can you give me the paragraph number again?

MR GODDARD QC:
Of course. Paragraph 201.

GLAZEBROOK J:
Was that a paragraph – I think I just generally agreed with those and I don't know that the Chief Justice referred to it.

MR GODDARD QC:
I think that's right, but obviously …

GLAZEBROOK J:
The general agreement might well cover.

MR GODDARD QC:
Yes. I think it must.

ELIAS CJ:
It's obiter, nevertheless.

GLAZEBROOK J:

Well, sort of. It's an illustration of the same damage point.

MR GODDARD QC:

Its application to the building context must be obiter because you weren't looking at a building case. But I don't think the majority would have gone where you'd gone if the result was not as described there. That would have been an extraordinary approach to adopt to contribution which no one saw as sensible, none of the Court.

GLAZEBROOK J:

Well, you have the council. I mean, you have an assumption, in any event, with council on other liability where contribution applies which the whole Court thought was consistent with their view of what "same damage" meant.

MR GODDARD QC:

Yes. Basically this concept of a civil proceeding relating to building work is co-extensive with a civil proceeding relating to the defective state of the building as constructed and that's why contribution is available between all the people whose negligence contributes to the building being constructed in a defective state. What has been done by Parliament here in order to draw a line after 10 years against claims, against councils, certifiers, builders, is to say any claim in respect of that damage, any claim in respect of that defective building work is barred and what that means is that you can't bring in anyone who's liable in respect of that damage. We're not going to leave some of the people responsible for that liable and others not after that period. We're going to draw a line. I mentioned yesterday where the cases had got to on the availability of claims for contribution after the 10 years, I was wrong to suggest it had reached the Court of Appeal. There's a raft of High Court decisions, all but one of which reached the conclusion and I have a list of those High Court decisions.

GLAZEBROOK J:

Sorry, reached what conclusion?

MR GODDARD QC:

Reached the conclusion that the longstop prevents claims for contribution after the 10 years, that the policy of the Act – first of all, that a claim for contribution is a civil

proceeding relating to building work and second that the policy of the Act in drawing a line requires both that you can't be sued directly and that you can't be brought in indirectly, so it's not a surprising conclusion and it's widely accepted as correct. But I also accept, having checked it overnight, that when I cheerfully said the Court of Appeal had said that I was completely wrong. But it doesn't matter whether I'm right or wrong for the purpose of my argument on that because either way it's not surprising that the legislation in the Building Act would draw a line after 10 years in relation to all claims about the defective state of the building as constructed. If you can't bring a contribution claim as that list of cases, then there would be obvious unfairness in leaving some of the people who contributed to that damage exposed after 10 years and unable to bring in the others.

ELIAS CJ:

But is that necessarily the case if you're talking about a manufacturer? Because the Act is about those who build, really, and the regulations under which they act in building.

GLAZEBROOK J:

With an extension to the regulators who have specific responsibility under the Act.

MR GODDARD QC:

The question is, was the bar limited to them or was it applicable to anyone whose conduct is said to have contributed to the building as constructed being defective? I make two submissions. The first is that the language is naturally broader than just "some people". It doesn't refer to who the defendant is, Your Honour.

ELIAS CJ:

But that's how you're shaping it. Whereas if it's a claim in negligence against a manufacturer it's a claim for damage.

MR GODDARD QC:

But for what damage? It's a claim that the building as constructed it not weathertight because the product is defective.

ELIAS CJ:

It's a claim that the product was not suitable.

MR GODDARD QC:

And it will often be the case but that the damage in respect of which a claim is brought is – and we saw this in the claim and it's unsurprising – is the damage required to do remedial work on the building work that was required, it's said, from day 1, and the –

GLAZEBROOK J:

So is that a, I'm just getting, again it's just your submissions in terms of the way the Court of Appeal you say misunderstood your argument, I just want to make crystal clear that I'm not falling into what you say is the same trap. You're answer to the Chief Justice, as I understood it, was you have to look at the damage and the damage is to the building, do you want to put that in another way? Sorry, do you want to just explain exactly what your argument is so I've got it down?

MR GODDARD QC:

A civil proceeding relating to building work is a civil proceeding that alleges that the building was constructed was defective and that seeks to attribute responsibility for the defective state of the building.

GLAZEBROOK J:

So your answer was you focus on the damage alleged, is that a shorthand?

MR GODDARD QC:

Is that a workable shorthand? Yes, it is –

GLAZEBROOK J:

I'm just using your words –

MR GODDARD QC:

– it is.

GLAZEBROOK J:

– when you answer the Chief Justice, that was all, I just wanted –

MR GODDARD QC:

It is useful shorthand. A civil proceeding relates to building work if the damage complained of is that there is a building which as constructed was defective and what you were seeking to do is to attribute responsibility for that defect.

GLAZEBROOK J:

Right.

MR GODDARD QC:

And it doesn't matter whether you're attributing it to the person who did the work, or to a regulator, or to a supplier of materials, or to an advisor of some kind, be it a designer within the statutory meaning, or someone who's not because they're publishing information on the web about how you solve a particular problem. If you're bringing a claim, say, that the building was constructed was defective, and it's this person's fault, then it's a civil proceeding relating to building work. What that means is that effectively the bar in section 393 is coextensive with the class in terms of who can invoke it, is coextensive with the class of persons who could seek contribution as among each other in respect of that damage, and that's the link that is helpfully, I think, teased out by the way Justice Young approached the contribution question –

GLAZEBROOK J:

Is there anything that links it to that? There's nothing explicit that you rely on?

MR GODDARD QC:

Well there are good policy reasons.

GLAZEBROOK J:

So is it a policy rather than an explicit linking that you rely on?

MR GODDARD QC:

It seems to me that's a natural reading of the language, and there are good –

GLAZEBROOK J:

Natural reading of subsection (2) seen in isolation –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

And you say in terms of the policy of the Act it should be read as the natural meaning would be of it seen in isolation, and I think your friend says the context of the section and in terms of the Act would lead to the opposite conclusion.

MR GODDARD QC:

And what I say is that if you read it down particularly in reference to subsection (1) that doesn't work because it would leave out –

GLAZEBROOK J:

No, no, I understand the BIA argument, yes.

MR GODDARD QC:

So we've been there, yes, and the product certification one. So –

ELIAS CJ:

Isn't it troubling the extent to which in this area it does depend how you characterise something because you say it is, you've got a defective building, but if the matter was conventionally put as a products liability case you'd say you got a defective product and your loss is consequential on, you know it's not really necessarily focused on the defective building.

MR GODDARD QC:

I don't think that one can –

ELIAS CJ:

Whereas under the Building Act, of course, it is, because it's looking at all those who have contributed to, or who might have avoided the result.

MR GODDARD QC:

It would be surprising if the effect of the addition of section 14G, which refers to the responsibility of manufacturers, were because it brings it within the explicit ambit of the Building Act to make available a limitation defence that wasn't available before

that statement of responsibility which has no substantive legal effect. So Your Honour says are we only interested in –

ELIAS CJ:

But as you say it has no substantive legal effect.

MR GODDARD QC:

In fact Your Honour said a moment ago, we're interested in the people who are within the scope of the Building Act and whose conduct contributes to the building work, and what we now see explicitly in section 14G is a recognition of something which has always been true in fact, and which is at the heart of this claim, which is that the quality of the materials used in building work has an important influence on the outcome of that building work, and it has an influence that cannot readily be separated out from subsequent steps in the process. There is no bright-line in the real world between what happens in a factory generically, and what happens on the ground when you build a building. You can build a building starting from bits of wood and nails and things, and buy the very basic materials, or you can bring in prefabricated panels, or prefabricated walls, or whole prefabricated rooms. I remember sitting in my old office at Chapman Tripp many years and watching with amazement as the hotel across the road in Grey Street was built and whole bathrooms that had been built somewhere else were dropped in by crane with all the fittings and everything in place. Whether you put the toilet in, you know, on site, or whether you just built a whole lot of generic bathroom units and sell them to people to put into buildings, shouldn't logically shouldn't, as a matter of policy, effect whether the person who designs the unit and puts it together, can invoke the longstop and the complaint by the plaintiff is the same. The complaint is you designed this bathroom unit badly and my building is defective as a result, and it just doesn't matter where that designing happened, and whether it was done with that building in mind or not. It just doesn't matter. From the plaintiff's perspective at all whether the bathroom was put together in a factory that produces $10,000 bathroom units that get dropped into buildings each year, or whether when those pipes were put together in a way that was always going to fail, that happened on site as the result of advice given by a particular designer working on that site, it's as a matter of what the complaint is by the plaintiff, completely logically irrelevant. As a matter of policy, completely irrelevant. It would be bizarre, in my submission, if Parliament drew a distinction for the purpose of this longstop depending on whether the work, whether the information

was generic and relied on a particular site, or site specific and relied on a particular site, and –

ELIAS CJ:

Do we have the text, by the way, of the, don't take us to it, of the Limitation Act, in the bundle?

MR GODDARD QC:

I don't think so Your Honour.

ELIAS CJ:

No? Okay.

MR GODDARD QC:

And one would need to, in order to understand statutory context, look at both of course. That's another reason why, you know, it's very, it's difficult to respond with enthusiasm to all aspects of the drafting of section 393 as what we now have is just a reference to despite the, as I say, the Limitation Act 2010 applies, however, in fact for a huge number of claims that are still coming before the courts in relation to acts that took place before the 2010 Act came into force, of course the 2010 Act is completely irrelevant. It's actually the old Act that applies. So it's all a bit clumsy in relation to subsection (1) but what is a constant across both the '91 Act and the 2004 Act, and a constant which has remained in place despite the change in the generic limitation regime from the 1950 Act to the 2010 Act, and despite the fact that there are also specific limitation provisions in, for example, the Fair Trading Act which mean that for some civil proceedings relating to building work, the Limitation Act is completely irrelevant, what we have is the broader bar in subsection (2) that applies to civil proceedings relating to building work and in my submission the only sensible way to understand that is that it's a proceeding which says my building is defective, it was defective as constructed and you're responsibility and what subsection (2) does, is say if that's the claim then it can be pursued subject to the normal limitation regime up to the 10 year cut-off but after the 10 year cut-off you can't bring a claim of that kind against anyone and that removes obviously the possibility of people being brought in, in contribution claims, after the 10 year longstop.

WILLIAM YOUNG J:

It's actually – I mean I've read the judgment of Justice Lang. I mean it's quite an interesting point. If you look at it in terms of section 17(1), it's obvious that there's a right of contribution because section 17(1) takes out limitation, would have sued in time.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Would and don't worry about limitation periods. So if that's the dominant provision that's great and if section 393 is the dominant provision well then you can understand Justice Lang. What I struggle slightly with the judgment is why Justice Lang says, well we don't worry about some limitation periods but we worry about others. It's not self-evidently correct, it's certainly arguably correct.

MR GODDARD QC:

And that's why, rather than spending time on whether it's right or wrong, something that I don't imagine this Court is going to want to decide when it hasn't been fully argued and there's no contradictor really. What I say is whether it's right or wrong, reflection of the implications of contribution claims supports my argument because if Justice Lang is right then there's an obvious unfairness in saying that 12 years down the track you can sue in respect of your defective cladding or your defective bathroom, someone who produced the materials or someone who manufactured a generic bathroom but you can't sue the – they can't then join by way of contribution the people who put it in, they say carelessly in a way that exacerbated the harm.

WILLIAM YOUNG J:

What about if it's the other way round? Say he's wrong, how does that bear on your argument?

MR GODDARD QC:

But if he's wrong, then it becomes all the more important that this provision rules out all claims against people who are responsible for that damage and who could see contribution between themselves because otherwise the –

WILLIAM YOUNG J:

Then everyone gets brought in.

MR GODDARD QC:

Yes everyone gets brought back in. If he's wrong Your Honour, then what – if the Court, you know –

WILLIAM YOUNG J:

Yes I understand that.

ELIAS CJ:

If *Hotchin* is right.

MR GODDARD QC:

If he's wrong we will join every –

GLAZEBROOK J:

No, no if you can get contribution then basically there's no 10 year longstop.

ELIAS CJ:

Oh yes the section 17 –

GLAZEBROOK J:

Because if there's one little product that contributed to it, then that's the end of it, if you bring everyone back in.

MR GODDARD QC:

Yes so you can see the product manufacturer, when the problem is discovered 12 years down the track and then they can join the builder, the Council, the BIA, every man and their dog.

WILLIAM YOUNG J:

But their liability is all subject to the product supplier being liable, they don't have any separate liability to the plaintiff.

MR GODDARD QC:

No that's right but if –

GLAZEBROOK J:
So they couldn't be brought back in for them not affixing it right?

MR GODDARD QC:
Yes they could.

WILLIAM YOUNG J:
Yes they could. What they couldn't be brought – the plaintiff, the building owner can say, well I suggest then –

MR GODDARD QC:
It's only contribution.

GLAZEBROOK J:
Well no but the person, the manufacturer wouldn't be liable for it not being fixed right. The manufacturer would only be liable in so far as the damage to the building came from the defective product. So the damage would be that arising from the defective product and if the manufacturer can say well half of it was in relation to it not being – I know it would be slightly odd but the manufacturer can't possibly be liable for damage that arises from it being affixed incorrectly.

WILLIAM YOUNG J:
Well because it might a combination of both.

MR GODDARD QC:
Jointly. The cost of remedying that might be the same.

GLAZEBROOK J:
The cost of remedying may be the same.

MR GODDARD QC:
And that's what contribution is designed –

GLAZEBROOK J:
No, no, no I understand that but if you could split, if you could split the responsibility, the only responsibility the manufacturer could possibly be liable for is the defective

product itself and the consequences from the defective product rather than how it was affixed or –

MR GODDARD QC:

Yes, where it becomes more complicated of course is that it is claimed here and I understand so that you can bring a claim against the manufacturer not only in relation to the physical thing but also the specifications which provide guidance on how it's going to be used.

GLAZEBROOK J:

Oh no, no I understand that but I'm assuming that the specifications were perfect, if the specifications were perfect it just happens that the particular product was defective, you know, it was a bad one as against – yes.

MR GODDARD QC:

Yes a bad batch of preservative which means that the materials which would otherwise would have lasted 50 years are only going to last 30 years and that was negligent but then what if the position is that they've been affixed in a way which is careless by the builder, would the result that instead of it being good for 30 years and not needing to be replaced for another 10, actually the only way of protecting against the adverse consequence is to strip it all out now.

GLAZEBROOK J:

Oh no absolutely, oh no absolutely.

MR GODDARD QC:

So it seems easy to identify many situations and I deal in my submission with this, is that defective buildings are usually the result of multiple contributions, multiple causes.

GLAZEBROOK J:

But the only way to fix part of it will be to change the lot.

MR GODDARD QC:

Yes and –

GLAZEBROOK J:

So each would be responsible for the changing of the lot if sued separately.

MR GODDARD QC:

Yes exactly and often when things go wrong it's also because of gaps, that the specifications go to a certain point, the designer goes to a certain point, there's not a perfect marrying up of what you need to do, the builder makes a call about how to bridge that gap and also gets it wrong, so you've got a defective –

GLAZEBROOK J:

All I was saying was that if you could split it off the builder still couldn't be brought in –

MR GODDARD QC:

You wouldn't have a problem.

GLAZEBROOK J:

– for the specific consequences of anything to do with the builder, as long as you could split it off from the manufacturer.

MR GODDARD QC:

Absolutely but of course there will be many cases where it can't be split off.

GLAZEBROOK J:

Absolutely, absolutely.

MR GODDARD QC:

And as long as that's the case the policy bites that this would be a giant hole. So if contribution is not available then my friend's interpretation works a great unfairness and my friend does kindly describe this as my best point without I think saying it's very good, somewhere in his conclusion, but there is at least an acknowledgement, he says, "This is Mr Goddard's best point but it's terrible." So if you can't seek a contribution there's a huge unfairness, if you can seek contribution, it's a huge breach in the policy of the Act and against that backdrop that's not at all surprising that the language is broad and the sensible way to read it, which is consistent both with the text and with purpose, is to read it as extending to any claim that says the building was defective as constructed and you are wholly or partly responsible for that. That

the issue is not whether the defendant performed building work is clear from the two decisions I am going to go to in this context. It's an issue dealt with at some length in my written submissions in paragraph 7.10 to 7.25.

I'm at 6.5 of my roadmap now. I'll just situate ourselves. And the two cases I'm going to go to are Her Honour Justice Glazebrook's decision in *Klinac* and the decision of the Court of Appeal and of this Court declining leave in *Gedye v South.* So if we take volume 2 of the authorities, for those of us working from hardcopy or go to tab 10 from those of us who are – who have firmly joined the modern world. So this was an appeal from the District Court to High Court. It came before Her Honour Justice Glazebrook sitting in Whangarei and it was a claim by a purchaser against a vendor in respect of representations made about building work and contractual warranties that were found in the then standard ADLS form about building work carried out while the vendor had owned the property. So two types of claim, a claim that representations had been made that the building work was code compliant and a claim for breach of warranty that the building work was code compliant. The relevant limitation provision at that time was the 1991 Act provision and if we turn to the judgment of the Court, what we see, it was a counterclaim, but is that in paragraph 4 there was a separate hearing in the District Court on the limitation issue and the Judge held that the contractual defence was statute barred but the misrepresentation defence was not. The Judge also made it clear that he would have reached a different conclusion on the contract issue except that he considered that he was bound by an earlier High Court decision, a decision of Justice Robertson in *Hamilton City Council v Rogers* HC Hamilton A92/97, 23 April 1998 and what Your Honour Justice Glazebrook had to decide here effectively was, was Rogers right, in which case a claim under a warranty or a claim for misrepresentation that building work was code compliant was a civil proceeding relating to building work and you counted from the date of the building work or was that wrong and what Your Honour held, just to do the punch line before we do the reasoning, Your Honour said, I accept, although Your Honour didn't have to decide it because I think it was conceded and we'll see a slight hesitation in here, "I accept that this is a civil proceeding relating to building work but without deciding it but the relevant act or omission is the giving of the warranty. So time runs not from the date the building work was carried out, which could have the ironical and absurd consequence that the warranty would never be effective, if you gave a warranty more than 10 years after the building work that it was code compliant, you could never sue on it and Your Honour pointed that out and said that's nuts, that can't be right and the reason is that

the act or omission on which the claim is more immediately founded is the act of the giving of the warranty. So you count 10 years from then and what that means is basically – and also for a misrepresentation claim which means that here there was no time bar. There was a slight procedural muddle because of the appeals and cross-appeals that weren't brought but Your Honour deals with both issues before reaching that problem.

So at paragraph 6 Your Honour set out section 91(2), "Civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based." Your Honour described the District Court decision. Considered in paragraphs 11 and 12 whether a misrepresentation claim could be distinguished from a breach of contract and Your Honour said no, a claim for misrepresentation in relation to code compliance, a claim for warranty, they're either both in or both out in terms of civil proceedings relating to building work, there can't be a difference.

Then Your Honour explored at some length the legislative history of section 91(2) in a way which has been referred back to by quite a few subsequent decisions. It's a very comprehensive treatment of where that came from and the Select Committee introduced it as Your Honour explained at 14. It wasn't in the Bill as introduced, it was introduced by the Select Committee. At that stage it was a 15 year longstop and what was said was – and the first paragraph, this quote is quite helpful, it will save me going to the Hansard which included it, the Select Committee introduced what the Minister said on the report back, "The Select Committee introduced what it has called a 15 year longstop for building liability. In other words no action can be taken after 15 years against a builder or a certifier or anybody involved in the construction of a building. After 15 years the responsibility for the construction rests entirely with the building's owner." So there's a bright-line there and after that time the owner has no claims and then the consequences of discoverability rule are described in rather lurid terms in the next paragraph and then we have some more discussion of that. At paragraph 16, "It is clear that the temporarily unlimited liability of those involved in the construction industry were seen as undesirable. Provision was therefore introduced, a 15 year longstop limitation on the liability of those involved in the process of construction and in particular local government. Concerns about liability of local government and negligence were clearly the driving force behind the provision."

Let me say at once that I accept my learned friend's submission that the focus in introducing the longstop was on the position of local government and on these new animals, certifiers, the private certifier equivalent of councils. There was a concern that if they could not insure their liability no one would want to take up this new role and it was thought they could get liability arising cover. Initially it was thought for a period of 15 years but then we see later it was thought, oh no 10 years is what they can get and actually it turned out that even that was wrong and Your Honour Justice Young deals with this.

WILLIAM YOUNG J:
They only got one year of claim didn't they?

MR GODDARD QC:
They could only get claims made, policies like anyone normal and the information that was relied on to reach this conclusion was obviously a bit light and what happened, of course, and this what Your Honour was dealing with in *Attorney-General v Body Corporate* 200200 [2007] 1 NZLR 95 (CA) (*Sacramento*), was that once the regime was up and running, one of the things that the BIA had to do before it approved a product certifier was to be satisfied with their insurance arrangements and no certifiers could get this 10 year liability arising cover and so the BIA took the pragmatic decision that if all you could get was claims made cover, then rather than refusing to certify any certifier they would accept that, which meant that there were lots of uninsured ones which meant there were lots of people who couldn't sue a council because it was done by a private certifier, couldn't get anything from the certifier because they had no insurance. It was a mess.

GLAZEBROOK J:
And it was also an incredibly small amount they approved from memory wasn't it, in terms of insurance?

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:
Half a million wasn't it?

GLAZEBROOK J:

Something ridiculous.

MR GODDARD QC:
It was peanuts and it was short-term and of course also when you get claims made policies, the other thing that you can do is each year introduce new limits as you become –

WILLIAM YOUNG J:
Or go off-risk as soon as –

MR GODDARD QC:
Or go off-risk, just say, "I'm not writing this anymore" and that's what happened by the time this blew up and the question in *Sacramento* is whether the BIA had been negligent doing that and Your Honour said, "No they're not liable."

WILLIAM YOUNG J:
Well I think they might've been negligent but they didn't owe a duty.

MR GODDARD QC:
Sorry, is that what Your Honour said, pretty much.

ELIAS CJ:
That's what everybody said except me. Well there was something – no, no in –

MR GODDARD QC:
In Grange.

ELIAS CJ:
When the issue came up.

MR GODDARD QC:
In *Grange* the Chief Justice said that there was a duty of care as well. So that's the rather unhappy information deficit or that led to the provision but what the policy was, was very clear that local authorities and certifiers in particular should not be exposed to any liability after the relevant period, ultimately 10 years and in particular for certifiers because otherwise if they faced an uninsurable liability after that period, no one would do it and a fundamental aspect of the scheme of the Act could not work

and of course that concern would exist just as much if they could be brought in by a contribution claim after 10 years as if they could be sued direct. So in terms of the policy, it's understandable that you would want it to be absolute.

The Law Commission work on limitation is described in paragraphs 17 through 20. The Law Commission's conclusion first that there should be a reasonable discoverability rule for latent defects but second that in fairness it needed to be matched by – that shouldn't be changed but it needed to be matched by a longstop provision and at 20 Your Honour summarises, and also the Court of Appeal view in *Askin v Knox* [1989] 1 NZLR 248 (CA) which the Commission endorsed that, "Parliament should seriously consider a longstop provision to provide a balance between the interests of home owners and those involved with the construction industry." Then by the time of the Bill's second reading the limitation period reduced to 10 years. I don't think we need to spend much time on that. 22, "It was thought the longstop provision would also have benefits for others involved in the construction industry. Architects and engineers would find professional indemnity insurance cheaper, and other building professionals would find it easier and cheaper to obtain, which would be an incentive to have proper cover. It appears to have been hoped this would result in lower costs passed onto consumers and in a greater prospect of compensation without litigation where faults did arise." Objectives that could only be achieved if the longstop precluded both direct and indirect claims against people who contributed to the building as constructed being defective.

Two amendments described. First, to clarify the position of architects, engineers and other design professionals, and second, to explicitly provide, this is in 24, that the civil proceedings must be related to building work. Before that the only restriction on limitation period was an implied one arising from context. And as Your Honour notes at 25, "It is noteworthy that the 10 year period is absolute. There is no similar provision in 28(b) of the Limitation Act which deals with fraud. No fraud or concealment exception at all and the Court of Appeal confirmed that subsequently in *Johnson v Watson* [2003] 1 NZLR 626 (CA) and there was no ability to rely on 28(b) and to extend the longstop.

Then there's a description of the decision reached by Justice Robertson in *Hamilton City Council v Rogers*, an oral decision of His Honour saying that causes of action in contract and in negligence against a council were barred by the longstop in relation to building the house on landfill. The – and 30 Justice Robertson considered that he

was inexorably driven to the conclusion that the proceeding was one relating to building work and it wasn't about implied terms with regard to sale of land. That's the situation where the building work had taken place more than 10 years before the claim was filed but the sale to the plaintiffs took place within the 10 years and Justice Robertson said, "No, looking at the building work."

Your Honour discusses that decision and looks at the reasoning in it and says, for example at 35, "The operative act in a cause of action in negligence must be the act which causes the breach of the duty. Even where the eventual plaintiff is unidentifiable, the duty is still owed and breached at that point. Damage is, however, an essential part of the cause of action in negligence and until the damage has occurred (or is discoverable) the cause of action is not complete. Section 91(2) focuses on the act or omission, not completion of the cause. This leads to the conclusion that for negligence time runs from the negligent building work as Robertson J held. Indeed, it was clearly the policy behind the legislation to provide a longstop provision mitigating against difficulties for the construction industry with the reasonable discoverability rule, while still providing the public with a measure of protection by choosing a period when most defects would have manifested themselves." That was the other information that was before Parliament at that stage, and I should have touched on this, the suggestion that a vast majority of defects do become apparent within 10 years.

Then at 42, after discussing another decision, Your Honour Justice Glazebrook concluded that, "*Hamilton City Council v Rogers* is correctly decided with respect to claims in negligence." But then turned to contractual claims. Notes that the contract in the *Hamilton City Council* case, as in this one, was a contract for sale of land. The term allegedly breached was an alleged implied term. This case relates to an alleged breach of an express term and an alleged misrepresentation. No sensible distinction between representations and breaches in this context. No sensible distinction between implied and express terms. "The cases cannot be distinguished on this basis. Robertson J held that the first question that must be asked is whether the proceedings relate to building work." That's set out, the scope of building work discussed, and at 45, about half way down, about six lines down, "Section 91(2) imposes the limitation period on all civil proceedings relating to any building work. In relation to the first issue, therefore, there can be no doubt that claims based on breach of contract or misrepresentation will be civil proceedings," clearly, "This building work requirement, however, indicates that the building work itself must be

directly related to the cause of action pleaded. Where a contract is one for the actual construction of a building then clearly there is the direct relationship needed. Of course, in almost all cases, the longstop provision in s 91(2) will be irrelevant," because it will be particular to the limitation regime.

Then 47, "where a contract relates to the sale of a building, whether there is a direction relationship to building work may depend on the precise nature of the term," and Your Honour makes the point that if you sell a building, warranting that it's free from all defects at the time you sell it, that's not a promise about building work because defects could have been caused by anything that's happened over the years. You know, it could have been driven into by a car, or you could have maintained it poorly with the result that it's deteriorated, but at 48 what Your Honour went on to say, "In contrast, however, where the representation or contractual term is to the effect that certain building works have been carried out in a proper and workmanlike fashion (as is the case here) then there may be a connection to 'building work' for the purposes of s 91(2). I do have a doubt on this point as clearly the civil proceedings relate more directly to the contract of sale then to the building works themselves. In addition the fact that the form of the term or the misrepresentation may determine whether s 91(2) applies may in itself throw doubt on Robertson J's view that the relevant act or omission in this context is the building work. Accepting for this purpose, however, that there may be the necessary connection with building work," so that's where, as I said, Your Honour accepted that but with some reservations, and I'll need to come back to that obviously.

"On Robertson J's analysis, the next issue is the identification of the 'act or omission on which the proceedings are based'. In this regard I respectfully differ from Robertson J's conclusion that the act or omission is the building work itself." Your Honour says yes it is in relation to negligence but over on the next column, four lines down, "In contrast, where the action is one based on breach of contract or misrepresentation, there is a further act must more closely connected to the cause of action – the entry into the contract and the breach of the contractual term and the making of the misrepresentation. That determines the relevance of other factors including proceeding of building work, the faulty building work is relevant solely because it goes to prove the representation was a misrepresentation that determined the contract was breached, it's not the act upon which the proceeding is based, unlike an actions for negligence.

Your Honour explains why that is consistent with the policy underpinning section 91 because if someone chooses at a later date to give a warranty, they are expressly undertaking a responsibility at that later date which they would expect to be enforceable. If you counted from the time of the building work then as Your Honour points out paragraph 53 over the page, if that weren't the case it would be possible for a person with impunity to warrant all the building work had been completed accordance with a permit and to a high standard providing the building work had been performed more than 10 years ago.

WILLIAM YOUNG J:

And this all just shows the act or omission is that of the defendant that for the purposes of the 10 year limitation period you look at what it is that the defendant did that the plaintiff is worrying about, complaining about.

MR GODDARD QC:

The purpose for which - Your Honour is right that the act or omission focussed on here is what the defendant did, it doesn't shed light on whether that can be broader. I need to deal with that separately. What is important here though is that it emphasises that the act or omission of the defendant need not be the performance of building work.

GLAZEBROOK J:

Well that's assuming 91(2) applies which frankly obviously I thought it didn't but was too – it didn't need to decide. I was going to say "not too polite" because that doesn't sound like me at all but –

MR GODDARD QC:

It might depend on the day Your Honour.

WILLIAM YOUNG J:

Sorry but I mean this is – there's a discussion here, there's a discussion in also the contribution cases as to whether the claims are within the – the claims in issue were claims relating to building work even though they didn't directly focus on the building work. Now so that's – there's some sort of I suppose indications of how this problem might arise in different contexts but that's about all isn't it?

MR GODDARD QC:

There's limited assistance to be had from previously decided cases on the issue.

WILLIAM YOUNG J:

And *Gedye* is the same isn't it?

MR GODDARD QC:

Gedye is exactly the same, it's a warranty case. What the Court of Appeal said there is that the concession that it was a civil proceeding relating to building work was clearly right. So they were more enthusiastic about that proposition than Your Honour Justice Glazebrook was. The Court in *Gedye* says that's obviously a civil –

ELIAS CJ:

Are you talking about the leave judgment or the Court of Appeal judgment?

MR GODDARD QC:

No the Court of Appeal, in the Court of Appeal it was also conceded. If we look at just – let me go to the two paragraphs that I think matter and then we can move on from *Gedye*. *Gedye* is under tab 7 of this same volume and the Court of Appeal, it was heard by Justice Arnold and Justice Pankhurst and Justice Harrison. I can I think be – so at 26 it's noted that it was conceded that the present proceeding does arise from building work undertaken by the Gedyes on the property, so the requirements of 91(1)(a) are met, hence it was accepted the issue is whether this is a civil proceeding based on act or omission which occurred 10 or more years before the date on which the proceeding was filed. Counsel in substance supported the analysis contained in *Klinac.*

And then if we turn over to 28, what is said, "We agree that this proceeding arises from building work associated with the design, construction, alteration, demolition or removal of any building" and then, "Accordingly the provisions of the Limitation Act apply except to the extent provided in subsection 2 of section 91. The determinative issue therefore is whether the act or omission on which the proceeding is based is characterised as the allegedly defective building work or the giving of the contractual warranty." So the Court there positively –

WILLIAM YOUNG J:

Well it's the answer, I mean it's a silly case because the answer had to be it's the claim based on the warranty, I mean it –

MR GODDARD QC:

Consistent with *Klinac* and it found that *Hamilton City Council v Rogers* was wrong.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

Yes. Your Honour says it's obvious but one High Court Judge had gone a different way, so it had actually needed some careful attention. Having said that, when it came on an application for leave to this Court, if we turn over to page 295 of the bundle to –

ELIAS CJ:

I'm not sure about citing the judgments by the way, but however. A lot of final Courts don't allow them to be cited at all.

MR GODDARD QC:

I didn't know that.

ELIAS CJ:

And I think there is some sense in that because it's not a judgment of the full Court bench.

MR GODDARD QC:

They rather suggest they shouldn't be reported, doesn't it?

ELIAS CJ:

Well I think that too and in fact we have had that argument with New Zealand Law Reports.

GLAZEBROOK J:

I don't think you're allowed to cite unreported cases, so are you – in a number of jurisdictions sorry and so not allowing them to be reported then means that they can't be cited. I mean we allow unreported so it wouldn't make a difference here.

WILLIAM YOUNG J:

The leave panel thought it was an obvious – the answer was obvious.

MR GODDARD QC:

And that's all I wanted to draw attention to was that after summarising the result reach in the High Court and Court of Appeal at paragraph 3 in the leave judgment what was said by the panel considering the leave application was, "We consider that this view is undoubtedly correct, the act or omission is the breach of contract." And –

WILLIAM YOUNG J:

I mean in a way this is quite a long trip through the cases but it doesn't really resolve the issue we discussed before of the certificate given a long time ago before the building work and the problem that on your approach, the longstop limitation period expires before anything happens.

MR GODDARD QC:

Yes and indeed the Court of Appeal looked at the Law Commission's work on limitation periods and noticed that in the Law Commission's formulation act or omission was act or omission of the defendant and said, although that's not in the Building Act, we think it's a fair bet that that is what people had in mind.

GLAZEBROOK J:

But also in these you don't need the longstop. The longstop – because you could never extend a contractual warranty past six years.

MR GODDARD QC:

No you don't need –

GLAZEBROOK J:

Absent fraud.

MR GODDARD QC:

You don't need the longstop for the limitation claim, for the contract claim.

GLAZEBROOK J:

And to say well it's obvious that it was supposed to be – that the Court say well, you know, it's obvious 91 applies but why is it obvious when you don't actually need it in a contract claim?

WILLIAM YOUNG J:

No, it's saying it's obvious that there's no longstop limitation problem.

MR GODDARD QC:

Yes, that's the way that – that would be the answer I think but where the –

GLAZEBROOK J:

But it's not obvious that it's building work and that 91 applies to it because you actually don't need 91 for a contract claim.

MR GODDARD QC:

Where the rubber hits the road in terms of subsequent sales is where statements are made that the building work is code compliant because that can give rise to liability under the Fair Trading Act and in negligent misstatement and in particular under the Fair Trading Act you've got an explicit statutory reasonable discoverability regime. So you do in the context –

GLAZEBROOK J:

But why on earth would you need a long – well I mean I suppose I'm just indicating what I thought in *Klinac*, why should you have a longstop in respect to something that you voluntarily said way after the building work when you mightn't have even completed the building work and had nothing whatsoever to do with it in terms of a sale document and why should you have the protection of a longstop that's actually to do with getting insurance for faulty building and in cases where you don't need it usually because way before 10 years you will have been statute barred anyway.

MR GODDARD QC:

Under the normal limitation regime, yes. So what –

ELIAS CJ:

So what's the point?

MR GODDARD QC:

The submission based on the cases is that the act or omission of the defendant on which a claim is based, sorry the act or omission on which a claim is based for the purposes of section 91, 393, need not be the performance of building work and need not be closely related to or connected with in some way performing building work. What the defendants did in *Klinac* and *Gedye* was give a warranty about building work. They didn't perform building work, they never got their hands dirty, they never raised a hammer.

WILLIAM YOUNG J:

They gave a warranty relating to building work?

MR GODDARD QC:

Yes and when they were sued because the building work was defective and therefore they were in breach of their warranty, the Courts I would say in the case of *Gedye,* held and certainly in the case of *Klinac*, accepted with some reservations that it was a civil proceeding relating to building work.

ELIAS CJ:

That was conceded in *Gedye*?

GLAZEBROOK J:

In both.

ELIAS CJ:

In both was it, yes.

MR GODDARD QC:

Yes, Your Honour is right but it was positively endorsed by the Court of Appeal nonetheless as a correct concession in *Gedye* and in my submission that's not surprising because –

GLAZEBROOK J:

It's very surprising to me frankly that it's accepted, for the reasons I said you don't need a longstop if it goes from the date and frankly I can't see voluntarily accepting a warranty that could be couched in slightly different terms to say exactly the same thing, "I warrant this building as weathertight, I warrant it's code compliance", why that makes the biggest bit of difference.

MR GODDARD QC:

So the result that was reached by Your Honour and by the Courts in *Gedye* is obviously the right result on the facts. But –

GLAZEBROOK J:

But you didn't need to fall over yourself to reach that result if section 91 didn't apply.

MR GODDARD QC:

I don't think Your Honour is being quite fair to your reasoning in *Klinac* to talk about falling over yourselves.

GLAZEBROOK J:

Oh no, no, no sorry I don't mean it that way.

MR GODDARD QC:

It was a perfectly coherent analysis.

GLAZEBROOK J:

But if it doesn't apply the case doesn't even need to be brought.

MR GODDARD QC:

Yes, of course.

GLAZEBROOK J:

Because it's just an ordinary limitation question and the question will be whether that ordinary limitation period has expired or not.

MR GODDARD QC:

The use of the cases for my purpose is to show that even if a defendant did not themselves carry out building work it still makes perfect sense to adopt a two-stage approach in which you first identify the fact that a claim relates to building work and

then you go on to ask what was the act or omission on which the claim is based and find that that is an act which was not itself building work. So that's consistent with the scheme of the statute that I was describing in relation to accreditation certificates and produce certificates, this idea that a claim may relate to building work even though the defendant doesn't perform building work and that we don't end up in an impossible situation merely because the defendant wasn't carrying out building work, merely because what the defendant was doing was either, in this case subsequent to that being completed but also prior to because it would make that and, yes so that's probably –

ELIAS CJ:

The only impossible outcome or result is the contribution complication, is it not? I mean, what else is there – sorry, you said something about otherwise we'd end up with an impossible result.

MR GODDARD QC:

Yes. The – in relation to – I want to make sure I'm answering the question Your Honour is asking.

ELIAS CJ:

Well, perhaps I should have asked you what your submission was when you said "an impossible result". What's the impossible result?

ARNOLD J:

I thought it was the uneven application of the longstop.

MR GODDARD QC:

I'm just trying to remember in which context I'd said it but in that context what I was saying was that the uneven application of the longstop to some people who have contributed to the defective state of the building as constructed is impossible. It's unworkable, either because it produces a great unfairness as between the people who can still be sued and those who can't be brought in to contribute or because if you can bring them in to contribute it drives a coach and four through the longstop. Whenever the quality of materials supplied or a manufacturer's specification is in issue, as is the case in, you know, many, many claims –

GLAZEBROOK J:

In relation to *Klinac* you couldn't actually bring anyone else in if you gave the warranty 10 years after …

MR GODDARD QC:

In fact, you couldn't do it six years after so it's nothing to do with the longstop. You'd have lost your contract claim against your builder.

GLAZEBROOK J:

No, no. What I'm saying is if you as a seller and the subject of 91 is there gave a warranty 10 years after the building was constructed you couldn't go back to any of the builders who had actually constructed and caused you to give a false warranty to get contribution because your 10 years runs from the – and, well, your six years, actually, runs from the time you give the warranty and in all of that period you had no recourse against any of the builders or anybody else because 10 years, they were protected by the longstop.

MR GODDARD QC:

In relation to a claim for contribution from them, that would depend on the relationship between the longstop and the Law Reform Act.

GLAZEBROOK J:

Yes, obviously, obviously.

MR GODDARD QC:

His Honour Justice's Young point.

GLAZEBROOK J:

Yes, I'm assuming. I'm assuming that the longstop protects them despite section 17.

MR GODDARD QC:

From the contribution claim, yes. If that's right then yes, the conscious choice sometime after the event to give a warranty exposes you to a new liability even though you might yourself well lose your ability to pass it on. But the point Your Honour makes is that's a choice made down the track and one that should be made in an informed way.

GLAZEBROOK J:

I would say that's a reason for the longstop not applying in those circumstances.

ELIAS CJ:

Where are you in your roadmap now?

MR GODDARD QC:

In my roadmap I've finished pretty much section 6 and I'm just checking whether there was anything in my full submissions that I haven't dealt with adequately.

GLAZEBROOK J:

There was something that you said you were going to come back to when you were discussing *Klinac*. The Chief Justice asked you something and said it didn't actually meet the point and you said you were going to come back to it.

MR GODDARD QC:

This is, I think, the related issue of whether the act or omission must be an act or omission of the defendant and the question of whether section 91(4) created a special rule about that only for the BIA whereas in all other cases you do have to look for an act or omission of the defendant and my submission on that is that 91(4) was effectively a provision for the avoidance of doubt and that under section 91 whenever a person provided generic information or advice or regulatory approvals that could be relied on at some time after they were given, where they were relied on and in reliance in them a building was constructed and it was defective when it was constructed. Two things follow. First, the claim against the person who provided that information, advice, is a civil proceeding relating to building work. It makes no sense to suggest that if you provide it in advance for use in a large number of projects and then you're sued once it's been used in one the claim is not a civil proceeding relating to that building work in which your information was relied on. It can't matter whether you're providing information once or whether you provide the same information intending that it be used time and time and time again and it is actually used. So it is a civil proceeding relating to building work but secondly I'm suggesting that the most sensible reading of the phrase "the act or omission" on which the proceeding is based in that context is reliance on the information or advice because that avoids the potential unfairness that the time within which you could sue on a statement that is still in circulation expires before it's even been relied on in the context of a particular project and that there's nothing surprising about saying that the

formula "the act or omission" on which the proceeding is based refers to what is effectively the last operative act or omission that connects the conduct of the defendant with the damage for which that defendant is sued and in relation to information and advice that link obviously is that it's relied on for the particular building work.

ARNOLD J:
So do you say then that in section 393(3) creates a sort of carve-out from that general principle for those specific authorities and determinations and certificates referred to? Because the relevant date there is the date issued.

MR GODDARD QC:
Yes. That avoids the argument that there is some sort of continuing breach or continuing wrong in relation to –

ARNOLD J:
But only for some people because, for example, it doesn't apply to a product certification authority but it does apply to the Chief Executive performing functions and determinations under Part 3 and so on.

