IN THE SUPREME COURT OF NEW ZEALAND

SC 93/2015
[2016] NZSC 95

BETWEEN	CARTER HOLT HARVEY LIMITED 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 and 15 April 2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	D J Goddard QC, I M Gault and J Q Wilson for Appellant J A Farmer QC, N F Flanagan, K C Chang and B J Thompson for Respondents
Judgment:	29 July 2016

JUDGMENT OF THE COURT

A **The appellant's appeal is dismissed.**

B **The respondents' cross-appeal is allowed.**

C **The order striking out the negligent misstatement cause of action is quashed.**

D **The appellant must pay to the respondents (collectively) costs of $45,000 and reasonable disbursements, to be fixed if necessary by the Registrar.**

REASONS
(Given by O'Regan J)

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The respondents' claims

[1] The appellant, Carter Holt Harvey Limited (CHH), manufactures cladding sheets and cladding systems that have been installed in various schools throughout New Zealand owned or administered by one or more of the respondents. The cladding sheet product is known as "Shadowclad". The respondents say that a large

number of school buildings have been affected by weathertightness issues and allege that these problems have arisen because the cladding sheets and cladding systems supplied by CHH are defective.[1]

[2] The respondents commenced proceedings against CHH.[2] There are five causes of action against CHH:

(a) A claim in negligence in relation to the design, manufacture and/or supplying of defective cladding sheets and cladding systems.

(b) Breach of the guarantees in ss 6, 9 and 13 of the Consumer Guarantees Act 1993.

(c) Negligent misstatement in promotional material relating to the cladding sheets and cladding systems.

(d) Negligent failure to warn about the risk characteristics of the cladding sheets and cladding systems.

(e) Breach of s 9 of the Fair Trading Act 1986 by the provision of misleading or deceptive information about the nature, characteristics and suitability of the cladding sheets and cladding systems.

[3] CHH applied to the High Court for an order striking out the causes of action described in (a)–(d) of [2] above. It did not seek to strike out the Fair Trading Act cause of action. The case came before Asher J. He dismissed the application to strike out the claims and ruled that all claims should go to trial.[3] In doing so, he

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1 References to "cladding system" encompass the overall system for cladding a building as promoted by CHH. Cladding systems are defined in the statement of claim as including cladding sheets designed to be installed with appropriate accessories and jointed with appropriate jointing systems and, in some cases, finished with appropriate paint or texture coatings, together with specifications or technical literature describing the features of the cladding system and the installation process.

2 The proceedings initially named four defendants, but the other three have reached a settlement with the respondents and are no longer involved in the proceedings.

3 *Minister of Education v Carter Holt Harvey Ltd* [2014] NZHC 681 [*Carter Holt* (HC)].

concluded that the "long stop" limitation provision in s 393 of the Building Act 2004 (the 2004 Act) did not apply in relation to the respondents' claims.[4]

[4] CHH appealed to the Court of Appeal. The appeal failed, except in relation to the negligent misstatement action which was struck out by the Court of Appeal.[5] The Court of Appeal also found that s 393 of the 2004 Act did not apply to the respondents' claims.[6]

Grounds of appeal

[5] CHH now appeals, with leave, to this Court against the refusal by the Court of Appeal to strike out the actions in negligence and negligent failure to warn, while the respondents cross-appeal in relation to the Court of Appeal's decision to strike out the negligent misstatement claim. This Court gave leave to appeal and cross-appeal. The approved grounds were whether the Court of Appeal was correct to conclude that:[7]

(a) the claims in negligence are arguable;

(b) the claims for negligent misstatement are not arguable; and

(c) s 393 of the 2004 Act does not apply to the respondents' claims.

[6] CHH did not seek leave to appeal against the decision of the Court of Appeal refusing to strike out the cause of action based on the Consumer Guarantees Act.

Pleaded defects

[7] The basis of the respondents' claim is that the cladding sheets and cladding systems manufactured, promoted and supplied by CHH contain inherent defects which cause damage to the buildings on which the cladding sheets are installed. The alleged defects include:

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4 At [149].

5 *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106 (Randerson, Stevens and Cooper JJ) [*Carter Holt* (CA)].

6 At [163]–[175].

7 *Carter Holt Harvey Ltd v Minister of Education* [2015] NZSC 182.

(a) The preservative treatment is below the level required by the relevant standard and insufficient to prevent fungal rot.

(b) The cladding sheets are inherently prone to absorbing significant amounts of moisture. In part this is because the end grains are exposed on all edges of the sheets. It is alleged that the absorbed moisture then gets transferred to the adjacent timber framing and building papers. This occurs because the cladding sheets have, in almost all cases to which the claim relates, been attached directly to the framing, rather than with the allowance of a cavity to allow moisture absorbed into the product to escape.[8]

(c) Aspects of the cladding system allow water to penetrate behind the cladding sheets.

[8] It is alleged that not only do the cladding sheets cause damage to buildings, but they also provide an environment in which fungal spores can grow, which can be harmful to human health when inhaled.

Pleaded loss

[9] The losses claimed by the respondents include:

(a) The cost of repairing and replacing the cladding sheets. This is said to be necessary in order to prevent the defects in the cladding sheets leading to damage to the school buildings and/or posing a health risk.

(b) The cost of repairing and replacing structural and other elements that have been damaged through the transference of moisture from the cladding sheets.

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[8] Although in most cases the Shadowclad cladding was applied directly to the structure without any cavity, the respondents say that even with a cavity the product is defective so the fact that the claim relates only to buildings where there is no cavity is simply because these are the buildings where the alleged defects create the most acute problems.

(c) Damages associated with preventing interference with the health and safety of children and staff at the affected schools.

(d) The diminution in value of school buildings (claimed as alternatives to the claimed losses in (a), (b) and (c) above).

Strike-out principles

[10] There was no dispute as to the law applicable to strike-out applications, which is conveniently summarised in *Attorney-General v Prince and Gardner*.[9] There have been a number of expressions in judgments of this Court of the need for caution about striking out negligence claims in circumstances where a novel duty of care is alleged, particularly where the facts alleged in the statement of claim cover a range of different factual circumstances.[10] CHH's arguments are based on the premise that a duty of care would be novel in the present case, so those words of caution clearly apply.

[11] Many of CHH's arguments are variations on arguments made (and rejected) in the earlier cases before this Court where this Court ruled that striking out the claims would be inappropriate and gave the warnings mentioned above. That suggests that, contrary to CHH's submissions, the duty of care said to arise in the present case is not novel, given the decisions of this Court in negligence cases decided over the last 10 years.[11] Rather, the case relates to the limits in the duty recognised by this Court in *Spencer on Byron*. That requires a close analysis of the facts, which makes the case unsuitable for resolution in an application to strike out.

[12] The need for caution in relation to strike out applications does not arise in relation to the proposed limitation defence based on s 393 of the 2004 Act because it is a question of law that can be resolved at the strike-out stage.

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9 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267–268.

10 See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [35] and [53] per Elias CJ and Anderson J; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [146] per Blanchard, McGrath and William Young JJ; and *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [4]–[5] per Elias CJ.

11 The cases mentioned above at n 10, as well as *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

Are the respondents' claims in negligence arguable?