MR GODDARD QC:
Yes, yes, it is effectively providing a bright-line rule which will give those parties more protection than they might otherwise have.

ARNOLD J:
And so – I mean, you've talked a lot about the kind of coherence of the scheme but even taking the section on its face – I mean, I don't know what the explanation might be for having as a cut-off for these people the date on which the relevant determination was made or the certificate was issued and not applying that to other groups.

MR GODDARD QC:
And the rationale for focusing on a particular date here in my submission is essentially to provide clarity, to provide certainty because there could well be arguments that it was earlier. It's not when we issued the code compliance certificates when we did the inspection, if we did that negligently. There could also be arguments that it was later. "No, no, it's when I relied on it." But if it's when you

relied on it then it would be in circulation potentially forever and councils wouldn't get that protection so you couldn't have reliance on something like a code compliance certificate by subsequent purchasers because the whole thing would open out effectively beyond the longstop. So what this is doing is saying that to avoid any uncertainty and to avoid an end run around the protection provided here. We're going to prescribe a specific date but identical provisions sat alongside 91(4) in the 1991 Act and what those, it seems to me, were attempting to do, again, was to preclude explicitly in the case of the generic decisions such as the accreditation certificate an ability to argue that similarly you just honed in on the date on which it was given with the result the 10 years could have run, even before your project got underway.

So then the question becomes, is this – 91(4)A – a one-off exception to the rule that otherwise you focus on an act or omission of the defendant and my submission is that in the context of a scheme where you have both project-specific conduct and generic conduct, not just by the specifically-identified bodies but a host of other people it is sensible to read the reference to the act or omission as the last act or omission linking the defendant to the damage – that's the subject matter of the claim – which will often be, but need not be, an act or omission of the defendant.

I am conscious of the time.

ELIAS CJ:
Yes, thank you. We'll take the adjournment now.

COURT ADJOURNS: 11.32 AM
COURT RESUMES: 11.51 AM

ELIAS CJ:
Thank you.

MR GODDARD QC:
Can I just pause and check given the adjustments there have been to sitting times. We were advised before the hearing began that this afternoon there would also be modified sitting times with a break at three for half an hour and then sitting on until five. Is that still…

ELIAS CJ:

Yes, if that's convenient to counsel.

MR GODDARD QC:

Absolutely.

ELIAS CJ:

We may not need the full half hour but there's an award to one of the staff in the Court so we really need to be at it.

MR GODDARD QC:

We shouldn't rush it. So I want to answer a question from His Honour Justice Young, make a final submission on the limitation issue, and then before lunch I'm going to deal with tort. Your Honour Justice Young asked whether there was a product certificate in relation to Shadowclad. None has ever been applied for.

GLAZEBROOK J:

Sorry?

WILLIAM YOUNG J:

None's been applied for.

MR GODDARD QC:

None has ever been applied for and therefore none exists because it's a voluntary process. Now limitation. I want to say two things about that. The first is that my argument does not depend on the act or omission being an act or omission of someone other than the defendant. Another way of looking at the way in which the longstop applies to a manufacturer like Carter Holt who produces both a product and specifications for its use, is that the relevant act or omission is the publication, in this case the ongoing publication, of the specifications for use of the products. So this links into the questions I was asked by the Court earlier about ongoing responsibility for certificates that are in force, or for specifications that are current. So what happens, obviously, and we see this in the pleading, is that Carter Holt periodically publishes new additions of its specifications for the use of this material. I'm not arguing that it's the publication moment that's the act or omission, but it would work perfectly sensibly if the relevant act or omission was the continuing publication for use by designer and builders of the specifications for the product and so for any

given building project it would be the fact that it was in the market, you know, being kept in the market as the current specification and that builders and designers were being encouraged to refer to it at the time, that would be the relevant act or omission of the defendant and that would bring the way in which the provision applies to specifications and advice about what materials can and can't be used for and how you use them, into line with the position of designers who do project specific design, which is not surprising if one thinks about it since there's a no bright-line between those two roles. Specifications provide generic advice about how to use a product and the designer picks up from there and says this is how you use it in this project, and different specifications will go further, be more or less detailed and people will pick up at different points. So –

ELIAS CJ:
How does that work if you have a product that's badly manufactured so it doesn't meet the specifications?

MR GODDARD QC:
The act or omission would be supplying it for use in building work and that would also be a perfectly sensible time from which to count. So the last act or omission of the defendant would be its supply by the defendant for use in carrying out building work which would be more or less coterminous with the time it was used in the building work and therefore the time against which the time from which a claim against the builder would run. So that would work fine as well Your Honour. So that's another way in which that could work.

I may, because I took 91(4) as being a generic, a specific example of a generic approach to the reliance situation, have framed my submissions unduly heavily in terms of reliance being the act or omission. I do still submit that that's a perfectly sensible reading of the two provisions which is consistent with the way in which accreditation certificates have been treated. But if the Court were to think that that was an exception from the normal rule that the act or omission must be the act or omission of the defendant, then on reflection that works perfectly well and produces consequences that are absolutely consistent with the consequences for designers. And that works also, if one thinks about it, for the ongoing supply of kitset buildings, because it's the supply of that kitset that's the last act or omission of the manufacturer. So it doesn't matter that it might have been designed 10 years earlier, you've just kept on pumping out those same kitsets with the same instructions on

how to put them together, the act or omission of the defendant would be the supply of that kitset for use to build that house and time would run from that. That also works just fine as well. I just want to make absolutely clear that my argument, although it's focused on the act or omission being potentially that of someone else, only reaches that at a very late stage, and that the thrust, the main thrust of my argument is that the act or omission need not itself be work on a particular building, and that it could either here be an act or omission of the defendant in supplying the product and the information, or most generously to a plaintiff, and this is what I was trying to do but it's got me into trouble with a number of members of the Court, it could be the act or omission of someone else in relying on it. But I do submit first and foremost that what is plain is that a civil proceeding may relate to building work although the defendant did not carry out building work and that we then go off and look as a quite separate enquiry at the relevant act or omission, which may be either of the defendant or possibly more plaintiff friendly of someone else. So that's the first point I wanted to make about limitation.

The second is that I was asked to be more precise about why I said that not applying the longstop to manufacturers like Carter Holt would be an impossible result and I identified one answer to that, but there are two, and I've given the second one in passing but I just want to respond to the request that I be absolutely clear about what the submission is. So why is it an impossible result? It's an impossible result firstly, and this is the answer I did give earlier today, because of the absurd consequences it would produce in the many cases where the defect in the building as constructed is caused or contributed to by the conduct of multiple parties. Either, if Justice Lang is right, it works a serious unfairness to the manufacturer because they can still be sued, but the designer can't, or if Justice Lang is wrong it's an impossible result because it seriously undermines the finality that this regime was intended to achieve for participants in the process for all the other people who have contributed to the defective state of the building.

The second reason that it's impossible, that it's a profoundly unsatisfactory result, is the arbitrary lines it would draw between defendants in terms of ability to invoke the longstop, depending on whether they were involved in project specific work or generic work. It's quite clear that the longstop was intended to apply to people performing generic work. It's most explicit in relation to the BIA under the 1991 Act, but in my submission it would be bizarre if it didn't apply to bodies issuing product certificates under the 2004 Act even though they don't naturally fit within subsection

(1) because they're not working on a particular building project. And I provide illustrations of just some of the anomalous and unfair results that you'd get in my main submissions in paragraphs 7.12 through 7.15. I begin by making the point at 7.12, "As almost any leaky building claim demonstrates, building failures are typically the consequence of the acts or omissions of multiple parties. The same damage to a building may have several contributing causes."

Then I give an example, "Suppose for example that a builder sought to follow technical guidance from a product supplier and building-specific guidance from an architect when installing a cladding system," and that happens in every case where you're building a house using technical guidance of this kind, because you have to relate it to the project as well, so you've got technical guidance from a product supplier and building-specific guidance from an architect, and the builder largely complies with that guidance but fails to do so in a number of respects. Also by no means unusual as a scenario. Suppose that the result is that the building is constructed with defects that were contributed to by negligent errors on the part of the product supplier in the specification. The architect in providing supplementary detailing and the builder in executing the work in light of the guidance they have got. There's no coherent policy rationale for providing a longstop in relation to the claims against the architect and the builder but not against the product supplier.

ELIAS CJ:

It does though turn on again on characterisation doesn't it because it would be in, in terms of legal concepts, perfectly understandable not to think about this as a defective building but to think about it as bad product which causes you resultant loss and to recover – and so that the claim against the manufacturer is what the manufacturer is liable for.

MR GODDARD QC:

Two points in response to that. The first is that you could say in exactly the same way that the claim against the builder is about poor work and the defect in the building is just the consequence of the poor work.

ELIAS CJ:

Yes well I accept that, you could.

MR GODDARD QC:

But in that case it seems to me that both, I mean clearly the poor work by the builder is caught here, why isn't the poor materials caught here, especially when you bear in mind that how much work is done on site, how much work is done off site, is not a bright-line. There's no sensible distinction between those so you end up with the absolute accident of how a prefabricated the particular building project is drawing a line there. And on the specifications –

ELIAS CJ:

I don't see a distinction, I must say, in terms of manufacturer's liability between prefabricated and raw material, if you like.

MR GODDARD QC:

Well my submission is that there shouldn't be and it shouldn't matter whether you're manufacturing panels or whole walls, or whole bathroom units, or whether you are building the wall or the bathroom unit on site. In either case the design work is, if defective, work that leads to a defective building, so the owner sues for that, and the execution of the work, whether it happens generically in a factory or on site, if it's defective leads to a building defect which leads to a claim by the owner who wants their building fixed and what the Act is talking about when it talks about civil proceedings relating to building work is a complaint that the building work as constructed, the building as constructed is defective and you're seeking to attribute responsibility for that.

That comes to my second answer to Your Honour which is that no, my policy argument does not depend on characterisation. My policy argument, which is also a purpose of the legislation argument that's why policy is relevant, is precisely that if conduct of manufacturer –

GLAZEBROOK J:

That's the impossible result is it, or is this wider?

MR GODDARD QC:

Yes, exactly.

GLAZEBROOK J:

Okay.

MR GODDARD QC:

And that's not depending on characterisation, it just says you get –

GLAZEBROOK J:

No, no, I understand that, just checking.

MR GODDARD QC:

– you get a silly and unstable line and I touched on the fact that it would be, it seems odd in the example I gave that after 10 years, 10 years after completion of the construction the building owner can sue the product supplier but not the architect or the builder, and I assume in particular a contribution result but actually it's just as silly if they could then be brought in. I also then deal in 7.13 with the example I've given before of an architect who prepares plans for a single house, and an architect who prepares plans for a standard house to be built by a large-scale building company, Lockwood Homes or someone like that, for numerous future clients. So in each case they're contracted in, they do a design, they give it to the client. A builder, either of one home or of lots of homes, and they go away. So they're not engaged in any ongoing activities. The two architects each make the same error in their designs with the result that the houses built from the plans are defective, exactly the same mistake, and in each case the architect is sued by the owners of the affected house, saying my house is defective and my house is defective because your plans are defective and you were careless in drawing them up. On the respondent's case the first architect, the one who did a plan for a known client for one house, could invoke the longstop, but the second architect, who didn't perform building work on a specific building, could not, that makes no sense. And the provision shouldn't be read in the way that produces such a counterintuitive and unfair result. Then I get into my pet example of the kitset buildings. Say that, you know, you can either have a situation where for a particular project a factory is commissioned to produce some prefabricated walls, or a prefabricated bathroom unit, and off that goes and it's installed on site. Or you can manufacture a generic product that's used at lots of different sites over time. As I understand the respondent's argument they would say that if it was built off site for delivery to a particular building project and installation there, that was building work but if you just manufacture standard panelised walls, standard kitsets, standard bathrooms and sell them to whoever comes along, then you're not protected and that seems completely arbitrary from a policy perspective. As I say at the end of my 7.14, "It would be arbitrary for the application of the longstop to depend on whether a specific project was in mind at the time of

manufacturing the building product" and that is not in my submission what the longstop limitation provisions require because the focus is on whether the civil proceedings relates to building work in the sense that it is saying the building as constructed was defective and you're responsible.

Last example, 7.15 focused more on information rather than tangible things. Consider the position of a product manufacturer who sends a representative on site to answer questions about the suitability of its product for that project who assures the owner that the product is suitable and will perform well or a manufacturer, we could add, who provides a producer statement for that project. Sorry Sir, I hoped that, especially as I was about to make the submission that Your Honour dealt quite fully –

WILLIAM YOUNG J:
Incorrectly with this in *Osborne*.

MR GODDARD QC:
Oh no I wasn't going to go to *Osborne* on this, I was going to go to –

WILLIAM YOUNG J:
Well you may provoke a spasm of coughing.

ELIAS CJ:
From more than one Judge on the bench.

MR GODDARD QC:
I was going to go to – the reference I was going to provide was actually Your Honour's treatment of the ongoing relevance of producer statements under the 2004 Act in *Spencer on Byron*. Your Honour discussed that at some length and made the point that although there's no longer specific statutory provision for those, as the MBIE website explains it's still open to territorial authorities to ask for producer statements and to rely on them, not with any bright-line defence from that but if it's reasonable to do so then obviously they're not negligent. So producer statements continue to be an important part of the project. So if you've got a product manufacturer and they send someone –

ELIAS CJ:

So they're not – they can found causes of action?

MR GODDARD QC:

Oh absolutely.

ELIAS CJ:

They're not just defences that can be invoked to negate negligence by others?

WILLIAM YOUNG J:

It's effectively the local authority can lay off the risk isn't it?

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

Yes, but not in a statutory way. With product certificates, if the local authority relies on those, the local authority has a defence but you could still sue the body that gave the product certificate negligently. With a producer statement you could potentially sue both the Council for negligently relying on it, for accepting it because there's no protection and you could sue the person who made it for having given it negligently and it seems to me that if you consider a claim of that kind plainly both could invoke the longstop, both the Council sued for negligence for relying on Goddard Buildings Limited saying, you know, my prefabricated walls are the cats pyjamas, they comply with the Building Code and I can sue the Council for accepting it from me and me for having said it and both of us could invoke the longstop because the civil proceeding would be civil proceeding relating to defective building work was in fact my prefabricated walls are terrible and again what that tells us is that on the respondent's case you get the bizarre result that if there is a producer statement or if a representative comes on site and gives some assurances about the suitability of the product, then you can rely on the longstop but if you just have product descriptions – the Court really is struggling.

WILLIAM YOUNG J:

I've infected the Chief Justice I think.

MR GODDARD QC:

Your Honour has.

ELIAS CJ:

He has.

WILLIAM YOUNG J:

And she's full of complaint about it.

MR GODDARD QC:

The risks and advantages of a collegiate Court. So -

ELIAS CJ:

So it was inconsistent – if they could invoke the longstop and –

MR GODDARD QC:

Yes but that someone who just had a standing claim to exactly the same effect in the market could not. That makes no sense and in fact if anything one might have thought that a person who turns up and makes the statement for use in a particular project, is more culpable than a person who just makes the general statement. I mean I think probably it's much the same but it's certainly no less culpable. Put another way, you're not more deserving of protection after 10 years because you say something on a particular building site or because you deliver a particular producer statement, than you are if you make a general claim to compliance with the Building Code of our product to the market as a whole. It would make absolutely no sense for that sort of distinction to drive a difference in application of the longstop. There's nothing in the text of the longstop to suggest that there is a difference between the one-off statement and the generic statement relied on to build a particular house, and there's no sensible policy distinction. So that's the other reason it's impossible, you just end up in an absolutely untenable, unfair, unworkable and arbitrary space. Whereas if instead you adopt what, in my submission, is certainly a natural, I'd say the natural reading of civil proceedings relating to building work and you treat them as civil proceedings claiming that the building as constructed is defective, and that the defendant has some responsibility for that result, you end up in a sensible workable space.

That was all that I was going to say about limitation unless the Court had any questions on that?

ELIAS CJ:
No thank you.

MR GODDARD QC:
I have dealt with it in some detail but that's because, as touched on yesterday, it seems like a long time ago now, this is effectively a final decision on this issue for these parties to whom it's very important and more generally.

That brings me on then to the duties of care. The duty that was held by the Court of Appeal not to exist so far as statements were concerned. Negligent misstatement claim, but it was held to be arguable in relation to negligence. I was about to say simpliciter but trying to avoid Latin. And probably the first thing I need to do is engage with the question, well isn't this just *Donoghue*. Isn't this just a plain vanilla application of *Donoghue*, and there are in summary four overlapping reasons why this claim is not a *Donoghue* claim. The first is that the damage is different. It's the difference between suing for the personal injury, the coughing and spluttering and food poisoning caused by the snail once you ingest it, and suing to recover the cost of a replacement bottle of ginger beer. This claim is predicated on there being a duty and a cause of action, even in respect of school buildings where there has not been damage to any part of the building other than the cladding itself. Sure in relation to a significant number of buildings the respondents say, "And what's more, other bits have been damaged," but even where there's no damage to anything else, the respondents claim that there is a –

GLAZEBROOK J:
That's now only about 10% though, isn't it?

MR GODDARD QC:
20% on my friend's figures.

GLAZEBROOK J:
I thought it was 90.9% had damage?

MR GODDARD QC:

It was 81.9 I think, or 80.9, yes. So 81%.

GLAZEBROOK J:

Okay, I'd written 90.9 I think, but I may not.

MR GODDARD QC:

No, sorry, so it's roughly 80/20 on the current numbers. So – and if the Court were to find that 20% of the claims were misconceived, that would also be an important result. So there are not –

ELIAS CJ:

How?

MR GODDARD QC:

The Court could find that there's no cause of action unless there's damage to some other part of the building and that that needs to be pleaded and provide an opportunity to amend to plead in respect of the ones where that's alleged.

GLAZEBROOK J:

Well, they're pleading risk so if the damage occurs tomorrow – I mean, how can we say?

MR GODDARD QC:

No, you can't, Your Honour.

GLAZEBROOK J:

Well, it has to wait to trial, then, doesn't it?

MR GODDARD QC:

No, Your Honour can identify the essential requirements for there to be a claim in tort.

GLAZEBROOK J:

But how do we know now that the risk to health that might arise from these things – I mean, you were relatively dismissive of the fungi, only fungi, not damage to the

frame. Whereas frankly if you've got children in a building then fungi would worry me much more than a bit of rotting wood.

MR GODDARD QC:
And what should happen if there's any real risk of that is the children shouldn't go into the building until whatever work is done as necessary and at that point again it's just a cost of remedial work plus, if necessary, the cost of alternative premises. Let me come back to that.

But just to respond specifically to the question, "What can the Court do?" if the Court were to say, "This is a *Donoghue* insofar as damage is caused to some other property," for example, and that is pleaded at least in respect of some buildings but not others, it would obviously be necessary for the respondent plaintiffs to file an amended pleading which identified the buildings in respect of which they can assert that and which omitted the buildings in respect of which they do not assert that there has been other damage and then the question would arise, can they bring that later if and when it occurs. If the Court finds that it's the existence of a risk that there may be moisture ingress and harm to health and safety at some time in the future, then in so finding the Court will dismiss my attempt to strike-out the pleading on the basis there's no duty of care but the Court will also have confirmed that the cause of action accrues in each case on completion of the building with those risk characteristics and that will be very important in terms of limitation under the 1950 Act for the future.

There's an inextricable relationship between the scope of the duty of care and the loss that is a duty to prevent and that's the point I made yesterday, the point made by *Boyd Knight* that a duty doesn't exist in the ether. It's a duty to hold the defendant harmless from a particular loss, from a particular form of damage so you've got to link the duty and the damage and that in turn links very importantly into orthodox limitation principles and one of the reasons why, in my submission, I'll come to this, this is not a *Donoghue* case and it's not a coherent case, is that it takes us down, effectively, the rabbit hole again.

WILLIAM YOUNG J:
You say this isn't controlled by *Sunset Terraces* because unlike the position of the builder in *Sunset Terraces* or the Council Carter Holt doesn't owe any obligations under the Building Act.

MR GODDARD QC:

In response to my submission that a duty of care would cut across the contractual frameworks and the allocation of responsibility between participants in commercial building projects and in response to my submission that the standard of care was indeterminate and that it would be unfair to require of people something more than they'd contracted to deliver what this Court said was, "No, because" –

WILLIAM YOUNG J:

It's all in the Building Act.

MR GODDARD QC:

The Building Act solves both problems. These are two fundamental problems with –

WILLIAM YOUNG J:

I just wonder whether that's – I mean, that's probably what was said. I can't remember. But not everyone involved in defective building claims has obligations under the Building Act. The architect doesn't, presumably. I mean the obligations under the Building Act are on the building owner, the builder and the council I think.

MR GODDARD QC:

I think they're on everyone who performs building work and quite a lot of design work is defined as building work.

WILLIAM YOUNG J:

So architects come into that?

MR GODDARD QC:

Yes. And we see that in those, yes, in short. If you look at the definition of "building work" in the current Act you'll see that it includes design work of the kind that's, you know, protected or regulated by the Act, and so performing that it must comply with the Code.

WILLIAM YOUNG J:

But this is –

GLAZEBROOK J:

It doesn't in the 1991 Act. Has it been amended? It does in the limitation provision include design work but not in the definition as far as I can see, unless there's an extension.

MR GODDARD QC:

Yes, so the 2004 Act extended the definition so –

GLAZEBROOK J:

The 2004, they've got extension in both?

MR GODDARD QC:

So if we look at tab, yes, Your Honour –

GLAZEBROOK J:

So I'm right? The 1991 one only extends it for the purpose to design for the purpose of the limitation provision which was obviously added anyway.

MR GODDARD QC:

Yes I think –

GLAZEBROOK J:

I don't know when, it doesn't, we haven't got the history in this.

MR GODDARD QC:

I mean I think that the definition doesn't expressly bring in design work in 1991. I'm just a bit hesitant to give a –

GLAZEBROOK J:

Oh, no, no, sorry, what I really meant, there's nothing express. I can understand an implied, it's included, especially if it's included although it was added later, design.

MR GODDARD QC:

Exactly, but when one takes work for or in connection with the construction of a building –

GLAZEBROOK J:

No, no, no, I don't have –

MR GODDARD QC:

– one might well think that design was in, but any –

GLAZEBROOK J:

No, no, I don't have a problem with that.

MR GODDARD QC:

Yes, but any doubt about that was removed in the 2004 Act, section 7 the definition includes design work explicitly in paragraph (c).

ARNOLD J:

Sorry, has the Governor-General, it's of a kind declared by the Governor-General, isn't it?

MR GODDARD QC:

To be restricted building work for the purposes of this Act.

ARNOLD J:

Yes, so it's not design work generally.

MR GODDARD QC:

No, Your Honour's right.

ELIAS CJ:

So is that designated under –

GLAZEBROOK J:

Can I just find, where's the 1991 Act?

MR GODDARD QC:

It's under tab 2 of volume 1.

GLAZEBROOK J:

So what is it, section 7?

MR GODDARD QC:

Yes, page 59 – ah, no. It's not section 7, it's section 2 of the '91 Act, page 11 of the bundle.

GLAZEBROOK J:

I've got the '91 Act.

MR GODDARD QC:

I'm sorry, yes, so there it is, yes. Section 7 and it's page 59 of the bundle. And again before I –

GLAZEBROOK J:

And 393, is design specifically in there?

MR GODDARD QC:

No. What you have in 1A is, it's on page 147 Your Honour of the bundle, there's a specific reference to –

GLAZEBROOK J:

Associated with the design, yes. So it's picked up exactly the same from '91?

MR GODDARD QC:

Yes.

GLAZEBROOK J:

As '91 was amended. Do you know whether '91 was – when '91 was amended to include design? If it was amended to include design and not – it's just in square brackets so it must have been an amendment.

MR GODDARD QC:

It was an amendment Your Honour dealt with that in *Klinac*.

GLAZEBROOK J:

Did I? Okay, I'll look it up.

MR GODDARD QC:

So we've both known once and I can't remember.

GLAZEBROOK J:

Okay.

MR GODDARD QC:

So in the elegantly named "Building (design work declared to be building work) Order 2007," clause 3 says, "design work of the specified kind is building work.

GLAZEBROOK J:

Design work sorry?

MR GODDARD QC:

Of the specified kind and then clause 2 says, "Design work of the specified kind means design work relating to building work for or in connection with the construction or alteration of a building." So that is –

O'REGAN J:

It would have been easier just to say that in the Act, wouldn't it?

MR GODDARD QC:

Yes, and arguably paragraph (a) of the definition of building work covers it, and we didn't need to go around any of that loop. Just –

GLAZEBROOK J:

That's just because quite clearly you have to design it in order to build it. Even in a – even at least conceptually thinking of it before you actually put the nails in.

MR GODDARD QC:

To try to adjust, you know, do it like improvised theatre –

GLAZEBROOK J:

Yes, exactly.

MR GODDARD QC:

– I think would be unsatisfactory. Improv building –

GLAZEBROOK J:

Sometimes you think they do do that.

WILLIAM YOUNG J:

But this is the only basis, real basis of distinction between this case and *Sunset Terraces*, isn't it? *Sunset Terraces*, the Court was dealing with duties that were closely parallel to statutory obligations, where here you say Carter Holt had no statutory obligations?

MR GODDARD QC:

So it's a very important difference that –

WILLIAM YOUNG J:

Are there others, or is this the only…

MR GODDARD QC:

The, it's certainly the most important, and it has two implications. The first is, when we're talking about proximity and the cases refer to the defendants' claim to be protected from undue responsibility, what the Courts have said to councils and builders in relation to the Building Act is well, you have no claim to be protected from taking reasonable care to comply with the Building Act because Parliament already told you, you have to, we're asking no more of you, and you can't contract out of that, and that's an important part of it. So no one can contract to build a building that doesn't comply with the Building Code, but that answer is not available to people to whom the Building Act duties don't apply and secondly, and very importantly, in relation to the difficulty which has always been identified by the Courts in contractual chain cases of working out what the content of the duty of care is, how do you articulate what there's a duty to take care in doing, and how much is it influenced by the contractual terms in terms of scope of responsibilities or whether it's a, you know, cheap basic job or a full on job and how can that affect a duty of care in tort. The Courts have said we don't need to worry about that here because we get a standard from the Building Act which is compliance with the Code. So you take reasonable care to ensure compliance with the Code. So it solves both the complaint that you're having a new obligation imposed on you, that you haven't voluntarily assumed, and that you could reasonably think you could, you know, contract to different effect in relation to whether your immediate party, and it solves the problem of specifying the content of the duty.

GLAZEBROOK J:

But say you don't have a Building Act at all and you contract, or you don't contract to build a building, at least in terms of a building you would expect that it wouldn't fall down the next day, it wouldn't be a danger to health and it would be weathertight, because I can't imagine contracting specifically for a building that lets the rain in unless it's some kind of conserve it, green sort of…

MR GODDARD QC:

But in the absence of a statutory framework –

GLAZEBROOK J:

But it wouldn't be very difficult to say well at the margins it might be difficult to work out but along these absolutely things you do expect that things won't make you ill and they won't fall down.

MR GODDARD QC:

Well I think there the question of what damage you're concerned with in relation to the duty becomes important because if you're talking about personal injury, if you're talking about a piece of the building falling on your head, people who have no involvement in the contractual change at all, people who just come into the building, can reasonable expect that, and there's no reason to treat –

GLAZEBROOK J:

But you yourself as a contract, as somebody who's part of a contract can't expect that. That sounds odd.

MR GODDARD QC:

No, no, I was going to say precisely that obviously the person who contracts can also expect the same thing unless they expressly contract out of it.

GLAZEBROOK J:

Well exactly but you do have concurrent liability – I mean that was always the difficulty with *Rolls-Royce* in that the real answer and one that I must say appealed to me and to some of my colleagues was to say well you've got all this contract, why do you need tort, but there is concurrent liability, so that simple answer is not enough. It has to be something more than there's a contract because rightly or wrongly, and I mean it's been there for a long time now, theirs is concurrent liability.

MR GODDARD QC:

But when you've got a contract between two parties, and then concurrent liability between those parties in tort, what has always been able to be said is of course the concurrent obligation in tort cannot go beyond the scope of the obligations in contract. They must be consistent. And so what the duty in tort has solved as a problem is not greater responsibility, it's the limitation issue. But the Courts have consistently said, we're not going to find there's a duty of care between contracting parties that goes beyond what we would in any event find express or implied in a contract.

GLAZEBROOK J:

Do you want to give us the authorities perhaps after lunch?

ELIAS CJ:

Well no perhaps he's going to complete before lunch.

MR GODDARD QC:

I was hoping to.

ELIAS CJ:

Yes.

GLAZEBROOK J:

No, but you can still just, is there a particular authority you're referring to?

MR GODDARD QC:

Let me come back to that…

WILLIAM YOUNG J:

Todd notes apropos slightly at this point but also the point you were making earlier that initially the Courts tended to say that duty of care in these cases was to ensure a sort of working –

MR GODDARD QC:

A sound, yes.

WILLIAM YOUNG J:

And it's more recently with *Spencer on Byron* and perhaps other cases focused on the core statutory obligations.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

But I mean whatever, and in a sense the core statutory obligations are absolute so what the Courts in opposing a negligence duty is saying is well at least you've got a duty of care with sales and damages to try to achieve the statutory obligation.

MR GODDARD QC:

And the Courts have also said, and it's no more than that and that's why all your arguments are wrong Mr Goddard. So the no more than that has been an essential part of the reasoning of the Courts in getting to where they've got to in cases like *Spencer on Byron*.

WILLIAM YOUNG J:

But what about the subcontractor whose obligation is to put in the window but not – but it's debatable whether the obligation was also to, was to add flashings. There might be a debate in terms of the Act upon, as to who the obligation was. Presumably the obligation would be on the head contractor.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

To ensure that one way or another –

MR GODDARD QC:

It happened.

WILLIAM YOUNG J:

But the subcontractors still get sued though, don't they?

MR GODDARD QC:

Yes, but if the subcontractor can say this wasn't part of my scope of work, then they do have a defence, because they only have to carry out with reasonable care the work that they were on site to do. That, I think, must be right Your Honour. So it's outside my scope is still a defence.

WILLIAM YOUNG J:

I think in one of the cases we had in the Court of Appeal there was an issue about designers who had prepared extremely skeletal designs that essentially said build them in accordance with the Building Code, or to the, you know, house reconstructed in accordance with the Building Code, which was all they were paid to do. I think we said that was okay.

MR GODDARD QC:

Yes, I think you did Your Honour, and the point is again, what's the scope, and within that scope you have to exercise reasonable care to achieve compliance with the Building Code, but there's no duty in tort to carry out a function you haven't been hired to perform, and that ties into the point that A, you know what the person is required to do, either as a result of contract or under the Act in the case of a regulator, you know what their scope of work is and that was important in relation to scope of work thing in *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701 where the question was what's the council scope of work where you've got a private certifier involved. So you look either to a contract, if it's someone doing building work or to the Act if it's someone performing a regulatory function to work out what their scope of responsibility is and then you say well within that scope you must exercise reasonable care to achieve/ensure in the case of the regulator, compliance with the Building Code. So that all fits together perfectly coherently where you have that statutory obligation. It doesn't work here. There is – so it really is to impose a new obligation not found in a statute on a manufacturer to say you must exercise reasonable care in the various ways pleaded in this claim.

GLAZEBROOK J:

But that's going to be with any – there's not going to be many statutes for a number of products. Of course we're getting more and more statutes for products but with lots of products there's not going to be a statute that says a nail has to not split as soon as you put it into a wall and I don't think anybody would – well we're in a

building context again but nobody would suggest that you have to have a statutory regulation context in order to ascertain what a duty of care might be.

MR GODDARD QC:

No, no, no.

GLAZEBROOK J:

But isn't that what you're saying because Carter Holt doesn't have any obligations, specific obligations under the Building Act, you can't set a standard?

MR GODDARD QC:

I would put it differently which is to say that the standard that's been set by the common law is that you need to take reasonable care to avoid causing injury to persons or to other property. That's what *Donoghue v Stevenson* set and as a result you can sue for damage to your person, except with New Zealand, with ACC that's not mostly not going to be available, it's impossible. Exceptions to that hopefully working their way through the Courts but that will reach you in about two years, so I won't trouble you with that now and – maybe a year and a half if we're quick and then there's other property and again if we come back –

WILLIAM YOUNG J:

But this is – but I'm afraid this is just me in *Spencer on Byron* which was rejected.

MR GODDARD QC:

It was rejected in that context because of the cases in relation to buildings which were held to already have that result inherent in them.

WILLIAM YOUNG J:

Okay but are there cases in New Zealand outside the building context where manufacturers' liability claims of this sort have been dealt with in Court?

MR GODDARD QC:

None that I'm aware of where a claim for the ultimate product into which something is incorporated being defective have succeeded.

WILLIAM YOUNG J:

I didn't look at the case but I see Mr Farmer said well a case like this might succeed in the UK for assisting some authority.

MR GODDARD QC:

And that was a reference to a decision I think declining to strike-out a claim against a cladding manufacturer based on a complex structure theory, it might've harmed other property and there's also the *Linklaters Business Services v Sir Robert McAlpine Limited* [2010] EWHC 1145 (TCC) case in relation to –

WILLIAM YOUNG J:

Complex, is that Pirelli, is complex building structure theory based on an American idea?

MR GODDARD QC:

It was floated, you know, it was sort of dreamt up by Lord Bridge in *D & F Estates Ltd v Church Commissioners* [1989] 1 AC 177 (HL).

WILLIAM YOUNG J:

Oh right.

MR GODDARD QC:

And then vigorously disowned by Lord Bridge in *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL). He said, "I wasn't saying it was a good idea just that it's the only possible way of justifying where things have got to."

WILLIAM YOUNG J:

All right and I've come across it and I've forgotten but –

MR GODDARD QC:

Your Honour discusses it in *Spencer on Byron*.

WILLIAM YOUNG J:

All right and what about - and there's my silly Supersocolate case.

MR GODDARD QC:

I don't think it – it was silly in the sense that the parties had got themselves into the most –

WILLIAM YOUNG J:

Well a silly case because it was all over the place.

ELIAS CJ:

It's awful going back through all these cases.

MR GODDARD QC:

Into the most terrible muddle procedurally.

WILLIAM YOUNG J:

It was a terrible muddle, that's what I really meant.

MR GODDARD QC:

Yes and what Your Honour really said was, "This whole thing is a dog's breakfast and what's more a rancid dog's breakfast because the Supersocolate has gone off and I'm going to non-suit ultimately I think the plaintiff without any award to costs and send everyone back to start again in the District Court" but on the way through what Your Honour said was to take a defective ingredient, mix it with the chocolate and say that the defective ingredient has damaged the chocolate makes no sense and that in my submission must be right, both as a matter of common sense and as a matter of law.

GLAZEBROOK J:

Although presumably that you couldn't distinguish the defective ingredient from the chocolate whereas here you can distinguish the cladding from the rest of the building quite easily.

WILLIAM YOUNG J:

Well it depends at what level you analyse the –

GLAZEBROOK J:

No, no it obviously does, it obviously does.

MR GODDARD QC:

Yes and not all that easily in the sense that, you know, it's all bound up with flashing and joined to other things and cut and painted. So it's not as if you can just take it off and wheel it back, it's not like your –

GLAZEBROOK J:

Well it's distinguishable from the floor or the tables and chairs that are in the building that have been damaged by the water ingress and the children.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

Or the danger to children.

MR GODDARD QC:

I think that when we're thinking about how the damage is different, His Honour Justice Arnold's question of the defective brakes in the car is a really good simple example that gets us away from some of the complexities that might otherwise arise and again –

GLAZEBROOK J:

We, when we were discussing this, had changed it to something leaking oil because – so a defective part that then causes oil to be leaked onto the -

WILLIAM YOUNG J:

Well the oil leak causes the engine to seize.

GLAZEBROOK J:

Or causes damage to the carpets in the car and to the luggage that's stored in the car. So you will be able to get a tort liability in respect of the luggage but not the carpet or the engine seizing. We couldn't make the example work with the brakes.

MR GODDARD QC:

So we start with the brakes but we can also do the oil example. So what happens if the risk of the oil leaking is identified before the oil has leaked. Has a claim in tort come into existence at that point in time, and in my submission the answer is no

that's just like the existence of a snail and a bottle being identified in *Donoghue* before it's consumed. So if you say I want the cost of replacing the faulty parts that caused the oil leak, you can get that form the person you bought the car from, you can get it from the manufacturer under the Consumer Guarantees Act, but you can't sue in tort for the cost of anticipating the harm that would be caused in the future by the oil leaking out, and it's a defect in quality of the car and you can recover that through all the other mechanisms I've identified, and there's no case in New Zealand or elsewhere that I'm aware of where that's been omitted. What then if the leak happens and it causes your engine to seize up or causes staining on your carpets or something like that, there we do have to engage with the complex structure theory. It's not an issue for the first example because nothing else has been damaged on any theory, it's just that the thing is risky as you deal with it. At that point you have to ask whether it's really sensible to think about this as damage to other property but even if you do what you recover is the cost of fixing that other property, not the cost of replacing whatever it is that's leaking, and just one case that illustrates exactly that distinction being drawn, *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189, in the Supreme Court of Canada, where there was a defect in a crane and –

GLAZEBROOK J:
Have we got that somewhere?

MR GODDARD QC:
No Your Honour. I can provide a copy.

ELIAS CJ:
That was cited in –

MR GODDARD QC:
My learned junior, who's super organised, has copies concealed about his person so will provide them.

WILLIAM YOUNG J:
It was the same in *Spencer on Byron* wasn't it?

MR GODDARD QC:
Yes. So I'll just provide that through Madam Registrar. But in *Rivtow* what happened was there was a defective crane. There was negligence in both providing it with a

defect and failing to tell the hirer of the crane because the defect. Because they were told about it so late, and they withdrew it from service, in order to have it fixed, they missed out on using it for a significant period, during some season, I actually forget what the industry was but it was something seasonal, and what the Supreme Court of Canada held was that you could recover in negligence the loss of use but not the cost of fixing the crane.

ELIAS CJ:
Logging.

MR GODDARD QC:
Logging, thank you Your Honour, so there's a season when presumably it's not nasty and snowy and cold and you can get out into the forests and chop them down.

ARNOLD J:
Sorry just going back to the car example on the leaking oil, I thought you'd said you could get the cost of fixing the engine.

MR GODDARD QC:
My primary submission is that it's not sensible to think about the car in that way. What you've got is a defective car and the – almost coincidence that, you can certainly have, bring a claim against the manufacturer of the car as a whole, as against your immediate supplier of the car, can you bring a claim against the person who manufactured the oil pipe, shall we say, that's leaking, the faulty oil pipe that has a tendency to leak, and claim that in tort, seeking compensation for damage to the car. That depends on the complex structure theory and whether you can unpick what you've bought, which is a single thing which is faulty in that way. My first submission is that really makes no sense for the reasons given by the House of Lords in *Murphy* when discussing chattels, in a very convincing way in my submission, and in a way this Court hasn't rejected, it's just said our case law and statutory framework in relation to buildings are different, and that's why it's a matter of intellectual preference we can go down a different path in relation to buildings, but the analysis of liability for chattels in *Murphy* is compelling and suggests that –

ARNOLD J:
I think one of their Lordships did talk specifically about the car situation, didn't he, and referred to an American authority.

MR GODDARD QC:

He talked about a catastrophic event that, yes, and that might work. So you've got an identifiable part that does something catastrophic, that might work.

WILLIAM YOUNG J:

Like the O ring in the Challenger disaster.

MR GODDARD QC:

Yes.

ARNOLD J:

Yes.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

I mean presumably they could have sued not just to recover the value of the O ring.

MR GODDARD QC:

Well I think probably they couldn't sue to recover the value of the O ring but they could sue for everything else. That's *Rivtow*. *Rivtow* would say you can't recover the cost of the O ring.

WILLIAM YOUNG J:

Right, yes, but you can recover everything else, yes.

MR GODDARD QC:

Yes. So, and that in itself would be an important conclusion in relation to this case before us.

GLAZEBROOK J:

I very much doubt in a strike-out coming to important conclusions on anything.

MR GODDARD QC:

Well the Courts have been willing to do that on matters of principle, especially where it's really legal principle and legal policy rather than something which is fact specific. *South Pacific* is a very good example of that.

ELIAS CJ:

New Zealand much more so than other jurisdictions.

MR GODDARD QC:

In terms of willingness to do that?

ELIAS CJ:

Yes. Most other jurisdictions don't entertain these things on strike-out.

MR GODDARD QC:

But our –

ELIAS CJ:

Because the see the duty of care so inextricably linked with the other elements that are required for liability in negligence in any event.

MR GODDARD QC:

I'd have to pause and check this prevalence. I'm not doubting Your Honours, I just don't know that I'm in a position to make any coherent submission about that. There are cases in other jurisdictions of a strike-out nature, or a preliminary question nature, that's the other way, this is something that's been dealt with, is to try this issue of duty as a preliminary question. I think for example *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515, and I just can't quite remember how the –

WILLIAM YOUNG J:

I think some of the cases may have been strike-outs. Some, not all of them.

MR GODDARD QC:

Murphy I –

ELIAS CJ:

The *Dorset Yacht Company* was, wasn't it?

MR GODDARD QC:

Was strike-out.

ELIAS CJ:

Yes.

MR GODDARD QC:

But there what was held was that there was an arguable duty.

ELIAS CJ:

Was it? I think it was.

MR GODDARD QC:

It was, I'm pretty sure it was a strike-out.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

So it was entertained but ultimately there was a finding that there was –

ELIAS CJ:

Although the point is there made by Lord Pearson I think, the one that I'm putting to you, that really concentrating on duty of care is very artificial anyway, as a reason why strike-out isn't appropriate.

MR GODDARD QC:

Again –

ELIAS CJ:

And not looking at breach and, what's the other element?

MR GODDARD QC:

Damage.

ELIAS CJ:

Yes, yes.

MR GODDARD QC:

It's especially artificial if you look at duty independent from the damage claimed –

ELIAS CJ:

Yes.

MR GODDARD QC:

– because they're two sides of the same coin, the point that I've been seeking to emphasise over the last two days, and that really, I should at least before one, and before we turn our minds to whether I'm going to be, going to stop or not, which the four key reasons why this isn't a *Donoghue* case, I got to the first one, which is that the damage is different. Especially in a case where the risk has been identified before it has materialised and, as I say that's certainly the argument in relation to health and safety here. Second, a related point, the date of accrual is different. In *Donoghue v Stevenson* I think the situation where you buy the ginger beer and it sits in your cupboard for some months, or for a bottle of wine, some years, but with ginger beer so let's have it in the cupboard for some months so we're not past the use by date, and then you take it out and you drink it and you drink the snail, when does your cause of action accrue.

WILLIAM YOUNG J:

When you are damaged.

MR GODDARD QC:

Yes, when you drink the snail, and that's because the loss is the personal injury to you from ingestion of the snail, not the acquisition of the defective bottle of ginger beer. So you've got a different damage, and a different date of accrual necessarily as a result, and here it's very important to –

ELIAS CJ:

Why is it different here? Why is the date of accrual different?

MR GODDARD QC:

The claim that is made –

ELIAS CJ:

It may be economic loss.

MR GODDARD QC:

Which is.

ELIAS CJ:

But –

MR GODDARD QC:

In which case it's when you discover the defect, in which case it's not a *Donoghue* case. So in my *Donoghue* example imagine that in that period of months –

ELIAS CJ:

Well suppose you hadn't discovered –

WILLIAM YOUNG J:

I don't think the Chief Justice accepts –

ELIAS CJ:

I'm not very big on that, no.

WILLIAM YOUNG J:

– the distinction between economic and –

ELIAS CJ:

No I don't. But suppose she'd ingested the snail and it had given her a disease that only comes on some time later, why do you say – I mean there might be a discoverability –

WILLIAM YOUNG J:

There are cases like that in asbestos and –

ELIAS CJ:

Yes, yes, that's right, of course there are.

WILLIAM YOUNG J:

So when does –

ELIAS CJ:

So it's not a…

MR GODDARD QC:

All I need to say for my purposes is that it doesn't accrue at the moment of purchase. It's later, that's also perfectly coherent with it being a *Donoghue* type claim.

ELIAS CJ:

This doesn't accrue at the date of purchase.

MR GODDARD QC:

Well what is said here, and it's not clear, but it appears to be said, either it accrues on construction because the risks exist at that point, or at the latest that it accrued when the risks were discovered and therefore, for example, the value of the building on resale fell, and if you look at the alternative forms of loss claimed, one of them is loss of value, and that can only be incurred as a –

WILLIAM YOUNG J:

These are all variations on the theme that economic, that a critical difference is economic and physical loss, which I have some sympathy for, others not so much.

MR GODDARD QC:

Well I don't think you need to attach labels to it just in order to say what is the loss that triggers the claim and –

WILLIAM YOUNG J:

Well here the claim in respect of some of the buildings is there's nothing wrong with them at all but there's a concern that they will, something will go wrong, and so this is simply a claim for, premised on the assumption we didn't get the sort of building we wanted to get.

MR GODDARD QC:

Well my friend doesn't –

WILLIAM YOUNG J:

The building we want, we got –

MR GODDARD QC:

My friend doesn't accept that. My friend says it's not a complaint that we didn't get the building we wanted. I say that is what it is and that that's why, for example, it's a claim in relation to building work, and that's why it's essentially a quality issue that should be dealt with contractually. My friend says, no, no, it's about damage. It's about physical damage to property and risk to health and safety.

WILLIAM YOUNG J:

Well it can be, I mean the ones where there is damage to buildings, damage to the elements of the building other than the cladding, well arguably it is.

MR GODDARD QC:

But only obviously once it happens.

WILLIAM YOUNG J:

Yes.

MR GODDARD QC:

And so you get a fundamental difference depending on what sort of claim it is. All I'm trying to identify is why it's not just like *Donoghue* and the first –

WILLIAM YOUNG J:

Well the truth is it's not really like *Donoghue*. The question is whether it's like *Hamlin*.

MR GODDARD QC:

Well I don't want to – but my friend repeatedly says this is not a *Hamlin* case, it's a *Donoghue* case, and he wants that because he doesn't want to be dependent on –

WILLIAM YOUNG J:

Statutory –

MR GODDARD QC:

Statutory obligations.

GLAZEBROOK J:

Well it's *Donoghue* because it's a product and so the ginger beer, when she used the ginger beer by drinking it –

MR GODDARD QC:

It caused her harm.

GLAZEBROOK J:

It caused her harm, accrues then or if she drank it without even realising that the snail was in there and there's some disease that manifests itself later, well she discovered the ginger beer was bad sometime later.

MR GODDARD QC:

But if before she drank it, or even opened it –

GLAZEBROOK J:

No, no, I understand that point, but we're not talking –

MR GODDARD QC:

That's all I –

GLAZEBROOK J:

No, no, but the second, no your second reason I thought was different. That was your first – your first reason it was the –

MR GODDARD QC:

Damage was different.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

The second is –

GLAZEBROOK J:

The second reason I thought was related to accrual and I don't see that it's, I don't see the difference.

WILLIAM YOUNG J:
I think it's the same point.

MR GODDARD QC:
It's closely related, I said they were overlapping points.

GLAZEBROOK J:
Oh, it's the same point then I must understand it I think.

MR GODDARD QC:
The third, and obviously it's also closely related, is that the loss was recoverable is different, and that's the *Rivtow* point, and the fourth, and again it's related –

ARNOLD J:
Sorry, sorry, I didn't quite get the third one?

MR GODDARD QC:
The third is that the loss that is recoverable is different.

ARNOLD J:
Right.

MR GODDARD QC:
Even if the other damage has materialised and *Rivtow* illustrates that, or in the Challenger example, you can't get the O ring. And the fourth point, which really drops out of the others, it's not a separate point, is that the scope of duty is different in terms of what loss it is that we say a defendant had an obligation to take reasonable care to avoid imposing.

WILLIAM YOUNG J:
The loss and the duty in *Donoghue v Stevenson* was not to expose consumers to the risk of harmful substance as opposed to a duty to provide a really tasty bottle of ginger beer.

MR GODDARD QC:
Yes.

WILLIAM YOUNG J:

That excited the tongue and was a –

MR GODDARD QC:

And thrilled the senses, yes. And similarly here if there is a duty to take care to prevent causing harm to health and safety, then anyone who suffers harm to their health and safety can, subject to the ACC issue, sue and probably it's not an injury by accident because it's gradual in fact –

WILLIAM YOUNG J:

Has there been any claims for injuries caused by leaky buildings, for ill health?

MR GODDARD QC:

Not that I'm aware of but I would have thought that there was a serious question about whether the ACC regime precluded them because it's not the sort of –

WILLIAM YOUNG J:

Not easily within the definition of "injury by accident".

MR GODDARD QC:

No it doesn't. So that's an open question I think.

ELIAS CJ:

Mr Goddard it's lunchtime and I have an appointment so can you just tell me what you want to cover?

MR GODDARD QC:

I think I could –

ELIAS CJ:

I'm not trying to cut you off because if we don't finish, we don't finish, but –

MR GODDARD QC:

It is important question, Your Honour. If I have to cut my cloth by reference to the time allocated, I will provide a high level summary of my argument in 15 to 20 minutes after lunch, in order to give my friend a fair crack.

ELIAS CJ:

I think if you could take the time you need, but confine yourself to what is a development of your written submissions, which we have read.

MR GODDARD QC:

That would be helpful, thank you.

ELIAS CJ:

Thank you, we'll take the adjournment now.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.18 PM

MR GODDARD QC:

Your Honour I'd just like to begin by clarifying an answer I gave to Justice Glazebrook, Her Honour Justice Glazebrook earlier today about the percentage of buildings listed in the schedule in respect of which there's, it's pleaded that there's damage and the percentage in respect of which it's pleaded that there is some damage is, as I said, some 81% in the current and formally updated version of the schedule but what I think I got wrong is that I gave that figure in answer to a question from Your Honour about damage to other parts of the building and the pleading of damage includes damage to the cladding itself. So that figure of 81% is a figure in respect of which the plaintiff respondents say that there is some damage either to the cladding or, and/or I suppose, to some other part of the building and the proportion that is identified as having damage to framing or mould and so forth is smaller than that. I don't think it's, you know, exactly where the line is drawn in terms of numbers is not all but I did give that figure in answer to that question and I overstated the position in relation to the number where it's said that there is some other damage apart from the cladding just being defective and/or for example degrading. So for example if the cladding is degraded or if the cladding has dampness in it, then there would be a pleading of damage, even though no part of the building except the cladding is damaged.

So let me come now to my remaining submissions in relation to duty of care and what I'm going to do is begin with negligent misrepresentation, the cause of action which was struck out by the Court of Appeal. So if I ask the Court to turn to – take my main submissions and turn to page 37, that's where I deal briefly with the

negligent misstatement claim. I begin of course by making the point that if the broader duty of care is bad there cannot be a claim for negligent misrepresentation. Those reasons, the same proximity and policy factors necessarily would apply here but then I go on to deal with the specific requirements for a negligent misrepresentation claim that persuaded the Court of Appeal to strike-out this cause of action and there were essentially two reasons. The first is dealt with in 9.4 of my submission. The Court of Appeal found at 119 to 122 that the respondents have not pleaded membership of a specific class in respect of whom Carter Holt can be said to have reasonably foreseen they'd rely on its statements about its cladding products. These were statements made to the world at large, you know, to the construction industry at large and as I go on to say with respect that's right and indeed Carter Holt could reasonably expect that no reliance would be placed on statements made about its product over and above those for which it was accepting contractual responsibility when supplying the product and in particular it could reasonably expect that no reliance would be placed on statements about the suitability of the product for particular uses over and above those for which it expressly accepted responsibility.

Correspondingly the respondents could reasonably expect that Carter Holt would have supplied the product on terms that included limits on liability. They couldn't have had any reasonable expectation of relying on statements made to the world at large by Carter Holt without enquiring into the limits on responsibility accepted by Carter Holt and as I say at 9.6, it is I think important to add that the respondents were in a position to ascertain by making enquiry to their head contractors, what manufacturers warranties, if any, were offered here and what terms the product, cladding or any other product they're interested in, roofing, had been purchased and if they'd called for and examined the terms of supply they would have known that Carter Holt wasn't assuming any responsibility to them unless expressly confirmed in writing.

ARNOLD J:

So that first bit about to the world at large, I think the respondents say well these weren't statements to the world at large, they were really directed at these building professionals who were going to be making decisions about the nature of the cladding and that is a difference. Now it doesn't affect your second argument about the contractual thing –

MR GODDARD QC:
Reliance.

ARNOLD J:
– but it may affect the first mightn't it?

MR GODDARD QC:
That takes me into the additional issue I wanted to deal with in this context which is that the way the respondents' arguments are framed here is very much in terms of these statements being addressed to building professional and relied on by the building professionals and so for example if Your Honour has the respondents' submissions, I think it's worth looking at this point because this is one extra thing I really wanted to cover. What we see on page 24 of the respondents' submissions, paragraph 8.21, is the respondents say, "Well our pleadings are okay because we plead that all building work undertaken by the respondents on the school buildings involved the engagement of building work professionals. In other words in no instance did the respondents carry out the building work without engaging such agents." And I just want to circle the word "agents" for the moment and then come back to that. Then, as Your Honour Justice Arnold notes, at 8.23 it said, "Building professionals would never recommend a cladding product in a vacuum, they must have looked at the suitability of Shadowclad by looking at the product literature and so on and so forth" and then over at 8.25 it said, "Given the content and circulation of the representations and particular descriptions, it can be inferred that the respondents' building work professionals must have seen and considered those statements in the course of assessing Shadowclad's suitability for us on the school building. It can be inferred that this assessment was a prerequisite to Shadowclad being installed on the school buildings, resulting in the pleaded loss. Put another way, it is inherent in the fact that the products were specified by building work professionals for use on the school buildings, and purchased and used in that way, that the representations and particular descriptions were relied on."

8.26, "Accordingly, the pleadings support the inference that the respondents or their agents relied on Carter Holt's statements." Now the respondents seem to be attempting here to elide the difference between a representation made to the building professionals and a representation made to them, because of course for a negligent misrepresentation claim to succeed by a plaintiff the representation must have been addressed to that plaintiff, and must have been reasonably relied on by that plaintiff.

Now of course if you have an agent in the true sense, an agency relationship someone operating for and on behalf of the principal, addressing a statement to the agent and reliance by that agent will found a negligent misstatement claim, that must be right. But there's no pleading here that the building work professionals engaged were agents in the orthodox sense, or indeed in any sense the word doesn't occur, of the plaintiffs and that would be an extraordinary and novel way to structure a construction project. Nothing's impossible but if it's an essential element of the claim in negligent misstatement, which it would be as explained in these submissions, that there was an agency relationship between the plaintiffs and some one or more of these building professionals, that would be an essential element of the claim that would need to be pleaded, and then you would need to go on to plead that the statement was addressed to those agents as agents for the plaintiff, and that it was actually relied on by those agents.

Now, and I say that because there is no authority I am aware of to suggest that a plaintiff can bring a negligent misstatement against a defendant who has made a representation to person X and in circumstances where person X has then entered into a contract with the plaintiff. Not an agent, just entered into a contract in reliance on the statement made to person X, as a result of which the performance by person X is less valuable to the plaintiff. That would be an extraordinary extension of the law in negligent misstatement. Completely inconsistent with the conceptual framework explained in cases like *Caparo*, accepted by the New Zealand Courts in cases like *Boyd Knight*. It would mean that whenever a statement was made to one group, not only could the people it was addressed to sue, but anyone who contracted with those people in a way that turned out to be less advantageous because those people had been misled could in turn sue in negligent misstatement. So the whole purpose of identifying a class of reasonable reliers, and specific reliance, would be defeated, and the effect of the statements would ripple out into the economy in precisely the way that is consistently been rejected by the English Courts and the New Zealand Courts. And every other Court I'm aware of.

ELIAS CJ:
Do we have *Boyd Knight*, by the way?

GLAZEBROOK J:
Yes we do somewhere.

ELIAS CJ:

It's in the respondent's is it?

GLAZEBROOK J:

It's at the, I have seen it.

ELIAS CJ:

MR GODDARD QC:

Let me just see if I can find it quickly. Respondent's tab 6 Your Honour.

ELIAS CJ:

Thank you.

MR GODDARD QC:

And I could add that *Caparo* has also been treated as authoritative. In cases like *Attorney-General v Carter* in the Court of Appeal, in this Court in *The Grange*, *The Grange* is in my authorities under tab 11, and the reference to the essential elements of a claim in *Caparo* is found at paragraph 189, immediately after the reference in paragraph 188 to a very similar statement in *Attorney-General v Carter*. So this Court has adopted as a helpful test for liability and negligent misstatement the –

ELIAS CJ:

Whose judgment are you citing from?

MR GODDARD QC:

I'm citing there from the joint judgment of Justice Blanchard, Justice McGrath and Justice Young.

ELIAS CJ:

Yes.

MR GODDARD QC:

Which is the plurality in that case and I was in paragraphs 188 and 189.

ELIAS CJ:

Yes.

MR GODDARD QC:

And Justice Tipping I think said he agreed, he just added – yes Justice Tipping wrote separately but I understand His Honour to have agreed with the other three Judges. I think it was just Your Honour the Chief Justice who was in disagreement on some aspects of the case. So –

ELIAS CJ:

It's just that *Caparo* is not an authority I would cite myself.

MR GODDARD QC:

And Your Honour didn't. But three Judges of the Court did with the concurrence of a fourth and the summary in the *Attorney-General v Carter* in the Court of Appeal was also picked up in *The Grange* at 188 as a helpful statement of the test and the idea that you can extend negligent misstatement out to reliance by someone you contract with is a very far reaching and ambitious argument for which no authority has been cited. Conversely, if what is sought it to bring this case within the – no, no it was addressed to the plaintiff through an agent and the plaintiff arride by their agent, the agency must be pleaded and it would be astonishing if such a pleading could be added to this case because that would be an extraordinary structure for construction contracts. And let me just build on that, if this is a statement addressed to building work professionals then that actually makes the very point I'm making which is that it wouldn't be addressed to these plaintiffs, they wouldn't be within the class to whom it was addressed. So this is some sort of downstream ricochet reliance to come up a new term, which is just not the law.

So either you're speaking to the world, including these plaintiffs, in which case it's as the Court of Appeal said, too broad a class to get you off the ground in terms of negligent misstatement or you're talking to someone else other than the plaintiffs and that doesn't get you there and then –

GLAZEBROOK J:

Well say it's a specific representation to a specific builder in respect of a specific building, you'd still say there's a – which the builder acts on to the detriment of his or her client, you'd still say it fails that test because it's made to someone else?

MR GODDARD QC:

Yes, yes I would and what I would –

GLAZEBROOK J:
So with impunity you can make these specific representations?

MR GODDARD QC:
No not with impunity Your Honour because of course if the result is that the builder does something which is inconsistent with what they are obliged to do by contract or in tort, you can sue the builder and the builder then has a claim against the person they say they relied on but you can't do it with impunity.

GLAZEBROOK J:
But you say you can't really sue the builder because there's a contractual matrix, so that takes tort out, don't you?

MR GODDARD QC:
No I don't say that, Your Honour. I have always first that you can sue the builder in contract, which is one of the things I said.

GLAZEBROOK J:
No, in contract obviously.

MR GODDARD QC:
But in tort, I've accepted, as I must given the decisions of this Court, that the builder owes duties in tort to take reasonable care to achieve compliance with the Building Code.

GLAZEBROOK J:
Oh sorry I'd forgotten that argument because I really think it's a very good one but to have a very specific reading of cases like *Spencer on Byron*, to say that it only relates to the Building Act I think is pretty doomed in my view but I understand – that's your argument.

MR GODDARD QC:
It is what a majority of the Court – the Court in that case was –

GLAZEBROOK J:
No they just said.

ELIAS CJ:

Which case are you talking about now?

MR GODDARD QC:

Spencer on Byron and the Court –

GLAZEBROOK J:

Just saying it's relating only to the Building Act and I just can't see it. In that case they said you don't have this indeterminacy because you've got these minimum standards. I don't think it's saying if you don't have minimum legislative standards in relation to products you can't have –

MR GODDARD QC:

It did go further than that and let – I think it might be helpful to go to it just to make sure that we're not at cross purposes on what was said. If the Court has volume 2 of my authorities and tab 6 is *Spencer on Byron*. Let me just provide some references which I hope will be helpful. Let me make sure I'm in the right place. So if we begin in Justice Tipping's judgment, first of all what we have here is in paragraphs 39 and 40 –

ELIAS CJ:

I thought that was *The Grange* tab 6. Oh sorry maybe I've got the wrong one, tab 6.

MR GODDARD QC:

So my volume 2, tab 6, *Spencer on Byron*.

ELIAS CJ:

Oh yes I have it thank you, yes sorry.

MR GODDARD QC:

The Grange is in the same volume, Your Honour probably might have still had that. First of all interface with contract. So this, importantly what was said in relation to cutting against contract says, "To recognise a duty of care for all buildings, we're focussing on commercial buildings here, would tend to undermine relevant contractual relationships and loss allocation mechanisms or opportunities, overstated problem, private certifiers couldn't contract out, position must have been the same for

Councils. In the second place those performing functions under the Act or within the scope of the Act, so that's builders as well, owed statutory duties not to breach the Building Code. So to that extent there was no capacity for anyone involved to limit their liability by contract." So no room to contract for a different obligation.

Then 40, "I accept that in circumstances where the parties have allocated, or have had the opportunity to allocate risks by contract, tort law should be slow to impose a different allocation from that expressly or implicitly adopted by the parties. But because of the way the Act is framed I do not see that proposition as being a significant feature of the present case." But then perhaps even more importantly, let me just make sure I've got the right –

GLAZEBROOK J:
Sorry can you just repeat those paragraph numbers again, I was having trouble.

MR GODDARD QC:
39 and 40 from Justice Tipping.

GLAZEBROOK J:
I'm sorry I thought you had another one as well.

MR GODDARD QC:
Yes I'm about to go to the next one, yes. I was just checking which it was. So probably if we go to the next page, 242 of the bundle, paragraphs 193 and 194 in the judgment of Justice Chambers and Justice McGrath. I think, let me just check that. Yes Justice McGrath, written by Justices Chambers. Cutting across contractual liability. "It is said that recognising a duty of care in the case of commercial buildings, which are likely to be much more complicated structures than residential homes, would cut across contractual relationships the developer has put in place. We disagree." Just pausing there, Your Honour will remember that from the earliest stages of the development of the case law on Council liability, right back to *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373 (CA), the Courts have consistently said we accept that it wouldn't be reasonable to impose liability on the Council in tort if the builder is not also liable in tort and that's been accepted by the New Zealand Courts as well. What's being addressed here is the argument that there are contractual arrangements, builders and others in this context, which would be undermined by imposing liability on the Council and on builders.

So. "It is said that recognising a duty of care in the case of commercial buildings would cut across contractual relationships, we disagree. Recognising a duty in tort does not in any way cut across contractual obligations the inspecting authority assumed towards the first owner who employed their services. No one can be party to the construction of a building which does not comply with the Building Code. The duty in tort imposes no higher duty than that: for example, the inspecting authority is not responsible for ensuring the building is constructed in accordance with the plans and specifications, which will inevitably go beyond Building Code requirements. Obligations in tort, whether of the inspecting authority or of any supervising architect or engineer, will be limited to," and that's the phrase I had in my head, "will be limited to the exercise of reasonable care with a view to ensuring compliance with the Building Code." And that statement's important because it goes on to explain why that means this is not like *Rolls-Royce* and essentially the Supreme Court here, as I understand that Your Honour, endorses the result in *Rolls-Royce* and the core reasoning in it. I don't think it's been overruled by any stretch of the imagination hence the careful distinction here.

"Thus these cases do not give rise to the kinds of issues which arose in *Rolls-Royce*, a case cited by Mr Goddard. That was a case in which Carter Holt was attempting to argue that Rolls-Royce was under a duty to it in tort to take reasonable care to perform a contract between Rolls-Royce and ECNZ, a proposition the Court of Appeal rejected. The obligation falling on inspecting authorities is quite different. It marches hand-in-hand with its statutory obligation and requires of the inspecting authority no more than Parliament has imposed." And there are other observations to similar effect. They're collected in footnote 29 of my submissions, I won't go to all of them, and His Honour Justice Arnold made the same point in *Econicorp*, one might want to add a note, at paragraph 56, I just add the note. So the justification for imposing liability in tort has been that that liability is limited to exercising reasonable care with a view to ensuring compliance with the Code so there's no interference with autonomy, no cutting across of contractual arrangements that parties are free to enter into. That's the foundation for the submission and –

GLAZEBROOK J:

I understand your submission.

MR GODDARD QC:

So coming back to negligent misstatement, the first issue was the absence of an identifiable class of persons who could be expected to reasonably rely on the statements. The second reason is that there was no pleading of specific reliance. I note that the paragraphs in which the Court of Appeal dealt with that at 9.9 of my submissions. As I say at 9.7, the reliance enquiry is fact dependent, of course that's right, but what that means is that relevant facts that establish reliance must be pleaded, and also properly particularised, but above all they must be pleaded. So you have to plead who relied on what and when and it has to have been the plaintiff who relied the negligent misstatement. There is not a negligent misstatement case anywhere in the common law world that I'm aware of suggesting that reliance by someone other than the plaintiff provides a basis for a claim in negligent misstatement and in particular the fact that someone you contract with relied has never been held to found a claim in negligent misstatement.

WILLIAM YOUNG J:

What about reliance by an agent, when you say well that's reliance by a person.

MR GODDARD QC:

Yes, so you can plead agency and say my agent relied, and for a company, of course, that must always be the position Your Honour. A company can only act through agents.

WILLIAM YOUNG J:

But I mean the distinction – what about reliance by your builder, does it really make a difference whether the builder's an independent contractor and not an agent?

MR GODDARD QC:

Yes it does because then you've got to enquire into whether they could reasonably rely for their own purposes and what loss, what price they could place on what they did in reliance on it, and what they will be able to recover – so it goes to a sort of purpose enquiry, you know, the emphasis that's placed in this context on who you're communicating it to and for the purpose for which you intend it to be used. So if you, let's look at that in another way, if –

WILLIAM YOUNG J:

But it might be, I mean it's not always that easy. You might say to a builder, well look I'm thinking of using these systems, what do you think, and the builder says well, I'll get some brochures, now I reckon that's quite a good system, the brochure says it is. Well why wouldn't the builder be your agent in those circumstances? Why wouldn't his reliance be enough?

MR GODDARD QC:

An agent to make that enquiry?

WILLIAM YOUNG J:

Yes well, I don't really like the word agent actually here, but I can't see why that's not your reliance. You're relying on someone else, and they rely on it.

MR GODDARD QC:

Because they are providing goods or services to you. You're relying on them to provide those and they are –

WILLIAM YOUNG J:

You may be relying, this may be outside the formal contract, this just may be what's the best way to build this house, what's the best way to build the school classroom.

MR GODDARD QC:

And in those circumstances if you want – it must be, sort of, there are a number, again, related responses. The first is that of course you can look to the builder in that example, in contract and in tort, for the performance of their obligations to you, and if they've incurred liability to you as a result of relying on statements made by the manufacturer, they in turn can sue the manufacturer. If we then ask what about cutting across that chain with a negligent misstatement claim. First, I would say there is no case I'm aware of at all that suggests that's possible, and second, that the reasoning in the decided cases is inconsistent with that approach because it effectively brings within the scope of potential reliance anyone who deals with someone who might rely and who might be adversely affected by their reliance for the purpose of providing goods or performing services in their business –

GLAZEBROOK J:

Well you have to bring foreseeability and proximity into that, wouldn't you? And there's a pretty, it's pretty proximate if you have it just my earlier example, isn't it, in relatively foreseeable that people are going to rely on it, that you're not going to have the clients saying, no, no, no, I'm not having that sorry.

MR GODDARD QC:

This is the example, Your Honour, of –

GLAZEBROOK J:

The example where you have a specific representation to a specific builder in respect of a specific house that he or she is building for a specific client.

MR GODDARD QC:

And in that situation it's not as if there are gaps in the liability framework –

GLAZEBROOK J:

No, no, I understand you say there's a chain but…

MR GODDARD QC:

It is of course foreseeable that harm will result but as the Courts have repeatedly said, that's a very crude screening mechanism. When we come to proximity the concern that the Courts have consistently expressed is that information can be used and repeated and repeated, and that builder may then rely on that same information for the next project, and the next project, and the next project. How do you identify who should be seen as proximate and the requirement has always been expressed as being that the statement was made to the person in question for the purpose for which it's being used and it seems to me that in circumstances where you're communicating, for example, a building professional, you can take into account their expertise and the other background information you think they should have in terms of how you put it and that critically the extent to which they can reasonably rely will depend on all the other information available to them and on their skill and expertise and the enquiry can only sensibly take place in that context. It just confuses things and dramatically expands the scope of liability for statements to say that downstream purchases can rely.

ELIAS CJ:

Mr Goddard, are you at para 9 of your argument?

MR GODDARD QC:

Yes.

ELIAS CJ:

So you're not having, yes, all right, thank you.

MR GODDARD QC:

I said I was going to start at nine, negligent misstatement –

ELIAS CJ:

Yes, but are you going to go back to seven?

MR GODDARD QC:

– and then I'm going to go back to eight briefly. I've done seven.

ELIAS CJ:

I'm getting seriously concerned about the time so perhaps we need to exercise some self-control.

MR GODDARD QC:

I don't think there's a problem with time Your Honour because as I said the main comments in which I wanted to add something to my written submissions which Your Honour has said I can be treated as banked, was in the context of negligent misstatement because there was this new argument about agents and I wanted to address it because it hasn't been advanced before, and to say that it's not supported by authority and it's wrong in principle and inconsistent with the principles identified in the authorities.

ELIAS CJ:

Well it seems to me, from the authorities you've taken us to, that the point has not been addressed in the authorities. That there is no authority for it.

MR GODDARD QC:

But I think it's also right to say if one looks at the reasons given for the tests that have been adopted, they were designed to ensure that people are held liable for careless statements that they make only when they ought to have foreseen that their statement would be provided to the person in question and would reasonably be relied on by that person because otherwise you get a ripple effect.

ELIAS CJ:

So that your submission is that general reliance/proximity is not enough?

MR GODDARD QC:

Yes. So for example –

ELIAS CJ:

Well that's contrary to what Justice Gault said in that case that I didn't know actually, *Boyd Knight*, or hadn't read for a long time because he says that he's not convinced that the principle should be any different for negligence and for negligent misstatement.

MR GODDARD QC:

That the enquiry in relation to proximity should be different?

ELIAS CJ:

Yes.

MR GODDARD QC:

Yes but then His Honour goes on to say, "And in this context there must be specific reliance." That was the essence of *Boyd Knight*. What was pleaded was general reliance and that was held not to be sufficient. There had to be specific reliance by a plaintiff on the relevant statements by the auditor and on the financial statements that were said, you know, by the auditor to be a true and fair view or whatever then. So it's exactly to that effect and the alternative is to say that if for example a manufacturer relies on information provided by someone and then manufactures for mass distribution, products which are sold to all the consumers or the consumers can sue the person who provided the information to the manufacturer. That's effectively what my friend is arguing and that both goes far beyond the cases and is wrong principle.

Second on this, even if it is sufficient for a supplier to rely, so in Your Honour Justice Glazebrook's example, if it is sufficient for the builder to rely on the statement made by the supplier, you would need to plead that reliance. So you would have to plead that, in Your Honour's example, has a plaintiff as owner of the house, my builder made this enquiry, this is what the builder was told and the builder relied on it in using this or in advising me that this product was suitable or whatever.

GLAZEBROOK J:
Well I think they have pleaded that. They've said here are all these specifications, here are all these statements, the builder must have relied on them because they used the product. So it's not a pleading point, is it? You just say that's not sufficient.

MR GODDARD QC:
I say that that's not the sort of specific reliance that cases like –

GLAZEBROOK J:
Well no, so it's not a pleading point, it's just saying it's not a specific reliance because you have a statement to all the world, even if the builder picked it up, it's still a statement to all the world?

MR GODDARD QC:
I think one can always describe these in two ways, one can either say that to have a successful claim you need to plead X and it's not pleaded so it's missing or you can look at what is pleaded and say, "This is what's pleaded, it's not enough as a matter of law." If all you're saying – yes and they're the same argument, I don't think there's a difference.

So that's negligent misstatement. Rewinding to the broader duty of care issue. If I could take the Court to page 25 of my submissions, paragraph 8.6 is a short statement taken from *South Pacific* of the fundamental problem here. As Justice Richardson said, "Those were the respective bargains the present parties made" and we're of course talking about an insured, an insurer and the insurer and the insurance investigator. That was the context of *South Pacific*. "Those were the respective bargains the present parties made. Tort theory should remain consistent with contract policies and public policy terms, I consider that where as here, contracts cover the two relationships. Those contracts should ordinarily control the allocation

of risk unless special reasons are established to warrant a direct suit in tort." Take three things out of that, first, the reference to contracts cover the two relationships. It's not enough that they're just B2 contracts, what is I think quite rightly implicit in this is that the contracts address or would be expected to address, to make provision for allocation of risks of damage of the kind that is in issue in the proceedings and that is why the fact that there are contracts between manufacturer and retailer, retailer and consumer, doesn't prevent a *Donoghue* type claim because you wouldn't expect contract to cover the risk of personal injury but do you expect contracts to cover, contracts for the sale of ginger beer to deal with the risk of personal injury but do you expect contracts for the supply of products to cover questions of quality and their suitability for use in a particular application, yes you do. So we're squarely in the space that you'd expect contract to cover and that in fact the contracts cover and I provide some other references.

GLAZEBROOK J:

If you've seen any standard form contracts with consumers, they always cover the risk of everything and exclude absolutely everything. So certainly now that couldn't be said because the huge millions of pages of small, would exclude absolutely everything.

MR GODDARD QC:

I'm not sure that's right, Your Honour, both because of the non-excludable duties under the Consumer Guarantees Act.

GLAZEBROOK J:

No, no I understand you can't exclude those duties now in terms of the Consumer Guarantees Act but all I'm saying is they certainly try their hardest to exclude everything they can't.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

They can't by statute not exclude.

MR GODDARD QC:

And the second point is that of course we now have express regulation of unfair contract terms under the Fair Trading Act in New Zealand. So again I would say that these are issues that we see Parliament dealing with in a considered and balanced way and that there is no need for tort to come in with an overlay like a rhinoceros in a Japanese garden and not only turn up but also trample the pathways that have been laid out by the legislature. If there's a problem with the pathways, then it's for Parliament, the gardener, to fix them, you know, just send in a large unwieldy beast like tort to sort it out and that was exactly the argument in *South Pacific* in relation to the tort, of course, also defamation, picking up the Maxi Crop decision, *Bell-Booth Group Ltd v Attorney-General* decision, from the Court some years earlier.

So the first point I want to pick out of that was that the enquiry is into whether the contracts cover the relationships, whether we're in the space of that risk and the second is special reasons. Of course the Court was saying, after all it was familiar with the building cases, that there may be special reasons why, despite a contractual framework, there will be a duty of care in tort but those special reasons need to identified and the facts that establish them need to be pleaded. So again, picking up on Your Honour Justice Glazebrook's question earlier, it doesn't matter whether you say yes there is a duty as long as special reasons are pleaded but they are missing here or whether you say what's pleaded does not disclose the special reason required by law to establish a duty of care in this contractual framework. Whichever way you put that, the problem is, with this claim, is that special reasons of a kind recognised by law are not pleaded and are most unlikely to be able to be pleaded here and when one asks what special reasons the law has recognised, then in my submission Professor Stapleton is right to say that under one guise or another they essentially relate to the vulnerability of the plaintiff, even where that language isn't used and they relate to the idea that the plaintiff could not reasonably be expect to contract for protection against the risk in question having regarding to their resources, having regard to market structure because no one can get terms of that kind, whatever. So there's various things that mean that there are special reasons but again, just so that vulnerability doesn't function as a distraction, I use it really as a convenient label for the various special reasons identified by the Courts over the years for not letting the contractual allocation of risk govern and none of those special reasons is present here and I work through them in gruesome detail in my submissions. The last thing I say in the one and a half minutes remaining to me, is that the new addition of *Todd on Torts* is in volume 7 of the authorities. It's under

tab 34. There's a helpful discussion of a number of the issues that are relevant to this proceeding but in relation to the coherence of the law, perhaps I could refer the Court in particular to pages 335 to 338, with an emphasis on 338 where Professor Todd says, makes a fairly clear suggestion which I gratefully adopt as a submission, that to the extent that there is any need – well that there's no need for tort and that indeed tort is likely to be inconsistent with the existing legal framework in this space, by reference to the Consumer Guarantees Act, and I adopt his analysis as a submission. It's exactly 3 o'clock so unless the Court has any questions I'll stop?

ELIAS CJ:
Thank you, well done. Mr Farmer we'll hear from you after the adjournment.

COURT ADJOURNS: 3.00 PM
COURT RESUMES: 3.30 PM

ELIAS CJ:
Yes Mr Farmer.

MR FARMER QC:
I was proposing to deal with duty of care and duty to warn, and then my learned friend Mr Flanagan would deal with negligent misstatement and then tomorrow I guess I would come back and deal with the longstop if that's an acceptable way of proceeding?

ELIAS CJ:
All right, thank you.

MR FARMER QC:
I had prepared some notes which build on the submission and incorporate them and build on what my learned friend has had to say, at least in the last day and a bit, and I think I'll be able to go through the duty of care part of it relatively quickly. I did want to start though with just some oral observations about my learned friend's differences between this case and *Donoghue v Stevenson*. He said there were four and they did seem to me to come down to two but the first of them being, he said that in *Donoghue v Stevenson* the plaintiff was suing for damage or injury resulting through drinking the ginger beer and the substance in the ginger beer, and it was not an

action for replace, or where the plaintiff was suing for the cost of another bottle of ginger beer, a replacement bottle of ginger beer, as a true tort case. Well we say that's exactly our position too here. We're not, this is not a warranted case, we're not suing Carter Holt Harvey asking for their product to be repair or rectified or replaced –

WILLIAM YOUNG J:
In some respects you are, aren't you?

MR FARMER QC:
Pardon?

WILLIAM YOUNG J:
Aren't you in some respects?

MR FARMER QC:
No.

WILLIAM YOUNG J:
Aren't there cases where there's, aren't there, in the no damage instances?

MR FARMER QC:
No, Your Honour. We don't want to have a bar of their product because we say it's –

WILLIAM YOUNG J:
I see.

MR FARMER QC:
Yes, and we say that –

WILLIAM YOUNG J:
But it's very the same, it's a bit like saying, you know, you sold me a lousy can of Coca Cola and I don't want another can but I'll take a can of Pepsi.

MR FARMER QC:
No. Well, well, perhaps, perhaps, but certainly not from them.

ELIAS CJ:

Because your Coke is so bad. Actually we probably shouldn't say that in absolute –

WILLIAM YOUNG J:

After what you did to me there's no way I'll have Coca Cola again.

MR FARMER QC:

What we're saying, Your Honour, is that we're suing to make this building safe. We say that the damage that's been caused is, relates to the safety of the building, and we want the cost of making the building safe, and then we will use the damages to make it safe. We don't want replacement Shadowclad, and the reason for that is, we'll find, if I can just take you back to the statement of claim where we can see in a little bit more detail just what the problem is and why replacing it with more Shadowclad is not going to be a satisfactory solution. So if you have that, you'll remember that's in volume 1 of the key documents bundle, at tab 8 and schedule 2 has the cladding sheets defects at page 169. I don't need to go through all these, I just need to really start and almost finish with, well there are two that I need to look at, they're related, the first one is paragraph 1, "Shadowclad takes in and retains more moisture than the protection offered by the preservative treatment would otherwise allow because it is inherently prone to absorbing significant amounts of moisture for example: a. by capillary action through end grain timber at all cut edges, particularly lower drip edges (and it is a particular feature of Shadowclad that there is an end grain cut edge on every side of a Shadowclad sheet)." So with an ordinary conventional weatherboard, timber weatherboard, you have cut edges at each end, and those cut edges would be by a saw, by a sawmill, and so they would tend to be rough. The problem with the Shadowclad is because of the way it's constructed it has cut edges, all four edges are cut, and that means you get –

WILLIAM YOUNG J:

Is that because it's plywood?

MR FARMER QC:

Yes, yes.

WILLIAM YOUNG J:

How many ply is it?

WILLIAM YOUNG J:

How many layers are there, is it two or three or four?

MR FARMER QC:

I don't know, I don't know, but you get capillary action, which –

WILLIAM YOUNG J:

All round.

MR FARMER QC:

Which is absorbed, drawing in the moisture, principally from the lower edge actually, and taking it right through the whole product and that paint, conventional painting and so forth is not an adequate protection on the edges because they are rough edges, they're not smooth, and that's actually I think referred to –

ELIAS CJ:

Have you got an illustration of it? For some reason I got an impression that they were horizontal –

MR FARMER QC:

Yes they are, they're weatherboards, like a weatherboard.

ELIAS CJ:

Yes, they're weatherboards, aren't they, yes.

MR FARMER QC:

But they overlap, but the four edges –

ELIAS CJ:

Yes I see, yes.

MR FARMER QC:

And so the three, one's on, and particularly the one on the bottom is exposed, and so, even though it might be painted over, because it's rough, like it's a sawn edge, you get this capillary action drawing the water up, the moisture up and the water up into it and then it goes from there to wherever it goes. In fact if you look at paragraph 5 on the next page it says, "Lower bottom and other similar edges of the Shadowclad

sheet are prone to moisture absorption, in particular by capillary rise." And then the particulars, "The exposure of end grains at lower bottom and other edges of Shadowclad sheets make it prone to capillary uprise, even when painted or stained." And then it goes on and expands that point and that's, it links into the sort of real world conditions point about painting, just painting over those edges is not going to stop that occurring. So that's why we say well we don't want more Shadowclad thank you. To make our building safe, to make it watertight, weathertight, we need to have something else, we need to have some other product, but you have to pay us the loss that's caused by your product and the loss is the loss of removing it and replacing it with something else. So it is, we say, in that sense a true tort case. It's not a breach of warranty contract type case.

ELIAS CJ:
Well it was unsuitable, you're saying?

MR FARMER QC:
Yes.

O'REGAN J:
It's a product liability case.

MR FARMER QC:
It is, it is.

O'REGAN J:
Whereas *Donoghue v Stevenson* wasn't.

MR FARMER QC:
Well *Donoghue v Stevenson* is a, no, it is, it is a product liability case as well. They're both product liability cases. I presume *Donoghue v Stevenson* the product was the ginger beer.

O'REGAN J:
Yes, not the snail.

GLAZEBROOK J:
Even if it existed.

MR FARMER QC:

Even if it existed. The second point is this question of the date of accrual with the cause of action and my learned friend's submission as I understood it was that that is the date of purchase. In our case the date of purchase, the date of supply date that the product is used in building the building and we say, no, it's not that, this is a reasonable discoverability case, it's a tort case. In *Donoghue v Stevenson* as it turns out the defect was discovered at the time of purchase and time of drinking. In our case the time of discovery was the time when we did the national survey in 2012 and so it is a reasonable discoverability case. That's when the cause of action accrued on all causes of action in our submission.

ELIAS CJ:

I mean in some ways this is a more, this is an easier case almost than *Donoghue v Stevenson* on one view, because its a durable product. I'm just thinking of the American writing in this area. Anyway.