[13] The Court of Appeal found that it was arguable that CHH owed a duty of care to the respondents and also found there was an arguable duty to warn. It refused to strike out the claims for alleged breaches of those duties. We will deal with the duty of care issue first. The duty to warn issue can then be dealt with briefly.

Is it arguable that CHH owes the respondents a duty of care?

[14] It was common ground in this Court, as it had been in the High Court and Court of Appeal, that the approach to determining whether it is fair, just and reasonable to impose a duty of care focuses on proximity between the parties and policy considerations.[12] It was also common ground that this approach is a framework, rather than a straightjacket.[13]

[15] The Court of Appeal began its analysis by addressing foreseeability. It found that, at least for strike-out purposes, foreseeability was established.[14] In short, it concluded that a manufacturer such as CHH could be taken to have foreseen that its cladding products would be used on buildings and that if the cladding products were defective by failing to fulfil their watertightness function, this could lead to a weakening and rotting of component structures and to the development of fungi causing health risks.[15] This finding was not challenged before us and we see no reason to question it.

Proximity

[16] The Court of Appeal addressed the issue of proximity under four headings: the parties' relationship, the contractual matrix, the statutory framework and vulnerability. In this Court the focus of the argument on behalf of CHH was on the contractual matrix and vulnerability, but we will briefly address the other two aspects of the Court of Appeal's analysis as well.

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12 *Carter Holt* (HC), above n 3, at [11]; and *Carter Holt* (CA), above n 5, at [23] and [38]–[39]. See also *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 305–306; *The Grange*, above n 10, at [149]–[152] and [161]; and *Spencer on Byron*, above n 10, at [184].

13 *Carter Holt* (CA), above n 5, at [38], citing *The Grange*, above n 10, at [149].

14 *Carter Holt* (CA), above n 5, at [43].

15 At [42]–[43].

The parties' relationship

[17] The Court of Appeal described the claim as follows:[16]

> At its heart, this is a claim against a manufacturer for (alleged) latent defects in products it has designed and manufactured, by consumers on whose buildings the products containing the latent defects were installed.

[18] The Court said that on the pleadings the cladding product was a specialist product; it could be anticipated that it would be bought by building professionals not end users as happened in the present case; the defects were not visually apparent, they took some time to develop, and needed scientific analysis to establish them; and the product was promoted for use as an exterior product, which meant that its quality should have included providing weatherproofing.[17]

[19] No real issue was taken with any of this analysis and it did not loom large in the Court of Appeal's analysis. We see no reason to question it, but nor do we see it as a significant aspect of the proximity analysis.

Contractual matrix

CHH's argument

[20] As it had in the Court of Appeal, CHH argued that the present case could be analysed as a "contractual chain case" of the same type as was considered in *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd*.[18] CHH concentrated its argument on this aspect of the case. Its counsel, Mr Goddard QC, said there was a chain of contracts in the present case under which:

(a) The respondents contracted with a head contractor for the construction of a school building. He said this contract could be expected to allocate risk and liability in respect of matters such as building defects and the costs of remedying them.

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16 At [47].
17 At [48]–[49].
18 See *Carter Holt* (CA), above n 5, at [62]–[63], citing *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) [*Rolls-Royce*].

(b) The cladding sheets to be used in the construction of a school building were acquired by the head contractor (or a subcontractor) either directly from CHH or from a merchant that had, in turn, been supplied by CHH.

(c) CHH sold the cladding sheets to the relevant head contractor, subcontractor or merchant under contracts which make specific provision for the extent to which CHH assumes responsibility for the quality of the product supplied and for its suitability and fitness for purpose.

[21] Mr Goddard accepted that the existence of a chain of contracts was not, of itself, decisive in respect of the existence of a duty of care. But he argued that, where there is an indirect contractual relationship between plaintiff and defendant, it is generally appropriate for the contracts entered into by the parties to control the allocation of risk. In this respect he relied on the following observation made by Richardson J in *South Pacific*:[19]

> Tort theory should remain consistent with contract policies. In public policy terms I consider that where, as here, contracts cover the two relationships, those contracts should ordinarily control the allocation of risk unless special reasons are established to warrant a direct suit in tort.

[22] Mr Goddard pointed to similar observations made in *Spencer on Byron*.[20] Those observations were by Tipping J who formed part of the majority in *Spencer on Byron* and William Young J who dissented. Tipping J qualified his observation by saying that he did not see the proposition as a significant feature in *Spencer on Byron*. A duty of care was imposed on the defendant in that case. So the argument now advanced by CHH failed.

Court of Appeal judgment

[23] The Court of Appeal did not accept that the analogy with *Rolls-Royce* was apt. It described *Rolls-Royce* as "readily distinguishable".[21] In particular the Court

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19 *South Pacific*, above n 12, at 308.
20 *Spencer on Byron*, above n 10, at [40] per Tipping J and [302]–[305] per William Young J.
21 *Carter Holt* (CA), above n 5, at [56].

of Appeal pointed to the fact that the contractual framework in *Rolls-Royce* involved the three relevant parties negotiating directly for the contractual setting that prevailed. It noted that in the present case the Court does not, at the strike-out stage, have the benefit of the details of the contractual arrangements and it also noted that the contractual position was much more fluid and complex in the present case than the carefully constructed contractual regime that applied in *Rolls-Royce*.[22]

[24] The analysis of the Court of Appeal in this case is similar to that of the Court of Appeal in *Minister of Education v Econicorp Holdings Ltd*.[23] That case involved a tort claim by the Minister against a builder in relation to defects in the design and construction of a school hall. There was a construction contract between the builder and the board of trustees of the school and a design contract between the builder and the architect. The Minister was not party to the contract with the builder.[24] The Court found it was not a comprehensive contractual matrix as existed in *Rolls-Royce*.[25] This was partly because the relationship between the board of trustees and the Minister was not a contractual relationship, but rather a public law relationship and there was a lack of clarity as to the level of interaction between the Minister and the builder prior to the contract being entered into. That distinguished the case from *Rolls-Royce*. The Court reversed the High Court decision striking out the Minister's claim in negligence.

Our approach

[25] We see *Rolls-Royce* as readily distinguishable from the present case. The contractual regime in *Rolls-Royce* was specifically designed for the particular project. The parties were legally advised throughout. They chose how the risks and responsibilities would be allocated.

[26] No doubt once the present case goes to trial there will be complete information available to the trial Judge about the contractual arrangements between

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22 At [56]–[58].

23 *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450, [2012] 1 NZLR 36. Leave to appeal to this Court was refused: *Econicorp Holdings Ltd v Minister of Education* [2011] NZSC 148.

24 At [15].

25 At [61](b) per Arnold J, with whom Glazebrook J agreed, and at [73] per Harrison J dissenting.

the parties in relation to each of the allegedly defective buildings which will allow the trial Judge to make a more detailed comparison of the present case with *Rolls-Royce*. However, we indicate that, at least at this preliminary stage, we do not consider that the terms of supply applying between CHH and merchants and between merchants and building contractors are likely to be seen in the same light as the carefully calibrated contractual regime that applied in *Rolls-Royce*, particularly if they are standard form contracts.[26]

[27] The cases dealt with in *South Pacific* are also distinguishable from the present case.[27] In both cases, there was a clear contractual structure between the insured party and the insurer on the one hand and between the insurer and the investigator on the other, which counted against recognising a duty of care on the part of the investigator to the insured party. In our view, *South Pacific* is in the same mould as *Rolls-Royce*.

[28] In summary, we do not see the contractual matrix as rendering unarguable the respondents' proximity argument.

Statutory framework

CHH's argument: the 2004 Act

[29] Mr Goddard argued that a significant factor in the decisions of this Court imposing a duty of care on councils in relation to both domestic and commercial leaky buildings was the fact that the 2004 Act imposed statutory obligations on councils. That meant that the imposition of a duty of care did not add to the obligations of the councils, but rather supplemented those statutory obligations by providing a regime for a remedy where the council failed to meet the required

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[26] It will also need to be determined at trial how much of the analysis in *Rolls-Royce* continues to apply after this Court's decision in *Spencer on Byron*.

[27] In *South Pacific* the Court heard two cases together, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* and *Mortensen v Laing*. See *South Pacific*, above n 12.

standards. This is made clear in the judgments in *Spencer on Byron*.[28] As McGrath and Chambers JJ put it in their judgment:[29]

> The law of negligence stands behind [the statutory duty imposed under the Building Act 1991 and the building code] by providing compensation should the Council contribute to breaches of the building code through careless acts or omissions in supervising construction.

[30] Mr Goddard argued that the absence of this factor in the present case is a significant difference between the decisions of this Court on liability by councils for defective inspection of both domestic and commercial buildings and the present case.

Court of Appeal judgment

[31] The Court of Appeal, in agreement with the High Court, accepted that the 2004 Act (and its predecessor, the Building Act 1991 (the 1991 Act)) did not impose statutory duties on suppliers of building components.[30] So it accepted that CHH was in a different position from that of a council in relation to the statutory obligations created by the 2004 Act and that this was a factor favouring CHH's position. However, the High Court found that the absence of statutory obligations under the 2004 Act in relation to suppliers of building components was not a decisive factor in determining proximity and the Court of Appeal agreed with this.[31]

Scheme of the 2004 Act

[32] In order to evaluate whether a finding that manufacturers and suppliers of building components owe a duty of care to building owners imposes obligations on them to which they are not already subject under the 2004 Act, it is necessary to consider the scheme of the 2004 Act.

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28 *Spencer on Byron*, above n 10 at [17] per Elias CJ, at [39]–[40] per Tipping J and at [71], [104], [162] and [193] per McGrath and Chambers JJ. *Spencer on Byron* addressed the Building Act 1991, but the observation applies equally to the 2004 Act.

29 At [162]. Elias CJ expressed general agreement with the judgment of McGrath and Chambers JJ: at [6].

30 *Carter Holt* (HC), above n 3, at [22], *Carter Holt* (CA), above n 5, at [68].

31 *Carter Holt* (HC), above n 3, at [23]; *Carter Holt* (CA), above n 5, at [68].

[33] Section 3 of the 2004 Act sets out the purposes of the Act. The first purpose is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners and the setting of performance standards for buildings to ensure certain outcomes. These outcomes include the health and safety of occupants. The second purpose is 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.

[34] The building code is set out in sch 1 to the Building Regulations 1992 (which were made under the 1991 Act but carried forward under the 2004 Act).[32] The provisions of particular relevance in the current case are cl B2 which deals with the durability of building elements and cl E2 which requires that buildings be constructed to provide adequate resistance to penetration by, and accumulation of, moisture from the outside.

[35] Part 1 subpt 4 of the 2004 Act sets out the responsibilities of owners, builders, designers and consent authorities under both the 2004 Act and the building code. Part 2 of the 2004 Act includes s 17, the provision requiring that all building work complies with the building code. Part 2 also provides for acceptable solutions and verification methods, warnings and bans, national multiple-use approvals, product information memoranda, building consents, building levies and the requirements for building work. Section 20 provides that regulations specifying a prescribed method of complying with any provision of the building code may require the use of a building method or product (which includes "building materials") that have a current product certificate issued under s 269 of the 2004 Act. Section 26 authorises the chief executive to issue a warning about or declare a ban on a building method or product. Cladding sheets are a building material to which these sections could apply.

[36] Part 3 deals with regulatory responsibilities and accreditation. Part 4 contains the provisions regulating building practitioners.

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[32] The Building Regulations 1992 were revoked by reg 8 of the Building (Forms) Regulations 2004, but under reg 8(2)(a) of the Building (Forms) Regulations, reg 3 and sch 1 of the Building Regulations 1992 continue in force.

[37] The 2004 Act therefore contains a comprehensive regime providing for performance standards for building work and regulating building practitioners. It does not, however, impose any direct obligations on manufacturers and suppliers of building products. This has now changed, because s 14G(2), which came into effect on 28 November 2013, provides that 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". That provision does not apply in the present case.

Our approach

[38] We accept CHH's argument that as a manufacturer and supplier of building components, it was not under any direct statutory duty under the 2004 Act at the time it supplied its cladding sheets and cladding systems for the respondents' buildings.

[39] CHH's argument was, in essence, that the curtailing of its contractual freedom to control and limit the extent of its responsibilities in relation to its products could not be overridden by the imposition of a duty of care in circumstances where such an obligation did not supplement pre-existing statutory obligations, but rather created new obligations that were outside the ambit of its contractually accepted obligations. The Court of Appeal did not see this as decisive. It observed that it would be odd if CHH had no regard to the 2004 Act in circumstances where its building products were intended for use in buildings that had to be built in accordance with the requirements of the 2004 Act and the building code.[33] Thus, while CHH was not, itself, required to comply with the 2004 Act and the building code, the fact that its products were being used by practitioners who were required to comply with those requirements and were to be used in buildings which had to be code compliant meant that the standards imposed by the 2004 Act and the building code were relevant to questions of proximity and foreseeability of harm.

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[33] *Carter Holt* (CA), above n 5, at [70].

[40] We accept that the absence of direct statutory obligations on CHH means that one factor that contributed to the finding in *Spencer on Byron* that councils owed a duty of care to commercial property owners is absent in this case. But we do not see this as a significant distinguishing factor between that case and the present case. Although the 2004 Act and the building code do not apply to manufacturers, the cladding sheets and cladding system produced by CHH are "building elements" to which certain requirements of the building code apply. Even though those requirements are not directly imposed on manufacturers, they define the standards manufacturers are required to meet in products, so that when they are used in a building the building will be code compliant. In addition, the cladding sheets are building materials in respect of which the powers in ss 20 and 26 of the 2004 Act can be exercised. In light of these factors, the duty of care sought to be imposed on CHH is, arguably, no greater than that of which it would already have been aware because of the building code requirements applying to building elements and the provisions of the 2004 Act applying to building materials.

Consumer Guarantees Act 1993

[41] Mr Goddard also argued that it was relevant that the Consumer Guarantees Act provided a carefully tailored regime for protection of consumers of goods and services where the goods or services are defective and provides remedies against both the immediate supplier and the manufacturer. He said the Court should be cautious about altering the balance struck by this legislation by imposing more onerous duties under the law of tort on manufacturers. We do not see the existence of statutory protections as precluding liability in tort. The present claim by the respondents includes a claim under the Consumer Guarantees Act and the significance of liability under that Act (if any) on the negligence claim can be evaluated at the trial.