MR FARMER QC:

No I was going to refer to –

ELIAS CJ:

Because it's put out into, and it is meant to carry on whereas presumably ginger beer loses its fizz after a while and…

MR FARMER QC:

Yes, well those sort of food products that always have a use by date on them. I think someone suggested I was past by use by date but that's another issue. But they do have a use by date but, no, here Your Honour's, with respect, quite correct that it's a 15 year, 50 year, whatever period is, but it's certainly not intended to cause the problems that it's caused within a much shorter period of time than that. And that, I'll come back to that point in a way, when we – my learned friend made reference to the Orewa contract, building contract and pointed to the two year weathertightness guarantee that was required to be procured by the builder. Well two years is hardly a period that's going to guarantee durability of something as critical as the walls of a school but when you take into account that Carter Holt Harvey has said and it's recorded in the Court of Appeal's judgment, that it would not provide guarantees, would not provide warranties, well then the two years is probably about as much as the builder would have been prepared to warrant or to agree to providing because it

knew that it couldn't get a more meaningful warranty or guarantee from Carter Holt Harvey itself. So, now do Your Honours have the council's notes which I have had handed up?

ELIAS CJ:
No.

MR FARMER QC:
Sorry we have them here.

WILLIAM YOUNG J:
Just looking at the photographs, is it normally – they're normally installed vertically in the shadow clad, just looking at the brochures.

MR FARMER QC:
I think it's vertically and horizontally I think.

WILLIAM YOUNG J:
Okay. I mean most of the brochures show vertical.

MR FARMER QC:
No vertical, I'm told vertical. Thank you, my learned friend says that it's five ply. My learned friend says that it's in the Newfield affidavit, paragraph 7.

GLAZEBROOK J:
That presumably means it does make it easier for the – if it's always at the bottom then –

MR FARMER QC:
Well it means the sides – it's the sides down here and it's the bottom and it may be the top as well.

GLAZEBROOK J:
Yes.

MR FARMER QC:
And I was thinking of it being applied horizontally and overlapping like a conventional weatherboard where it would be principally the bottom edge that would be the problem.

GLAZEBROOK J:
Yes.

MR FARMER QC:
So the problem is actually greater than I thought. Now so what I've had handed to you are the notes and also a case I do want to refer to which is Court of Appeal's decision in *R M Turton & Co Ltd (In Liquidation) v Kerslake and Partners* [2000] 3 NZLR 406 which is not in any of the casebooks, although it's probably in one of your electronic systems.

So looking at the notes, I don't need to dwell at all on what's called general principles because that's re-stating the, what is usually called a two-stage process, although the first stage proximity is the whole question of forseeability of harm, whether you treat that as a preliminary assessment or whether it's just simply part of the proximity analysis. It doesn't matter I would have thought in the least and we've just given some references where that general framework for dealing with the duty of care has in recent New Zealand cases been dealt with.

What is perhaps worth mentioning is at paragraph 2, that in *South Pacific* Sir Robin Cooke did make the point that the important object is that all relevant factors be weighed one way or another and that was reaffirmed in *Spencer on Byron* and echoed by the Court of Appeal in the present case at paragraph 39 and I don't need to take you to it, where Their Honours cited Justice Blanchard and *The Grange* to the same effect and a number of other authorities that Justice Blanchard dealt with. The point being, leading to a point, to a submission that it's one of the major reasons why these kinds of issues as to whether there is a duty of care are not easily dealt with on a strike-out application because there is such a range of factors that have to be weighed and of course that will inevitably involve a factual enquiry and we don't have that or at least we're not in a position to be able to undertake that enquiry very readily at this point on a strike-out application.

Now I've then listed, and again I don't need to take any real time on this but for the sake of clarity, I hope, I've listed what I understand Carter Holt's principal legal arguments to be and there are five of them, the chain of contracts. I think this is the third time I've listened to my learned friend on the chain of contracts, *Sunset Terraces*, *Spencer on Byron* and now again this case. He spent rather less time on it orally in the last day and a half thankfully but it's in his written submissions and we've, I think – I've given you the reference to his written submissions where he deals with that and then that leads on to the consequences of that submissions, the second one. He says that by suing in tort the plaintiffs seeks to advance claims that will be excluded by Carter Holt's standard terms of trade. The other side of that coin is he says the plaintiffs chose not to seek warranties over and above Carter Holt's standard terms of supply and the law of tort should not be deployed to give them rights for which they never contracted and never paid for and to impose on Carter Holt liability, a liability that it never agreed to assume and elsewhere in his submissions he refers to the freedom to charge a higher price to customers who seek more extensive assurances or higher or no caps on liability and that's been a standard theme throughout this whole case, that if you want weathertight plywood you've got to pay more for it, if you want a guarantee of that, you've got to pay more for it and I've made a reference, we've referred to this in our written submissions to Justice Cooper's comment to my learned friend during the course of argument in the Court of Appeal and I can't, of course, reproduce the drama of the moment here but His Honour said to my learned friend, "Well you mean that you want something that doesn't leak, you want something that's weathertight, well you're going to have to pay more if that's what you want." And of course when one then looks at what the objectives of the law of tort in this area are, which are to ensure, to protect the health and safety of person and property, then that particular position is not, with respect, attractive.

And then we have paragraph 4, my learned friend says, "The Court should not impose a duty of care in tort that would cut across the contractual allocation of the relevant risks." That's another way of saying the same thing and then the policy issues where again one comes back to the notion that the law of contract is sacrosanct, it must be protected, it must remain coherent and you shouldn't allow the law of tort, as my learned friend put it today I think, blunder in like a rhinoceros trampling all over the law of contract and it would, he said, in the submissions he says it would undermine the need for commercial certainty.

And then there's a sort of similar analogous submission made in relation to statutes that are involved here. First of all the Building Act where he says duties of care would be inconsistent with the balance struck by the legislature in the Building Act in relation to deemed warranties with respect to materials and compliance with building legislation and other regulatory requirements and I'll come back and deal with the deemed warranty situation which my learned friend spent some time on orally, later. There is also a reference by him of course to other statues, the Fair Trading Act, the Consumer Guarantees Act, the point being made by him fairly forcefully that the Consumer Guarantees Act in particular provides for remedies, statutory remedies against manufacturers and there's not really room or shouldn't be room for the law of tort to overlap or interfere with that and so if you've got a statutory remedy, statutory framework then the law of tort should butt out. That's really the effect of what he was submitting and what to the contrary we would say that what *Spencer on Byron* in particular emphasises is that the law of tort has its part to play, even where you have a statutory scheme, as you do with the Building Act in particular and I'll come back and I'll remind Your Honours where that's dealt with in that particular case.

Now we go on then, I've just got some general responses which again I don't need to dwell on I don't think but what we do say and we want to emphasise is that the governing feature of this case is the danger to health and property that Carter Holt's product represents and the ability, inability of end consumers and users of that product to detect its latent failures. So those are the two features, latent defects and danger to health and property and that's what makes it a true *Donoghue v Stevenson* case and what we say – and that's what we say, go on to say here in these notes and we say that ever since at least *Donoghue v Stevenson*, the common law concern has been to protect property and persons for harm and injury for a product that has latent defects. We've given a reference to particular pages in Lord Atkin's famous judgment, a case that he cites which I don't need to take it to because it's, I think, in our written submissions, and we make the point that the tort may run even if the plaintiff has no contractual link direct or indirect with the defendant for example the friend of the purchaser of the bottle of ginger beer, or the tenant of the building owner. I want to say something just briefly about the tenant of the building owner but this is not really a, strictly speaking a concurrent liability case, although the concurrent liability cases are helpful in terms of illuminating the principles that we're dealing with here, but because there is no contractual relationship, of course, between Ministry of Education or the Boards of Trustees on the one hand and Carter

Holt Harvey on the other and there was no contractual relationship of course between the plaintiff in *Donoghue v Stevenson* and the defendant manufacturer.

The point about the tenant and a building owner, if I could just take you back to *Sunset Terraces* and you'll find that in our bundle of authorities volume 1 which is a blue volume at tab 11 at page 313. Sorry yes it is page – I think it's paragraph 313, no, no page 313 sorry. Page 313, lines, towards the bottom of the page paragraph 53, where there's a discussion about *Hamlin* and you'll recall that one of the issues in that case was whether investor owners, that is to say non-residential – owners of residential buildings who are not occupiers of the buildings who rented them out, they were typically investors, whether they could be the beneficiaries of the duty of care and of course it was held they could.

And going down to about line 39, 40, it said here in the judgment, "The proposed exclusion would not be consistent with the policy reasons for the duty. Protection of a non-owner occupant, such as a tenant, can be achieved only through a duty owed to the owner as it is only the owner whose pocket is damaged as a result of the negligence of the building inspector, it is only the owner who can undertake the necessary remedial action and the point being of course that the occupier, the tenant, was the one who was likely to suffer in terms of health because of leakage into the building but there was little the tenant could do about it. It was the owner who really had the, as it were, the obligation to fix a building and the way that the owner could do that was by recovering from the, whatever party it was who caused or contributed to that situation and so there again you see the link between the sort of economic consequences of the negligence and the objective of allowing the duty or recognising the duty which was one of ensuring that there is not damage or danger to health, safety or to property and what, turning over the next page of my notes, what I've gone on to say that this has remained sacrosanct in the law of tort, even in the United Kingdom where recovery for pure economic loss has not been allowed, so that those English cases which have said no you can't recover for pure economic loss, have always recognised, perhaps as an exception to that, situations where there has been damage or injury of a *Donoghue v Stevenson* kind and if you look at the cases like *Murphy* in particular that is recognised and I've given a number of references. I probably only need to go to the, maybe the first one or two. You'll find *Murphy* – well perhaps before we get to *Murphy*, there's *D & F Estates* –

WILLIAM YOUNG J:

Are there cases that involve complex building theory? The idea that it's damage to property if the defective element damage is another element within the same structure.

MR FARMER QC:

Well as my learned friend said this morning, I think he's correct in saying that and I think the complex building theory was something that Lord Bridge developed in the *D & F Estates* and then later retracted I think in *Murphy.*

WILLIAM YOUNG J:

And without knowing about it I sort of discussed something similar in the Supersocolate case.

MR FARMER QC:

Yes, yes and I don't know that – we haven't chosen to go down that track because it's obviously controversial, I don't think we need it. In our case, the only point I'm really wanting to draw out of these English cases is that certainly if you have either a health and safety problem arising out of the actions of the defendant or if you have damage to the property in circumstances which is more than just suing in contract for a breach of warranty, then that takes you back to *Donoghue v Stevenson* fairly readily and the English Courts have never disputed that and if I could perhaps just give you one or two of the references so you can see it.

So we can find *D & F Estates*, volume 5 of my learned friend's authorities and that's at tab 22 and going through to page 206B. Back on the previous page, 205, interestingly there's references made right at the bottom of page 205 to Sir Clifford Richmond's judgment in *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA) and then on to the more controversial decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 but going onto 206B where it said, "These principles are easy enough to comprehend and probably not difficult to apply when the defect complained of is a chattel supplied complete by a single manufacturer, if the hidden defect in the chattel is the cause of personal injury or of damage to property other than the chattel itself, the manufacturer is liable but if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of *Donoghue v Stevenson* principle, the chattel is now defective in quality but is no longer dangerous. It may be valueless, may be capable

of economic repair, in either case the economic loss is recoverable in contract by a buyer or hirer of the chattel but is not recoverable in tort by remote buyer or hirer." That actually leads into – those last statements are themselves controversial and lead you into the discussion about the so-called impossible distinction which I will come back to briefly but the important point out of that passage is that the hidden defect, the concept of the hidden defect, the concept of personal injury or damage to property other than to the chattel itself, the manufacturer is liable, there's no dispute certainly with that proposition even in England and the same sort of comment is made by Lord Oliver further in the judgment and then so far as *Murphy* is concerned, it's in the same volume at tab 25 and a number of the –

ELIAS CJ:

Well sorry you took us to *D & F Estates* for the concepts that were being talked about, not for the law, is that right?

MR FARMER QC:

Well the law is that if it's latent or hidden defects in the product, if it's damage to personal property, other than the chattel itself, the manufacturer is liable. So that's both law and concept.

GLAZEBROOK J:

Where do you get the latent defects because the latent defects that are discovered in time, this says unless it's a complex structure you don't recover.

MR FARMER QC:

Well that's what's said there but we don't, with respect, agree with that.

ELIAS CJ:

Well that's really –

GLAZEBROOK J:

Oh, okay so –

ELIAS CJ:

I'm just trying to clarify, you're not relying on this?

MR FARMER QC:

No, no, not for that latter part, no, because we say that, and I'll take you to *Spencer on Byron* which we say establishes that. If you discover the latent defect you don't have to wait to see whether a damage, until damage occurs. In our instance where we know that the only way ever of dealing effectively with this defect is by ripping it off now and putting something else there, we can do that now and recover the cost of doing it. I think the, what is really being addressed there is the situation where someone buying a house knows it has certain defects and is able to buy it at a lower price because the price represents the loss of value through the defect. In that situation, having done that, they can't turn around and then sue the purchaser, can't turn around and sue the person that caused the defect. On the other hand it may well be that the vendor, the original owner of the house, can because the loss they've suffered then is the loss of value through the defect. That's, those are the very issues that were dealt with, of course, by this Court in *Sunset Terraces* in particular and to a lesser extent in *Spencer on Byron*.

WILLIAM YOUNG J:

The only, you are probably going to come to it, but the only apparent difference between this case and *Spencer on Byron* is that Carter Holt is not subject, as I understand it, to specific duties under the Building Act, whereas the council in *Spencer on Byron* was –

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

And that was to some extent relied on in the judgment certainly of Justices McGrath and Chambers as justifying imposition of a duty that was separate from or additional to the contractual duties.

MR FARMER QC:

Yes, I was going to take Your Honour to that passage in a little while, but what Their Honours said was that you have the statutory obligations and the law of tort in effect supports and provides a ready means of enforcement of those obligations by allowing damages to be sought and by imposing duty of care. Now the other point to make about that is that of course the duty – sorry the liability of local authorities and

the duty of care that was imposed on them, predates the Building Act, that's *Hamlin*, and even although the Building Act –

WILLIAM YOUNG J:
Yes but it doesn't necessarily, it doesn't predate statutory functions in relation to a building regime, a building, a regulatory regime controlling buildings because, I mean although it was a rather more diffuse scheme –

MR FARMER QC:
Yes, yes.

WILLIAM YOUNG J:
– there was a scheme at the time of…

MR FARMER QC:
Yes, that's true. What the scheme was, I think my learned friend may have dealt with this briefly, the scheme was that each local authority had their own bylaws.

WILLIAM YOUNG J:
Yes, they had their own building bylaws.

MR FARMER QC:
Yes.

WILLIAM YOUNG J:
Mainly the same, in fact, but it was a pretty diffuse system.

MR FARMER QC:
It was, and certainly nowhere near as effective as what, or as comprehensive as one gets under the Building Act.

O'REGAN J:
I think effective might be a bit of a stretch.

WILLIAM YOUNG J:
Well it probably was more effective actually –

MR FARMER QC:

Yes, I'm probably too kind to the local authorities Sir.

WILLIAM YOUNG J:

Sorry, but isn't, to say that *Hamlin* duty precedes the Building Act is not a complete answer because it's still referable to a statutory regime.

MR FARMER QC:

In the bylaws.

WILLIAM YOUNG J:

In the bylaws and the local Government Act or the Counties Act or whatever it was that imposed the obligation to conform to the building bylaw.

MR FARMER QC:

No, Your Honour is with respect correct but it's interesting to – I mean there's nothing in the Privy Council's judgment, or in the Court of Appeal's judgment before it in *Hamlin* that deals with that particular regulatory regime as it existed then. There is reference to the Building Act coming into force in the Privy Council but there's no real –

ELIAS CJ:

But *Bowen* referred to that regime.

MR FARMER QC:

Sorry?

ELIAS CJ:

Bowen referred to that regime and *Hamlin*, I mean it's a silly thing to refer to it, as I've said, but – as the *Hamlin* principle, because it's older and it's a general principle.

MR FARMER QC:

It is, it is.

ELIAS CJ:

But Justice Young is right, surely, that all of these cases are, after there was a statutory system of licensing, - well not licensing, whatever it is, regulating.

WILLIAM YOUNG J:

As was the case in the UK in *Dutton v Bognor Regis*.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

There are references there to the building bylaw or the building regime.

ELIAS CJ:

Yes.

MR FARMER QC:

Yes, well I didn't meant to overstate what I was saying. I was saying that it predates the Building Act, and yes I agree there was a regulatory regime, but all the discussion by my learned friend has been about the Building Act and the statutory obligations of the Building Act imposes on local authorities, and what – but not on manufacturers and I think we really start with the notion that there is no statutory obligation on manufacturers and so one would assume that the case for the law of tort to play a part is stronger in that instance than it was even in the case of local authorities in *Sunset* and *Spencer*.

WILLIAM YOUNG J:

But that is turning, we better have a look at what Justices McGrath and Chambers had to say –

MR FARMER QC:

I'm going to do that.

WILLIAM YOUNG J:

– because I suspect you're turning that on its head aren't you?

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

Well aren't they saying what makes it, what justifies the course they propose is that the tort, the duties in tort are effectively a shadow of the actual statutory obligations?

MR FARMER QC:

What they really, I think they make two points –

ELIAS CJ:

They're not inconsistent.

WILLIAM YOUNG J:

Well I think one of them…

MR FARMER QC:

I'll come to it, I'm going to come to it soon.

ELIAS CJ:

That marched hand-in-hand, that's *Stovin v Wise*, isn't it, it's stained?

MR FARMER QC:

Yes, well I think what, the way that Justices McGrath and Chambers put it is that they say that the – they say two things. They say first of all the Building Act tells you what the standard is of the duty of care, because it can't be something less than the statutory obligation, so the Building Code, if you like, helps to define just what it is –

ELIAS CJ:

Breach.

MR FARMER QC:

– you have to do in order to carry out the duty, yes. that's the first point. The second point is that the law of tort provides the backup, if you like, to that statutory regime by providing the remedy.

ELIAS CJ:

And they're also saying presumably that there's no policy reason for denying the remedy in tort because it marches hand-in-hand with the statute.

WILLIAM YOUNG J:

Yes, okay, and the point that's being made, or was made, is that can't be said here. That you can't rely on that sort of argument in this case.

MR FARMER QC:

Because there's no statutory regulation of Carter Holt but my point that follows from that is that that makes our case stronger not weaker. Because that takes us back into the conventional common law situation of the common law imposing a duty of care to ensure that products that are supplied to a consumer by a manufacturer or directly or indirectly are not either dangerous to health and safety or likely to damage property.

WILLIAM YOUNG J:

Would a case against a local authority or a builder be stronger or weaker in the absence of statutory obligations under the Building Act. I'd have thought it would be weaker. I think that Justices McGrath and Chambers would have said that too.

MR FARMER QC:

I don't recall. They certainly didn't say that in those words. Maybe Your Honour's correct, that you can take that out of what they say, but I would have thought that's a proposition you could argue either way.

WILLIAM YOUNG J:

Because I wouldn't tell if you lose.

MR FARMER QC:

I mean you can either, the contrary argument to what Your Honour's just put to me is that if there's a gap, a very large gap, if the statutory –

WILLIAM YOUNG J:

I understand that.

MR FARMER QC:

– doesn't protect, well then the Courts will.

ARNOLD J:

Well I suppose too you could say that, you know, if this is indeed a product liability claim you are, as you're pointing out, plugging into a common law stream of liability that's existed for now a long time.

WILLIAM YOUNG J:

What product liability has been recognised in New Zealand or England or Australia –

ELIAS CJ:

Or America.

WILLIAM YOUNG J:

No, no, no, leave America aside for a moment because I know it's recognised there, in relation to non-building cases, in what cases, for instance, has anyone in New Zealand sued to recover damages because the –

GLAZEBROOK J:

They're usually the health so breast implants.

WILLIAM YOUNG J:

Sorry?

GLAZEBROOK J:

The breast implant ones.

MR FARMER QC:

That's Canada.

WILLIAM YOUNG J:

That's personal injuries – I suppose maybe.

GLAZEBROOK J:

But we can't have personal injury here but…

WILLIAM YOUNG J:

No, I'm more interested in the product basically not being any good.

ELIAS CJ:

Well they weren't.

GLAZEBROOK J:

No, it's not that it's no good; it has to be dangerous or –

WILLIAM YOUNG J:

Yes, yes.

GLAZEBROOK J:

But that's Mr Farmer's point.

MR FARMER QC:

And the same was true of the oral contraceptive case in Canada where again we don't have an Accident Compensation regime but in those cases where the oral – it was more under duty to warn but because the product, there was no warning about the dangers of the product, there was found to be a liability under a failure to carry out a duty to warn of those dangers, which I'm going to come to those and deal with those, but –

WILLIAM YOUNG J:

Okay, no, that's fine.

MR FARMER QC:

But in *Spencer on Byron*, I will come to that very soon and in fact maybe I'll come to it…

GLAZEBROOK J:

Yes, it couldn't be just that it doesn't work unless there's a negligent misrepresentation. It has to be danger to health or property. That's the point you're making, isn't it –

MR FARMER QC:

Yes, yes.

GLAZEBROOK J:

– under the common law?

MR FARMER QC:

Yes. So let me sort of deal with – I'm going to really follow these notes through directly because I'd rather perhaps get straight into *Spencer on Byron* fairly quickly and I can do that actually. It's my very next paragraph, paragraph 3, where I actually, Your Honour, Justice Young, I actually gratefully adopt what you said in *Spencer on Byron*, and I'll read it, "It is right that everyone should take reasonable care not to damage the person or property of others. This is why Lord Atkins' speech in *Donoghue v Stevenson* makes perfect sense when the foreseeable loss involves personal injury or damage to property," and, of course, Your Honour did dissent in that case but on other grounds and – but that particular statement we would say is completely uncontroversial and it's one that we rely very heavily on in the present case.

Now if we – where I deal with *Spencer on Byron* in the notes is paragraph 6 at the bottom of page 3. So let me take you to that and that you'll find in volume 2 of the respondent's cases at tab 6 and I will follow more or less my notes from this point because dealing first, but not exclusively, with the judgment, joint judgment of Justices McGrath and Chambers, and here's the first point is, it's the point I made that Your Honours perhaps weren't entirely happy with the way I formulated it, but if we go to paragraph 106 of the judgment, actually really starting at page 334 at paragraph 98.

This leads into the Building Act, my learned friend's analysis in that case on the Building Act, and then on the next page you will see at paragraph 102 the reference to *Hamlin* and what was said by the Privy Council there, "There's nothing in the Act to abrogate or amend the existing common law, as developed by New Zealand Judges, so as to bring it into line with *Murphy's* case. On the contrary, a number of provisions in the Act clearly envisaged that private law claims for damages against local authorities will continue to be made as before." So that was looking at the Building Act as it was at that very point of time although it had not, I think, come into force. It certainly wasn't in force before the case got to the Privy Council.

And then at 104, and the point that's made in 103 is that the New Zealand Parliament in enacting the Building Act did nothing to change the common law, nothing

expressly anyway, to change the common law, and in 104 Their Honours said, "This Court endorsed that approach in *Sunset Terraces*. There was nothing in the Building Act to suggest Parliament wanted to alter the line of New Zealand authority which had developed in the late '70s and '80s."

And then going to 105, "Indeed, the 1991 Act," and this is Your Honour, Justice Young's point, I think, "the 1991 Act can be seen as having strengthened the argument that local authorities should be liable if they performed their supervision tasks negligently."

And then 106, three or four lines down, "The Act was confirmatory of existing common law. We accept that the Act did not impose 'a wider duty' than had previously been recognised."

So then on my notes, the next, in the same judgment, I've wanted to go to paragraph 162 which is really dealing with the relationship between the Act and the law of tort and the duty of care, and they are there dealing with the Court of Appeal's judgment, earlier judgment, in the *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460 case which I don't need to take you to. 162, and effectively overruling *Te Mata* they say the majority in *Te Mata*, "Considered *Hamlin* to be an anomaly which should not be extended. Its underpinning rationale, they said, was 'the need to protect vulnerable home owners from economic loss'." And Their Honours say, "That reasoning is inconsistent with what this Court later held in *Sunset Terraces*. The underpinning rationale of the duty of care in this area is the need to provide encouragement to those responsible for the construction of buildings to use reasonable care in their respective tasks within that overall undertaking," and then they refer to the duty of councils, and then there's this statement, which we say is very helpful, "The law of negligence stands behind this statutory duty by providing compensation should the Council contribute to breaches of the Building Code through careless acts or questions in supervising construction."

And this next paragraph too, "Ever since *Dutton*, the Courts, in those jurisdictions which have approved *Dutton*-style reasoning, have been concerned to protect two interests. One interest is the habitation interest of those who use buildings. Undisputedly that is one of the aims of the Building Code," and refer to Justice Baragwanath, and then further down, "We respectfully disagree with the majority's reasoning on this point. This Court in *Sunset Terraces* recognised the

health and safety interest, which it rephrased in these terms," and then they quote, "The duty affirmed in *Hamlin* is designed to protect the interests citizens have in their homes," and they go on to say in 164, "In context this was a shorthand way of referring to health and safety interests, as well as associated economic interests," and that idea that the economic interests and the health and safety interests are interrelated comes out also in the judgment of Justice Tipping in the same case. And if you go back to paragraph 43, and this is under a heading "Economic Loss" further up the page. His Honour says at 43, "Furthermore, a building owner will normally incur expense and hence economic loss when remedying health and safety deficiencies. In the same way as a residential landlord has to spent money if the premises are defective, in order to protect the health and safety of the tenant, so too an employer may have to spent money to protect the health and safety of employees in the workplace," and if I can pause there, schools, the health and safety of the teachers and the pupils, and then they continue, "The same is true of hotelier and the motelier. It is unduly simplistic to say that the Act has a health and safety rather than an economic focus. It is unpersuasive and somewhat contradictory to say you can sue for the physical damage to your building but not for the cost of cure."

WILLIAM YOUNG J:

The passage, I think, Mr Goddard would rely on in the judgment of Justices McGrath and Chambers is 193.

MR FARMER QC:

193. Well, you see, I've highlighted 193 as well myself and, again, can I just, before I comment on 193 can I take you first of all to 192? "Thirdly, as Mr Farmer pointed out, it is simplistic to say that those proposing to purchase commercial buildings can obtain warranties as to quality. It is unrealistic to think that the unit title owner of level 12 of a 20-storey building would be prepared to give a warranty as to the overall state of the building." This is, of course, it's dealing with the *Spencer on Byron* building. "He or she simply will not known the condition of all the other units, it will be impossible often for him or her to find out the information. It makes more sense economically for liability to fall on those responsible for negligent construction, including where appropriate the inspecting authority which saw the building under construction and was therefore in a position to preventive defective construction occurring." And then 193, "Cutting across contractual liability", this is my learned friend's argument, "It is said that recognising duty of care in the case of commercial buildings which are likely to be much more complicated structures that residential

homes would cut across contractual relationships the developer has put in place. We disagree. Recognise the duty in tort does not in any way cut across contractual obligations the inspecting authority assumed towards the first owner who employed their services. No one can be party to the construction of a building which does not comply with the Building Code. Duty in tort imposes no higher duty than that. For example the inspecting authority is not responsible for ensuring a building is constructed in accordance with the plans and specifications which inevitably go beyond Building Code requirements." And then I think this is the passage Your Honour's thinking of, "Obligations in tort, whether of the inspecting authority or of any supervising architectural engineer will be limited to the exercise of reasonable care with a view to ensuring compliance with the Building Code.

Now I am perfectly happy Your Honour with paragraph 193 and then I'd go on and look at 194, "Thus these cases do not give rise to the kinds of issues which arose in *Rolls-Royce.* That was a case in which Carter Holt was attempting to argue Rolls-Royce was under a duty to it in tort to take reasonable care to perform a contract between Rolls-Royce and ECNZ, a proposition the Court of Appeal rejected. The obligation falling on inspecting authorities is quite different. It marches hand and hand with its statutory obligation and requires of the inspecting authority no more than Parliament has imposed." So that's Your Honour the Chief Justice's reference I think to marching hand in hand, law of tort marching hand in hand with statutory obligations. So I'm with respect more than comfortable with all of that and –

WILLIAM YOUNG J:
Don't you think those would be – that if there had been no statutory obligations on Councils or those involved in a building project, the case wouldn't have been as strong. I mean obviously it wouldn't have been as strong on this point. So I mean the facts are a bit hard to realise because if it wasn't an obligation by the Council they wouldn't have been sued I suppose.

ELIAS CJ:
Are you talking about standards or are you talking about proximity?

WILLIAM YOUNG J:
No I'm just talking about whether it's contrary to policy to impose obligations that relate to the quality of services to be provided pursuant to a contract to which you're not a party. So here's the Ministry effectively saying, "We say you've got a duty in

tort as to the quality of the product construed broadly you are supplying pursuant to your contract to Carter Holt with builders and we can enforce those standards even though we're not a party to those contracts." Now that's the argument in a nutshell.

MR FARMER QC:

Yes the Ministry is saying that, the Ministry is definitely saying that, yes and I think what I've understood what Your Honour was really putting to me was that do I think that or would I submit that if there be – it's a statute, there was no statutory regulation at all in this area, would the case for the law of tort imposing these duties, would it be stronger or weaker? And I think what I said was well you could argue that both ways, you can say well here are the statutory obligations and so the law tort comes in and this is certainly what Justices McGrath and Chambers said, well the law of tort will come in and make sure that statutory regime works.

WILLIAM YOUNG J:

And we're not expecting you to do any more than your core legal obligation, so there's no cutting across.

MR FARMER QC:

No that's right and there is a reference in that same joint judgment, it may be in, sorry in Justice Tipping's judgment actually, oh yes here it is here, paragraph 47 of Justice Tipping's judgment actually says and I'll read that, "In *Rolls-Royce* the Court of Appeal was concerned about how quality standards will be set if a duty were to be recognised. That may be a valid concern if the tort duty would be unclear as to the precise standard required but in the present context there's no difficulty in this respect. The standard the duty requires is compliance with the Building Code."

WILLIAM YOUNG J:

See the problem, I mean I didn't get a response but in *Bowen* it was distinctly argued well the poor old builder had merely been required to build a normal foundation with the building owner as it were, warranting the ground conditions were fine but in the end it was the builder that copped the liability I think.

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

So in a way that does show how you can get a – I mean my interpretation of the facts may or may not have been right, but it does show how you can get a tort duty generously applied in favour of plaintiffs that extends the obligations that the defendant actually agreed to do because I'm pretty sure all the builder in *Bowen* agreed to do was provide a normal foundation. It wasn't warranting that a normal foundation would do the job. That was left to the decision of someone else.

MR FARMER QC:

And architect or an engineer.

WILLIAM YOUNG J:

Yes.

MR FARMER QC:

I mean normally when you build a building you have a geotechnical engineer who comes in and examines the ground.

WILLIAM YOUNG J:

This was in the '60s or '50s though wasn't it? *Bowen* would be in the '60s I think.

O'REGAN J:

Well you do now because of *Bowen* probably.

GLAZEBROOK J:

Which may be an indication because isn't the answer really that the standard might be something that's going to cause damage to another property or an issue of health, so even if you didn't have the Building Code, that would be the bottom line because *Rolls-Royce*, they were basically saying there was a duty to perform the contract in tort which was slightly odd because it seemed to me certainly that the duty to perform the contract was in contract not tort.

MR FARMER QC:

Yes, yes.

GLAZEBROOK J:

And the difficulty there was who could possibly know what, in terms of that very specialist equipment, the adequate quality standards or the health standards. I mean you may be able to off-set it but that was not what was being asserted at least as far as our understanding and I think that probably comes through in the judgment. It certainly comes through that there's no duty in tort to perform a contract to the standard set in the contract.

MR FARMER QC:

No, no, no quite.

GLAZEBROOK J:

It has to be a duty to perform it – it has to be a duty not to harm health or property which is the way you put it.

MR FARMER QC:

And Your Honour made the point in the judgment that that was not a case where there was any question of health or safety or damage to other property being involved and we do not argue here that *Rolls-Royce* with great respect, was wrongly decided. We say it was decided on its own facts and on its own particular circumstances. There are cases, there are other cases, *South Pacific* is one of them and one or two of those English cases, where in fact you have a small number of parties who are dealing with each other, each one knows what the other one's contract looks like because they're sort of back to back or interrelated contract and where there are lawyers involved negotiating the contracts, all the rest of it, that is typical *Rolls-Royce*, that is the *Rolls-Royce* situation and that is so totally – it's light years away from what we're dealing with here and damage to the – I have a situation at the moment where the property up behind my house which is on higher ground, we have an owner who's come in and he says, "I'm going to excavate six metres to build a house" and I and my neighbour are saying, "Well have you had a geotech engineer look at that?" Because we're also on a Parnell cliff as well and we're very concerned about that and it's probably going to lead to litigation, it may end up here one day, who knows.

ELIAS CJ:

You better not say anymore.

MR FARMER QC:

So anyway, so that's –

O'REGAN J:

But aren't you in this case saying that the Building Act standard does apply?

MR FARMER QC:

Yes.

O'REGAN J:

Even though in fact Carter Holt isn't a party that's bound to comply with the Code?

MR FARMER QC:

Well we have, put it this way, B2 and E2 of the Building Code which lay down standards as to durability and as to weathertightness which we say are extremely – they may or may not be conclusive in our case against Carter Holt but they are very, very indicative of the sort of standard that a Court would say should be achieved by a manufacturer, because the manufacturer whose building a building product and knowing of those standards and those requirements, it doesn't met them when it designs and manufactures its product, the likelihood of it being found liable in tort is that much the greater. So the Building Code is helpful to a pure common law case.

ELIAS CJ:

But don't you have to unpick it a bit. It is one of the problems of dealing with these things on strike-out that everyone puts everything into duty of care but a lot of what you're talking about really is directed at breach.

MR FARMER QC:

Yes, yes.

ELIAS CJ:

Surely for duty of care the key thing about the statutory background is that it shows there's, as Hoffmann said, no why pick on me element. It helps establish proximity. Now you don't have that here but you have – you also don't have a policy which arguably which excludes the liability of a manufacturer who puts into the market a durable product for use in homes.

MR FARMER QC:

Yes, knowing what the standards are imposed in the Code on the homes –

ELIAS CJ:

But I think perhaps even irrespective of that. What other use is this product to be put but in exterior cladding. What's the point of exterior cladding in a house, that's to provide shelter, so the common law just doesn't really need, it seems to me, in terms of duty of care, the statutory prop except to counter the policy arguments that there's a floodgates issue here.

MR FARMER QC:

I'm happy with that but –

O'REGAN J:

This is the distinction that Justice Young is talking about. So you're saying in *Spencer on Byron* they said the duty is obvious because the Building Act already imposes it on you, so that's the standard you have to comply with to meet your duty of care, but in this case you're saying it's obvious, even though it doesn't apply to you, that if you're making a building product it has to be something that complies with the Code, so you aren't, you don't have the same argument that was raised by Justice Chambers in his judgment, this is just giving a remedy for something the Act already imposed on you, in your case the Act didn't impose it on Carter Holt, did it?

MR FARMER QC:

No it didn't, it didn't, and I suppose really, I mean if we didn't have the Building Code and we were suing, we would be calling expert evidence to say well this is how you would carry out the duty, we'll probably still do that, but we've also got the Building Code we can point to, and say look here are the standards set out in B2 and E2 or whatever, and that's a, so that helps us in our common law claim.

WILLIAM YOUNG J:

Well there's something –

MR FARMER QC:

It's an evidential thing perhaps.

WILLIAM YOUNG J:

I mean it's quite, its intimately connected with the standards because the brochures are all carefully integrated with the standards. They explain how the Shadowclad system complies with the various components in the Building Code. Durability and I think weathertightness.

MR FARMER QC:

Yes, yes.

WILLIAM YOUNG J:

Certainly durability I think.

MR FARMER QC:

Now I, it was helpful for me at any rate, and there was one – I think just in terms of product liability, it may not be in this case, it may be in *Sunset Terraces* if I can just go back to that.

ELIAS CJ:

Where's that again, what tab?

MR FARMER QC:

That's tab 11 of volume 1 of our cases and I was just going to refer to the passage in Your Honour's judgment, and I haven't marked it so that's not very helpful, where Your Honour referred in fact to I think by way of analogy to the American law on product liability and I've just forgotten where that reference is I'm sorry.

ELIAS CJ:

I see, it's at three.

MR FARMER QC:

Three of Sunset, yes. Yes, the end of paragraph 4 thank you, after referring to *Anns v Merton London Borough Council* [1978] AC 728 (HL), Your Honour the Chief Justice said, "In respect of the liability to successive owners, it is comparable," which of course where there's no contractual link, "It is comparable with the liability of builders in some jurisdictions of the United States, arrived at in part by adaption of the law of product liability." And that was dealing specifically with that issue of the right to the able to sue in tort by a subsequent purchaser was one step removed as it

were from the negligent acts, and where there was no contractual privity that could be claimed. I think that's, I actually in the notes, I do have a section on, going over to *Spencer on Byron* at the bottom of page 7, I see on paragraph – on page 8, paragraph 2 is where I actually gave that reference to Your Honour the Chief Justice at paragraph 4.

ELIAS CJ:

Sorry, which one?

MR FARMER QC:

Page 8 of my notes, at paragraph number 2 on that page and that's where it's referred to and paragraph 3 I've gone back to the judgment of Justice Tipping where he deals with Lord Denning's judgment in *Dutton* where His Honour, His Lordship rather said in that case that a builder could be liable to a party with whom he had no contractual relationship, "In the same way as a manufacturer of goods could be liable to someone with whom the manufacturer had no contractual relationship." That's paragraph 33 of Justice Tipping's judgment in *Spencer on Byron*. And if you've still got that there, the *Spencer on Byron* case that is, which unhelpfully I haven't, but I will have in a moment.

GLAZEBROOK J:

When you look at some of those English cases one of the reasons they don't have liability in this area is that it is related to the particular product i.e. the building. Now because we do have liability in this area, do we have that restriction in New Zealand?

MR FARMER QC:

No.

GLAZEBROOK J:

Because if we, because it seems to me if we did you can't quite see why *Hamlin* and that line of authority is decided in the way it is.

MR FARMER QC:

No, no.

GLAZEBROOK J:

Because it is a latent defect in the very thing that they were negligent over rather than that it fell down on somebody or fell down next door.

MR FARMER QC:

Yes.

GLAZEBROOK J:

So and you pick up the loss of value before it has fallen down and hurt someone or before, subject to obviously accident compensation or before it's fallen down on the next door building.

MR FARMER QC:

Yes, yes, that's right. And on that point about you don't have to wait, that's really the point that in *Spencer on Byron*, and in *Dutton*, Justice Tipping picked up from *Dutton* and *Spencer on Byron* and I think if you go to, back to *Spencer on Byron*, paragraph 41 I think it is. Yes 41.

GLAZEBROOK J:

I've lost *Spencer on Byron* again now sorry.

MR FARMER QC:

Spencer on Byron, yes, I'm sorry.

ELIAS CJ:

Where is it?

MR FARMER QC:

It's volume 2 of my learned friend's authorities, tab 11, tab 6, tab 6, and paragraph, under that heading, paragraph 41, I read you paragraph 43, but let me take you back to 41, "I address now the contention that *Dutton* and the cases that have followed it have inappropriately extended *Donoghue v Stevenson* into an area where what is involved is economic injury rather than physical injury or damage. New Zealand has never drawn the sharp divide that has been drawn between these types of harm, particularly in the present field, in England. Under New Zealand law the nature of the loss in suit is relevant to whether a duty of care to avoid it should be imposed. But the nature of the loss has never dictated the answer." And then if you go to – he

comes back to *Dutton* at 75, “We begin by considering English cases decided before *Murphy* since it is an English case *Dutton* which first recognised the duty of care falling on building inspectors, it was as this Court said in *Sunset*, *Dutton* which gave the impetus to the New Zealand developments and provided much of their conceptual and policy basis. *Dutton* involved damage to a house but the Court of Appeal’s reasoning was not limited to houses.” And then there's a quote from Lord Denning’s judgment.

Then at 76, “The Master of the Rolls held that the plaintiff did not have to show he or she had relied on those responsible for the construction of the building.” And then in 77 there's a reference to *Anns* and then later His Honour goes on to look at New Zealand cases of ’83 and in particular *Bowen* which Your Honour has just referred to a few minutes ago and really I think probably that’s – it’s interesting at 91, *Rivtow* which my learned friend referred to is referred to and then to other Australian, sorry Canadian cases, *Nielsen v Kamloops (City)* [1984] 2 SCR 2 that’s paragraph 92 and I think other cases and His Honour then goes on at 96 to deal with Australian case law and of course the point about the Australian case law which you're well aware of and familiar with and it’s referred to, is that the Australian High Court has accepted without question but that New Zealand Courts have gone, they're entitled to go their own way so to speak in relation to duty of care case law. So I don’t know that there's – oh in my notes at page –

ELIAS CJ:
Now these are all about supervisors too. I mean this is a manufacturer.

MR FARMER QC:
Yes.

ELIAS CJ:
This is the – yes.

MR FARMER QC:
The one who caused the original problem. I mean the supervisor has the problem of detecting the latent problem in the product the manufacturer made. So the source of the problem is the manufacturer and one would think that the primary responsibility should certainly start there and then in my notes and I won't read you all of this but the so-called impossible distinction which really again sort of arises out of this

question as to whether what we're dealing with is pure economic loss or not and that's my paragraph 5 on page 9 and what we've said is that the argument that effectively anyway has been run in the present case is that the tort of negligence is not intended to provide compensation for economic loss and that a person wanting protection should have to buy protection by obtaining a warranty of quality and that we say was firmly reject – it has been firmly rejected by this Court and in fact in the joint judgment of Justices McGrath and Chambers they refer to Sir Robin Cooke's *Law Quarterly Review* Impossible Distinction article where it was said, "The imposition of a duty of care is not the equivalent of the imposition of a warranty and" –

WILLIAM YOUNG J:
Well it sort of is though, isn't it?