Contracts (Privity) Act 1982

[42] Mr Goddard also pointed to the Contracts (Privity) Act 1982, which provides for enforcement of a contract by a non-party in circumstances where the non-party is

entitled to the benefit of the promises made in the contract.[34] He said there was no suggestion that the respondents could claim under any contract to which CHH was a party, and by allowing a claim in tort this was allowing them to achieve an outcome in tort that was not available to them in contract. We do not see that as taking the argument very far. There is nothing preventing concurrent liability in contract and tort, so it would be odd if a party that had no contractual liability was able to also escape tortious liability simply because no contractual remedy was available against them.

Vulnerability

CHH's argument

[43] CHH argued that the respondents were not "vulnerable" and that this therefore counted against a finding of proximity. This argument built on the contractual chain argument, by arguing that, even though the respondents are not protected by contractual rights, they could have been. CHH says the respondents could have insisted that the head contractor provided warranties that would have provided protection against the losses for which the respondents now claim from CHH.

[44] Mr Goddard said one or more of the respondents have contracts with the relevant head contractors in relation to each school building, which will contain provisions imposing liability on the head contractor in relation to defects or non-compliance with the relevant statutory and non-statutory building standards. If these contracts do not provide adequate protection for the respondents, they should not be entitled to achieve through the law of tort what they failed to contract for under the law of contract. His argument was that, if a duty of care is to be imposed in this context, the respondents need to be able to point to "special reasons" to justify the imposition of that duty and those special reasons need to be pleaded and proved as an essential part of the claim. He said that the special reasons for imposing a duty of care in cases such as this generally relate to a concern about the vulnerability of the relevant plaintiff. However, in this case, he argued that the respondents could not be considered vulnerable even if they had pleaded this as an element of their claim.

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[34] Contracts (Privity) Act 1982, s 4.

[45] Mr Goddard said that the loss for which the respondents sought relief in the present case was the financial cost of repairing the relevant buildings. This was not a case where the respondents themselves were exposed to harm to their health and safety, and nor was there any pleading that such harm had been suffered by any other person to date.

[46] Rather, the respondents were mindful of their statutory duty in relation to the safety of the users of their buildings and felt compelled to incur the financial cost of fixing the buildings. This was a financial cost for which the respondents could have obtained protection by contract. He said they could have obtained this protection from the head contractor, leaving the head contractor to then protect itself by provisions in its contracts with suppliers. Alternatively it could have required the head contractor to assign warranties it had received from subcontractors and suppliers or required the head contractor to obtain such warranties with a stipulation that they were for the benefit of the respondents for the purposes of the Contracts (Privity) Act. Alternatively they could have sought warranties from the subcontractors and suppliers directly.

[47] The Court of Appeal[35] saw this argument as relying on reasoning of the kind adopted by the High Court of Australia in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*[36] and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*.[37] The Court of Appeal observed that the Australian approach to vulnerability was not one that had found favour in New Zealand,[38] citing the judgment of McGrath and Chambers JJ in *Spencer on Byron*[39] and the majority judgment in *Econicorp*.[40]

[48] Mr Goddard questioned whether the extracts from *Spencer on Byron* relied on by the Court of Appeal and the respondents in relation to vulnerability really

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35 *Carter Holt* (CA), above n 5, at [73].
36 *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, (2014) 254 CLR 185.
37 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16, (2004) 216 CLR 515.
38 *Carter Holt* (CA), above n 5, at [74].
39 *Spencer on Byron*, above n 10, at [156] and [199]–[201]. Elias CJ expressed general agreement with the judgment of McGrath and Chambers JJ: at [6]. See also Tipping J at [38].
40 *Econicorp*, above n 23, at [45].

rejected the Australian approach to vulnerability from *Brookfield Multiplex* and *Woolcock Street Investments*.

[49] Mr Goddard said that the authority for the proposition that special reasons are required for the imposition of a duty of care in this situation is the decision of the Court of Appeal in *Rolls-Royce*. In that case, the Court said:

> [61] The extent to which those in the plaintiff's position are vulnerable can also be taken into account. The inquiry may in this case concentrate on whether a defendant with special skills has power over a vulnerable plaintiff … That vulnerability is a key factor in determining liability was recently noted by the High Court of Australia in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* …
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> [62] Whether there are or could realistically have been other remedies for a plaintiff is relevant to the assessment of vulnerability. If there are, then this may point to there having been adequate means for the plaintiff to protect itself and to there being adequate deterrence for the defendant …

[50] Mr Goddard also referred to the discussion in *The Law of Torts in New Zealand*.[41] He pointed in particular to Professor Todd's commentary under the heading "Protecting the Vulnerable" as follows:[42]

> A Court will take into account whether, or the extent to which, a plaintiff should be seen as entitled to legal protection. The principle has both a positive and a negative aspect. On the one hand, the concern is with protecting persons in a vulnerable position, who have no reasonably available means of protecting themselves. It might be seen as a form of "consumer" protection at common law, and to this extent it marches in step with legislative developments during the later part of the 20th century, in New Zealand and elsewhere. The emphasis is on effecting corrective justice between a wrongdoer and a victim. On the other hand, if a person is well positioned to look after himself or herself a duty may be thought to be inappropriate. The court is concerned with the steps a person could reasonably have taken to look after his or her own interests.

[51] Mr Goddard's argument focused on the respondents themselves, particularly the Ministry, which is a large government department responsible for very substantial building portfolios and could be seen as capable of obtaining the necessary contractual protections. He said it was clearly not a vulnerable plaintiff.

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41 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013).

42 At 5.4.03.

Our approach

[52] We do not consider CHH's focus on the present plaintiffs was correct. Professor Todd qualified the statement in relation of vulnerability on which Mr Goddard relied as follows:[43]

> A vulnerability principle requires that the kind of claim being asserted should be categorised as one likely to involve a vulnerable plaintiff. A principle looking to an individual plaintiff's vulnerability on the facts of any particular case would be unworkable and impossible to administer. One reason for the decision of the Supreme Court in [*Spencer on Byron*], declining to draw a distinction between negligence claims involving residential buildings and those involving commercial buildings, was that the position as to vulnerability did not assist. Residential owners might be very well able to protect themselves and commercial owners might be highly vulnerable.

[53] We see this as an important qualification. Those contracting for building projects can include vulnerable home owners, sophisticated non-vulnerable home owners, vulnerable commercial property owners, sophisticated commercial property owners, and other entities such as the Ministry, which would no doubt fall at the sophisticated end of the spectrum.

[54] The refusal of this Court to draw a distinction between vulnerable and non-vulnerable or commercial and non-commercial property owners in *Spencer on Byron* was on the basis that the question of vulnerability must be looked at not in relation to the plaintiff in the case at hand but in relation to likely plaintiffs as a class.[44] In this case we do not think it is realistic to expect all those entering into building contracts to protect themselves by the contractual measures suggested by Mr Goddard. Indeed, we think it is probably unrealistic to expect sophisticated property owners like the Ministry to do so. As the respondents said in their submissions, CHH's approach would require the head contractor on each building project to approach each supplier to negotiate warranties, from the nails to the paint to the glass, and for the building owner to satisfy itself as to the adequacy of each one.

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[43] At 5.4.03.

[44] *Spencer on Byron*, above n 10, at [197]–[198], per McGrath and Chambers JJ. Elias CJ expressed general agreement with their judgment: at [6].

[55] There is no other available form of protection, given that the defects in this case are latent defects that have only been able to be identified with specialist assistance. The respondents could not have been expected to know of the defects and take steps to protect themselves against them. In those circumstances, we do not think that the vulnerability factor has much significance and, to the extent that it does, we do not see it as militating against the finding of a duty of care.

Conclusion on proximity

[56] As the above discussion illustrates, there are a number of issues in relation to the proximity analysis which will need to be carefully evaluated at the trial. We do not see any error in the approach taken by the Court of Appeal requiring that these issues be resolved at trial, rather than at the strike-out stage. We see that as consistent with the approach taken by this Court in *Couch*, and as reflecting the fact that the respondents' arguments that there is sufficient proximity are, on the information currently available, arguable.

Policy factors

[57] We now turn to policy factors to be considered in determining whether the imposition of a duty of care would be fair, just and reasonable in the circumstances of this case. As explained in *The Grange*, this requires the Court to assess the possible effects of the decision to impose a duty on society and on the law generally.[45]

[58] As the Court of Appeal noted, the policy arguments substantially overlap with the proximity arguments.[46] The Court of Appeal addressed the policy arguments under the headings of incoherence, commercial certainty and contractual chains, loss and damage claimed, health and safety and statutory framework. We will adopt the same format.

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45 *The Grange*, above n 10, at [160] per Blanchard J writing on behalf of himself and McGrath and William Young JJ.

46 *Carter Holt* (CA), above n 5, at [78].

Incoherence, commercial certainty and contractual chains

[59] CHH argued that the major public policy factor against the imposition of a duty of care would be that this would cut across the law of contract, creating commercial uncertainty and making the common law incoherent. These arguments have largely been addressed when dealing with this factor in relation to the issue of proximity.[47] The Court of Appeal accepted that these were important policy issues, but considered that the careful and comprehensive analysis that would be required should occur at a trial.[48] CHH again relied on *Rolls-Royce* in this context, but, for the reasons we have already given, we see *Rolls-Royce* as distinguishable from the present case.[49]

[60] Mr Goddard argued that the duty of care that the respondents seek to impose on CHH would provide the respondents with greater legal protection than those who purchased cladding sheets and cladding systems from CHH directly, and who could therefore rely on their contractual rights against CHH. He referred to the observation in *Brookfield Multiplex* that such an outcome "would reduce the common law to incoherence".[50]

[61] We agree with the Court of Appeal that these issues cannot be resolved at the strike-out stage. We do not see any of CHH's arguments as decisive, but they are matters that will need to be explored fully at the trial, once the contractual relationships have been clearly established.

[62] CHH also argued that imposing a duty of care on CHH would cut across the statutory regime of deemed warranties (originally in ss 396–399 of the 2004 Act and now set out in an expanded form in Part 4A) and statutory guarantees in the Consumer Guarantees Act. This was also said to lead to incoherence in the law. That argument assumes a parliamentary intention that the warranties in the 2004 Act and the guarantees in the Consumer Guarantees Act should be a comprehensive regime, to the exclusion of the law of torts. We do not see any indication of such an

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47 Above at [20]–[28].
48 *Carter Holt* (CA), above n 5, at [80].
49 *Rolls-Royce*, above n 18, at [118]; see above at [20]–[28].
50 *Brookfield Multiplex*, above n 36, at [69] and [132].

intention. A tortious duty of care standing alongside the statutory protections does not make the law incoherent.

Loss and damage claimed

[63] The essence of CHH's argument under this head is that the respondents are seeking to recover in tort the cost of replacing cladding sheets that do not perform as they should, which is essentially a quality issue. CHH disputed the finding by the High Court and Court of Appeal that the product could lead to physical damage, as opposed to economic loss.[51]

[64] CHH argued that the cladding sheets had not, in any meaningful sense, caused damage to school buildings. It argued that rather, the cladding sheets had failed to perform, with the result that the building was not watertight. This may have, in turn, led to damage to other parts of the relevant school buildings, which could have implications for the scope of the remedial work required, but did not alter the basic nature of the claim. That claim was that the cladding sheets were not suitable for the purpose for which they were supplied (being fixed directly to the building frame). Echoing its earlier arguments about contractual risk allocation, it argued that such loss is a type of loss for which contracting parties can and do bargain.

[65] CHH says the respondents can deal with any health risk by taking remedial action: they do not need to mount a tort claim in order to do this.

[66] This line of argument is inconsistent with the determination in *Spencer on Byron*. There it was held that a building owner may claim for the costs of repairing a defect before it causes damage to property or health. As Tipping J put it in that case:[52]

> In cases where negligent inspection has given rise to the potential for damage but no such damage has yet occurred, it cannot be the law that you have to wait for physical damage to occur before you are regarded as having suffered loss or harm. It is not determinative whether the loss suffered at the

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51 *Carter Holt* (HC), above n 3, at [56]; *Carter Holt* (CA), above n 5, at [91]–[93].

52 *Spencer on Byron*, above n 10, at [45] per Tipping J. See also at [12]–[19] per Elias CJ and [187] per McGrath and Chambers JJ.

> 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 and thereby removing the potential for physical damage and the associated health and safety concerns. A duty of care should be recognised in respect of preemptive expenditure as well as expenditure necessary to reinstate or repair physical damage which has actually occurred.

[67] Unsurprisingly, counsel for the respondents, Mr Farmer QC, relied on this in countering the argument advanced by CHH. In addition, he said it was an essential part of the respondents' claim that the cladding sheets manufactured and supplied by CHH were not only unfit for purpose, but also caused damage to the buildings owned or managed by the respondents because they not only absorbed moisture, but transferred it to other parts of the building, causing those other parts to rot.

[68] We were given to understand that the claim by the respondents is, in relation to most buildings covered by the claim, a claim not only that the cladding sheets are defective, but that they have caused damage to structures. Similarly, the creation of spores from rotting wood has given rise to health risks. It may be that when the facts are fully known, it will become apparent that at least some claims are only in relation to the defectiveness of the cladding sheets themselves, which may give rise to an issue as to whether liability in negligence should arise for what is essentially what Mr Goddard called a "quality issue". If the defects in the cladding sheets create a health and safety issue, the argument that there is a mere "quality issue" would be confronted by the recognition of health and safety concerns in *Spencer on Byron*.[53] It is not possible to evaluate this in the absence of the facts established at trial.

Health and safety

[69] The health and safety of occupants of school buildings is obviously a significant issue for the respondents, not only under health and safety legislation,[54] but also under the Education Act 1989. On the face of it, this appears to be a strong policy factor in the respondents' favour. In *Sunset Terraces*, Tipping J observed:[55]

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53 *Spencer on Byron*, above n 10, at [163]–[164], per McGrath and Chambers JJ. Elias CJ expressed general agreement with their judgment: at [6].

54 For example, the Health and Safety in Employment Act 1992.

55 *Sunset Terraces*, above n 11, at [53].