MR FARMER QC:
Sorry?

WILLIAM YOUNG J:
It sort of is, it's just you've got to show negligence.

MR FARMER QC:
Well –

WILLIAM YOUNG J:
I mean it's often referred to as –

MR FARMER QC:
It may have the same effect but it's conceptually quite different.

WILLIAM YOUNG J:
Yes. It's often referred, sometimes referred to as a quasi warranty.

MR FARMER QC:
I haven't seen that reference.

WILLIAM YOUNG J:
I think I discussed it in my judgment of *Spencer on Byron*.

MR FARMER QC:

Okay.

ELIAS CJ:

Well negligence is a not inconsiderable hurdle.

MR FARMER QC:

No.

WILLIAM YOUNG J:

Well yes normally, are there many cases –

ELIAS CJ:

Well not here because they're all done on strike-out.

WILLIAM YOUNG J:

Defective buildings where the building was held to be defective, certified good and the certificate was held to be non-negligent.

MR FARMER QC:

Say that again, where the?

WILLIAM YOUNG J:

Let's just assume a standard leaky building claim, the Judge accepts that the building was deficient, did not meet the Building Code, a building certifier certified it as meeting the Building Code, are there any cases where the certifier has been held to meet not negligent, I wonder?

MR FARMER QC:

Well if the building's okay, if it's –

WILLIAM YOUNG J:

Yes, no the building is not okay.

MR FARMER QC:

Oh not okay?

WILLIAM YOUNG J:

Yes.

MR FARMER QC:

And the certifier?

WILLIAM YOUNG J:

The certifier certified it as okay. Now are there any other cases – have we got any cases where they've been acquitted of negligence?

MR FARMER QC:

I don't know of a case, if you're building certifier is one of those –

WILLIAM YOUNG J:

No I'm talking City Council.

MR FARMER QC:

City Council, okay.

ELIAS CJ:

One would think that one of the principal candidates would be a manufactured product that is affixed which has a latent defect which couldn't reasonably be discovered on inspection, I would have thought.

WILLIAM YOUNG J:

Have there been such cases? I'm not aware of them, perhaps there have.

GLAZEBROOK J:

Well I think they'd normally say well you should have discovered it anyway but it will be a question of fact but –

WILLIAM YOUNG J:

But on this issue –

GLAZEBROOK J:

Those cases don't come up.

MR FARMER QC:

I think what typically, it may be that we're entering a second phase as it were of this kind of litigation because the first phase, for many years now, as Your Honours know is that typically a plaintiff sues everybody in sight, the builder, the architect, the local authority and so on and those cases often collapse under their own weight and end up in a mediation and it gets sorted out in that way. It's only the cases perhaps where the builder is broke, the architect has got no money and the insurance companies won't back them or whatever, that the attention turns to the local authority and that's how *Sunset Terraces* and *Spencer on Byron* get to this Court. Now we're at the phase really of looking at – I mean when we have problem on the scale of this case where we have 800 school buildings and the cause of the problem is clear that it's the product, the cladding product, the cause of the problem. Now there have been, some of these school cases, we know that *Econicorp* was a case where others have been sued but –

WILLIAM YOUNG J:

Did that case ever go to trial?

MR FARMER QC:

No I don't think it has yet. It settled I'm told.

WILLIAM YOUNG J:

Sorry all I'm saying is I suspect in practice that a City Council building inspector who certifies a building as code compliant when it's not has practically given a warranty that it complies because I suspect that in virtually all cases they would've been found to be negligent.

MR FARMER QC:

Right, just on that point Your Honour, I was sort of trying to recall exactly where in Justice Tipping's judgment he compares the tort, duty of care and tort with the question of warranty and it's paragraph 46, under the heading "Quality". Actually I need to go back to 45 first. So where he says, "In cases where negligent inspection has given rise to the potential for physical damage but no such damage has yet occurred", which is our case in some instances, "it cannot be the law that you have to wait for physical damage to occur before you're regarded as having suffered loss or harm. It is not determinative whether the loss suffered at the outset is characterised as financial or physical. It is measured by the cost of bringing the building up to the

standard required by the Code, in other words making it weathertight and thereby removing the potential for physical damage and the associated health and safety concerns. Duty of care should be recognised in respect of pre-emptive expenditure as well as expenditure necessary to reinstate or repair physical damage which has actually occurred. The present situation the line between economic loss and physical damage is far from bright. Even if one were to analyse cases such as the present as resulting solely in economic loss, there is no good reason for denying a duty of care. There is no risk of indeterminate liability; only a current owner can sue and in this context there cannot be any logical distinction between residential premises and premises of other kinds."

And then in 46, under the heading "Quality", His Honour said, "In expressing myself in this way I am not to be taken as suggesting that the law of tort, through the mechanism of a duty care, should provide the owner of a building with what amounts to a warranty of quality. Generally, quality is for contract. But if a negligently caused deficiency in a building is apt to impinge on the interests the Act is designed to protect, tort law can properly become involved."

It's in that following paragraph that I read to you before where he says, "The standard the duty requires," duty of care that is requires, "is compliance with the Building Code."

Now the *Econicorp* case I did make some comments about that on page 7 of the notes, paragraph 12. I say, "Although it also preceded the Court's judgment in *Spencer on Byron*, as did *Rolls-Royce*, the Court of Appeal decision in *Econicorp*, discussed with apparent approval in the present case by the Court of Appeal at paragraph 59," and the Court of Appeal in *Econicorp* included Your Honour, Justice Glazebrook who, of course, also gave judgment in *Rolls-Royce* as we all know, "makes it plain that the considerations that were relevant and applied in *Rolls-Royce* did not necessarily apply to a school situation," and Your Honour, Justice Arnold's judgment at paragraphs 60 and 61, and I can deal with that fairly quickly, that's our cases, volume 1 at tab 10.

ELIAS CJ:

Sorry, whose casebook?

MR FARMER QC:

This is *Econicorp*, our cases, respondent's cases, volume 1, tab 10, where Your Honour, Justice Arnold, was discussing *Rolls-Royce* at paragraphs 59 and 60 and effectively acknowledged the importance of the commercial and contractual considerations in *Rolls-Royce* but then in 61 went on to say, "However, I consider it is arguable that these considerations have less force in this particular case for the following reasons," and this is a school we're talking about here. "Arguably this was not a truly commercial situation. School boards have management obligations, including as to building projects, not because they are commercial parties, or because they can be expected to act as if they were commercial parties, but because it is thought that there are significant public benefits, both to schools and their communities, from giving them such responsibilities, albeit subject to Ministry-imposed limitations and requirements. This is a policy assessment which has been legislatively implemented and has been maintained by successive governments."

And if I can pause there, we did actually in the Court of Appeal talk about the responsibilities, educational responsibilities, by the Minister of – imposed on the Minister and the school boards, that that's the backdrop that there are those particular responsibilities to provide a system of education and one that was safe for teachers and pupils. So that's part of the matrix, if you like, or the background facts that's perhaps relevant here.

Anyway, going back to Your Honour's judgment, "Unlike the situation in *Rolls-Royce* where the relationships between all the parties were clearly commercial, the relationship between the Minister and the Board is, arguably at least, not commercial. Rather, it is a public law relationship, in the sense that it is governed by statutory and other regulatory provisions which are structured to achieve public policy objectives. Precisely how, if at all, this should be accommodated within the duty analysis is, in my view, best left until the facts have been fully determined. In this context, it may be important to know exactly how much Ahead," who is the builder, "knew about the nature of the arrangements between the Minister and the Board. Although there was a construction contract between Ahead and the Board, and a design contract between Ahead," and another entity, "there was not as comprehensive a contractual matrix as existed in *Rolls-Royce*. Nor is it clear whether there was interaction between the Minister and Ahead prior to the contract being entered into of the type that occurred in Rolls-Royce. In *Rolls-Royce* the turnkey contract severely limited

the liability of Rolls-Royce to Genesis, and CHH was aware of that limitation." As I said earlier, the three parties in *Rolls-Royce* all knew precisely what their contractual arrangements were, and had negotiated them. "Accordingly, it was difficult to say that there was an assumption of responsibility by Rolls-Royce or reasonable reliance by CHH. In the present case, there were, as Mr Hollyman submitted, limitation of liability clauses in the contract for construction of the hall. It is not clear from the available material exactly what the Minister knew of the detail of those contractual arrangements." And so Your Honour then went on to say, "There are significant policy considerations pointing against imposing a duty of care." However, there are features that we get to be brought out and so therefore the matter should effectively go to trial.

Now I did, one of the cases I did want to take you to, it's the one we had handed up, is *R M Turton & Co Ltd (in liq) v Kerslake* [2000] 3 NZLR 406 (CA), which is a decision of the Court of Appeal in 2000, and I just take you to this because it's very usefully, with respect, deals with the situation of concurrent liability but in so doing deals with one of the English cases that my learned friend relies on, namely *Simaan General Contracting Co v Pilkington Glass Ltd* (No. 2) [1988] 1 QB 758 (CA), and it's a joint judgment of Justices Henry and Keith that I want to refer you to, and I won't read you the whole, I'll just give you the references and read you little bits of it, but there's a section duty of care which begins paragraph 7 on page 409. Now this was a negligent misstatement case but you see when you get into the discussion that really they are talking very much about general duty of care cases that have been decided in England and elsewhere. So in paragraph 8 it said, "The modern doctrine of concurrent liability in tort and contract establishes that the mere fact that a defendant's alleged tortious liability arises from actions taken in respect of a contract, whether with the plaintiff or another, does not of itself negate a common law duty of care. That is now well-established law. The authorities, however, do show that the existence and terms of contracts under which work is carried out may militate against the existence of a separate duty of care." And then there's a reference to the *British Telecommunications v James Thomson & Sons* [1999] HL 9, [1999] 2 All ER 241 case which in turn refers to Lord Steyn in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211 (HL) and which in turn refers to *Home Office v Dorset Yacht* [1970] AC 1004 (HL) case, and the concepts, the framework of foreseeability, proximity and considerations of fairness, justice and reasonableness is dealt with.

Then if we go to paragraph 9, “Acceptance of the doctrine of concurrency of duties does not conflict with the principle that regard must be had to the existence of any contracts, or indeed a contractual matrix, in the decision to impose a duty in tort or not. Concurrency is concerned with remedies, specifically that one remedy is not to be preferred over another. While theories of the primacy of contractual remedies over tortious ones found support in some of the early decisions, the main and now accepted rationale behind the contractual matrix principle is concerned not with the existence of a contractual remedy, but with the way in which the contractual intention can help to enlighten the often difficult question of when the relationship between two parties is such as to warrant the intervention of the general law of tort.” And you then, there’s a reference to the Court of Appeal’s judgment in *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) and to, I’ll just read the first bit of that, “To hold that a party who enjoys sufficient proximity with A to raise a prima facie duty of care in tort should be confined to a contractual remedy against B, when the efficacy of that remedy is dubious, hardly seems a good policy reason for denying the existence of a duty of care in A,” and my learned friend’s case here really is, well, you’ve got these contracts and there’s a contract with a builder and you can say to him, “Go off and get some warranties from your suppliers and so on,” and the question then that arises, well, how efficacious is that in terms of protecting, in this case, the Ministry or the school against the dangers to health and safety and to property?

And I won’t read the rest of that but – and then they go on to deal with, in paragraph 10, to say, “The manner in which contracts are structured amongst the variously connected parties is also important in assessing relationships,” and that’s back to *Rolls-Royce* really, I think, and there’s the reference to *Simaan v Pilkington Glass*, and then the final thing – and related to that I’ve referred again in the notes to what was said, this is page 7, paragraph 10, referred to *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) and my comment on that case is that the willingness of the House of Lords in *Henderson* to expand the situations of concurrent liability of professional people was largely a reaction to the injustice that can arise under limitation laws if a plaintiff is restricted to a remedy in contract and he is barred because he was not aware that he had a claim until that claim was statute barred, and that’s Lord Goff and that’s volume 5 of my learned friend’s cases at tab 24 and the page is 185. I just need to show it to you briefly and then that will pretty well finish me, I think. At 184 is a heading, “The impact of the contractual context”.

ELIAS CJ:

Sorry, what tab was it?

MR FARMER QC:

This is tab 24 of volume 5 of my learned friend's cases, and you get the most interesting discussion on page 184 of European systems of law, but I'm not going to take you through that. That's just a bit of an interesting diversion. But if you go to 185, letter E, Lord Goff said, "I think it is desirable to stress at this stage the question of concurrent liability is by no means only of academic significance." Now I just –

GLAZEBROOK J:

Sorry, I've only just found volume 5. What tab is it again?

MR FARMER QC:

24.

GLAZEBROOK J:

24, thank you.

MR FARMER QC:

And what Lord Goff, on page 184, he has this wonderful discussion about foreign European systems of law and then he goes on to have a crack at the law schools and says they haven't really, concurrent liability is something they never paid proper attention to and so the Courts have been left on their own to develop this area of law and they've done that, and at 185, letter E, he says, "I think it is desirable to stress at this stage that the question of concurrent liability is by no means only of academic significance. Practical issues, which can be of great importance to the parties, are at stake. Foremost among these is perhaps the question of limitation of actions. If concurrent liability in tort is not recognised, a claimant may find his claim barred at a time when he was unaware of its existence. This must moreover be a real possibility in the case of claims against professional men, such as solicitors and architects, since the consequence of their negligence may well not come to light until after the lapse of six years from the date when the relevant breach of contract occurred."

And that is actually all I wanted to say about the duty of care and tomorrow, unless Your Honours want to come back to this, I propose dealing relatively shortly with the

duty to warn. My learned friend will deal with negligent misstatement and then we deal with the longstop.

ELIAS CJ:

How do you think we're going?

MR FARMER QC:

Fine. Well, I hope so, fine. I think…

ELIAS CJ:

In terms of time.

MR FARMER QC:

Yes, I'm sure we'll finish tomorrow unless my learned friend is planning to subject us to…

O'REGAN J:

Unless we get locked out of the courtroom.

ELIAS CJ:

All right, that's good. We'll take the adjournment and we'll resume at 10 tomorrow.

COURT ADJOURNS: 5.05 PM

COURT RESUMES ON FRIDAY 15 APRIL 2016 AT 10.04 AM

MR FARMER QC:
If Your Honours please, there was a question asked yesterday about what this product looks like and we've got a photograph which we can hand up, and you'll see that there are actually five layers in each sheet, and why there are rough edges on all four sides is because each layer is –

WILLIAM YOUNG J:
At right angles to the one before.

MR FARMER QC:
Sorry?

WILLIAM YOUNG J:
At right angles to the one before.

MR FARMER QC:
That's right, right angles to the one before, that's correct. So that may be helpful. Perhaps I should also deal with a point raised by my learned friend which I've investigated. My learned friend took a little exception, I think, at my saying that we would have, wouldn't have a bar of Shadowclad for the future as far as remedying and rectifying the existing school buildings and that is correct. However, it is also the case that last year the Ministry entered into, or rather agents for the Ministry, entered into a contract for the construction of modular, transportable classrooms and they contracted with Carter Holt Harvey for the supply of a different product called Shadowclad Ultra which has different features. It uses different treatment methods. It's pre-primed and it has other features that in large part may well address the problems with the Shadowclad that are in the school building so…

ELIAS CJ:
Well, that's not anything that we can make any use of.

MR FARMER QC:
No, but I wanted to correct the impression that –

WILLIAM YOUNG J:

You don't want us to say it's universally acknowledged as a rubbish product.

MR FARMER QC:

Well –

ARNOLD J:

I think Mr Goddard would certainly prefer us not to say that.

MR FARMER QC:

Yes, yes, because they've learnt something.

ELIAS CJ:

Well, that remains to be seen if the matter proceeds to trial.

MR FARMER QC:

Of course, of course, and please forgive my advocate's licence.

Now duty to warn. So that's the last page of the notes that I handed up yesterday and I have referred there to where you find in our written submissions, paragraphs 9.1 to 9.7 –

WILLIAM YOUNG J:

Isn't the whole idea of a duty to warn a bit of a misnomer, that it's a duty to take reasonable care, that the failure to warn might be a breach of a wider duty?

MR FARMER QC:

Well, that's, I think, more or less the approach that His Honour, Justice Asher took. He said, "Well, really this is perhaps an alternative or a different aspect of the duty of care," but in contrast to that we say, "No, it's actually a standalone duty. It is a duty."

WILLIAM YOUNG J:

So it's an absolute duty?

MR FARMER QC:

It is an absolute duty. If the product has dangerous characteristics, it may be – or if it has features which require people to take particular care in certain situations then there may be duty to warn and that duty may or –

WILLIAM YOUNG J:

Well, why isn't it just a duty to take care in the way it's marketed as a subset of which it is negligent? It would be a particular breach that a warning wasn't given.

MR FARMER QC:

Well, in most cases that will be so but it can arise, the duty can arise subsequently, for example, after it's been marketed and after it's been sold and, of course, the product recall cases are good examples of that. But if, for example, the product was marketed, it was sold and then subsequently the manufacturer either knew or ought to have known from its researching and further experience with the product that there were features of it that required a warning to be given then that warning should be given, and I suppose cigarettes are a good example of that as the knowledge about the harm from cigarettes increased over the years, as manufacturers learnt more about it.

ARNOLD J:

I suppose the more common case is the *Rivtow* type situation where the product that the cranes developed cracks the manufacturer was said to have known about that but didn't warn the consumers –

MR FARMER QC:

Yes, well, that's really in the product recall class, I think, that one, yes. And so we do say, I mean, but at the end of the day perhaps a lot may not turn on this, but we do say it is a different course of action. For example, the product, there may be no negligence in the actual manufacture of the product, the design and manufacture, but, as I say, if it has, in certain situations where it might be used, if it has potential danger, then the duty to warn would come in. One of the cases that I'll refer you to is exactly that sort of case.

So I'm not going to spend a lot of time on this but just looking at the notes, the case law on the duty to warn as a discrete duty has been traversed at some length by Justice Lang in the *Pou v British American Tobacco (NZ) Ltd* HC Auckland CIV-2002-

404-1729, 3 May 2006 case which I've given the particular references and I won't take time to go through it but if you just quickly look at the case it's volume 3 of the appellant's authorities at tab 12, and the paragraph numbers are 33 to 43 and where His Honour under the heading "The duty to warn" began by saying in 33, "It's now widely accepted that in certain circumstances the duty to take reasonable care may include…" So this is Your Honour Justice Young's point, "may include a duty to warn potential consumers about the product's potentially harmful qualities or dangerous propensities. And the rationale of it, he goes on to describe, and I've got this in our notes as well, it's because of the imbalance of knowledge as between the manufacturer and the consumer. The manufacturer knows a lot more about the product and about its characteristics and about its potential dangers.

ELIAS CJ:
Well what sort of warning, I can't remember now, what sort of warning do you contend for here?

MR FARMER QC:
Well I'll take you to the statement of claim.

ELIAS CJ:
No just tell me.

MR FARMER QC:
Well I was going to take you to it anyway.

ELIAS CJ:
Oh you were going to take us. Do it in your own, that's fine.

MR FARMER QC:
I want to take you to it anyway because it brings out this point, it brings out two points really, one that the duty may arise at a later date if the defects are discovered at a later date. When they started marketing the product, their state of knowledge would have been different and perhaps – and certainly lesser than over time as they gained experience of a product, they would have learnt of the problems with it or if they didn't they ought to have and we certainly pleaded it that way. So perhaps if I take you straight to that now, which is volume 1 of the key documents at tab 8 and you'll see I've given the references in my notes at paragraph 3. So if you go first of all to

paragraph 46(c) which is on page 149 of the case on appeal. So 46 says, "At all material times Carter Holt Harvey (c) failed adequately to correct, amend, retract and/or remove from the market the representations and particular descriptions in light of the misleading representations."

Then if you go to 105(h) and sorry and that, just to get the definition correct, that paragraph, together with all the other paragraphs in 46, right at the end of 46 on the next page is defined as being "failures to address problems." And so then if you go to 105(h) on page 160, beginning on page 163, 105, "The duty of care arises out of the following facts and circumstances" and then (a), "Carter Holt Harvey as a designer, manufacturer and/or supplier of building materials has specialist expertise and knowledge of cladding systems and building elements." And then going down to (h), "At all material times Carter Holt Harvey knew or as a designer, manufacturer and supplier ought to have known" and then 3, "of their failure to address problems and the consequences of that." So that takes you back to 46, which is 46(c). So that's how we've pleaded it.

ELIAS CJ:
But what were the – on your contention though they would have had to have warned that this product was unfit for purpose, wouldn't they?

MR FARMER QC:
And they ought to have –

ELIAS CJ:
There's nothing else that they could have warned about.

GLAZEBROOK J:
Well there is the cavity issue I suppose. The direct affixing because this case is only concerned direct affixing.

MR FARMER QC:
Yes this case is about direct fixing. So if they had learnt for example that it should not be fixed directly to the timber framing, because that was just inviting trouble, well then they ought to have put that out into the public and they ought to have taken steps to retract or withdraw product that they were aware of that had been fixed

directly to timber framing and I'm not saying – when I say that I'm not conceding that fixing it to a cavity of itself solves all the problems but it clearly solves some of them.

ELIAS CJ:
So it's a fallback position for you if your higher contention that it was totally unsuitable for purpose fails, you say there was a duty to warn about the cavity?

MR FARMER QC:
Yes, that's why I call it a standalone duty.

GLAZEBROOK J:
Although those cases are only concern on the facts.

O'REGAN J:
What's your loss in that situation?

MR FARMER QC:
The loss?

O'REGAN J:
I mean it can't be any more than the loss you've suffered from having an inadequate product.

MR FARMER QC:
Oh no, no it's no more than the loss, no, no but it meets the point that there may be situations and we don't say this is one of them but there may be situations where a product is not manufactured, designed and manufactured negligently but because it had – but at some point, either at the time of supply or subsequently, the manufacturer learns or ought to have learnt from its experience and knowledge and so on and continuing obligation to review the product, it learns that there are characteristics, for example in this case that if it's supplied in a particular way or in a particular situation, such as being fixed directly to the framing, then there is going to be a problem and in that situation we would say that they have to do something about it.

O'REGAN J:

I mean it's not suggested though that if, for example, there had been some system designed to seal the cut edges, that that would have meant the product was okay if it was fixed directly.

MR FARMER QC:

No we're not suggesting that. I mean the defence that we're going to face eventually in this case is that the product can be installed adequately or properly and then there's no problem and we dispute that. The product is inherently defective.

ELIAS CJ:

But really it is one of the irritating things about strike-out concentrating on duty of care, that as Justice Young puts, this could equally be viewed as an aspect of breach, so that there might not be breach because no negligence in the manufacture but with the knowledge that the manufacturer acquires, there could be a further breach. There could be breach, another standalone breach.

MR FARMER QC:

Yes, yes, it is another standalone breach, yes.

ELIAS CJ:

I accept that they're standalone, yes.

MR FARMER QC:

I'm just a bit unclear and I did note Your Honour's use of the word "irritating" in this context and I wasn't entirely clearly why that was.

ELIAS CJ:

Did I say "irritating"?

MR FARMER QC:

No Your Honour Justice Young used the expression.

ELIAS CJ:

Oh were you irritated?

MR FARMER QC:

Yes I think you are both irritated apparently.

WILLIAM YOUNG J:

Only in the throat.

MR FARMER QC:

But just to cover cases that we referred to in these notes, I was with the *Pou v British American Tobacco* case and actually, as I say, I'm not going to take through it but if you read through the following paragraphs from about 35 on, you'll see various cases which are mostly Canadian or English being referred to and looking at paragraph 36 and the *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88 case which is actually in the bundle but I won't take you to it, which is a case where a manufacturer of chemicals was held liable for failing to warn of the hazard of the risk of serious explosion if these chemicals came into contact with water. So the chemicals were perfectly all right as long so they didn't come into contact with water and that was the danger that should have been warned of because that then led to a fire and actually in the particular facts of that case a very major fire and then – and I don't think I need to say any more about that case.

The two cases or rather the Canadian case that we do refer to which is in the notes which deals with the imbalance of information point because of course there is always a imbalance of information as between a supplier or a manufacturer on the one hand and a consumer on the other. The manufacturer always knows more about the product than the consumer. So the imbalance has – it's a question of degree. How great is the imbalance? And particularly where the defect is latent, then that becomes a very important enquiry.

ELIAS CJ:

Sorry is this a submission in response to the indication of the Stapleton line about vulnerability that was put by Mr Goddard? I'm just wondering where it's directed.

MR FARMER QC:

Well it's – the cases that deal with imbalance of knowledge don't put it – don't use the language of vulnerability but yes it is really the same point in a different form. So if I take you to in the notes, the case of *Buchan v Ortho Pharmaceuticals (Canada) Ltd* (1986) 25 DLR (4th) 658 (ONCA) which is in our cases, volume 2 at tab 15. That was

the oral contraceptive case where the plaintiff suffered a stroke as a result of using oral contraceptives manufactured by the defendant and prescribed for her by her doctor. The defendant knew of the risk of a stroke but gave no warning to the doctor or to anyone else and in the judgment, first of all at page 669, at the top of the page there's a statement of general principle. Three lines down, "The general rule at common law is that the manufacturer of such drugs, like the manufacturer of other products, has a duty to provide consumers with adequate warning of the potentially harmful side-effects that the manufacturer knows or has reason to know may be produced by the drug." So it's not just knowledge, it's constructive knowledge as well.

And then at page 687 in the same case, again there's this reference, half way down the second paragraph, a reference to drug manufacturers can escape liability, "By the simple expedient of providing a clear and forthright warning of the dangers inherent in the use of their products of which they know or ought to know. In my opinion, it is sound in principle and policy to adopt an approach which facilitates meaningful consumer choice and promotes market-place honesty by encouraging full disclosure. This is preferable to invoking evidentiary burdens that serve to exonerate negligent manufacturers as well as manufacturers who would rather risk liability than provide information which might prejudicially affect their volume of sales."

And then the other case which deals with the point of constructive knowledge is right at the end of the notes. That's the *Vacwell* case that I mentioned a minute ago and that's in the same volume that you have there at tab 20, and this was the case of the chemicals that were supplied, that when coming into contact with water could cause a fire, and page 99 of the judgment, this was Justice Rees, at the foot of the page, at letter H, "My conclusion upon the whole of the evidence is that it was the duty of BDH to have established and maintained a system under which adequate investigation and research into the scientific literature took place" –

GLAZEBROOK J:
Sorry, I've lost your page.

MR FARMER QC:
Sorry, 99.

GLAZEBROOK J:
99, thank you.

MR FARMER QC:
Letter H, "My conclusion upon the whole of the evidence is that it was the duty of BDH to have established and maintained a system which adequate investigation and research into the scientific literature took place in order to discover inter alia what hazards were known before a new or little known chemical was marketed. That duty wasn't complied with." And, of course, you can see immediately from what I have just traversed that a strike-out application is not a satisfactory vehicle for dealing with these sorts of issues that are being raised and which are, of course, very, very fact specific.

And I don't know that, I think, that I need to say any more about the duty to warn. I think – unless Your Honours have a question about that, I can move on.

I did say yesterday that we might interpose Mr Flanagan with negligent misstatement but I'm actually quite happy to carry on and deal with the longstop part of the case, if you'd like me to, and then –

ELIAS CJ:
Well, it may be – it is unusual to break it but if you're dividing it in that way it's probably best to hear the negligence arguments together so if Mr Flanagan would like to be imposed, that's good.

MR FLANAGAN:
May it please Your Honours, I propose to deal with the issue of negligent misstatement which, of course, is the subject of the cross-appeal in this case. It's a short point and can I begin by saying that the respondent doesn't object to the propositions as to the law in this area set out in the Court of Appeal's decision. The respondent simply says that, with respect, the Court of Appeal misunderstood the way that the respondent had pleaded and advanced its case, and it says that in fact that case meets the standards for the tort of negligent misrepresentation as they are commonly understood and as they are set out in the decision under appeal.

Now the key issue, of course, is that of reliance and it's relevant in two quite distinct senses, both of which the Court of Appeal said was missing in this case, and the first

is whether the statement, whether the statements are reasonably capable of being relied on, which is a question of law, and what I'll take you to are the passages in the judgment of 119 and 122, and – or the second issue, whether the respondent in fact relied upon the statements, which is a question of fact, and that is analysed at pages 123 to 128 of the decision.

So the starting point, of course, is what is it then that a plaintiff must prove and if Your Honours would please turn to the Court of Appeal decision which is to be found on the case on appeal at tab 4.

At paragraph 119, the second half of the paragraph, the Court summarises the position as follows, "In essence a defendant will only be found to be under a duty to take care to prevent loss occasioned by a misstatement when the defendant knows or ought to know that the words are such to engender reasonable reliance thereon by a specific person or a group of people, the class, and when the defendant accepts, or by his or her actions can be deemed to accept, the consequences of making that misstatement."

And then turning the page, the Court went to the well known decision of the House of Lords in *Caparo* and it's the second half of that passage that's most pertinent. It begins, about half way through, "Hence, looking only at the circumstances of these decided cases where a duty of care in respect of negligent statements has been held to exist, I should expect to find that the limit or control mechanism imposed upon the liability of a wrongdoer towards those who have suffered economic damage in consequence of his negligence rested in the necessity to prove, in this category of the tort of negligence, as an essential ingredient of the proximity between the plaintiff and the defendant, that the defendant knew his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind, for example, in a prospectus inviting investment, and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind," and, as I say, that analysis is accepted, Your Honours, as accurately stating what the plaintiff must show for this cause of action to succeed.

And can I really only add just something minor which is in response to – the response to what my learned friend, Mr Goddard, has said. In the decision of *Attorney-General*

v Carter, which is to be found in the respondents' volume 1 at tab 4, and paragraph 32 the Court said, "The contractual matrix and special skill points, of which particularly the former assumed prominence in *Turton v Kerslake*, should be seen simply as matters upon which the Court considered it appropriate to focus in the particular circumstances of that case and the way it was argued. We do not consider that these two matters should be treated as other than relevant ingredients of the conventional two stage approach." So I simply note that the emphasis –

ELIAS CJ:
Sorry, which paragraph were you referring to?

MR FLANAGAN:
Paragraph 32 Ma'am.

ELIAS CJ:
Thank you.

MR FLANAGAN:
And the point is no more than that the contractual matrix point and the special skill point that my learned friend relies on, is essential to his argument, is simply part of the overall assessment in the way that it is to negligence generally.

The other point I note in relation to the appellant's position on this is that my learned friend said something about the fact that in this case the representations were made somewhat, to someone other than the plaintiff directly, and he said that there were two options in this case. Either that his client Carter Holt in making the statements had been speaking to the world, or that they were speaking just to the plaintiff, and he said, and I wrote this down, "There has been no case where a plaintiff has relied on a statement made to someone they are in a contractual relationship with," and you will recall the dire consequences he predicted that would come to pass if the law was as such. Well of course that was the situation in the case that was the genesis of this area of the law, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), because Your Honours will recall that was a case where the statement in question was not made from the defendant to the plaintiff but was made to the defendant from the plaintiff's bankers, someone who the plaintiff was in a contractual relationship with. So the point I make simply Your Honours is that absolute proposition cannot be sustained and cannot be a bar to a case of negligent misstatement in and of itself.

ELIAS CJ:

I'm trying to clearly – the facts sufficiently of *Hedley Byrne*.

MR FLANAGAN:

Yes, well in a nutshell involved an advertising agency that were looking at taking on a new client. They wanted to know because they would be exposed to pay for the advertisements –

ELIAS CJ:

Yes, and they spoke to the bankers.

MR FLANAGAN:

They had their bankers speak to the bankers for this proposed client and –

ELIAS CJ:

But they didn't have a contractual relationship with the…

MR FLANAGAN:

The point is no more than that the statement was not made to them directly.

ELIAS CJ:

Oh I see –

MR FLANAGAN:

It was made to someone that –

ELIAS CJ:

– the indirect link, I see.

MR FLANAGAN:

Yes, that they had a contractual relationship with, and I say nothing much turns on that and it seems that that's the way the House of Lords in *Hedley* thought too.

The second point again very briefly my learned friend's made was that the idea of an agency relationship which he says is advanced in the submissions, he says is not one to be found in the pleadings. In fact Your Honours it is, and if we just turn to the pleadings which are, of course, in volume 1 of the case on appeal at tab 8. If we turn

to paragraph 91, and I should say I'm going to put all of this in context in a moment, but I just wanted to pick up this notion that the agency idea is not in the pleadings, because in 91 in the particulars you will see an express reference to the representations in defined terms, and I'll be taking you through that, including the plaintiffs and their agents through the promotional activities, and in the very next paragraph 92, particular (ii), you will see again a reference to the plaintiffs or their agents. So it is pleaded and my learned friend said it would be extraordinary in the building context for their truly to be an agency relationship but, and I won't take you to this, at paragraph 19 there is pleaded the fact that the Ministry of Education uses project managers to undertake – in the course of undertaking building work, and my submission would be, of course, that type of person is very naturally an agent. They stand in the shoes of the owner, they do what the owner themselves would do if they had the time or the skills or so on to do it. They enter into contracts, they oversee the work, they direct the contractors. So my point is only that that relationship might be one of agency, that would be a question of fact, that will be a matter for trial, but that the point is fairly expressed and put in the pleadings.

So I began, Your Honour, by accepting that what the Court of Appeal said in this case as to what the law was, was with respect accurate, but that the purpose of this cross-appeal is as to the treatment of what was pleaded and so what I propose to do in relation to this point is nothing more than –

O'REGAN J:
So when you say – are you saying your agents are the project managers, is that what you're referring to?

MR FLANAGAN:
Yes, I'm saying they're a natural –

O'REGAN J:
Is that what you're pleading, that the representations were made to project managers?

MR FLANAGAN:
Yes, we plead more than that, we say they were made to the builders and the architects and there'll be a no doubt more difficult question of fact as to whether they

can be said to be agents. In my submission the most natural way – the most natural entity person to describe as an agent is a project manager.

WILLIAM YOUNG J:
But in a way it's sort of, as to whether the representation should be treated as having been, in the end, made to the Ministry, and you're looking at particular people, it seems to me to be best to look at whether that's a sensible attribution rather than say as a matter of law as an architect an agent for a building owner.

MR FLANAGAN:
Yes.

WILLIAM YOUNG J:
So, I mean I imagine an architect usually isn't an agent for a building owner but in some respects maybe.

MR FLANAGAN:
Yes.

WILLIAM YOUNG J:
And it's really best to look at it in terms, in the context of the question that arises.

MR FLANAGAN:
Yes, and that would very much be my submission in about five minutes Sir.

WILLIAM YOUNG J:
And the same might be to a builder who certainly isn't an agent in the ordinary circumstances of a building owner.

MR FLANAGAN:
Yes, right.

WILLIAM YOUNG J:
But if you're just talking to the builder of what would be a really good product, and went on to set up the specifications around that and it was a co-operative venture, well then perhaps the builder is the agent of the…

MR FLANAGAN:

Indeed and bearing in mind, of course, that the only purpose for these specifications is to convince the builder and their client to use this product and that the product will perform in the very specific way that the specifications set out.

WILLIAM YOUNG J:

The thing I really sort of slightly make about all this is that whether all of this is a bit artificial now given the Fair Trading Act cause of action. There's a limitation problem, an irritating limitation problem because there's a three year limitation period under the Fair Trading Act as opposed to a six year limitation period. But is this a case where the law is actually now too artificial given that the statutory premise is that if you conduct yourself in a false and misleading way then you're liable.

MR FLANAGAN:

Well there is the limitation problem Your Honour. There's also the fact that one has to bring oneself within the terms of the Fair Trading Act, it's not a difficulty here –

WILLIAM YOUNG J:

It's in trade.

MR FLANAGAN:

Quite. Not a difficulty here but it's easy to conceive of a situation where –

WILLIAM YOUNG J:

In many cases, negligent misstatement is almost always going to arise in a trading context, isn't it?

MR FLANAGAN:

Well of course there is an instance where there could have been no Fair Trading Act representation, let's say there wasn't a contractual warranty but Mr Gedye had nearly brought round the property, pointing out various features of it and making representations about –

WILLIAM YOUNG J:

Well that would be, there's an argument about whether the sale of a property is in trade and if it's made by the real estate agent it probably is, if it's made by the vendor, perhaps not.

MR FLANAGAN:

Precisely Sir and that's my only point which is there'll always be an open and difficult question. So in that sense the tort in negligence may well add something meaningful and there's also Your Honour's point as to the limitation issue.

O'REGAN J:

But here if a representation is made to the architect, and you can't sue the architect, it seems a bit odd that you can then sue the person who made the representation to the architect, doesn't it?

MR FLANAGAN:

Well not, Sir, if the core difficulty is what was said to the architect and also if what was said was something that was only said to the architect for the benefit of the ultimate client, and we'll see when we get into the pleadings that these representations are often quite technical and of a kind that, you know, candidly nobody in this courtroom could understand if we did not have a trading in the Building Act. So there is, the point is that in order to sort of give meaning to what Carter Holt itself is trying to do, persuade people to use its product, to ensure them that they are sound, they make these representations understanding the way in which they will be communicated and then relied upon.

GLAZEBROOK J:

Can I just ask what this cause of action adds – not that it means it shouldn't go ahead, but does it add anything to the other causes of action? I suppose it's a bit the same question about the duty to perform?

MR FLANAGAN:

It adds a something tangible in this case, Ma'am, because it's accepted that the Fair Trading Act cause of action can't succeed in respect of buildings built after about –

GLAZEBROOK J:

Oh, no, sorry, I didn't mean – I meant add to negligence rather than add to…

MR FLANAGAN:

Well, I suppose the one possibility at trial where it would add something meaningful of course is where it was found that these products didn't meet the specifications but that that was not negligent. Now it's hard to imagine that, but let's say Carter Holt

could not have known that its – well, I suppose on reflection that's a terrible example, candidly –

GLAZEBROOK J:
Yes.

MR FLANAGAN:
But –

GLAZEBROOK J:
So it probably doesn't add much but that doesn't mean to say it doesn't go ahead for that purpose, you can have overlapping causes of action.

MR FLANAGAN:
And I suppose my terrible example illustrates the difficulty doing this in the abstract –

GLAZEBROOK J:
Yes.

MR FLANAGAN:
– and a strike-out application because the facts at trial could come out in a way that I cannot think of standing here, that does make a meaningful and material difference.

ELIAS CJ:
And I suppose there's the slight inconsistency in striking-out this cause of action and leaving in the other –

GLAZEBROOK J:
Well, that was the point I was –

ELIAS CJ:
– which you probably were –

GLAZEBROOK J:
Yes.

ELIAS CJ:

– address too.

MR FLANAGAN:

And in tandem, Ma'am, that's why the cross-appeal was brought.

GLAZEBROOK J:

Yes, I would have imagined so.

MR FLANAGAN:

So if we turn to the Court of Appeal's judgment, which is to be found at tab 4, and at paragraph 121 the Court analysed the pleadings. But my core submission is simply that it did so without regard with respect to key elements of those pleadings, and so what I propose to do is flip between what the Court of Appeal said and what the pleaded case in fact is, with reference to each criticism made, which in turn goes to each element in relation to reliance.

So the first point that is said is that, "The respondents have not pleaded membership of a specific class," you'll see that, Your Honours, in the very first line. If we flick forward to tab 8, where the pleadings of course are to be found, and go to paragraph 32 –

GLAZEBROOK J:

Sorry, so can you just give me the paragraph number, the pleadings things, because I –

MR FLANAGAN:

Yes, so…

GLAZEBROOK J:

– I'm still on the statement of claim, sorry.

MR FLANAGAN:

So we're in –

GLAZEBROOK J:

132?

O'REGAN J:

132 of the – sorry, 121 of the Court of Appeal.

GLAZEBROOK J:

121, great, thank you.

MR FLANAGAN:

So 32(b) of the pleadings, Your Honours will see a pleading in relation to the advertising and promotion of the products, including by, at 32(b), "Marketing directly to consumers, architect and building contractors." And then in the next paragraph at 33 you'll see a pleading as to marketing, supplying of the products for various uses, I'll come back to that, but in the particulars it provides, "Carter Holt Harvey supplied the cladding sheets and cladding systems to the construction market, which includes architects, project managers, builders, tradespeople and consumers interest in building new buildings or renovating older buildings," and then the term is defined as "the construction market". And if we march forward to paragraph 44, 44(b), which is five pages away, we will see the pleading that in the course of its promotional activities, at (b), "At all material times Carter Holt Harvey publish within its specifications and supplied in the construction market particular descriptions and representations of its products." So what we have, in my submission, in this pleading is an identification of a specific class, it's this defined term, and that the representation went to that class.

ELIAS CJ:

It's another example of, in strike-out, putting everything onto duty of care because if, one would have thought – and therefore the quest for an identifiable class, when in fact at trial causation sorts this out, and it could equally be looked through that lens, as was said in *Dorset Yacht Company* by, I can't remember, I think it was Lord Pearce.

MR FLANAGAN:

Yes, because of course the facts are everything, Ma'am, and that is our core point on a strike-out.

ELIAS CJ:

Well, there's not going to be indeterminate liability, because it's only those who use this product who are going to be within the class, and whether you're able to demonstrate their loss is going to really determine your class.

MR FLANAGAN:

Yes, and we'll see that when we come to the specifications, because these are not the sorts of things that one pours a glass of wine late at night and sits down to read, these are specific technical documents designed –

ELIAS CJ:

Perhaps you'd need a glass of wine if you're reading them.

MR FLANAGAN:

It might help with understanding.

So the next criticism, Ma'am, in the Court of Appeal, Your Honours, in the Court of Appeal judgment is that, "The pleading refers to generic diffuse representations," that's in the same paragraph, 121, where we were at before, and that is answered in the same paragraph we just left off, 44(b), because after noting publication of the specifications in the construction market it goes on to say, "Particular descriptions or representations of its products set out as underlined in schedule 3," and then when one turns to schedule –

GLAZEBROOK J:

Sorry, I've just missed where you are – oh, no, no, I've found it, don't worry.