> 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 negligence of the building inspector. It is only the owner who can undertake the necessary remedial action.

[70] Mr Goddard argued that this was "plainly wrong" because building owners can and do take remedial action to render buildings safe by non-owner occupants whether or not they can recover the cost of doing so through a tort claim. With respect to Mr Goddard, we think that is a misconstruction of what Tipping J said in *Sunset Terraces*. He was not suggesting that building owners could not fix the building unless they had a tort claim. Rather, he was recording the obvious point that where negligence by one party has caused a risk to the health and safety of building occupants, the person that can sue for the cost of repair is the building owner, as it is the building owner that incurs the cost. We see no error in what was stated there, and we see the health and safety factors as at least arguably weighing in favour of the imposition of a duty in the present circumstances. But, once again, the final evaluation of this factor will be able to be made with greater certainty in the context of the trial when the facts have been fully disclosed.

Statutory framework

[71] The Court of Appeal saw the applicable statutes as informing the policy assessment, particularly the 2004 Act.[56] We agree, for reasons we have already canvassed.[57] Similarly, as just noted, statutory obligations in relation to health and safety are important factors. They will need to be evaluated once the full context is clear. At this stage of the proceeding there is no need to say more than this about this factor.

Conclusion on duty of care

[72] For reasons which largely correspond with those given by the Court of Appeal, we conclude that it is arguable that CHH owed a duty of care to all or some of the respondents. The determination of whether, in fact, CHH owe such a duty should be resolved at trial, in the context of factual findings.

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[56] *Carter Holt* (CA), above n 5, at [97]–[98].
[57] Above at [32]–[37].

Is it arguable that CHH had a duty to warn?

[73] The respondents pleaded a separate duty on the part of CHH to warn them, as consumers or users of CHH's cladding sheets and cladding systems, of their potentially harmful qualities or dangerous propensities. The respondents allege that CHH had such a duty in this case and failed to discharge it, because it did not warn them of the risk characteristics of the cladding sheets and cladding system. CHH both denies it was under any such duty and also denies that there was any occasion for such a warning to be given because the products were not dangerous to people or property. It argued that even if a duty existed, it did not extend to simple defects in the products that merely reduce their economic worth.

[74] The Court of Appeal considered that the respondents' pleadings raised sufficient factual issues relating to the risk characteristics of the products and knowledge of those characteristics on CHH's part that it was at least arguable that the facts might give rise to a duty to warn consumers about them.[58] However, it saw that as having to be left for determination at trial, once the facts were known.

[75] Mr Goddard argued that the duty to warn could not extend to a duty to warn about the unsuitability of a product or about other characteristics that did not create a danger or risk to persons or to other property. He argued that no relevant danger or risk was pleaded: the alleged failure of the buildings on which the cladding sheets had been installed to comply with the building code did not amount to damage to other property in the required sense. In addition he argued that the duty to warn could only arise where the manufacturer had knowledge about a danger inherent in the use of a product that the consumer did not have or could not reasonably have been expected to have.

[76] The respondents argue that it is sufficient that CHH ought to have known of the risks associated with its products: it was not necessary to prove that it actually did know. The Court of Appeal acknowledged that the "ought to know" pleading

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[58] *Carter Holt* (CA), above n 5, at [135].

may be insufficient,[59] but it was accompanied by a pleading of actual knowledge as well.

[77] While we doubt that the pleaded duty to warn adds much to the negligence cause of action, we do not see it as appropriate to strike it out. Whether the product caused damage to property or to the health of the occupants and what CHH knew about those risks are intensely factual issues which are best resolved at trial. We do not think it would be useful to say more about this issue at this stage.

Are the respondents' claims in negligent misstatement arguable?

[78] The respondents' claim in negligent misstatement involves an allegation that CHH carried out "promotional activities" (broadly defined in the statement of claim) which included descriptions and representations about the cladding systems that would lead a reasonable person to believe that the cladding sheets, when affixed directly to a building frame (without a cavity) would meet recognised building standards and the requirements of the building code, as well as (among other things) providing a weathertight exterior to the building.[60] The term "promotional activities" may be misleading as to the content of some of this material, which included technical detail about the way the cladding sheets should be affixed and addressed weathertightness issues.

[79] The Court of Appeal struck out the negligent misstatement claim on the basis that the respondents could not establish that the statements alleged to have been made by CHH were reasonably capable of being relied upon or that there was, in fact, reliance causing loss to the respondents.[61] The Court of Appeal considered that CHH had not pleaded that it was a member of a specific class that CHH could reasonably have seen would rely on the allegedly misleading statements.[62] In addition, there was no basis for reliance as a matter of fact on the representations by CHH that could be said to be arguably causative of the loss suffered by the

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59 At n 119.
60 The pleading is described in more detail in *Carter Holt* (CA), above n 5, at [102]–[104].
61 At [117]–[118].
62 At [121].

respondents.[63] The Court concluded that the negligent misstatement claim added nothing to the negligence claim and ruled that it should be struck out.[64]

[80] In *The Grange*, Blanchard J, for himself and McGrath and William Young JJ, adopted the requirements summarised in *Caparo Industries PLC v Dickman* that must generally be met before a plaintiff can say it is entitled to rely on a statement or advice. The necessary relationship between the maker of the statement and the recipient will typically arise where:[65]

(a) the advice is required for a purpose that is made known (at least inferentially) to the adviser;

(b) the adviser knows (at least inferentially) that the advice will be communicated to the advisee specifically or as a member of an ascertainable class;

(c) the adviser knows (at least inferentially) the advice is likely to be acted on without independent inquiry; and

(d) the advisee does act on the advice to its detriment.

[81] Mr Goddard argued that the respondents had not pleaded a special relationship between CHH and them such that CHH had assumed responsibility to them to take reasonable care concerning the truth of its statements about its cladding sheets and cladding system. This meant that the respondents had not pleaded membership of a specific class, and as a result the pleaded liability was indeterminate. He supported the Court of Appeal's conclusion.

[82] Mr Flanagan, who argued this aspect of the case on behalf of the respondents, argued that CHH could reasonably expect that purchasers of its cladding products would need to assess their suitability and would rely on CHH's promotional material. Even building professionals would need to rely on this material: a visual inspection

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63 At [125].
64 At [128].
65 *The Grange*, above n 10, at [189]; citing *Caparo Industries PLC v Dickman* [1990] 2 AC 605 (HL) at 638.

of the product would not suffice, as would be the case for less specialised products. The promotional material was intended to encourage potential purchasers to buy the cladding sheets and assure them of their suitability as a cladding when affixed as specified in the promotional material. Purchasers would rely on the promotional material directly or as a result of advice from building professionals who relied on the material.

[83] Mr Flanagan said that, to the extent a special relationship is required, these facts meant such a relationship existed between CHH and the respondents.[66] There was no risk in the present case of liability to an indeterminate class.

[84] Mr Flanagan said the pleadings were clear in alleging actual reliance on CHH's statements about the cladding products by building professionals engaged by the respondents on whom the respondents relied. Given the large number of school buildings involved, it was not practical to specify each instance of reliance in the pleadings. In any event, reliance can be inferred from, and is inherent in, the fact that the respondents allowed Shadowclad to be used on their buildings.