MR FLANAGAN:

So that was 44(b), and then schedule 3 is of course at the end, it's, if it assists, in this volume it's at 173, page 173 in the bottom right-hand corner. This is the schedule referred to and this sets out the specific representations that are objected to, and I'll only take you to two, but the very first one, it's 2(a), you'll see a box there with three underlined statements, it's the underlined statements that are objections taken to, the second is that that, "Finished sheets are preservative treated to provide long-term protection from decay," and that's pleaded in relation to a specific document, you'll see that there in a document that is dated, it's the specifications as existing in November 1996. And if I could give Your Honours one more example, because it

illustrates the point I've, just making in relation to Your Honour the Chief Justice's question at (e), which is some three pages away, the middle representation is, "Left uncoated or stained Shadowclad meets the provisions of NZBC 2.31(b), being 15 years in terms of cladding." Now that's something that would mean nothing to most people, it's something that is directed at a specific class of people by definition, it's inherent in it, otherwise they wouldn't understand it.

And then if we turn back to the body of the pleadings quickly at paragraph 90(d), we'll see this start to come together –

ARNOLD J:
90, did you say?

MR FLANAGAN:
90, Sir, yes. That's to be found at page 159 of the volume. You'll see the pleading is to the duty of care arising out of a number of factors. One is the carrying out of the promotional activities, the marketing and supplying of the sheets according to the representations as so far as they relate to cladding sheets in the particular descriptions, that's the first piece of the puzzle, and then over at 91 is the more important part, that's in the next page, Carter Holt Harvey made the representations insofar as they relate to cladding sheets, in particular its descriptions in relation to the cladding sheets, and you'll see interview he particulars the express pleading that they were made to the construction market, that defined term "including the plaintiffs and their agents". So again, Your Honours, we simply respectfully submit that that's not a generic diffuse representation, it's a specific one directed to a particular group, and that is as much inherent in the nature of the representation as anything else.

And then the next point is that the Court below described the statements as, "Made apparently to the world, consumers at large." Well, I've already covered much of this, but just to give you references again, 44(b) is the provision where the construction market, where the pleading is made that the publications were made to a defined class of persons, 32(b) as well. 90(d) which I have just taken you to, and 91 which no doubt you still have open in front of you. The only thing I'd add to that, just as an aside, the fact that a statement is publicly available isn't fatal, of course, to a finding that it was directed to a class of persons, and this Court held to that effect on *Spencer on Byron*, and I needn't take you to it but I'll give you the reference. At 219 to 222 the Court held that a cause of action in negligent misstatement could be

founded on a code of compliance certificate, and of course that is a document that's publicly available. In one sense it's available to the world at large, in another much more meaningful one it's aimed towards owners and prospective owners of the building in question.

The next reason that the Court below gave for striking-out this cause of action, and again we're still in paragraph 121, Your Honours need not turn to it, was that it was, "Representations were not limited to any specific transaction or context." And in that can I take you please to paragraph 33 of the pleading. It's a paragraph we've seen before. This is the construction market paragraph but at the end of it –

WILLIAM YOUNG J:
Sorry, I missed that?

MR FLANAGAN:
I'm sorry Sir, it's paragraph 33, it's to be found at 143. After the particular, the passage in the particulars that I've already taken Your Honours to, and after the defined term you'll see that it's pleaded that the supply was, "For use on light buildings." And light buildings is a defined term elsewhere in the paragraph. So that is the purpose for which its pleaded and identified. And again can I just note as an aside the provisions of *Caparo* on all of this, it's cited in the Court of Appeal's decision. Quite properly the Court notes that *Caparo* stands for the proposition that sufficient if the limitation is, "To transactions of a particular kind eg a prospectus inviting investment." That's at 621 of *Caparo* and in 120 of the Court of Appeal's decision. But I could just take Your Honours to the decision of *Caparo*, which is to be found in the appellant's bundle, volume 5 and tab 21. In Lord Oliver's speech we'll see at about half way down the page, just below letter –

GLAZEBROOK J:
What page?

MR FLANAGAN:
652 at letter E there's a helpful passage that begins, "Before it can be concluded that the duty is imposed to protect the recipient against harm which he suffers by reason of the particular use that he chooses to make of the information which he receives, one must, I think, first ascertain the purpose for which the information is required to be given. Indeed the paradigmatic *Donoghue v Stevenson* case of a manufactured

article requires, as an essential ingredient of liability, that the article has been used by the consumer in the manner in which it was intended to be used." Very much the case here and then there's citation to Australian authorities and *Junior Books*, and I should say *Junior Books* is not a case that's found much favour subsequently.

"I entirely follow that if the conclusion is reached that the very purpose of providing the information is to serve as the basis for making investment decisions or giving investment advice, it is not difficult then to conclude also that the duty imposed upon the adviser extends to protecting the recipient against loss occasioned by an unfortunate investment decision which is based on carelessly inaccurate information." And I would say there's a close analogy between that situation and this one because here we have a manufacturer promulgating specific information, expressly designed to get people to buy the product, to convince them that it's sound and that they should use it, and that those people very naturally rely upon that information as a consequence.

So to just summarise then, the Court of Appeal's conclusions at paragraph 120, namely that, "The statement of claim as drafted does not limit in any way who can rely on the statement and for what purpose. There is no attempt to identify who the relevant end user class might be or how Carter Holt might identify individuals in the class to whom it could be liable." In my respectful submission that criticism is not a fair one on the basis of the case as its pleaded and is it advanced and while I won't take Your Honours through it, my submissions at paragraph 8.7 to 8.11 and again at 8.15 and 8.16 I make in summary and expand upon the points that I have just made.

But the short point is that the plaintiffs say that its claim in fact, properly analysed, fits within conventional enough principles. In the words of *Caparo*, cited by the Court of Appeal, the statements were deliberately given to a defined class of people, they were specifically in connection with transactions of a particular kind and in the knowledge that the plaintiff would be very likely to rely upon them for the purpose of deciding whether or not to enter into the transaction of that kind. So that's the first limb of the Court of Appeal's findings.

The second limb was the Court of Appeal found – concluded that the pleadings were also lacking in the sense that there was not proper reliance in fact on behalf of the plaintiff and the Court said that this was not a case of assumed reliance and the fact of reliance was not sufficiently pleaded and it was said that the plaintiff just relied

upon general reliance which I accept in the sense that they used it as impermissible and that of course is how my learned friend categorises it and that aspect of the decision, which is conceptually distinct, begins at paragraph 123 of the judgment. It's tab 4 again and just a few pages on and the Court, in my respectful submission, begins by rightly recognising that reliance may be inferred and you'll see draws a distinction with inherent or assumed reliance and the plaintiffs' objection is that inherent reliance isn't assumed reliance, it's not general reliance, it's inferred reliance. It's reliance that can be drawn from the facts and circumstances overall so that reliance can be proven as a matter of fact at trial. And again if I can just quickly go to the pleadings to demonstrate the point that I make.

WILLIAM YOUNG J:
Well someone must have assumed, formed the view, that this product would meet the requirements of the Building Code?

MR FLANAGAN:
Yes or else it wouldn't have been there in the first place is my submission.

WILLIAM YOUNG J:
And these are statements that assert that?

MR FLANAGAN:
Yes.

WILLIAM YOUNG J:
So it's reasonable to conclude that there was somewhere in all of this some reliance?

MR FLANAGAN:
Yes Your Honour has put it perfectly with respect and that is in a nutshell the pleaded position as well. It may be then, Your Honours I can pass over this quite quickly but paragraph 19 of the pleadings, of course we're in tab 8 of the case on appeal. It begins with a passage that lays the – and it's a simple point, it's just the pleaded fact that the Minister of Education doesn't build buildings, the Ministry of Education uses building work professionals of the type pleaded to do that for her. 44(a) is a passage that we have already been to. These are (a) and (b) are the passages which lay out the representations and who they're made to.

We've already been to schedule 3. We've already been to 90(d). I'm just giving Your Honour the reference again for completeness. That's the reference to the carrying out of the promotional activities and the marketing but 90(f) is not something I have taken Your Honours to and it's key. That begins at page 159 of the volume. The pleading is, "The duty of care arises in part from the plaintiffs relying on representations made by Carter Holt Harvey in relation to the cladding sheets, including the representations in so far as they relate to cladding sheets and particular descriptions. Carter Holt Harvey's capacity as the designer, manufacturer and suppliers of the cladding sheets, the plaintiffs reliance was inherent in the plaintiffs allowing the cladding sheets to be installed on the school buildings. And can I just say my learned friend said there was no pleading the plaintiff relied. Well the first point is there it is.

The second point is that ties it all together. Nobody can build a building in New Zealand with cladding that has unknown properties, without the representations in question no one would buy this product and it certainly couldn't be used to build buildings because – and every building erected in New Zealand, there must be plans that specify what the cladding is and the cladding must be suitable or else the architect won't sign off, the project manager won't sign off, the client won't sign off, the Council won't sign off and the only source of information about that is the specifications and they're designed to be relied on in the way that they were. That's their only purpose and they are targeted at a small group of people to meet their specific requirements. So it's inherent that in the product being used on a light building that the specifications have relied on or it can be inferred, put another way, that it has been. That's the very purpose of the documents, in my submission, that's what they are for and that is the point made in paragraph 8.25 of my submissions. That's the way the plaintiff pursues the case on the pleadings and that also, for completeness, is the way the High Court understood the position. Your Honours will find that at paragraph 96.

So the plaintiff just says in conclusion, again the Court of Appeal's criticism with respect, of the basis of this cause of action just doesn't have sufficient regard to the way that it is actually pursued and that in fact a proper factual basis for reliance is made out, albeit that it requires inferences and albeit of course that will be a matter to be proven at trial. And those are my submissions on the points Your Honours.

ELIAS CJ:

Yes thank you Mr Flanagan.

MR FARMER QC:

Yes if the Court pleases, on the longstop, we deal with that in our written submissions and I'm proposing to go through the written submissions and talk to them rather than to hand up any separate notes. So that's our written submissions at page 26, section 10 and at 10.2 we say the starting point is that the longstop provision is not a catch all, it does not apply to all claims in which buildings are involved but only a defined subset of them and the key statutory provision in that respect that limits the application of a longstop is that the claim must be one that relates to building work claims. It's not a claim relating to building, it's a claim that relates to building work and we make that point which is really the focal, the central point over and over because it is so important and what is a claim that relates to building work of course is essentially a matter of statutory interpretation but applied of course to the facts of the particular case and of the particular claim.

ARNOLD J:

Can I just ask a somewhat preliminary question that's been puzzling me and that is why is section 393 subsection 1 in there in the first place? I mean why – what is the necessity for it? Why wouldn't the civil claim for money be governed by the Limitation Act? What is the purpose of subsection (1) because it just seems to me the…

GLAZEBROOK J:

I suppose it could be that they think otherwise the longstop would be the limitation period if you don't say it so that you didn't have two limitation periods, ie, a limitation period and a longstop. The longstop becomes the limitation period but it would be an odd result. So in avoidance of doubt, I suppose.

ARNOLD J:

Maybe that is the answer. It's just –

MR FARMER QC:

I don't have a better answer.

ELIAS CJ:

Was there anything in the – no, because it was in the 2004, 2004 Act or 1991 Act?

MR FARMER QC:

You're thinking of the 1991 Act.

ELIAS CJ:

Yes. So there's not, you know, the legislation getting out of kilter with each other or anything?

MR FARMER QC:

No.

ELIAS CJ:

No.

MR FARMER QC:

It's in section 91(1) as well.

ELIAS CJ:

Yes.

MR FARMER QC:

Although interestingly there are those words that I think someone may have commented on earlier in this hearing that in 91(1) it begins with the words, "Except to the extent provided in subsection (2)," and subsection (2), of course, is effectively the longstop provision, so those words are not in 393(1).

GLAZEBROOK J:

Although there's a "however" in subsection (2).

MR FARMER QC:

It is a "however".

O'REGAN J:

Yes, it's just a drafting style change, isn't it?

MR FARMER QC:
It is a drafting style, yes.

ELIAS CJ:
Is it, this might be quite wrong, but is it because there wasn't a longstop in the Limitation Act in 1991?

MR FARMER QC:
There wasn't a?

ELIAS CJ:
Longstop.

WILLIAM YOUNG J:
No, there wasn't.

GLAZEBROOK J:
There wasn't?

ELIAS CJ:
Yes.

GLAZEBROOK J:
So that's what I mean, it might have been that they thought otherwise the longstop might appear to be –

ELIAS CJ:
Yes.

GLAZEBROOK J:
– the new limitation period –

ELIAS CJ:
Yes, yes. Yes, but it would also –

GLAZEBROOK J:
– ie, 10 years, not six.

ELIAS CJ:

– work the other way, wouldn't it, that they were introducing –

GLAZEBROOK J:

Yes.

ELIAS CJ:

– a long stop for building work.

MR FARMER QC:

Yes. Claims relating to…

ELIAS CJ:

For claims relating to building work –

MR FARMER QC:

Yes.

ELIAS CJ:

– because it wasn't in the general law, but now that we've got longstops in –

O'REGAN J:

Well, only after 2004 though.

ELIAS CJ:

Yes, that's true, yes.

MR FARMER QC:

All right. So going back to our submissions, in paragraph 10.3 we draw a distinction which we say is in the Act between building materials and building work. These are quite different concepts, and we also make the point that the longstop applies only to work done for a particular building. The position with building materials is different because, of course, a manufacturer of building materials manufactures them without regard to a particular building. You can't really talk about building work that doesn't relate to a particular building because it's work to build a building whereas materials, the manufacture of materials, may not relate at all, and generally won't relate at all, to

a particular building so that that's sort of a distinction that assists in defining the proper scope of the longstop provision.

ELIAS CJ:

I'm sorry, but following on from what Justice Arnold said, and thinking about what the legislature was doing in 1991 when it introduced the longstop, I just wonder whether that does provide maybe some support for your argument in the sense that it wasn't a general longstop. The law didn't provide for that. So it was in the particular context of the obligations and interconnected dealings that are provided for in the Building Act. Sorry, that it's narrowly focused on the…

MR FARMER QC:

It is narrowly focused and we'll see when we look at the purpose of the Building Act itself the purposes relates to the construction of buildings and the duties that are imposed are imposed on those who are involved in the construction of buildings, so it's building, that's the concept of building work.

ELIAS CJ:

Well, I understand that's the argument you're making on the construction of the –

MR FARMER QC:

Yes.

ELIAS CJ:

– provision. I'm just wondering whether the legislative history of the introduction of the longstop may support that. It hadn't occurred to me before because we haven't heard very much about what the policy was.

MR FARMER QC:

No. Well…

ELIAS CJ:

Anyway, don't get distracted.

MR FARMER QC:

And the legislative history, of course, is, with respect, very adequately and fully set out, for example, in Your Honour, Justice Glazebrook's judgment in *Klinac* and which later cases have referred to for that particular purpose is that's where you'll find –

ELIAS CJ:

Thank you.

MR FARMER QC:

– a description of the history.

So going to 10.4, this distinction between claims relating to buildings and claims relating to building work is very critical and we've noted in 10.4 that in my learned friend's written submissions what is submitted is that the effect of the longstop provision is to prevent "all building-related claims" and, with respect, that is simply not so. It can't be so because that's not the way in which the – that ignores completely the word "work". It's there and it's there for a purpose which is to define the scope of the provision.

WILLIAM YOUNG J:

Well, you say it's confined to claims where the act or omission relied on is involved building work?

MR FARMER QC:

Yes, in the sense of –

WILLIAM YOUNG J:

So that's one way of reading section 393(2) that…

MR FARMER QC:

Yes, yes, yes, we do.

WILLIAM YOUNG J:

It means you don't get a limitation period starting too soon.

MR FARMER QC:

No. And the way the Court of Appeal put it, as we say in 10.6, is to say that the Act was not intended to prevent all claims which happened to have some connection to building work and, as it's put, that neither the wording of the provision nor the overall scheme of the Act supports that interpretation, and that's paragraph 165 of Their Honours' judgment which – perhaps if I read the whole paragraph. That's volume 1 of the key documents, tab 4, page 77.

ARNOLD J:

Tab 12, is it?

MR FARMER QC:

Tab 4 of the key documents, Court of Appeal judgment, paragraph 165, "It is clear from the wording of the provision itself that Parliament did not intend to include manufacturers and suppliers of products within the longstop limitation directly. It is also clear from the legislative materials the statute was not intended to prevent all claims relating to any building work at all. Neither the wording of the longstop provision, nor the overall scheme of the Act, supports this interpretation," and I'll come back to talk about the overall scheme of the Act. "The question then is whether anything related to building work is identifiable in the claim before us, such that this can be said to be a civil proceeding that relates to it." That was the issue as defined we would say correctly by the Court of Appeal.

So we then turn to the definition of building work. This is paragraph 10.7 and that is defined, you'll find that, it's in section 7, so that's volume 1 of the appellant's bundle, at tab 3, the Building Act 2004, section 7. 59, my learned friend's helped me on that, the number's at the top of the page. So, "Building work means work, (a)(i) for, or in connection with," and those words "in connection with" I'll come back to, "for, or in connection with, the construction, alteration, demolition, or removal of a building; and (ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the Building Code." So we're not concerned with that and then there's some other things specifically included, site work, design work and that provision we looked earlier I think and other – and that's sort of expanded a little.

So just going back to (a)(1), "Work for or in connection with the construction et cetera of a building" and those words "in connection with", a little bit like "related to" and in fact we'll see that in two High Court decisions, *Thomson v Christchurch City Council*

HC Christchurch CIV-2010-409-002298, 28 March 2011 and *Deeming v EIG-Ansvar Limited* [2013] NZHC 955 that the High Court Judge in each case or Associate Judge in one instance, in effect telescoped what is really a two-stage enquiry. You look first of all to see is this building work and in deciding whether it's building work, you look to see whether it's work for or in connection with the construction of a building. So in connection with may be something a little bit broader than actually hands on work on site but then you –

ELIAS CJ:
You'd start really with work wouldn't you?

MR FARMER QC:
Yes.

ELIAS CJ:
On your argument.

MR FARMER QC:
Well start with work and then it's work –

ELIAS CJ:
Because on your argument isn't - the liability you are contending for here is not work, is it?

MR FARMER QC:
No, no it's certainly not work and it's not work, well I suppose the manufacturer of the product is work but it's not work in connection with the construction of a building.

ELIAS CJ:
It's not building work, yes, yes.

MR FARMER QC:
And so –

GLAZEBROOK J:
Which is common ground in fact.

MR FARMER QC:

It is common ground and then when you get to the next point as well, if it is that if it's not that, the next question is well is it work – is it activity that is related to building work and that's conceded not to be the case here. What was said instead by my learned friends is that it is the proceeding, the Court proceeding which relates to building work and we'll come back to that point but what –

O'REGAN J:

But do you get, I mean you've got something, is it in relation to something which is in connection with, don't you?

MR FARMER QC:

Yes.

O'REGAN J:

You've got two –

MR FARMER QC:

That related to and in connection with, in these two cases that I referred to, the Judge has really treated it as almost telescoped. It's the same sort of –

O'REGAN J:

Is that legitimate though because they're actually in tort?

MR FARMER QC:

Well probably not, probably not but that's how they treated it but they go to the right outcome. If they had asked the question well is this in connection with work, they may or may not have answered that yes or no but if they'd answered it yes and then asked the next question, is it related to that, the answer was no and that was the correct outcome but they didn't kind of analyse it in that way and I think –

O'REGAN J:

Well if you take one of the schools, the work in relation to that school would have included affixing the cladding presumably?

MR FARMER QC:

Yes.

O'REGAN J:
So then we say is this claim in relation to that?

MR FARMER QC:
That's right and the answer to that is the claim goes right back to the design and manufacture of the cladding which was then –

O'REGAN J:
But well, but it alleges that the problem arises from the way it was affixed to the building, doesn't it?

MR FARMER QC:
Well we don't say the way it's fixed is the problem, we say the problem is the design and manufacture, the design and the inherent qualities of the product are not suitable for use as an exterior cladding to buildings because they will leak, no matter how well they're installed or fixed.

O'REGAN J:
Well there's quite a lot though in the pleadings about the way it was used, isn't there?

MR FARMER QC:
The real world insulation, yes what we say there in the real world it's not possible to install this particular product in a way that it won't leak.

O'REGAN J:
But you wouldn't be making a claim if it had never been affixed to a building.

MR FARMER QC:
No, no but then we wouldn't have suffered loss either if it had never been fixed to a building and that's –

O'REGAN J:
Well that's what I mean but that means in order to establish your claim you've got to say it was affixed to a building.

MR FARMER QC:

That's correct, that's correct, there was building work done but then the question is, is our claim against the manufacturer one that relates to the building work that was done and we so no it wasn't, yeah.

So going back to our submissions, at the end of 10.9, 10.9 makes the point that Carter Holt has accepted these two propositions, first of all that it does not carry out building work itself and secondly, that its activities, that is to say its design and manufacturing activities do not relate to building work, rather what they say is that the proceedings which is a claim against Carter Holt in respect of its design and manufacture of the products, they say the proceedings, the claim relates to building work and they've been at pains to make that point and to say effectively that their case has been previously misunderstood in that respect and you'll find that in their written submissions at paragraph 3.5 and I'll just read it to you, I don't think you need to necessarily go to it, where they say, "The High Court Judge also held that the longstop limitation provision did not apply to these claims. At paragraph 109 the Judge incorrectly recorded Carter Holt's argument in a manner that appears to have significantly influenced his approach to this case. His Honour describes Carter Holt's argument as being that the manufacture and supply of the cladding sheets were related to building work. That is not correct. The argument was and is the proceedings relate to building work because the respondents' claims relate to building work, namely the building work carried out on the school buildings using the cladding sheets which it is alleged has resulted in buildings that failed to comply with the performance requirements of the Building Code. This is an important distinction as decisions such as *Klinac* illustrate, the same misdescription to the argument appears at paragraph 124, the argument was that the longstop provisions apply to certain types of claim, not to certain types of work." So it's I think important to just be absolutely clear about how the appellants put their case and therefore how the issue is that arises.

GLAZEBROOK J:

Can I just ask, is your answer to Justice O'Regan was that the claim can only relate to building work if the person sued does building work?

MR FARMER QC:

I'm not sure I would go quite that far. I'm trying to envisage a situation where that might not – where that might not be the case. I don't think I'd go quite that far.

GLAZEBROOK J:

Well if it's wider, why isn't it wide enough to include things that are clearly put up on buildings?

MR FARMER QC:

Because the claim goes back to the defects in the product as designed and manufactured. The act or omission of the defendant are its acts in designing the building, sorry designing the cladding.

GLAZEBROOK J:

So the act or omissions, so rather than the way I put it, the act or omission have to be related to building work specifically, whether conducted by the person or someone else?

MR FARMER QC:

Yes, yes, that's a better – thank you, yes. Paragraph 10.10 we refer to the section 14G which my learned friend made some point about but what we say is that prior to that – so 14G came into operation, didn't come into operation till November 2013 and that was a somewhat – it's the first time actually that we have specifically some responsibilities of manufacturers being brought into the Act and you'll recall that subpart 4 outlined the responsibilities under the Act, it identifies various different people, types of people and it is described as an outline of their particular individual responsibilities, "For guidance only," and then 14G, which is the last of them, is that "product manufacturers or suppliers" is a definition of what a product manufacturer or supplier is, and it says that the product manufacturer or supplier is responsible for ensuring that the product will, "If installed in accordance with the technical data, plans, et cetera, comply with the relevant provisions of the Code," so for the first time in November 2013 we have a, some responsibilities being imposed on manufacturers as a separate, been brought into the Act in that way, but they are still identified separately from those who do building work from builders, from designers and, of course, from those who are directly, others who are directly involved in building work such as local authorities, and what we say is that, that those activities of product manufacturers are separate and distinct from building work, notwithstanding that the products that they make are invariably necessary to enable, rather, that the works that are done are invariably and necessarily use the products that are manufactured separately by the manufacturers. So that takes us to –

ELIAS CJ:

I'm not sure that I entirely understand that. If post the enactment of this provision a manufacturer doesn't comply with that obligation –

MR FARMER QC:

Yes.

ELIAS CJ:

– a claim against the manufacturer is still not, on your submission, not in respect or relating to building work.

MR FARMER QC:

No. No, it's not. In other words, putting it another way, the specific enactment of that provision which imposed for the first time responsibilities on manufacturers to ensure that their products comply with the Building Code doesn't alter the scheme of the Act in relation to building work and nor does it alter the way in which section 393 and the words related to building work should be interpreted. And if that –

ELIAS CJ:

So there's no longstop at all in relation to that obligation?

MR FARMER QC:

No, there's not, and there was in, specifically in 2013 as well, when the section 14G was introduced, at that time there was no further amendment, for example to 393, to make it plain that 393 from this point on would apply to manufactured products that were used in relation to buildings. And possibly the reason for that was because it was, by that time it was perceived that there really was not likely to be any major problem going forward by the fact that manufacturers henceforth would remain outside the longstop provision, and the reason for that is because it was known that the Limitation Act 15-year provision, it was known to be coming into force, as it now has, and of course so that effectively means that, yes, there's a difference between the 10 years and the 15 years, but it effectively means that from this point on all claims, all civil claims now have this 15-year, it's effectively a 15-year longstop provision, and which happily happens to coincide in the case of cladding manufacturers with the obligations or the provision in the Building Code that cladding that's not used for a, that doesn't have a structural function, should have a 15-year durability characteristic of quality.

ELIAS CJ:

You say "happily", but all of this may be by design I suppose.

MR FARMER QC:

Well, I suppose what I'm saying is that the longstop provision itself creates in one sense anomalies because it's restricted in scope, and you get the sort of anomalies that were, arose in *Gedye's* case, for example, where Mr Gedye was not able to obtain the benefit of the longstop but on the other hand nor was he able to invoke a contribution, make contribution claims against those who were involved, responsible in the first place for building the defective building, because 13 years had gone by since the building work had been done, and that was, that sort of anomaly is there, but it's inherent actually in the way the Act is structured and the way section 393 is structured, and in fact this Court in declining leave to take the, for Mr Gedye to take the case on to this Court, effectively said, "Well, we've got to just define the law as it is, and there it is." So it's because section 393 had specific people in mind that it wanted to protect, and they were the local authorities and the builders and those who were directly involved in the construction of buildings, which is what the Building Act is directed at, they are the people the Building Act is directed to, because there was a protection that was wanted, they needed to give to them, and the, it was the, as the Court knows, it was the fact that building certifiers were going to be introduced into the market, into the regulatory part of the market, as alternatives to councils doing the work and because of the insurance problem that arose with them, that the whole question of having a longstop protection arose. So all of that was done in that context and for that purpose, and the inevitable outcome of that was that there were going to be anomalies outside that, "Sure, we've looked after them," but then the anomalies of the, for the Mr Gedyes of this world and, perhaps, for the Carter Holts of this world, if they are anomalies, could arise, but –

ELIAS CJ:

But is anomaly the only explanation you can give for it, or is there a possible policy justification for the difference?

MR FARMER QC:

Well, yes – no, there is. The policy justification is the one that this particular identified group of people who are the people who are involved in the construction of buildings, which is what the Building Act regulates, those people it was felt needed some degree of protection, and so they were given that degree of protection. Those

who are not involved in the construction of building work, and Mr Gedye is one and Carter Holt Harvey are another, they were not within the policy that Parliament was promulgating, they were not within the protective umbrella that Parliament was seeking to provided. But the point I was making was that if you're concerned about that – and it would be a concern only about the policy and the consequence of the policy – but if you're concerned about it and if Parliament perhaps was concerned about it, and I'm not saying they were, but if they had been concerned about it when they enacted 14G, then they needn't have worried because the Limitation Act 15-year provision was about to come into force, and so from that point on Carter Holt Harvey for the future have that protection, everybody has that protection.

O'REGAN J:

But one of the – they might not have amended it because they thought it already applied.

MR FARMER QC:

Well, that's possible, yes.

GLAZEBROOK J:

Yes. Although if you look at 14G, even leaving aside 14A, which sort of seems to limit what it might do, it actually only applies to someone who says that it meets the Building Code.

MR FARMER QC:

Sorry, the Act only applies to what?

GLAZEBROOK J:

Sorry?

MR FARMER QC:

I'm sorry, I didn't catch that.

GLAZEBROOK J:

Even leaving aside the 14A in terms of whether it is actually an obligation –

MR FARMER QC:

Yes.

GLAZEBROOK J:

– but if you look at 14G it's very narrowly focused on people say that, who say their products meet the Building Code, isn't it?

MR FARMER QC:

Yes, yes, that's –

GLAZEBROOK J:

So if a manufacturer just puts out a product and says, "Well, use it if you want," then they don't have a responsibility. So it's only if they claim it does meet the Building Code, of course it's probably what somebody – well, I don't know, because if you sell nails or a piece of wood you're unlikely to say, "This meets the Building Code" –

MR FARMER QC:

That's right.

GLAZEBROOK J:

– because it depends very much on how you use the piece of wood or the nails.

MR FARMER QC:

That's right, yes.

GLAZEBROOK J:

But, so it is a very narrowly focused –

MR FARMER QC:

Yes, it is.

GLAZEBROOK J:

– responsibility.

MR FARMER QC:

It is.

GLAZEBROOK J:

But of course it is one that, if I understand, that Carter Holt does do, well, effectively says that its product meets the Building Code.

MR FARMER QC:

Yes, yes. Is that a convenient time..

ELIAS CJ:

Yes, thank you, we'll take the adjournment now.

COURT ADJOURNS: 11.35 AM

COURT RESUMES: 11.53 AM

ELIAS CJ:

Thank you.

MR FARMER QC:

I was in our written submissions if the Court pleases at the top of page 28 and the heading, "Wider scheme of the Act," and what I'm attempting to do here is to relate the concept and the definition of "building work" to the Act as a whole and to the purpose of the Act. If we go to section 3 we find that dealt with very succinctly. Section 3 of the Building Act, so that's volume 1, again of the appellant's cases, tab 4. Tab 3 I'm sorry, tab 3, and at page 53, using the numbers at the top of the page, section 3, under the heading, "Purpose and principles," section 3, "Purposes. This Act has the following purposes." And it simply begins, "(a) to provide for the regulation of building work," and then it goes on to refer to licensing regimes and the like, but then if you got to (b), "To promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the Building Code." So there it is set out very clearly and – very clearly.

So they are the parties who are responsible for building work and the purpose is to provide for the regulation of building work and to provide accountability for those who perform it. And that was picked up both by Justice Asher in the High Court, this is my paragraph 10.13, and by the Court of Appeal and if you look at the Court of Appeal judgment, because it refers to and relies on section 3, Court of Appeal judgment, so again that's in the volume 1 of the key documents, tab 4 and paragraph 172, which is at page 80 of the bundle, paragraph 172, and at the very end of the previous paragraph, at the bottom of the previous page, the Court refers to the fact that, what it said is, "To the extent that the longstop provision may apply only to limited

categories of proceedings relating to building work, this must be taken to be Parliament's intention," and I made that submission earlier.

And then 172, "The purpose and policy of the longstop also supports this view. Carter Holt's criticism that it is unfair and arbitrary for product manufacturers and suppliers to be treated differently from those building professionals responsible for building work under the Building Act is unsustainable. We see it as consistent with the statutory intent (until the amendments in 2013 which introduced a provision relating to manufacturers) that the 2004 Act applies to the parties such as owners, designers, builders and building consent authorities identified in s 3," and that should be 3(b) clearly, "and not to manufacturers and suppliers of products. Like Asher J, we consider the focus of the Act is on those parties directly connected to the construction of a building."

Now when you look further into the Act we say in 10.14 of our submissions that the legislative framework overall draws a distinction between building work and building products and so you get that, for example, the Act itself identifies and defines building methods or products as something that is separate from building work, and we've given the references to a number of sections and we don't need to take you to it, it's in footnote 121 of our submission, where you see that occurring. The interpretation section itself provides for separate definitions of those two things, building work on the one hand and building methods or products on the other, and the definition of "building method or products" makes no reference to building work. And when you look at some of the provisions and one we have identified is section 4(2)(b) which is, if you still have the Building Act there, you'll find that, in fact, on the next page after section 3, which is page 54, section 4 is headed, "Principles to be applied in performing functions or duties, or exercising powers, under this Act," it's a section that applies to the Minister, to the Chief Executive and to territorial authorities and subsection (2) begins, "In achieving the purpose of this Act, a person to whom this section applies must take into account the following principles that are relevant to the performance of functions or duties imposed, or the exercise of powers conferred, on that person," so it is dealing with that relatively, that particular subset of identified persons, namely the regulators, and going down to sub clause (b), 4(2)(b), what must be taken account of is, "the need to ensure that any harmful effect on human health resulting from the use of a particular building methods or products or of a particular building design, or from building work," so all those things are quite separate activities that are identified separately, "is prevented or minimised." So the

regulators, as opposed to anyone else, must exercise their powers to take account of harmful effects arising from any of those particular activities. So my only point about it is to show that building work is a separate concept, separate activity from, in this case what we're concerned with is building products.

And if the same point is true, this is my 10.16, when you look at the Code itself, the Code refers to building elements, the things that go into a building, and that's something that again is separate under the Code from building work, and in the case of building elements what the Code does, as we know, is to prescribe performance qualities that should be attained and in the case of cladding sheets which are listed in clause B2, the requirement is that cladding should have a durability of 15 years if it's not being used as a structural support, or 50 years if it is. So that's something again that's different from the provisions in the Code that deal with the performance requirements relating to building work.

And so it's not a surprise that section 393 should be focused, the protective provisions of section 393, the focus should be on those involved in construction of buildings, ie, building work, and that others outside that are in a different category, so to speak. And if you take the example of cladding, if my learned friend's position is correct, well, then we would have the odd situation where if the cladding failed after, say, 12 years, on their case if the longstop provided no claim could be brought and yet the Code says it's got to last 15 years and that just, if one is concerned about anomalies, there is one for a start that would arise on my learned friend's case.

O'REGAN J:
But it says it has to last 50 years if it's structural so what –

MR FARMER QC:
If it's structural.

O'REGAN J:
What happens if there's a claim after 18 years?

MR FARMER QC:
Well, I'm not sure this is the sort of product that one would ever – I can't imagine a house with –

ELIAS CJ:

No, but a product that was structural.

MR FARMER QC:

Yes.

ELIAS CJ:

Will –

GLAZEBROOK J:

Well, isn't the indication –

MR FARMER QC:

Well –

O'REGAN J:

That's always going to be a problem.

GLAZEBROOK J:

But didn't they say in relation to – it was originally going to be 15 years and they said that the evidence was that most latent defects come out within 15 years.

MR FARMER QC:

Yes, they do, and, of course, it was going to be 15 years and the reason it was brought back to 10 –

GLAZEBROOK J:

Yes, was insurance.

MR FARMER QC:

– was because the certifiers couldn't get insurance for 15 years.

WILLIAM YOUNG J:

Well, they couldn't get it for 10 either, could they?

MR FARMER QC:

Well, as it turns out they couldn't but the thought was that they might be able to. That's why they brought it back from 15 to 10. But that was – the insurance problem was what proved to be the death knell of the private certifiers.

Now just before 10.18 we have a heading, "The substance of the proceedings is determined by reference to the alleged acts or omissions of the defendant." So this goes back to what's this claim about? And the answer is the claim is about what the defendant did or failed to do, and that's how you determine what the substance of the proceeding is and the substance of the proceeding is not, we say, about building work. It's about the activities, the acts and omissions of Carter Holt, who is a manufacturer who is building a particular product, generically, supplying it into the market and then ultimately it may end up, well, it normally will end up being used in relation to a variety of buildings, but it's the acts or omissions of Carter Holt Harvey that the claim relates to, and so that is using the words, of course, of section 393 itself.

O'REGAN J:

But it doesn't have to be, the act doesn't have to be building work. It just has to relate to building work, doesn't it?

MR FARMER QC:

Yes, that's true, that's true, yes, and – that's true but you go back to look at the act or omission and determine the nature of the claim and then see whether that claim relates to building work, and it's only if it does that the longstop would come into play, and, in fact – and that brings in a test of sufficient connection to – and we'll see that – well, in fact, I could take you – it involves really looking at Your Honour's, Justice Glazebrook's, judgment in *Klinac* but also, before I get to that, if you go down to 10.21 we've referred to the Court of Appeal judgment again and I've set out the full paragraph. Actually, no, I haven't set out the full paragraph, and I probably should read the full paragraph. So that's paragraph 166 of Their Honours' judgment, which is again tab 4 of the key documents, volume 1, at page 78 of that volume, and it begins, and this was the Court's ruling, "The manufacture and design of cladding sheets does not relate to the construction, demolition, alteration or removal of a building, in the direct sense intended by the statutory definition. The central enquiry here is the substance of the claim, that being the act or omission in respect of which the proceedings are brought," and you'll see there that footnote is a reference to Your

Honour, Justice Glazebrook's judgment in *Klinac*, which I'm going to come back to, "being the act or omission in respect of which the proceedings are brought. That relevant act or omission must itself be sufficiently connected to the building work to align with the Parliamentary purpose intended in the longstop." So if I can just pause there, the Parliament purpose we've seen was in effect making accountable those involved directly in construction building work. We took you to that. Their Honours continued, "The focus must, therefore, be on the activities of the defendant in question. Justice Asher was not, as Carter Holt submits, erroneously requiring the defendant to have carried out some building work itself. Rather he was focusing on the impugned conduct in question to ascertain whether it fell within the statutory concept of building work." That's what Justice Asher was doing but the point is you look at the acts or omissions of the defendant, in this case it's the manufacturer of a particular product. That tells us what the substance of the claim is. And then those acts or omissions must themselves be sufficiently connected to the building work to align with the Parliamentary purpose intended in the longstop, and those words, those last words, are important, we would submit, in deciding whether or not the activities of the defendant are related to the building work.

And then you will see, in paragraph 167, Their Honours continue, "We, too, are satisfied it does not. Carter Holt is alleged to have manufactured and designed a defective product to be used in the construction of buildings. Such a claim relates to the negligent manufacture. There is no necessary relationship with the building work itself. Any relevance is necessarily incidental in the sense that cladding sheeting will in due course be used in building work. That does not mean every claim in respect of the defective cladding sheeting relates to building work." And, of course, as I said to Your Honour, Justice O'Regan, earlier, if the cladding wasn't used, wasn't put on the building, wasn't installed on the building, well, then, of course, we wouldn't be here because there would be no harm caused, no loss caused, to the plaintiffs. But that fact, the fact that it was installed, the fact that harm and loss was caused, does not in terms of the Parliamentary purpose, we would submit, constitute a sufficient connection between the negligence claim that's made against Carter Holt and the work that was done installing the particular product on the building.

During the hearing before Justice Asher His Honour actually – it's not – it didn't make its way into his judgment but His Honour gave the example of toilets that are manufactured and they are ultimately installed in the building. I mean, what other use will they be? But His Honour raised the point, made the point, well, the fact that

they are actually ultimately installed and used in a building doesn't of itself mean that they are related to building work and that's perhaps just another example.

Now, so going back to our notes, our submissions, so we say in 10.22, "The enquiry is not focussed on incidental act or omissions carried out by other parties who may feature within the factual matrix of a claim, rather it's focused on the very conduct that has been impugned against the defendant in the pleadings in question, that's what the claim is about." Now of course at the trial there's going to be a lot of evidence about the building work, the building, this is what happened, the building was built and cladding was installed et cetera. The defendant's defence is going to be that it wasn't installed correctly and we dispute that, we say the product was inherently defective et cetera, just as in *Gedye's* case, it was recognised that although the claim there was a breach of warranty claim, when the case goes to trial, I don't know whether it did or didn't but if it went to trial then inevitably there was going to be a lot of evidence about the building work that was done 13 years earlier but that didn't mean that the longstop provision didn't apply to those who did the building work because in fact it was held that it did.

So back to our submissions, 10.23, "Carter Holt suggests the enquiry ought to be focussed on 'The last relevant act or omission which features in the claim, namely the installation.'" And we say no to that. We say in 10.24 that approach is inconsistent with the plain language of 393(2) which provides that limitation periods starts from, "The date of the act or omission on which the proceedings are based. There is no question that the act or omission on which the proceedings are based refers to the acts or omissions of the defendant in this case. In *Gedye's* case the act or omission in which those proceedings were based were the giving of the warranty that building work – the warranty that building work had been carried out to a certain standard by the defendant who was the vendor of the property. So the limitation period ran in that case from the date that Mr Gedye gave the warranty not the date of the building work that he warranted, which had been carried out by other parties."

GLAZEBROOK J:
So when does it run from here because it doesn't run from the date of manufacture?

ELIAS CJ:
Well that's a question I suppose.

GLAZEBROOK J:

But it would be odd if it ran from the date of manufacture.

ELIAS CJ:

Well you'd be in trouble, you'd be in major trouble.

WILLIAM YOUNG J:

Here it runs, on your case, from the date of loss.

MR FARMER QC:

Date of?

WILLIAM YOUNG J:

Loss.

MR FARMER QC:

Yes, oh yes discoverability, yes.

WILLIAM YOUNG J:

And deferred by discoverability, yes.

MR FARMER QC:

Now, so I'm now on page 30 of our submissions and I think I could go down to 10.26 which is *Thomson's* case, I referred to that earlier, Justice Asher.

GLAZEBROOK J:

Well just coming back though, that doesn't fit easily within the longstop, does it because the act or omission of the defendant is making of the specifications and the making of the product.

MR FARMER QC:

Yes.

GLAZEBROOK J:

What other act or omission is there?

WILLIAM YOUNG J:

Your argument is that if it puts it too far back, if the act or omission – that if you apply section 393 to manufacturers, it puts the commencement of the start date too far back.

GLAZEBROOK J:

No that was the point I was making because if it is act or omission of the defendant the only ones I can think of is putting out the specifications and not withdrawing them and the manufacture.

MR FARMER QC:

Oh and when it's supplied to.