[85] It is not clear at this stage whether the negligent misstatement cause of action adds anything to the negligence claim. An issue as to whether there needs to be proof of actual reliance by the respondents may arise. But we think it is premature to see these concerns as fatal to the claim. The issues are, as Asher J noted,[67] fact-specific and best analysed after discovery and in the context of a trial where evidence has been contested. We consider the Court of Appeal erred in striking out this aspect of the claim.

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66 Asher J accepted that there was a question as to whether a special relationship was required, citing *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [32] and *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA): *Carter Holt* (HC), above n 3, at [96]. We do not see those authorities as assisting greatly on this point.

67 *Carter Holt* (HC), above n 3, at [98].

Does s 393 of the 2004 Act apply to the respondents' claims?

[86] Section 393 of the 2004 Act provides as follows:

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

[87] Section 393 provides for the "longstop" limitation period in relation to civil proceedings that relate to building work.[68] There is obviously no dispute that the present proceedings are a civil proceeding, so the applicability of s 393 turns on whether the respondents' claims are civil proceedings relating to building work.

[88] CHH argues that, although its manufacture and supply of cladding sheets and cladding systems is not, in itself, building work, the claim made by the respondents involves allegations that the cladding sheets and cladding systems have defects that mean that, when affixed to buildings, the buildings do not comply with the 2004 Act,

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[68] The definition of "building work" in s 2 of the 1991 Act (and in the 2004 Act itself before 2005) was essentially the same as s 7(a)(i) and (b) of the current definition: Building Act 2004, s 7.

the building code or other recognised building standards. Thus, it argues, the claim relates to building work, even though the acts or omissions of CHH that underlie the claim are not, themselves, building work.

[89] As will be apparent, there is a degree of tension between CHH's position as just articulated and its position in relation to the duty of care issue. In the present context, its argument is that the respondents' claim is to the effect that CHH's allegedly defective products have caused non-compliance with the Building Act and building code. In relation to the duty of care issue, it argued that the fact that the 2004 Act does not impose statutory duties on suppliers of building components assists its argument that there is no duty of care.

Meaning of the words

[90] The term "building work" is defined in s 7 of the 2004 Act as follows:

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

[91] The importance of the definition of building work in the context of the 2004 Act as a whole can be seen from the statement of the purposes of the 2004 Act in s 3, which provides:

> **3 Purposes**
>
> This Act has the following purposes:
>
> (a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
>
> (i) people who use buildings can do so safely and without endangering their health; and
>
> (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
>
> (iii) people who use a building can escape from the building if it is on fire; and
>
> (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
>
> (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.

[92] The building code also refers to building work, and makes an important distinction between building elements and building work. The term building elements is defined in the building code as:[69]

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

[93] There was no dispute that the acts or omissions of CHH that underpin the allegations made against it in the respondents' statement of claim are not building work. It is also common ground that cladding sheets are building elements for the purposes of the building code.

[94] The most natural interpretation of the words "civil proceedings relating to building work" in s 393(2) is that those words are a shorthand reference for civil proceedings of the kind described in s 393(1). On that test, the present proceedings are not proceedings arising from building work or the performance of a function

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[69] The building code, cl A2 (original emphasis).

under the 2004 Act of a kind described in s 393(1)(b) and therefore not within the scope of s 393. Even if "civil proceedings relating to building work" is not a reference back to s 393(1), the present proceedings are not referable to "building work" as defined, but rather to the manufacture and supply of building products or elements. However, CHH strongly argued that this interpretation did not represent the intention of Parliament.

[95] Before turning to CHH's arguments, we note two other matters in relation to the words of the section. The first is that s 393(2) makes it clear that it applies when the *civil proceeding* relates to building work, rather than when the act or omission of the defendant involves building work. Mr Goddard emphasised that the fact that CHH did not undertake building work did not necessarily stop the respondents' claim against it from being civil proceedings relating to building work. We agree.

[96] The second is that s 393(1) seems to serve no obvious purpose, in that it simply declares that another statute, the Limitation Act 2010, applies to proceedings of the kind described in s 393(1). Obviously the Limitation Act applies whether s 393(1) says so or not. As Mr Goddard pointed out, the declaration made in s 393(1) is at best incomplete because it does not refer to other applicable limitation periods, such as that applying under the Fair Trading Act to claims under that Act.[70] It also fails to refer to its predecessor section, s 91 of the 1991 Act, which is still applicable to claims relating to acts or omissions that occurred when it was in force (and which may apply in relation to some of the claims made by the respondents in the present proceedings).

[97] We now turn to the arguments said to support CHH's interpretation of s 393.

Scheme of the Act

[98] As is apparent from the purpose provision quoted earlier, the focus of the 2004 Act is on regulating building work, the establishment of a licensing regime for building practitioners and setting performance standards for buildings. It makes no attempt to regulate the supply and marketing of building elements or building

[70] Fair Trading Act 1986, s 43A.

materials. The distinction between "building methods or products" and "building work" is highlighted as significant by the respondents. It is notable, for example, that s 4(2)(b) states that one of the principles of the 2004 Act which must be taken into account by the relevant regulatory authority is:

> the need to ensure that any harmful effect on human health resulting from the use of particular building methods or products or of a particular building design, or from building work, is prevented or minimised

The fact that building work is treated as distinct from building products makes it clear that the legislation, when referring to building work, is not referring to building products or building methods.

[99] The respondents also highlight that the building code specifies that cladding products should perform for 15 years if not structural and 50 years if structural.[71] They point out that it would be incongruous if there was a longstop of 10 years when the minimum standard expected of a product was a 15 year performance level.

[100] The statutory scheme reinforces the view that the act or omission of CHH was not an act or omission that, itself, constituted building work. That, however, does not resolve the issue that is raised by the wording of s 393(2), which focuses on whether the proceeding relates to building work.

The nature of the claim

[101] Mr Goddard argued that, in essence, the nature of the dispute between CHH and the respondents is about buildings and whether they meet the requirements of the building code. That being the case, the proceedings must "relate to building work". He emphasised the fact that the respondents' pleadings focus on the fact that buildings on which CHH's cladding sheets have been installed failed to meet the requirements of the 2004 Act, the building code and other relevant building standards. CHH's defence is to the effect that the cladding sheets are suitable for their purpose and that the problems identified by the respondents are attributable to the design and construction of the buildings and the way in which the cladding

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71 The building code, cl B2.

sheets were installed. This also highlighted the fact that the claim related to building work.

[102] While it is true that the pleadings refer to the fact that the buildings on which the cladding sheets were installed failed to meet the relevant standards, we do not see that as defining the claim. The essence of the claim by the respondents is that the cladding sheets are inherently defective, because of their proneness to absorb moisture. The fact that the buildings to which the cladding sheets have been affixed do not comply with the building code, if it is proven to be the case, does not alter the essential nature of the claim which relates to the allegedly defective quality of cladding sheets and the cladding system. That is, as noted earlier, a building material and not something which is subject to the jurisdiction of the 2004 Act.[72]

[103] The key concept in the definition of building work is that it involves work for (as in the present case) the construction of a building. In this case the claim relates to the acts or omissions of CHH, and CHH did not undertake any work for the construction of a building: rather it supplied a product to a third party which affixed it to a building.