GLAZEBROOK J:

Supply?

MR FARMER QC:

Yes.

GLAZEBROOK J:

But you're not negligently supplying, you're supplying negligent product.

WILLIAM YOUNG J:

It may not be negligent supply, it may be, you know, supply from Mitre 10 or something.

MR FARMER QC:

No it's, I suppose when it's – well it's a question of whether you can separate out all of those components of design, manufacture, supply, into the market and then ultimately I suppose supply to particular builders.

GLAZEBROOK J:

All I'm making the point is 393 doesn't site very easily if it is related to the act or omission of the defendant with it applying to – with the longstop applying to manufacturers.

MR FARMER QC:
No, no you mean if –

GLAZEBROOK J:
If act or omission means an act of the defendant then 393 doesn't sit very easily because if it's the manufacture, then that's arbitrary, if it's the supply well negligently supplying a product.

MR FARMER QC:
A defective product, supplying a defective product.

GLAZEBROOK J:
Well in construction you know what they've done, they've designed it and they've put the nail in.

MR FARMER QC:
Yes, yes that's when it gets to the point of construction, that's right but as I say my – all I'm trying to saying is it's a little bit difficult to separate out that process which starts with design, continues with manufacturing, goes to putting it out into the market, ie supplying to the market and then ultimately further supply to builders and the way we've pleaded it is supply, is really to use the term supply in that sense of supplying if you like a negligently designed and manufactured product.

So on page 30 then, we've referred to these two decisions of *Thomson* and *Deeming* and I don't think I need to take you to them but *Thomson* was a case where the roof of a building was leaking and a contractor was retained to advise and they advised and supplied what we've described here cladding, it was more in the nature of a membrane that was put into the roof as a sort of protective provision from water ingress. It turned out it didn't work and in that particular case, what's important for – I referred to it earlier, is that the Judge in that case telescoping the two stages but effectively what he did do correctly was to focus or in dealing with the question of whether or not the defendant was carrying out building work, he looked at the nature of the claim and complaint that was made against him and that happened also in the *Deeming* case where the geotechnical engineer who had provided reports in relation to an area of land that was proposed for subdivision and he certified that the land was sufficiently stable to go ahead with the subdivision and His Honour in that case, Associate Judge Doogue, focused we say correctly on the act that was complained

of which was the preparation of the geotechnical report and then considered whether that activity was either building work or ultimately in terms of the Act related to building work. Although as I say both cases, they telescoped the two because they focussed on those words "in connection with", the definition in building work was "work for or in connection with the construction of a building" and didn't really see that as just that's the definition of building work and then go on to look at the question, is this activity related to building work, they treated it all one and the same but those are those cases and what they demonstrate as we say in 10.29, is that in assessing whether a proceeding relates to building work the proper focus of the enquiry is on the act or omission pleaded against the defendant and that the Judges in both those cases did exactly that and we go on to make comment about the one step, two step point.

Now that takes us through to 10.31 on the next page where again we say that it's essential to be quite clear how this needs to be approached and what we say in the second sentence there is that, well I'll read the whole paragraph. What we say, "The consistent and principled approach is to focus on the relevant acts or omissions alleged against the defendant in assessing the true nature of the proceedings, where the acts or omissions are directed towards the defendant's activities, as they are in this case, it is appropriate to consider first of all whether the defendant's activities are building work and it's conceded they're not or sufficiently related to building work." And we say the Court of Appeal well understood that was the correct approach and at footnote 135 we've referred to paragraph 166 which I read to you a few minutes ago.

Now that takes us to *Klinac* and also *Gedye* but it's *Klinac* particularly that I want to, and that is in the appellant's authorities, volume 2, at tab 10. So like *Gedye* this is a breach of warranty case. That's the act complained of, is breach of warranty, which is obviously on any view is not building work. Now the Court was taken to this case the other day, by my learned friend I think, and there was quite some discussion about it so I won't, I'll go directly to the paragraphs that I wanted the Court to look at, which is paragraph, beginning of paragraph 47, that's on page 326 of the volume, and I'll read you 47 first, so Your Honour Justice Glazebrook said, "Where a contract relates to the sale of a building, whether there is a direct relationship to building work may depend on the precise nature of the term. A claim for misrepresentation relating to the current state of a building or for breach of a contractual term that a property is free from defects (which may perhaps have been an easier term to argue as an

implied term in the *Hamilton City Council* case) may have no direct connection with building work at all. A representation or term to such effect does not relate to the origin of the alleged defect. All that is necessary to prove misrepresentation or breach of such a contractual term is that the property is not in fact free from defect. The defect may be the result of negligent workmanship, or of an Act of God or of lack of repair, or of normal wear and tear. This does not matter and a plaintiff is not required to enter into an examination of the alleged defects origin in order to prove his or her cause of action." So that's the this building is free from defects situation.

"In contrast, however," this is [48] Your Honour said, "where the representation or contractual term is to the effect that certain building works have been carried out in a proper and workmanlike fashion (as is the case here), then there may be a connection to "building works" for the purposes of s 91(2)." And then Your Honour said, "I do have a doubt on this point as clearly the civil proceedings relate more directly to the contract of sale than to the building works themselves." And I think Your Honour expressed that reservation again to my learned friend earlier in the week. "In addition the fact that the form of the term or the misrepresentation may determine whether s 91(2) applies may in itself throw doubt on Robertson J's view that the relevant act or omission in this context is the building work."

So Your Honour, with respect, had this view that perhaps really what this case, the nature of the case was about was the contract of sale rather than about building work, although building work was an incidental aspect of the claim because in a sense the warranty, the subject matter of the warranty was that building work had been carried out effectively.

Paragraph [49], "Accepting for this purpose, however, that there may be the necessary connection with building work, on Robertson J's analysis the next issue is the identification of the 'act or omission on which the proceeding are based'. In this regard I respectfully differ from Robertson J's conclusion that the act or omission is the building work itself." So that's focusing on the nature of the claim. What are you suing for, you're suing for breach of warranty under a contract of sale.

Then paragraph [50], "In an action for negligence as indicated above the act or omission upon which the cause of action is based is the negligent act or omission at the time of the building works. There is no later act or omission upon which the proceedings can be based. In contrast, where the action is one based on breach of

contract or misrepresentation, there is a further act much more closely connected to the cause of action – the entry into the contract and the breach of the contractual term and the making of the misrepresentation. The making of the representation and the entry into the agreement containing the term it is alleged has been breached determines the relevance of other factors, including the preceding building work. The faulty building work is relevant solely because it goes to prove that a representation was a misrepresentation or that a term of the contract was breached. It is not the act upon which the proceeding is based (unlike in actions for negligence). And although it's the other way around here in the sense that the manufacture and supply occurred before the building, before the cladding was put on the building, we say the same is true. What is the true, what is the substance of the claim, to use the Court of Appeal's expression. The substance of a claim is the, relates to the manufacture of the product and although there is a connection obviously that follows the question is, how close is that connection to the claim that's made into the negligence that's alleged against eh manufacturer, and with respect we say that's a correct way of analysing the situation and when you do we say it becomes plain that this claim does not relate to the building work which subsequently occurred, albeit that if that building work hadn't occurred then we would not ever have suffered any loss because, for obvious reasons.

Now that, I think, really takes me through, there's a section on page 32 on regulatory authorities. The point being there that Carter Holt brings out, they say well, regulatory authorities don't perform building work, although there's this *Osborne* case which has excited some attention in this area of the law, but nevertheless they're protected. Well, yes, they are, but that's because Parliament expressly said they should be protected and they are specifically given that protection as a separate category of people.

WILLIAM YOUNG J:

Perhaps it may have been expressed a bit – well incorrectly in *Osborne*, but the section it's predicated on the assumption that certification in relation to particular buildings is an act or omission relating to building work.

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

That probably would have been a better way of putting it.

MR FARMER QC:
But as I understand it that's not quite the way it was put.

WILLIAM YOUNG J:
Put in *Osborne*, no.

MR FARMER QC:
No.

WILLIAM YOUNG J:
Osborne, but of course *Osborne* was looking at two different sections.

MR FARMER QC:
Yes.

WILLIAM YOUNG J:
It was also looking at section 14 of the Weathertight –

MR FARMER QC:
Yes, but one could hear the excitement levels around Auckland city rising with the, those who do this, who make a living totally out of this kind of work, and it's – anyway, wherever that ends up I don't know, but that's helpful, Your Honour, to have that clarification.

So the point here just simply is that the regulatory authorities are expressly provided for when you look at section 393, and that was the case previously with section 91. Now – so it really has no relevance to what we're dealing with here except to say, this is one of the class of persons involved in the construction of buildings that Parliament decided should have the benefit of that statutory protection.

Now in 10.39 we also say no useful analogy can be drawn with the functions of the BIA under section 91(4) of the 1991 Act. And generally I must say, with great respect to my learned friend, I sat here in puzzlement listening as he took Your Honours at some length through the 1991 Act because I couldn't see exactly what the particular relevance of that Act was to what we're dealing with here today, and we did -

Your Honours asked the question whether there were transitional provisions and I did try to help my learned friend but I didn't do it very well, so we've got the transitional provisions and we can hand them up, thank you. And so there are quite a lot of them, as you'll see, but 415 is perhaps the important one to start with, and that repeals the 1991 Act. But it then goes on, in subsection (2) to preserve the operation of certain regulations and orders, and then you have a whole series of provisions which deal with particular transitional provisions and none of them have any particular relevance until we get to the last of them, which is 448, and that relates to transitional provision for proceedings under the former Act, and I think my learned friend may have suggested that one or two of our school buildings effectively still come under the former Act and we say no, that's not right. This says, "This section applies to the following proceedings. The proceedings under section 54 or 55 of the former Act in relation to building certifiers," and we're not concerned with that, and then (b), "Proceedings under Part 9 of the former Act, including Court proceedings related to an application for a determination under section 17 of the Act."

Now Part 9 you'll see actually if you want to look at it, it's in volume 1 of the appellant's authorities, tab 2, and you just need to look at the index at the front, "Part 9, legal proceedings and miscellaneous provisions," and it's pretty well everything, dangerous and insanitary buildings, there are a number of provisions about that, territorial authorities, carrying out work, inspections by them, powers of the building authority, offences and proceedings and the like, and then civil proceedings and defences, that's in relation to, that's at paragraph, sections 89 on, and so on. So essentially – and what, going back 488 – 448, sorry – what that says in subsection (2) is, "Any proceedings to which this section applies that were commenced but not completed before the date of commencement of this section must be continued and completed in all respects under the former Act, as if this Act had not been passed." So if you had a proceedings of that kind on foot, then it has to be dealt with under the '91 Act. But of course we didn't have any proceedings on foot in this case, we didn't issue our proceedings until 2013 –

WILLIAM YOUNG J:

A pretty clunky provision, because section 91 is in the Part 9, but it's a bit odd to treat a claim for damages as being a claim under Part 9.

MR FARMER QC:

Yes, yes.

WILLIAM YOUNG J:

So that's the problem with it. But who knows.

MR FARMER QC:

Yes. But the only simply point is that our case wasn't started until 2013 so it's got to be dealt with insofar as the Building Act applies, insofar as section, the longstop provision may apply, it's section 393 that's the relevant section, and any arguments by way of analogy that my learned friend is seeking to make, from 91 in particular, 91(4) and the like, with respect, are simply unhelpful and don't take the analysis any further at all, in fact they just create confusion.

So *The Grange*, there was a lot of argument about that. We simply say, well, *The Grange* is very clear that it relates to particular buildings is the main point probably we rely on there, and that takes me through to page 33, substance of the claim as pleaded. So in 10.42 we summarise, we say, "In applying the section 393 the Court must focus on the conduct that is impugned in the proceedings," and, well, that's just repeating what you've already heard now a number of times. And 10.43 we say Carter Holt mischaracterises our claim, and we go on to say a couple of lines down that Carter Holt says, "The respondents accept that there are other causes of the alleged defects arising out of the manner in which the building, where it was performed," we do not say that, sorry, we don't. They may say it but we don't say it. The defects allegedness claims solely relate to defects in Carter Holt's product. Fundamentally the claim is about Carter Holt's in designing, manufacturing and supplying a product with inherent defects. Then in 10.44 Carter Holt also says that if the relevant building work complied with the Code in relevance then hence the claim could not succeed, and we say that ignores the fundamental premise of the claim which alleges the products are inherently defective, irrespective of how well the building work may have been carried out. The claim does not, as Carter Holt argues, turn on whether the building work carried out on the schools was defective, it's the product that's complained about. And then they say that a complaint about non-compliance with the Code is necessarily a complaint about building work. We say on that analysis a claim arising from a flood inundating a house and rendering it non-compliant with the Code would be a complaint about building work, that's unsustainable. And that takes us back to paragraph 47 where Your Honour noted that a defect in a building may have no direct connection to building work at all, there could be a number of causes if the building's defective, so you can't just look at the

building, say it's defective, therefore it must follow that the any complaint is about building work.

10.46, the installation point. They say the claim turns on the manner in which the building is constructed and we say no, that's not true at all. Again, we go back, it's the product that we complain about. And so in 10.47 we go back to that paragraph I've already to you from the Court of Appeal, which is 167, the second of the two paragraphs I read to you, the claim relates to negligent mismanufacture, no necessary relationship with the building work itself, "Any relevance is necessarily incidental," the Court of Appeal said, in the sense that cladding sheet will in due course be used in building work. That does not mean that every claim in respect of a defective cladding sheeting relates to building work.

Then there's the section on specific and *The Grange*, going over to the next page and dealing with that, this 10.53, my learned friend had two examples, two hypothetical examples. He had his two architects, the one who drafts plans for a specific building and the other one who drafts plans for a building company for numerous clients in the future, and he say, "Well, it's counterintuitive and unfair if the longstop applies to the first architect and not the second," and we say, well, architects' work is perhaps a poor analogy for the generic activities of the BIA, as in *The Grange*, and product manufacturers, as in this case. By definition the drafting of plans from which a building is ultimately constructed is work which relates to a specific building, namely the one designed. So the respondents' don't necessarily agree with the assumption that the longstop would not apply also to the second architect, who's designed plans for a building company, a specific birthday company with specific clients that they propose in effect to sell the concept of a house with those plans too. There's no real distinction in substance, we would think, between those two situations.

And then my learned friend's other example on the next page is the kitset manufacturer and the manufacturer's representative who goes onto the site. Now what we say in 10.56 is that, third line, "Given that a line must be drawn by the Courts, it seems rational for a manufacturer who designed and manufactured building components to order for a specific development to be in a different position from a manufacturer of a generic product which is simply offered to the market at large. Likewise, a product manufacturer who sends a representative to consult and advise on a specific building project is naturally in a different position from a manufacturer

that does no more than ship products from a factory with no particular project in mind." I mean, the whole idea of a kitset manufacturer is that he – well, we're using the word "manufacturer" but it's someone building a building out of particular modules or components that is then being sold to a purchaser to be used on a particular site. So it's, it's the only difference between that and a conventional building is that, is perhaps that most of the components, the modules, are being probably built off site and it's hard to see that there's any real difference between that situation and the conventional situation that involves building work.

ELIAS CJ:

Well, what's the difference between your case and that case though?

MR FARMER QC:

Because we're simply designing and manufacturing a particular component which is one of many, many components that ultimately is used to make a building. My learned friend's example of the kitset manufacturers, they are building a whole building but it happens to be in module or kitset form and it's transported on a truck or something to a site and put on the site. It's very, very different.

ELIAS CJ:

So you wouldn't say, you don't argue that a delivery of a kitset is the same as delivery of the panels?

MR FARMER QC:

No, it's not the same. It's effectively what's happening there is they are building a whole building, a whole – they're building it off site and transporting it on the back of a truck. That's quite different from delivering panels and there'll be other trucks that deliver nails and bits of timber and all the other components, many, many components that go to make up, that the work is then applied to build a building.

O'REGAN J:

So are you saying a kitset maker is protected by the longstop?

MR FARMER QC:

Well, I'm not making that concession. I'm just saying that it's a very different situation from what we're dealing with here.

GLAZEBROOK J:

Well, you could just argue the kitset builder is constructing a building –

MR FARMER QC:

Yes.

GLAZEBROOK J:

– and as soon as it's shipped to a particular site it's constructing a particular building.

MR FARMER QC:

Yes.

GLAZEBROOK J:

Well, I suppose it is, even as a kitset manufacturer, it's still a particular building. It's just that it's not…

MR FARMER QC:

Yes, yes. It's the same, I – yes, it is, that's right. It's –

GLAZEBROOK J:

So you say the fact that it's not constructed on site but constructed off site and shifted to a site –

MR FARMER QC:

Yes, and –

GLAZEBROOK J:

– logically may not make any difference?

MR FARMER QC:

That's the point, that's the point I'm making. I mean, it is a – someone has built a –

ELIAS CJ:

It might be better for you to reserve that point which is –

GLAZEBROOK J:

Well, I think he was reserving it.

MR FARMER QC:
I did, I did, I'm trying to deal with these examples –

ELIAS CJ:
Butterflies.

MR FARMER QC:
– that my learned friend is so good at coming up with, these sort of hypothetical examples, and someone has to try and deal with them, but the way I'm dealing with it is to say, well, this is quite different from manufacturing one component that ends up being used in building because this is actually building a building off site, putting it on the back of a truck and taking it to a particular site and dumping it on the ground.

ELIAS CJ:
Well, suppose it doesn't go on assembled on the back of a truck? Suppose it's lying flat in bits?

MR FARMER QC:
Well, there's building work, the building work is – some of the building work is then being done off site. All the components, everything, is being built off site by the manufacturer, and the fact that it has to be transported on, not on one truck but on three or four trucks perhaps and then assembled doesn't alter the fact that there's been building work undertaken right from the beginning to the end of that whole exercise by the one manufacturer.

O'REGAN J:
Well, or there's work related to building work which is all that's needed, isn't it?

MR FARMER QC:
Or it's certainly that, yes. I mean, even if you've got a different builder who assembles it on the site, then it would be hard to argue that what the kitset builder did, my learned friend uses the word "manufacturer" but he's really a kitset builder in the sense that he's building a building, what he did is either building work or intimately connected with building work and therefore related to it.

Now I've got a section beginning at 10.58 on the policy, the purpose and policy of the longstop and I don't think I need take you through that. You've already been alerted

to the fact that following the 1991 Act there were changes made in 1993 that this concept of relating to building work came in the – by way of a 1993 amendment, and we do in –

GLAZEBROOK J:
What did it read before? Have we got that?

MR FARMER QC:
Pardon?

GLAZEBROOK J:
What did it read before then? Have we got that somewhere? Was that in *Klinac* or…

MR FARMER QC:
Well, you can get it quite easily because if you look at the 1991 Act, which is tab 2, go to section 91, and 91(1), 91(2) I'm sorry, 91, 1, (2) says, "Civil proceedings," and then you'll see in square brackets, "relating to any building work," and they are the words that were inserted in 1993. So it read, initially, "Civil proceedings may not be brought against any person 10 years or more after the date of the act or omission," et cetera. So it's those words in square brackets that were put in in 1993.

GLAZEBROOK J:
Did anyone say why they'd brought them in apart from the obvious that civil proceedings generally might have been somewhat obliged?

MR FARMER QC:
Yes, well, yes, there is an explanation. We've referred to it in 10.64 where in presenting the select committee report on the Building Amendment Bill (No 2), which is the amendment that we've just looked at, John Carter recognised, John or John Carter, recognised the longstop was directed towards "participants in building work". In other words, that's taking you back to section 3, the purpose of the Act. It was thought, I think, that as worded originally it was too broad and so they wanted to tie it back to the participants in building work.

GLAZEBROOK J:
Well, it looks as though that was when they added design as well to a –

MR FARMER QC:

Yes, yes, they did. So, and that's consistent with – I don't know whether we have the actual – we've only got parts of the 1991 Acts. It's not a criticism but… Yes, actually, we have got the – section 6 of the 1991 Act had the purpose and principles, and there you see it, section 6(1), "The purpose of this Act," this is on page 14, "The purposes of this Act are to provide for (a) necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary and have means of escape from fire; and (b) the co-ordination of those controls with other controls relating to business use and the management of natural and physical resources, and you get" – so it's a similar effect as the 2004 Act.

And so the addition of design is, was just a recognition that design work is an integral part of building work. You can't build something – when you build something, you build it to a design that someone's done.

And the point we make in 10.65 of our submissions is that when Parliament specifically amended the Building Act to include building design professionals within the longstop they didn't seek to broaden it even further to bring in other participants in the industry, in the industry, such as manufacturers and suppliers.

And then we go on to refer to 10.66. This again is part of what occurred. When the Justice and Electoral Committee subsequently asked the Ministry of Justice for advice about the longstop in the context of its consideration of the Bill that became the Limitation Act 2010, the Ministry advised that the benefit of the longstop applies to building certifiers, territorial authorities, builders, architects and engineers. So that's what was said and, of course, there's a limit to how far you can take that but it's at least of interest and of relevance, and at 10.67, this sentiment, we say, is reflected in the very select committee quote that Carter Holt cites, namely that the purpose of longstop was to ensure finality in litigation against anybody "involved in the construction of a building", and we say that the manufacturers of generic building products don't have involvement in the construction of a building.

Now then finally, I think, there is a section on an allegation of unfairness to product manufacturers. Carter Holt argues there's no coherent rationale for product manufacturers to be treated differently from those building professionals responsible for building work under the Act as they would not be entitled to join such parties if a claim is brought against them more than 10 years after the relevant acts or

omissions. So this is the contribution point that was touched on the other day, and we just say, well, the rationale is apparent from the clear statutory intent for the Act at the relevant time – sorry, that the clear statutory intent for the Act at the relevant time is only to apply to those parties, that is to say those who are directly involved in the construction of a building. Justice Asher recognised the focus of the actions on those directly connected, involved in or connected to, the construction of a building, and then we refer to a paragraph from the Court of Appeal and I've just set it out here. "For the most part," the Court said, "it is easier for plaintiffs to pursue parties who were directly involved in the construction process, such as builders, architects and territorial authorities. Being more remote from the actual building work has made it easier for product manufacturers to avoid liability." The point there, I think, is that sort of the lower hanging fruit, the builders, the architects, the people who were directly, who built the building, directly involved in it, and the local authorities who supervised in a regulatory way, the building, they are the people who traditionally have been the targets, the easy targets, as it were. So, one might say, well, it's perhaps – if one's concerned about good fortune or bad fortune, well, the product manufacturers by and large have not been the immediate targets. I don't think any, that you can say very much about this except to say, "Well, I don't think the Court ultimately is going to be too concerned one way or the other about unfairness." It is, after all, a matter of applying the Act as it is and – which is what this Court did in *Gedye's* case, the fact that Mr Gedye couldn't seek contribution from the builders who were responsible for the defects in his building 13 years earlier is just, in a sense, bad luck. That's the way the Act operates.

That contribution point was discussed the other day particularly between my learned friend and Your Honour, Justice Young, and in relation to *Hotchin's* case, and you were given and have been given a copy of Justice Lang's judgment where His Honour looked at a number of earlier High Court decisions. We don't ourselves feel we necessarily need to take a particular position on this. Justice Lang chose to follow Justice Courtney's judgment in the *Dustin* case. You'll see all of that dealt with at –

WILLIAM YOUNG J:

It's quite a funny question, if you just sort of say section 17(1) requires you to ask would the contribution defendant, if sued in time, be liable for the same damage, and if the answer to that is "yes" then it seems odd to say, "But because he wasn't sued in time he can't be sued," so that's the Justice John Hansen approach.

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

On the other hand, I guess contribution claims probably weren't subject to specific limitation themselves in the Limitation Act, 1950 Limitation Act.

MR FARMER QC:

Yes.

WILLIAM YOUNG J:

Well, I'm not sure on that.

MR FARMER QC:

Well, a contribution claim is, as I understand it, was, is regarded in it, in it's, in effect as a separate proceeding so therefore is subject to the –

WILLIAM YOUNG J:

I see. So it's a claim where the cause of action arises when the judgment was entered?

MR FARMER QC:

Yes, it's subject to the six year. Yes, I think we're all –

WILLIAM YOUNG J:

Okay, well, in that case the first argument does seem to be quite plausible.

MR FARMER QC:

Justice Hanson's?

WILLIAM YOUNG J:

Yes, because it seems time (inaudible), yes, well, there's no point. It would frustrate section 17 to say, "But you can still raise a limitation defence."

MR FARMER QC:

Yes, well, my learned friend says, well, if you go the other way, if you say, well, you can bring your contribution defendants in after the 10 years then that's sort of undermining the purpose of section –

WILLIAM YOUNG J:

But you can do that, but I mean you can – I mean it certainly applies to limitation defences. I mean contribution defendants can't plead the Limitation Act.

MR FARMER QC:

No, no they can't.

WILLIAM YOUNG J:

They can't say, "Well I can't be -" there's a car accident, two drivers are involved, the two drivers are alleged to be negligent, if the contribution claim is issued six years after the accident well that's just tough luck for the other driver because they don't have a contribution defence.

MR FARMER QC:

Yeah, yeah that's right and –

WILLIAM YOUNG J:

They don't have a limitation defence I should say.

MR FARMER QC:

No and so really that's in a sense what we're dealing with here, the same situation in a different context altogether.

GLAZEBROOK J:

But isn't the argument that the longstop overrides the normal provision under section 17?

MR FARMER QC:

Oh well it certainly does, that's the way the section is structured, that word "however".

GLAZEBROOK J:

Well it overrides the – no it overrides the Limitation Act but I think that the argument is that it also overrides the position that would be the case under section 17.

MR FARMER QC:

Yes, yes.

GLAZEBROOK J:

Because it is a longstop provision and they must be related to building work.

MR FARMER QC:

Yes, yes that's right and it's a provision that's –

GLAZEBROOK J:

So it will be a sort of a later overrides the former or something argument?

ARNOLD J:

I was just showing Justice Young section 34 of the Limitation Act which deals with contribution claims and it has its own limitation regime and it's two years after the liability of the person seeking contribution is quantified. So that tends to suggests that –

WILLIAM YOUNG J:

It used to be six years I think.

ARNOLD J:

Yes.

GLAZEBROOK J:

So the argument would be that applies but also the longstop applies presumably.

WILLIAM YOUNG J:

Well I think the argument that – well there are two arguments, one is look at it in terms of section 17(c). The answer is obvious, the contribution defendant would have been liable if sued in time. The form of the question means it can't matter that he wasn't sued in time.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

The other question is but – and the other way of looking at it is but it's still a claim relating to building work and therefore section 393(2) comes over the top of it.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

But if you see section 393(2) as just another limitation provision that doesn't make much sense either. So it's quite a difficult problem to which I'm not sure what the answer is.

ELIAS CJ:

But not one we need to resolve.

WILLIAM YOUNG J:

We don't think we need to.

ELIAS CJ:

No.

WILLIAM YOUNG J:

Perhaps the more practical answer is that in the context of this case, the sort of claims that would be made by way of contribution would actually diminish directly a claim against Carter Holt, to the extent to which the damage to the schools as a result of faulty work, that can't be laid at the door of Carter Holt. So, I mean that they don't really need a contribution claim to lay off the consequences of other people's fault.

MR FARMER QC:

That's their defence, that's going to be their defence, faulty installation.

O'REGAN J:

Well it might be more significant than that though mightn't it? I mean if you could put a protective coating on say and that hadn't been done properly in some places. I mean presumably the painter would be someone doing building work. So Carter Holt would say, well it's now damaged the framing and so but if it had been painted properly it would've been a defective product but it wouldn't have damaged the framing. So it sort of changes the whole nature of the claim against them doesn't it?

MR FARMER QC:

Well our case is, I mentioned this the other day I think, that the, because of the nature of the product and the rough sawn edges et cetera, that painting it of itself doesn't deal with that problem.

O'REGAN J:

Yes but it might have stopped it being so bad that it got through to the frame.

MR FARMER QC:

It may have – that may have delayed the process of deterioration, yes, that's the most you could say I think. I do need to just finally I do just need to go back to the – go to the subject of product certificates briefly. So 91.4, there's a discussion arose or an issue arose out of 91 and 91.4 in particular, the date of reliance on an accreditation certificate. So it's plain that under the '91 Act it envisaged that there might well be actions against the BIA subject to the limitations that were found by this Court in *The Grange* but the product certificates, my learned friend said well really the product certificates under this Act are much the same. Our submission is that they don't fall within the 2004 longstop and if you go to section 393.

WILLIAM YOUNG J:

They're all specific to the building at hand aren't they?

MR FARMER QC:

Sorry?

WILLIAM YOUNG J:

All the examples that are given as to when – of certificates are all certificates that are specific to a building, a particular building?

MR FARMER QC:

Well it's in 393(3)(a), "For the purposes of subsection (2)," that's the longstop, "the date of the act or omission is (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority or the chief executive in relation to the issue of a building consent, a code compliance certificate, a determination under Part 3, the date of issue of the consents, certificate of termination as the case may be, the relevant date is the date of issue" but the point we make is that product certificates which my learned friend pointed out are now not made by – they're made by product certifiers who are a different class of people. Product certifiers are not within that group of people where there is provision for the date of issue of the certificate or consent rather or determination, to be the relevant date for the purposes of subsection (2). So they are no longer specifically, product certifiers are no longer specifically within section 393 and in particular 393(2). That's the – because the issue of product certificates is dealt with under a totally different section of the Act altogether which is 269 and it's not a determination of the kind that's referred to in 393(3)(a). That was the only point I wanted to make about that and that's less than two minutes I hope.

GLAZEBROOK J:

So they do or do not have the benefit of the longstop?

MR FARMER QC:

They don't, they don't.

ELIAS CJ:

They have a specific provision did you say?

MR FARMER QC:

Yes, there's no specific provision relating to them.

GLAZEBROOK J:

What about under the general provision, do they have the benefit of the longstop or does that depend on *Grange* or –

MR FARMER QC:

It depends on *Grange*.

GLAZEBROOK J:
All right.

MR FARMER QC:
So those are our submissions if the Court pleases.

ELIAS CJ:
Thank you Mr Farmer.

COURT ADJOURNS: 1.03 PM
COURT RESUMES: 2.19 PM

ELIAS CJ:
Yes, Mr Goddard.

MR GODDARD QC:
The home straight, Your Honour. In an endeavour to save time and to reduce perhaps even eliminate the need for your Your Honours to take notes, I've printed off the notes I made for myself in relation to my reply and that should enable me to move quite quickly through it. The other attachments to that that the Court has I was asked yesterday for the authorities to support the proposition which I put forward in answer to a question, also I think it's in the submissions, that where there's concurrent liability in tort and contract the duty in tort will not be more extensive than the duty in contract, and so I've provided that list and two of the items referred to that I think are most helpful, just to save time, and I'll come back to that in a moment in reply because my friends dealt with one aspect of that and I want to allude back to it.

Let me begin then on my notes, and I'm going to deal with the limitation issue first. And I'll begin by saying that I have wondered the same thing that Your Honour Justice Arnold asked in relation to subsection (1) of section 393 and its predecessor, subsection (1) of section 91 of the original Act. I imagine the reason that we have subsection (1) of section 393 is that there was an essentially identical provision, subject to some drafting tweaks in 1991, and it was carried forward without a lot of thought about its relationship to the rest of the provision and the need for it. But the question has no better answer. I had also wondered – and this is Your Honour Justice Glazebrook's question – whether it might have been to dispel a suggestion, or to dispel any risk of an inference that this was now the only limitation period that

applied to civil proceedings relating to building work, but there are two problems with that reading of it, although it's possible. One is that it just seems such a strange inference for anyone to draw, as Your Honour pointed in an exchange with my learned friend, Mr Farmer, this morning. The other reason is that it doesn't explain why there's no reference to the other limitation periods under other legislation that would apply to other claims. I mean, why expressly dispel that vis-à-vis the Limitation Act limitation rules but not limitation periods, for example, in the Fair Trading Act that would apply to a Fair Trading Act proceeding relating to building work? So it's not very clear. But I don't think that we need to worry about it too much except to note that it seems quite clear in the 1991 Act that the scope of subsection (2) was broader than the two limbs referred to in subsection (1) of section 91, if we go to it, it's under tab 2, and we see –

GLAZEBROOK J:
We have already gone to this –

MR GODDARD QC:
Yes.

GLAZEBROOK J:
– again and again.

MR GODDARD QC:
Well, Justice Arnold was turning to it, Your Honour, and I thought that it might be helpful for me to address that, but I'm happy to leave it.

ELIAS CJ:
Sorry what are you taking us to?

MR GODDARD QC:
I may not be…

ELIAS CJ:
Well, go ahead, I…

GLAZEBROOK J:

Well, it's just making again the point that subsection (2) is broader because of subsection (4) of section 91, which was made ad nauseam over and over again in your main submission.

MR GODDARD QC:

And I don't need to make it again.

GLAZEBROOK J:

Are you making any point other than that?

MR GODDARD QC:

I wasn't going to go to it until Justice Arnold turned it up, Your Honour, and I thought that if His Honour was looking at it and had a question it might be helpful to turn to it.

ELIAS CJ:

Do you have a response –

MR GODDARD QC:

I don't have –

ELIAS CJ:

– to an unarticulated question? No?

MR GODDARD QC:

I was just going to make the point that they are of different scope, and I don't need to spend any more time on that.

ELIAS CJ:

Sorry, Mr Goddard. There wasn't anything additional you wanted to say.

MR GODDARD QC:

No, there's nothing additional I need to add.

ELIAS CJ:

Thank you.

MR GODDARD QC:
I was anticipating a possible question.

Second point in my note. There was some suggestion that the focus of the Building Act is on the performance of building work rather than, for example, materials used, and my submission is that it is more accurate to say that the focus of the Building Acts is on construction of buildings to meet specified performance standards in the Code and a claim that this has not be achieved is a claim relating to building work whatever the suggested cause of that failure.

The next point I wanted to make was that the limitation argument made by Carter Holt in this case does not require the Court to say that any manufacturer of any product that happens to be used in building work, someone that makes nails that could be used for a host of other purposes which are held to contribute, is protected by the longstop limitation. The claim here depends on use of the cladding products in building work. If there was no building work – and this is Your Honour Justice O'Regan's question to my friend earlier – if there was no building work there'd be no claim. More importantly perhaps, in terms of the close linkage between this claim and building work, if there had been no marketing of this product for use in building work, as suitable for use in building work, as suitable for use as exterior cladding in building work, there would be no defects as identified. All the defects pleaded in schedule 2 of this claim are defects in this product if used as an exterior cladding, they wouldn't be defects if they were used an interior cladding or, for example, as a display board. Only because you intend to use the product in building work and because it's been marketed for that purpose that these things can be described as defects, they're teleological defects. And if there were no defects in the building work there would be no claim seeking to attribute responsibility for those defects. My learned friend went to section 14G and emphasised that it was introduced relatively recently, but obviously what that section does is illustrate the link between product manufacture and supply and building work, and the obvious point that defects in the product, defects in specification provided, about how to use the product when performing building work, may give rise to non-compliance of building work that uses the product, and a claim that this has occurred is a claim relating to building work.

One the issues that the Court explored with my learned friend was what the relevant act or omission would be if the act or omission referred to in the provision is an act or omission of the defendant and if that is the right approach then as I, then the

submission is that the relevant acts are the supply of the product for use in building work, that's what the complaint is, that this was supplied for use in building work. The relevant omission – and this drops most neatly out of the failure to warn claim but it's present in the main negligence claim, as the Court has seen – is failure to advise of, failure to warn about, limits on the manner in which the product can be used in carrying out building work if one wants to achieve code compliance. So there's an obvious omission right up to the moment that the product is used to say, "Don't use it for this, only use it with a cavity," or, "Don't use it as exterior cladding, it's not suitable," for example. So there's a clear claim in relation to omissions to warn about unsuitability for use in building work which is a claim relating to building work.

My learned friend in an exchange with the Court about whether the defendant's act or omission –

GLAZEBROOK J:
Can we just go back to that relevant (inaudible) why, because if goes through an intermediary how do you know when the relevant act is suppliers in relation to that particular building? Because, I mean, there might be a first-in-first-out, there might – who knows? Because it will be a supply by Carter Holt and Carter Holt will have sold it to Mitre 10 if, let's say.

MR GODDARD QC:
The way the claim is framed –

GLAZEBROOK J:
No, no, we're not talking about the way the claim is framed.

MR GODDARD QC:
Yes.

GLAZEBROOK J:
We're talking about any generic claim there might be in relation to building products. You say the act or omission is the relevant supply to Mitre 10, somebody –

MR GODDARD QC:
Yes, if it's the –

GLAZEBROOK J:

– might buy that a year later. I mean, I have no idea how long they keep this product, to be honest, but…

MR GODDARD QC:

And that would be a matter for, to be established by evidence, in the same way that if there's a complaint about a particular subcontractor's work during a long building project you'd have to –

GLAZEBROOK J:

No, no, but I understand that. But what it's, it's got to be in relation to the particular building, and if it's a generic supply of a whole pile of material to Mitre 10 which sometime later somebody comes along and purchases, in terms of the –

MR GODDARD QC:

Yes.

GLAZEBROOK J:

– wording of 393.

MR GODDARD QC:

Yes. If that's the right act or omission, if it's an act or omission of the defendant Your Honour's exactly right, it would have to be the last supplied by Carter Holt, and if it's the case, and it's speculation, I don't know, that sometimes these things are sold to the intermediary a material time beforehand then you –

GLAZEBROOK J:

I have no idea either –

MR GODDARD QC:

No.

GLAZEBROOK J:

– because it may be on –

MR GODDARD QC:

Yes, real time.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

And it seems inherently unlikely that any intermediary would want to have huge quantities of this –

GLAZEBROOK J:

Yes.

MR GODDARD QC:

– on hand and paid for. So Your Honour's identified a possible theoretical difficulty. But can I suggest that the reality is that there's going to be a matter of, you know, weeks or months at most, it's not going to be material in most cases.

GLAZEBROOK J:

It's really just as a matter of statutory interpretation I'm looking at, that's all.

MR GODDARD QC:

Yes.

GLAZEBROOK J:

In terms of the, whether logically they were thinking of that or whether logically they were thinking of something much more closely connected to building work which will be the submission of your friend.

MR GODDARD QC:

And in my submission the supply is going to be close enough that it's not a material difference. It's all happening within a timeframe for the building project in a matter of weeks or months here or there is not material for the operation of a policy of this kind. That argument obviously becomes even simpler to make in relation to the omissions complained about.

GLAZEBROOK J:

Yes, no I understand that.

MR GODDARD QC:

And also Your Honour related to that, the omissions to update the specifications, omissions to warn obviously.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

And Your Honour explored with me and my friend the possibility of a continuing breach by having the specification out there holding it out as suitable for this use and not correcting any inadequate instructions about sealing the underneath surface. I should of course emphasise that and my friend pointed out quite rightly that there is grain exposed at the bottom of the surface but of course the specifications require sealing and the case will all be about or one of the issues in the case will be about whether those instructions were adequate and were reasonably capable of being undertaken. So again intimately related that defect, that first defect about wicking to whether, when you use it as an exterior cladding, the instructions about how you use it are sufficient to achieve compliance with the Building Code or not, whether the building work will comply.

So coming onto my item 6, the Court explored with my learned friend whether the argument for the respondents is that the defendant must have themselves carried out building work and my friend, as I understood it, said no they didn't need to go that far, that what they said was that it had to be sufficiently related to building work and that's the sort of language we find in the cases in the High Court on this issue that are referred to in both parties' submissions. Well if that's the requirement, if that's how claims relating to building work should be understood and in my submission that's not the best reading of it, it's a paraphrase of the statutory language and we should also always be a little bit careful about paraphrases but if that's the right test, if that's a helpful paraphrase, then that requirement is satisfied in this case and I've explained why briefly in my note 6. What Carter Holt did, it's alleged to have done and I don't think it's been disputed, is that sit supplied and put into building work for the purpose of carrying out building work in a manner that would, if properly performed, achieve compliance with the Building Code. The alleged defects in the product, I said it's a defective product case, product defect, all depend on an intention that the product would be used to carry out building work and that it would be used as exterior cladding. None of the defects make sense apart from that. It's not like a defect in an

iPad where if it won't turn on it's no use for anything. It's a very specific complaint about a product that for a range of reasons it's not suitable for use in building work and if the product was not intended to be used in that way and was not in fact used to so there would be no claim. So this is a claim that is intimately linked to the product being a product for use in building work and not being adequate for that purpose. That's why it is – the acts or omissions are sufficiently related to building work. It's a failure to design and manufacture a product that will achieve code compliance when used in building work. It's very closely related to building work and that's why, even putting to one side the contribution issue, you will get anomalous and arbitrary outcomes of some people who contribute to defects in a building as constructed because their conduct is related to building work, can be sued after 10 years but others cannot. It doesn't matter in my submission whether the defendant's acts or omissions took place before, during or after the performance of the building work itself, if the claim is they're responsible for defects in the building as constructed.

So after think of a code compliance certificate. The building work has finished, Council comes along, Council grants a certificate. It's failed after all the building work was finished to identify defects and refuse a certificate. It's contributed to the fact that the building work is defective, it hasn't been remedied, it's been passed and it's liable and that's a claim relating to building work even though the relevant acts and omissions happen after all the building work has happened. Similarly, as long as the work is an essential input into the building work it doesn't matter whether it took place onsite or offsite. It doesn't matter whether it took place with a particular project in mind or generically. There's no sensible policy rationale for the difference in treatment contended for because my learned friend said that – I've been a fertile source of illustrations, I thought I'd provide one more really simple one, just to tease that out. Consider a vanity unit to be installed in a bathroom. You can go down to Placemakers or somewhere like that and you will see some vanity units that already have the sink in them and the taps on and all the pipes all in the back and all you need to do is put the unit into your bathroom and attach the pipes to the outlet in your wall and you're away.

You will also see, for the more enterprising person and even that first step is probably beyond me but this second bit is certainly beyond me, the vanity units just have a hole where the sink goes and holes where the taps would go and no pipes and you have to buy all those things separately and put them in. If a builder goes to their supplier and buys the unit with no sink in it, no taps on it, no tubes, and buys all those

bits separately, takes them all to the house they're building and puts it all together there and connects it up, that's obviously building work. No one I think would suggest otherwise. And if what they've done is select a type of tubing that's not actually suitable for hot water, so you've connected it to the hot tap but you've used the cold tubing, so it's going to fail quite quickly as it perishes with the hot water, a claim that you've used the wrong tubing and that that's caused leaks and damage to the bathroom, obviously falls within the longstop limitation period, it's claim relating to building work.

If the builder instead buys the built up vanity and that mistake has taken place in a factory somewhere, they've used the wrong tubing, exactly the same mistake but it's taken place in a factory, then in my submission you've got exactly the same conduct directed to exactly the same end, the policy issues are identical in all respects, it would be extraordinary if a claim against the manufacturer for having made exactly the same error in putting together that unit to be used in building work, was not covered by the longstop.

I have endeavoured genuinely to try to think of why one might make that distinction and there's no conceivable policy rationale that I can identify. It seems completely irrelevant where the plumber who picked the wrong pipe and attached it was sitting when they made that mistake, it's irrelevant whether, when they were doing that pipe they had a particular house in mind or they were just making lots of vanity units like that and making that mistake. The issue so far as the plaintiff is concerned obviously are identical. They've got the same problem and it's no more or less fair that their claim be barred after 10 years. From the perspective of the defendant, they've made the same mistake, contributed to the same loss. Why would Parliament treat them differently? It just makes no sense and in my submission whether one adopts the approach of saying that a claim that the pipe is unsuitable, that it's leaked, that it's damaged the bathroom, is just classified as a claim relating to building work because the desired outcome that the building work not leak, I think it's clause E1 that's internal moisture as opposed to E2, that's the external moisture. So it would be an E1 claim. If that claim, yes, that claim is a civil proceeding relating to building work or whether one adopts my friend's test of asking whether the acts or omissions of the defendant are sufficiently related to building work because they've created a product that can only be used to perform building work and it is defective when used in that way. Either way same result in my submission.

And that's important because that doesn't depend in any way on the contribution issue which the Court has noted in an exchange from my learned friend, obviously it would prefer to leave a result (inaudible) with me. But just focussing on that vanity unit, that in my submission is an essentially decisive illustration. I do say over the page on page 2 of my notes that the contribution position is important because Carter Holt says and will certainly argue at trial, if this goes to trial, that the damage that's alleged has been caused or contributed to by failures by building professionals. And the Court's, of course, right that if you can say, "Well, there is some damage that is only caused by Carter Holt," the question of contribution doesn't arise, but the point here is that's it's said that the defects have led to water ingress, mould and damage to other structural items. Obviously, the extent of that damage is going rather depend on whether you have put the things together nice and close or whether some builder has just whacked holes in and penetrations that should be there, left gaps that are inconsistent with the specification in a way that's careless, and indeed unsurprisingly that's accepted by the plaintiff respondents in their reply. If we just look quickly at volume 1 of the case on appeal, the reply is under tab 10, and if we go to…

ELIAS CJ:

Sorry, which bundle?

MR GODDARD QC:

Volume 1 of the case on appeal, Your Honour. So the Court's been taken to the statement of claim. The defence, as well as saying that a number of the allegations are misconceived, says if there's any problem with water ingress it's caused by failures by building professionals to follow the specifications and do their job properly, and the response to that in paragraph 19 of the reply, if we turn over to page 223 of the bundle, at paragraph (c), "In response to paragraph 19(c), they," ie, the respondent plaintiffs, "admit that, in many cases, water ingress and other defects in school buildings may have been contributed to by failures by building work professionals." So, of course, my friend is right to say that it's –

GLAZEBROOK J:

What about little (ii) though?

MR GODDARD QC:

That the defects complained of in the claim, namely the cladding sheet defects and cladding system defects, are caused by the acts or omissions of the defendant. Of course if the cladding sheets are defective that hasn't been caused by anyone else, and of course if the cladding systems are defective that hasn't been caused by anyone else, but of course contribution relates not to having committed the same wrong but having contributed to the same damage. That's what this Court has just dealt with in *Hotchin* and the damage that's pleaded includes the consequences of moisture ingress, mould, fungi, rotting, corrosion of steel framing, and that, as is acknowledged in (c)(i), but even if it wasn't acknowledged it would still that it was obviously a relevant argument, has been contributed to by failures by building work professionals. So there's no doubt but that there are live contribution issues in this proceeding because of contribution to the same damage. And what that means is that whether Justice Lang is right, in which case this is a profound unfairness, or whether His Honour was wrong, in which case this is going to open up, by a back door, extensive claims outside the 10-year period against people who are supposed to enjoy the benefit of the longstop because some people who cause the same damage, as identified by Justice Young in *Hotchin* at [201], can still be sued after the 10-year period. Of course, if no one sued in respect of that damage can be sued after 10 years you're not going to get that result.

Nine. My learned friend sought to distinguish between building methods and products and building work and said that this was a distinct concept. That's 10.15 of his submissions and he went to that earlier today. But, with respect, that can't be right. Building methods and products are encompassed in the broader concept of building work. They're a subset of building work. In carrying out building work, what do you use? Building methods and building products. They're overlapping concepts, not mutually exclusive.

My learned friend said that he couldn't see the relevance of section 91, that he didn't know why I'd inflicted on the Court a survey of the 1991 Act and I thought it might be helpful just to set that out in three steps.

First, and most obviously, in my submission, section 91 is the immediate precursor of section 393 of the current Act and we can understand what the current Act is intended to achieve by looking at what section 1 was doing in the context of that Act, especially as there are two good reasons, and this is two and three, to think that

section 393 should be at least as broad, in my submission it's exactly coextensive with, but it should be at least as broad as the old section 91. The first is, again, why did I take the Court to accreditation certificates? Because, among other things, they're still in use. There was a transitional provision, the Court will remember, which treated them as if they are product certificates. So after 2004 accreditation certificates that had been issued by the BIA were still in circulation and were still being relied on. And it seems odd to suggest that the BIA, which was always intended to be protected from claims of having issued such certificates negligently, lost that protection when section 91 was repealed and the new Act came into force. I absolutely agree with my learned friend that civil proceedings in tort or under the Fair Trading Act, because I know that, are not proceedings under Part 9 of the kind that were continued under the transitional provisions for the 2004 Act, we don't disagree on that. But that means precisely that if the BIA sued in respect of an accreditation certificate in proceedings brought this year in respect of reliance on an accreditation certificate that occurred in 2008, that you'd be applying the new Act, and it was always the policy, plainly, under the old Act, that there should be a longstop applicable to those, it seems odd to read identical language in subsection (2) of each section as suddenly having been narrowed merely because the date specification limb of old 91(4) has gone. And third and more generally, many, many civil claims were barred under the 1991 Act. Whenever building work had been carried out up to 1994, and there was lots of building work that had happened between 1991 and 1994, it was already time barred when the 2004 Act came into force. But of course 91's been repealed. If in 2005 someone sued in respect of that – so, well, suppose it was done in 1992, if they'd been sued in 2003 you lose, time bar. You're sued in 2005, transitional provisions don't apply because as my learned friend pointed out, A, they're not proceeding under Part 9 and, B, they weren't commenced before the Act was repealed. Sued in 2005, you're relying on the 2004 Act, it would be very off if those proceedings had effectively been revived because its scope was narrower. It's not, it's at least as broad, and that's why it's helpful to look at what Parliament understood it to extend to pre-2004.

ARNOLD J:

Would that have happened under the new Limitation Act, with the introduction of the 15-year longstop and the reasonable discovery and so on?

MR GODDARD QC:

Ah…

ARNOLD J:

Would that of, would any claims have been revived?

MR GODDARD QC:

No, Your Honour, no claim. The transitional provisions deal with that very carefully, no least by continuing the 1950 Act in relation to effectively acts or omissions that took place before the 2010 Act –

ARNOLD J:

I see, yes.

MR GODDARD QC:

– came into force. There were some very neat transitional provisions in the 2010 Act which included inserting some new provisions for a new longstop in the 1950 Act, then repealing the 1950 Act but providing that it continues to apply in respect of the acts or omissions before the repeal.

ARNOLD J:

I see, yes.

MR GODDARD QC:

My understanding is that it was Justice Blanchard of this Court that came up with the scheme for doing it, and very elegant it is too. Alas, no one sought similarly insightful advice when doing the transitional regime for the 2004 Act.

ARNOLD J:

Right.

MR GODDARD QC:

Actually that's the other point I should have made in relation to Your Honour's question. If you think about it, because all conduct that took place before 2010 is still subject to the 1950 Act, not the 2010 Act, it's slightly weird that in 393(1) we only refer to the 2010 Act, you know, it says the 2010 Act continues to apply to these things.

ARNOLD J:

Yes.

MR GODDARD QC:
Actually, the 1950 Act applies to everything that's going to happen for the next 10 years or so.

ARNOLD J:
Yes.

MR GODDARD QC:
What that now says can't have any relevance until 2020 or, no, sorry, 2016, when the sixth year starts to bite, yes.

Okay, so, unless the Court has any questions arising out of that on the limitation longstop point, that's all I propose to say about that.

Turn then to duty of care. And in a series of helpful exchange with my learned friend yesterday my learned friend confirmed that their case is that their negligence claim arose upon discovery through the pleaded survey – the Court will remember the Auckland survey and the national survey in the pleadings – that it arose upon discovery through the pleadings – so I suppose that should be "surveys", plural, in my 11.1 – of the alleged defects in the school buildings and that those resulted from the alleged defects in the cladding products. So there were surveys of weathertightness of schools and the finding was, yes, there are weathertightness problems in relation to schools, and one of the causes is the cladding work. My learned friend also said that the claim does not depend on there being damage to any other part of the buildings. That's why, even if there's nothing wrong with the building except that it has Shadowclad on it, they say they are entitled to recover the cost of removing it and re-cladding. And my learned friend said it doesn't depend on the complex structure theory in 2 and 3, they're obviously very closely related. But it necessarily follows that this is not a claim that comes within *Donoghue* as that decision contemplates recovery, "Only for personal injury or damage that has occurred," so personal injury, pause, "or damage that has occurred to other property." The claim for the cost of replacing a defective product, whether with one from the same supplier or somewhere else – that's a red herring obviously – or for preventive costs to render it safe, does not come within the scope of the *Donoghue* decision and its underlying rationale. I made that submission two days ago as a matter of logic, but there's also high authority to support it. One of the passages is of course the passage in *D & F Estates* to which my learned friend took the Court, and

there's just one sentence of Lord Bridge concurred in by the others, which I think makes that very clear: "If the hidden defect is discovered before any such damage is caused," and His Honour's referring to personal injury or actual damage to other property, "there is no longer any room for the application of the *Donoghue* principle." So Their Lordships at least shared the view that I am submitting this Court should adopt, which is that *Donoghue* runs out when the hidden defect is discovered and there is no longer going to be damage to a person or damage to other property. And Lord Oliver described a claim for replacement costs or preventive costs as, "An entirely new concept of the common law tort of negligence," after discussing *Donoghue* and what it reached –

WILLIAM YOUNG J:

But I mean this is really old ground. I happen to agree with you entirely, but I mean on my view, expressing that, was in a distinct minority in the *Spencer on Byron* case. Now it may be that *Spencer on Byron* stands only for the proposition that *Donoghue v Stevenson* applies where, in a case that's covered entirely by the Building Code –

MR GODDARD QC:

Yes, and that's –

WILLIAM YOUNG J:

– in which case you've got a good point.

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

Or it may be that it doesn't, in which case you're –

MR GODDARD QC:

Precluded by *Spencer on Byron*.

WILLIAM YOUNG J:

Yes, you're beating your arms against wind.

MR GODDARD QC:

Yes, those are the two possibilities. And in my submission option 1's the better one. Your Honour's reasoning in *Spencer on Byron* in my respectful submission –

WILLIAM YOUNG J:

Is impeccable.

MR GODDARD QC:

– is impeccable. No one can pack it. And this really – I can move past my paragraph 13 –

ELIAS CJ:

Well, what cases can you point to in which a defect may be discovered but cannot be cured because it's part, the defect is part of, of a structure like this? I mean, what sort of authority…

MR GODDARD QC:

My learned friend disowns any importance of it being part of a broader structure, except in terms of quantifying the loss caused.

ELIAS CJ:

No, but what's the answer to the question I'm putting to you?

MR GODDARD QC:

Yes. Essentially there are two lines of authority here and the question is which is more analogous to this type of case? And this, there's an example, and I think it's page 475 of *Murphy*, which teases this out nicely. Suppose that I buy this iPad –

GLAZEBROOK J:

Well, why don't we go to *Murphy*?

ELIAS CJ:

Let's don't go back to it. Let's not go back to *Murphy*.

GLAZEBROOK J:

Well, we've never been to *Murphy*.

ELIAS CJ:

I was more thinking more about *Rivtow*, actually.

MR GODDARD QC:

That's a failure to warn case so it's – I will come to that in just a moment. Can I do the base example first? I buy the iPad and it doesn't work. It won't switch on. It's not dangerous in any way. It just doesn't go. It's no use. It's very clear that I have no claim in tort against the manufacturer of this iPad. I have claims in contract against Noel Leeming or whoever I bought it from. If it was Dick Smith I might have more difficulty, but let's say, I remember with this one actually.

WILLIAM YOUNG J:

And maybe a manufacturer's warranty but –

MR GODDARD QC:

And of course there'll be, and there's the Consumer Guarantees Act, so I'm fine. I've got rights against Apple under the Consumer Guarantees Act. But it's absolutely clear there's no claim in tort.

Now suppose that the problem with the iPad is that the battery might catch fire, setting fire to the iPad and presumably me, my gown, your Court, if it happens spectacularly when I turn it on in order to go to *Murphy*. I can avoid – once I'm warned about that, if Apple issue a recall notice, big, you know, full page advertisement saying, "Do not turn on an iPad Pro. Bring them back," then what the English Courts have said is that I'm in exactly the same position as if it would never turn on in the first place. It's useless. It's a useless chattel. But now that I know of the defect and I'm not exposed to that risk any more, the cost of replacing it, or of repairing it, if that's possible, is exactly the same as the cost of replacing or repairing the one that wouldn't turn on. There's no difference.

Conversely, what has been said in relation to chattels is that if it does before I am warned burst into flames, destroying my gown, I have to buy a new one from Ede & Ravenscroft, I can recover the cost of the gown. What the New Zealand Courts have said in relation to buildings is that because of the risk to health and safety and to the broader economic interests protected by the building legislation, Your Honour, the Chief Justice, in particular made this point, that it was artificial to separate the economic interests protected by the Building Act from the underlying

health and safety interests, but all of the Court, I think, adopted that reasoning in *Sunset Terraces*, for example.

GLAZEBROOK J:

Well, what about *Hamlin*, because that isn't dependent on the Building Act, is it?

MR GODDARD QC:

Hamlin was dependent on the previous legislation.

GLAZEBROOK J:

Well, I understand that but – oh, well.

MR GODDARD QC:

Yes, and in –

GLAZEBROOK J:

We've been over this and we're just going over the same ground again, as Justice Young said, so I'm not sure there's much more that can be said about it so unless it's new, it's not really in reply.

MR GODDARD QC:

What I am –

ELIAS CJ:

I think I provoked that but anyway I think we are probably just flogging a dead horse.

MR GODDARD QC:

Yes, we are, I'm going to try to confine myself to material that responds to issues that arose in the course of my friend's submissions, issues that the Court was exploring with my learned friend and what I've –

ELIAS CJ:

Yes.

MR GODDARD QC:

– I've very much focused on those and if I've overshot or if I need to provide context to an answer, I apologise.

ELIAS CJ:

No, no, you were responding to –

MR GODDARD QC:

But I –

ELIAS CJ:

- the comments.

MR GODDARD QC:

Yes, that's right.

ELIAS CJ:

Yes, that's fine.

MR GODDARD QC:

And again in relation to that novelty point, I've said it before so I won't say it again, but in paragraph 14 despite the suggestion that this is orthodox *Donoghue* territory the decisions referred to by my learned friend about contraceptive pills, about breast implants, other things, are all cases of a product causing injury to a person or to some other property. No counsel in this case has identified in their submissions any case in which the cost of replacing a defective product or of preventive expenditure rendering it safe has been recovered in tort in any of those countries, which does rather suggest that in terms of *Murphy* the analogy with the useless iPad is the one that everyone has worked on to date.

ARNOLD J:

I think the minority in *Rivtow* were inclined to think that you could get…

MR GODDARD QC:

So *Rivtow* was very much a failure to warn case and it was the negligent delay in warning about the defect. I don't think it was suggested that there was negligence that had caused the damage in the first place.

WILLIAM YOUNG J:

I think Justice Arnold is right, the minority would've given damages on both heads.

MR GODDARD QC:

They would but even though – that was just to respond to the late warning. They would've said to remove the risk you had to fix it. So Your Honour is exactly right, the Court was unanimous that there was liability, you know, divided on what was recoverable with the majority saying it was only the delay costs.

GLAZEBROOK J:

What's the rationale for having a distinction in New Zealand? You can understand that they have that in Britain because they don't allow *Hamlin* type claims but what's the rationale in New Zealand for having a distinction between products and buildings when your example of a product could – your dangerous product could be just as difficult for health and safety as a building. So why wouldn't you have it in a car which could kill a whole lot of people, when you have it for a building? What's the policy rationale in New Zealand for that distinction?

MR GODDARD QC:

And that's item 17 of my note which I sought to address because I was sure that Your Honour had this concern and it is that the base rule, the base common law rule is there is no liability.

GLAZEBROOK J:

But there are a lot of statutory foundations for product liability. There's a whole lot of stuff about medicines and all of that sort of stuff that you – and I'm sure there are product liability things in relation to prams.

MR GODDARD QC:

And so of course when one looks at a product that is regulated in that way, one of the questions is whether the statutory framework is intended to protect interests that go beyond the interest of people who might be affected in their health and safety. So there's an underlying common law rule Your Honour of course.

GLAZEBROOK J:

Sorry I don't understand that.

MR GODDARD QC:

Yes so let me take that in bites.

GLAZEBROOK J:

So if we had a pram – if we had a code in relation to prams, then you could get a latent defect in a pram or you couldn't?

MR GODDARD QC:

I don't think it's helpful to ask whether you can get a defect. The question is whether the particular types of damage are recoverable. So let me start with –

WILLIAM YOUNG J:

Injury to a child in a pram would be recoverable –

GLAZEBROOK J:

Yes well nobody says this but what you say is the building, because it's a health and safety issue you can get a recovery for a latent defect in a building without damage to other property?

MR GODDARD QC:

No there's an additional step in Your Honour which is –

GLAZEBROOK J:

All right well you tell me what it is.

MR GODDARD QC:

It's the point that's perhaps identified best in my 18.3. The statutory obligations under the building legislation both post-1991 but also pre-1991 and this was strongly emphasised by the New Zealand Courts for example in cases like *Porirua City Council v Stieller* [1986] 1 NZLR 84 (CA), it was said that the purpose of the statutory regime was to protect not only the health and safety of building users but also the economic interest of the building owner in having a sound and durable building. So in relation to any statutory scheme what you ask is what are the interests to be protected here and we've given different answers in the New Zealand Courts to that question in relation to different assets. So in relation to houses, we've said the interests to be protected are both health and safety and the economic interest of the owner. In relation to ships the Courts have said the opposite. *Attorney-General v Carter*, there the negligence claim in relation to certification of a ship, it had been relied on, it was said by the purchaser and it was wrong and negligently given. That was struck-out because after carefully examining the purpose

of the statutory regime the Court of Appeal concluded that the purpose of the statutory regime was only to protect health and safety and positively not to protect economic interests and that therefore the normal principle that you couldn't, you know, piggyback one form of loss that you weren't intended to be protected from on another that you were and another suffered by someone else meant you couldn't recover.

GLAZEBROOK J:
So if you had a claim that was related to health and safety under the Shipping Act or under the prams, ie your iPad that's going to catch fire, is that different or you have to also want to protect economic interest?

MR GODDARD QC:
If it has caught fire then obviously you've got a claim.

GLAZEBROOK J:
No, no we're not talking about that, we're talking about latent defect.

MR GODDARD QC:
But if it hasn't caught fire then you can only recover the cost of replacing it or remedying it.

GLAZEBROOK J:
Even in the – even if there's a statutory framework that looks after health and safety?

MR GODDARD QC:
Health and safety, yes.

GLAZEBROOK J:
All right so you have to have a statutory framework that looks after health and safety and the economic interests in order to be able to recover, okay well fine.

MR GODDARD QC:
Yes to make a distinction from the baseline common law position.

GLAZEBROOK J:
And that you draw out of *Attorney-General v Carter* and *Sunset* et cetera?

MR GODDARD QC:

Yes I say that –

GLAZEBROOK J:

Anything else, any other case?

MR GODDARD QC:

I say that the common law in New Zealand in relation to chattels is the same as the common law in England described the House of Lords in *D & F Estates* and in *Murphy* and that New Zealand law has departed from it.

GLAZEBROOK J:

And so where are the New Zealand cases that say that? Is it just *Attorney-General Carter* and the *Sunset* Line, *Hamlin* et cetera?

MR GODDARD QC:

It's – the submission is based as much on the absence of any case saying that our law is broader except in those specific contexts rather than anyone positively saying it's the same but I think that's been the working assumption. It was the working assumption in the early building cases for example which were founded on *Dutton* which drew some of these distinctions.

So the law developed in the same way and then when the English Courts chose to pull back in relation to buildings, New Zealand said we're not going to do that in *Hamlin* and in the joint judgment of Justice Chambers and Justice McGrath in *Spencer on Byron*, the reasons given by the *Hamlin* Court were carefully analysed and effectively there were two, defensible reasoning, we're entitled to chose to go a different way in relation to buildings and local conditions. Now obviously local conditions doesn't get you to a different place on chattels but defensible reasoning might, depending what the nature of that reasoning was and whether as a matter of logic it applies to chattels in the same way and for all the reasons I've gone through and I'm not going to go through again, my submission is that it doesn't, that the line of analysis that Justice Young adopted in *Spencer on Byron* is good New Zealand law in relation to chattels and that the reasons for going down a different path in relation to people who perform building work and Councils don't bite in relation to other chattels.

And that links into my 18 of my note. The statutory framework matters for the three reasons in my paragraph 18. The statutory obligations that apply to a person performing building work or a Council do three things, they provide an answer to the question, why should I have this liability which I have not agreed to assume and as this Court said in *Spencer on Byron* well you've already got, you've actually already got this obligation. Second, the statutory obligations determine the content of the duty owed, the indeterminacy point which is a strong argument, the Courts have acknowledged, outside the statutory context isn't present and third, and importantly, coming back to where I've just been in answer to questions from Your Honour Justice Glazebrook, the statutory obligations in relation to people who perform building work and Councils are, the Courts have said, broad enough to extend to the economic consequences of non-compliance with the Building Code and that's also what the New Zealand Courts said in relation to the previous system of building regulation and that's why in a case like *Stieller,* Your Honour, where the defects were essentially aesthetic defects in some external weatherboards, there was no health and safety risk, that was common ground. Nonetheless it was held that there was an action in tort to recover the cost of making good the defect explicitly because the interests protected under the then applicable legislative regime extended to the protection of economic interests of house owners and their house. The argument that was presented and rejected in *Sunset Terraces* was that that had changed in 1991 and that was rejected.

My learned friend, and this is 21 – oh, no, I should, 19, I've already said it – my friend made something of the suggestion that the remedial work would not be undertaken with Shadowclad, it's not my understanding that there is any issue at all about the performance of Shadowclad with a cavity, so that's a red herring of course, because it doesn't matter what it's going to be repaired with, what it's going to be replaced with, the point remains that this is a claim for replacement repair of the allegedly defective product like the, "My iPad doesn't go, can I have a new one, please," claim.

It was suggested by my friend that what was said by me effectively in the Court of Appeal was that Carter Holt would not provide any warranties or guarantees, period, blank it. That's certainly not my recollection of what I said or what I had instructions to say, which was the more nuanced point that there were no warranties or guarantees that would be provided unless they were explicitly agreed in a particular case, that it would always be necessary to discuss the extent and nature of any recourse, and that depending on what was sought an additional payment might

be required. So certainly it's not the case that the assurances claimed in this case would have been provided for free if anyone had just asked nicely, I accept that at once, but that some assurances could have been provided on negotiated terms in exchange for a payment is an issue that I certainly am not in a position to speculate about and that nothing to the best of my recollection has ever been said about, certainly no evidence on it. I know they said that but I think it's a misunderstanding.

My learned friend also picked up an exchange in the Court of Appeal, said, "Oh, are you saying that if you want a product that doesn't leak you're going to have to pay more for that?" Again, that is not a fair characterisation of the submission which was made, which is that a right of recourse, a right of direct recourse, would need to be negotiated, and depending on the nature, extent and duration of that right an additional payment might be sought.

My learned friend referred to *Henderson v Merrett Syndicates*. The same point that I made about the building legislation can be made in relation to that case, and in relation to cases such as *Gartside v Sheffield* [1983] NZLR 37 (CA) in New Zealand, *White v Jones* [1995] 2 AC 207 (HL) in England, which is that the Courts were very careful to say that we're not imposing a duty to the third party that goes beyond the duty to the immediate contracting party, there's no additional substantive scope, we're just adding an obligee to an existing obligation, but you're not being asked to do anything new, and that's not the case here.

And that comes back to the point that the Court explored with me yesterday about concurrent duties in tort and contract. I made the submission that a concurrent duty in tort must be consistent with contractual duties and must not impose a more extensive substantive obligation in relation to a matter governed by the contract. That, in my submission, is perfectly orthodox New Zealand law, I've provided my reference to and copies of Burrows, Finn and Todd, where that's discussed, the leading Court of Appeal decision to that effect, *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782 (CA), and a list of other authorities that make the same point but really the multiplication of them I don't think takes us much further. But he talked about *Rivtow*, this, touching on the failure to warn claim, my learned friend said, "Well, there can be a claim for a failure to warn after a sale has taken place." Of course there can, product recalls where you fail to recall and the delay causes distinct loss is the prime example of that, and that was where the majority ended up in *Rivtow,* for example, it was distinct loss resulting from the day. Or of course if the iPad might burst into

flames the manufacturer knows that but fails to tell me, and it does burst into flames, then I have a claim for that. But there is no loss claimed in this case that relates to the time period after supply and installation through to when the defects are said to have been discovered. So the failure to warn cause of action doesn't, in my submission, add anything, and is misconceived because it pleads that the duty arises if you know or ought to know of the defect, whereas to the extent that there can be a separate failure to warn cause of action it must be based on actual knowledge, not a duty to know. But I also accept unhesitatingly what the Court has said, that if it doesn't add very much then there's, you know, really probably neither here nor there in terms of whether it continues if the principle tort, cause of action, continues.

Negligent misstatement. We're in a three-party scenario on the plaintiffs' theory explained in their submissions and developed by my learned friend, Mr Flanagan, of the reliance by architects or builders or other industry participants, and that three-party scenario is helpfully discussed in *Williams v Natural Life Health Foods* [1998] 1 WLR 830 (HL), I included some quotes from that and references to it in my written submissions, I won't go back to those. But the submission I made in relation to that was not that there's never been a case where the statement has been passed on to the plaintiff by someone else. Of course that's wrong, and *Hedley Byrne*, the foundation case in this area, illustrates that. The submission I made is what I've set out in my 24.1, that there's no case where a plaintiff has succeeded in a negligent misstatement claim against a defendant where the reliance was not by the plaintiff but by someone else.

WILLIAM YOUNG J:

But why isn't it by the plaintiff on the basis that I put to Mr Flanagan? In the end the Ministry used Shadowclad for these buildings. In doing so it must have been of the view or relied on the views others had reached for it that it would meet the Building Code. You've got Carter Holt going to town and saying, "Yes, this does really meet the Building Code, it's just great." What's the problem there with that being a claim for negligent misrepresentation? I mean, it might be hard to put your finger on the precise link, but there must be a link, it's to be inferred.

MR GODDARD QC:

Yes, so there are two reasons. The first is that there is still a proximity issue, duty of care issue, in relation to the statement, not just a causation issue in my submission, Your Honour, because –

WILLIAM YOUNG J:

But the statement is being made to those who are interested in acquiring –

MR GODDARD QC:

Yes.

WILLIAM YOUNG J:

– product of this kind for building.

MR GODDARD QC:

And if, for example, the builder relies on that and in turn recommends to the plaintiff that they build using the product, then the plaintiff has recourse against the builder for that and the builder –

WILLIAM YOUNG J:

But if it's a dud product and the builder's broke, what would be wrong with looking at it in terms of a misrepresentation as to quality of goods. But the representation's absolutely fundamental, I mean, and it's very explicit –

MR GODDARD QC:

But if –

WILLIAM YOUNG J:

– so, and it's made for a purpose.

MR GODDARD QC:

Suppose there had been no pre-contractual representation at all, merely a warranty in a contract by which Carter Holt supplied the product? So suppose it was a product that might or might not have been suitable for a particular use and the builder came to Carter Holt or some other manufacturer and said, "Will you warrant that this is suitable for that use?" and it was, a term was included in the contract. It wouldn't be the case that the builder's customer –

WILLIAM YOUNG J:

Because I wouldn't treat that as a representation –

ELIAS CJ:

No.

WILLIAM YOUNG J:

– and giving liability, arise to liability under the Fair Trading Act as well as in contract. But I mean that's me.

MR GODDARD QC:

And under the Fair Trading Act that might work. But what we're talking about is tort here, and the orthodox response to that situation would be to say that the term, the warranty that it's suitable for a particular use, can be relied on by the ultimate purchaser if and only if they were a person who was intended to benefit from it but under the Contracts (Privity) Act 1982 –

GLAZEBROOK J:

I'm sorry –

MR GODDARD QC:

I'm sorry.

GLAZEBROOK J:

– you sort of started to really go fast and I lost that first part of the sentence.

MR GODDARD QC:

I'm sorry. I don't think anyone is more anxious for my reply to conclude than –

GLAZEBROOK J:

No, no, I can understand why you're rushing.

MR GODDARD QC:

Well, no, Your Honour and I may be in a contest for that, but I'll try to slow down and do the last bit in a measured way.

So, you've got a situation where a product supplier is approached by a builder and asked whether their product is –

GLAZEBROOK J:

Oh, no, no, I got that. It was just –

MR GODDARD QC:

There's a warranty in that first contract, yes.

GLAZEBROOK J:

– the very last sentence I didn't get.

MR GODDARD QC:

There's a warranty in that first contract, and then what happens is the person here, the builder, contracts to build the building using that product. In relation to the ability to sue on that warranty, the orthodox enquiry would be was it one to which the Contracts (Privity) Act applies, in other words was it made for the benefit of that person, and that, in my submission, is the right enquiry, and to cut across it in tort is effectively to render the Contracts (Privity) Act redundant in relation to warranties.

WILLIAM YOUNG J:

If you treat the Fair Trading Act as torts you can anyway.

MR GODDARD QC:

But to – if that Fair Trading Act does that then there's no need for the common law to duplicate it and so we're taken back to the situation –

WILLIAM YOUNG J:

But we've got incoherence. I mean, we've got a terribly incoherent system now.

MR GODDARD QC:

We do but the question is whether the response to a measure of incoherence is to go for broke and celebrate incoherence and do it whenever we can.

GLAZEBROOK J:

Of course Justice Young would say that's what *Spencer on Byron* did, go for broke, but –

MR GODDARD QC:

And –

ELIAS CJ:

No, I think it could go further. I mean, one wonders why New Zealand, having taken this line, why, why are we stopping with buildings? Why don't the principles apply more widely?

GLAZEBROOK J:

Well, that was my question, and I wouldn't have had the same question if it was merely related to *Hamlin* because – and I probably have made no secret of the fact that I, especially as *Rolls-Royce* would have had that distinction based on vulnerability between big commercial parties and otherwise, and that would be a real exception that you can understand because it is very much related to consumer, consumer New Zealand situation, that as soon as you widen it to commercial it does seem difficult as the policy reads and I understand and I take your point that you've got there.

MR GODDARD QC:

And my submission is that Your Honour was absolutely right in adopting that approach, that what this Court has said is that that approach gives way to the specific policy concerns of the building legislation, but in my submission –

GLAZEBROOK J:

All right, I understand.

MR GODDARD QC:

– Your Honour's approach is good except where there's a statutory framework designed to protect economic interests as well as health and safety.

GLAZEBROOK J:

And I've certainly understood that submission and so that is the best. I don't think that's the best you can do in a pejorative sense but that's your answer.

MR GODDARD QC:

That is the argument, yes.

GLAZEBROOK J:

Yes.

MR GODDARD QC:

And the logic of it, for the reasons explained by Your Honour in *Rolls-Royce*, Justice Young in *Spencer on Byron*, is, to pick up Justice Young's term for it, impeccable and there's no reason, no statutory reason, to be driven to a different conclusion in the space we're in here.

And then coming lastly, well, then we get to the other issue with, that Your Honour, Justice Young, touched on in question to me a few minutes ago, which is you've still got to have some reliance by someone somewhere. 24.2, there's no pleading here that any identified person was an agent of the plaintiffs. Of course my friend, Mr Flanagan's, right to say that the pleading that was relied on by the plaintiffs or an agent of the plaintiffs is found in the particulars, but who is this mystery agent? If –

WILLIAM YOUNG J:

But it may be a different person in relation to each of the 5000 buildings.

MR GODDARD QC:

And – 890 buildings.

WILLIAM YOUNG J:

I mean, can't it just be an inferred –

MR GODDARD QC:

And it should be pleaded.

WILLIAM YOUNG J:

Well, but I mean it's going to be a pleading that's going to look like, you know, the *Encyclopaedia Britannica*.

MR GODDARD QC:

But if one wants to bring a single claim in relation to large numbers of buildings –

WILLIAM YOUNG J:

Yes. But, sorry, but I mean that's a pleading point. In the end isn't it apparent that there must have been reliance? Isn't it, sorry, I'll put it, isn't it apparent that it is more likely than not that the assertions that Carter Holt made as to the qualities of its

product were relied on in the decision making which led this product being used on these buildings?

MR GODDARD QC:
In the context of negligent misstatement claim Carter Holt is entitled to know who it is who is said to have relied and to test whether in fact they did so.

WILLIAM YOUNG J:
But I see it as particulars, just a particulars issue.

GLAZEBROOK J:
And you'll be able to do that at trial.

MR GODDARD QC:
Well, no, the plaintiffs are saying that they don't need to plead that and they don't need to prove it. So they're saying they're not going to go there. They're not going to call someone for each building –

GLAZEBROOK J:
Actually, I can –

MR GODDARD QC:
– to say they relied.

GLAZEBROOK J:
Well, I didn't think they were saying that actually. I just understood that they said they had pleaded it. They'd pleaded they were agents and they actually recognised they'd have to show at trial that they were agents.

MR GODDARD QC:
That's not my understanding of the way the case is being presented.

GLAZEBROOK J:
Well, if they don't, if they need to and they don't, well, they'll fail at trial but…

MR GODDARD QC:

But if they need to then they have to plead it and if they don't they haven't pleaded an essential step in the claim and they have to amend –

GLAZEBROOK J:

Well, so they have to identify each particular agent. Is the pleading point…

MR GODDARD QC:

… they haven't pleaded an essential in the claim and they have to amend.

GLAZEBROOK J:

Well so they have to identify each particular agent – is the pleading point that they would have to identify each particular agent in relation to each of the however many buildings there are.

MR GODDARD QC:

Eight hundred and ninety buildings, yes. So for each building –

GLAZEBROOK J:

All right so of each of the 890 buildings they would have to identify and plead a specific agent, is that –

MR GODDARD QC:

And what representation that person relied on. So again it's the point made in *Boyd Knight,* some sort of general reliance on it being out there which must mean it's okay is not good enough, you have to be able to show reliance by a particular person on particular statements and because that's an essential element of the claim it must be pleaded and that was the Court of Appeal's point, in my submission the Court was absolutely right to say this is an essential element of a negligent misstatement claim, it's absent and therefore it must be struck out and I have no problem with the Court saying have a window to particularise this, if you can particularise it, it won't be struck out but, you know, that's an alternative that the Court can go down because it's always been the case, emphasised for example by Justice Tipping in *Marshall Futures Ltd (in liq) v Marshall* [1992] 1 NZLR 316 (HC), that if a pleading is capable of effective repair it should be permitted to be repaired, it's only if it's a total right-off that you strike it out. So by all means have an opportunity to repair the defective pleading but if it can't be done, if there's still an essential gap, if at the end of the day

the car still doesn't have wheels, then there's an essential part missing and it's not a useful car, it's not a viable claim.

25, the last point in my reply notes. This is the other reason that the Court of Appeal gave for striking it out apart from the absence of any pleading of sufficient reliance. It's, and again in my submission the Court was right to do so, to say that representations made to the construction market, the very non-particular particulars to which my learned friend Mr Flanagan took the Court, as lacking in necessary specificity as representations to for example an investigation market in *Boyd* and *Caparo*. When you publish financial statements you're not addressing them to any who might be interested in investing and a statement that was made to anyone who might be interested in investing wouldn't found a negligent misstatement claim because –

WILLIAM YOUNG J:
It's actually, I mean although I'm reasonably sympathetic to aspect of your argument I find this one distinctly unattractive. I mean it's a big company, it puts out technical data and now it's saying that it has no responsibility in relation to the accuracy of that data.

MR GODDARD QC:
No what it's saying is that if you want it to accept legal responsibility for that information in a contractual –

WILLIAM YOUNG J:
But it's still wanting people to rely on it.

MR GODDARD QC:
In a contractual framework, then you should come and negotiate with us the metes and bounds of that responsibility. That's not an unreasonable position to take and it's impossible for someone like Carter Holt who is not dealing with the end user to negotiate limitations with everyone who uses the product, they can't do that. They can only say we will govern our responsibility by saying we don't accept any unless you approach us and tell us what assurances you want to provide and then we'll have a negotiation about that.

WILLIAM YOUNG J:

Yes but I mean it's not puffery, it's not this is a really good product and builders say it's just fantastic, it's this will meet the requirements of clause E of the Building Code, this will meet the 15 year durability required of X, it's really specific.

MR GODDARD QC:

And certainly there are obligations that are accepted to the immediate contracting party who will in turn accept obligations to their principal but if the principal wants a direct right of recourse in relation to those assurances, all they have to do is approach Carter Holt through the head contractor, in the same way that roofing suppliers are approached and negotiate the extent of that, otherwise we end up in a strange space where for example for the windows and doors supplier in the Orewa Primary School case, there was an express request for a two year, I think it was, warranty on pages 85 and 86. So the head contractor will go out to the aluminium doors people and say we want a two year warranty and that warranty will say well sign up for two years, we're not liable beyond that and here's the maximum amount we're liable for, dah de dah de dah. They end up better off than a supplier who was not approached and didn't have the opportunity to deal direct with the principal and set a two year limit on their exposure and set financial limits. So one ends up with an absolutely practically unmanageable situation in which indirect suppliers cannot manage their liability unless the principal, the ultimate owner chooses to approach them to embark on that negotiation. The only way to avoid that situation which in my submission was fairly described by the High Court in Australia, two of the Judges in it, as resulting in incoherence in the law, is to say there's no commitment across the chain unless it's sought and given.

GLAZEBROOK J:

Well you could say that in the advertising material couldn't you? Because if you make it clear it shouldn't be relied on then you're home and hosed in terms of *Hedley Byrne*, sorry your client. You say we say this meets the specifications but you're not allowed to rely on this unless you come to us for a specific warranty to that effect.

MR GODDARD QC:

And that's what the standard terms on which it was supplied say. It's exactly what they say, "We accept no responsibility beyond what we expressly agreed to."

GLAZEBROOK J:
Well you haven't said that have you?

MR GODDARD QC:
Yes I have, they're in my written submissions and the Court said it had read them and that's why I didn't go through every paragraph but they're attached to Ms Newfield's affidavit and that's exactly what the terms say. So if I just give Your Honour the paragraph reference just for convenience.

GLAZEBROOK J:
Well I hadn't understood you had said there was an explicit *Hedley Byrne*, you're not allowed to rely on any.

MR GODDARD QC:
I do but of course I don't say that it will have necessarily been seen by the plaintiffs because you're dealing just with your immediate –

GLAZEBROOK J:
All right, okay, okay, no I understand now.

MR GODDARD QC:
So that's the point I was making but if it's not possible to say there's nothing, no responsibility except what I assume contractually to more distant parties, there is no way that that extent of responsibility can be effectively managed. There are two ways of approaching this in terms of big picture legal design, in terms of policy, one is to say there are no obligations across the contractual chain in a situation like this unless the person who wants a direct right of recourse approaches the person and bargains for it and then whenever it's desired it can contracted for and its scope can be outlined. The alternative approach is to say there will be liability, what's contended for here unless it's expressly excluded, which is what my friends say but how is it to be expressly excluded by someone who does not know who ultimately is using their product, who has no ability to identify and go out and deal with them. So there are two paths we can go down, one works practically, the other one doesn't and it's not unreasonably, it's perfectly sensible and consistent with contract policy, to use Justice Richardson's language in *South Pacific* to say we will not impose obligations unless they are sought and agreed. Sorry that got quite fast again.

Unless the Court has any questions, what I've just covered is what's effectively in my 25.2, that a reasonable person in the construction market would expect the product to be supplied pursuant to a contract and would expect that contract to govern the nature, extent and duration of any responsibility assumed for the accuracy of information supplied. In other words they would expect that there would limits, they wouldn't just assume that legal responsibility was being assumed to them based on silence. Unless the Court has any questions, those are my reply submissions.

ELIAS CJ:

Thank you, yes. Well thank you Mr Goddard, thank you counsel for your help. We will reserve our decision.

COURT ADJOURNS: 3.33 PM