[104] We do not consider the nature of the claim is such that is can be said to relate to building work as CHH argues.

Statutory history

[105] Mr Goddard argued that the statutory history to the longstop provision, originally contained in s 91 of the 1991 Act, provides no support for the distinction between claims against product suppliers and other claims relating to building work. He referred to the following statement from Hansard during Parliament's consideration of the Bill that became the 1991 Act:[73]

> … the select committee introduced what is has called a 15-year long-stop 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

[72] However, as noted above at [37], s 14G does now impose statutory obligations on product manufacturers and suppliers, with effect from 28 November 2013.

[73] (31 October 1991) 520 NZPD 5296, Speech by Hon John Carter, Chair of the Internal Affairs and Local Government Committee. The 15 year period referred to was later reduced to 10 years.

> building. After 15 years the responsibility for the construction rests entirely with the building's owner.

[106] Mr Goddard particularly emphasised the last sentence. He also relied on the following observation made by the Court of Appeal in *Gedye v South*:[74]

> History shows that the impetus for a long-stop provision in New Zealand was the problems engendered by a discoverability approach in the context of negligence claims pertaining to building work and building control. Equally clearly, we think the purpose of s 91(2) was to restrict the litigation of faulty building claims to a maximum 10-year period.

[107] Again, Mr Goddard emphasised the last sentence. He also highlighted the important purpose of a longstop limitation period: the need to protect defendants from stale claims and to ensure there is an end to litigation. He argued that another purpose of the longstop provision was to avoid the problem of a potentially unlimited period of liability where claims are based on the occurrence or discoverability of damage.

[108] Ultimately we do not see the statutory history as assisting us in determining the scope of the longstop provision. Neither of the statements referred to at [105] and [106] above is inconsistent with the longstop provision applying to claims arising out of building work as defined but not to claims against suppliers of building products.

Particular building

[109] As mentioned earlier, an obvious interpretation of "civil proceedings relating to building work" in s 393(2) is that those words refer back to proceedings described in s 393(1). That was the tentative view expressed in *The Grange*.[75] The corollary to that view is that s 393(2) is engaged only where building work is associated with a particular building or buildings. That interpretation also fits in with the definition of "building work" in s 7 which refers to construction, alteration, demolition or removal of "a building". Mr Farmer relied on this interpretation.

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[74] *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271 at [35]. A more complete analysis of the statutory history appears in the judgment of Glazebrook J in *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 (HC) at [13]–[26].

[75] *The Grange*, above n 10, at [90] per Elias CJ and at [205]–[210] per Blanchard, McGrath and William Young JJ.

[110] Mr Goddard argued that *The Grange* could be distinguished from the present case because the work of the Building Industry Authority (BIA) that was in issue in *The Grange* was further removed from a particular building or buildings than the work done by CHH in the present case. We do not see that as a point of distinction: the conclusion reached in *The Grange* related to the interpretation of the section rather than the particular facts of that case.

[111] Mr Goddard argued that even on the test tentatively expressed in *The Grange*, the present claim comes within s 393(2) because it relates to the building work on specified buildings, albeit a very large number (over 800). We disagree. The claim relates to CHH's manufacture and supply of cladding products that, allegedly, were defective.

Case law

[112] Both parties place some emphasis on the decisions in *Klinac v Lehmann*[76] and *Gedye v South*.[77] Both cases dealt with claims under a warranty provided by the vendor of a house that certain building work carried out some years earlier had been completed in compliance with the requirements of the 1991 Act. The purchasers sued for breach of warranty. At the time the proceedings were commenced in both cases, the period since the building work had been undertaken exceeded 10 years, and the vendors argued that the longstop limitation provision in s 91 of the 1991 Act meant the claims were time barred. In both cases it was found that the claims were based on the breach of the warranty, rather than on the faulty building work, and both claims were found to be within time, having been commenced soon after the breach of warranty was established.

[113] The respondents drew support from these cases on the basis that they indicated that the relevant inquiry when assessing the substance of the claim is the relevant act or omissions by the defendant, not the fact that the subject of the claim is defective building work. CHH relied on the fact that both cases contemplated the possibility that a claim could fall within the longstop provision even in circumstances where the defendant was not itself performing building work.

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[76] *Klinac v Lehmann*, above n 74.
[77] *Gedye v South*, above n 74.

[114] There was no doubt in both *Klinac* and *Gedye* that the civil proceedings related to building work, because the warranty specifically referred to "building work". But we see as much more decisive the fact that in both cases the Court found that the focus had to be on the act or omission of the defendant rather than the subject matter of the claim.

[115] We were also referred to a number of High Court cases which support the respondents' position that the longstop does not apply to proceedings relating to the manufacture and supply of building products.[78] We agree that these three cases support the respondents' position.

Anomalous results

[116] Mr Goddard argued that the interpretation of s 393 advocated by the respondents would give rise to anomalous results and said these anomalies could not have been intended by Parliament or would be avoided by adopting the interpretation for which CHH contended.

[117] The first anomaly identified by Mr Goddard was the treatment 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 construction company for numerous future clients. He said if each architect made the same error in their design, and were then sued by the owner of the affected houses, the architect of the single house would be able to rely on s 393(2), but the architect who did not perform work on a specific building could not. This, he argued, made no sense.

[118] The respondents said the analogy with the architects was not a good one and did not accept the assumption that the second architect would not be entitled to the longstop because the architect's work would still be relating to the design of a specific building. We agree the position is not as clear cut as Mr Goddard suggested.

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[78] *Thomson v Christchurch City Council* HC Christchurch CIV-2010-409-2298, 28 March 2011 and *Deeming v EIG-ANSVAR Ltd* [2013] NZHC 955. *Body Corporate 192346 v Symphony Group* HC Auckland CIV-2004-404-232, 3 November 2005 was also referred to in *Carter Holt* (HC), above n 3, at [138].

[119] The second example was the manufacture of kitset buildings where the kitset components are manufactured in a factory process for onsite assembly by builders. Mr Goddard said that if the manufacturer made the components to order for a specific property, it would have the benefit of s 393(2), but if it made the components for future sale without any particular project in mind at the time of manufacture, it would not. He said this again emphasised the arbitrariness of the respondents' interpretation of s 393(2).

[120] The respondents said that the line must be drawn somewhere and it was dangerous to make assumptions without seeing the details of the pleadings and the facts of the individual case. We agree.

[121] We think it is best to leave determinations of the application of s 393 to specific factual situations to cases where the facts are established. So we do not express any view on CHH's examples. If the examples are as stated by CHH, we agree there can be seen to be some arbitrariness in the scope of the longstop provision. But that is a consequence of a line being drawn and wherever that line is drawn, those falling outside it will argue there is unfairness. That does not mean the interpretation leading to that outcome is wrong.

Position of regulators

[122] Section 393(2) applies to the conduct of a council that certifies in relation to building work and to the BIA or the chief executive in relation to building work carried out by others.[79] Mr Goddard said that the better view was that these regulators do not themselves perform building work, and s 393(1) distinguishes between building work and the performance of regulatory functions. However, where a regulator is sued in relation to defects in building work that it is alleged that they should have prevented, the claim relates to building work and the longstop therefore applies. Mr Goddard took issue with the dicta in *Osborne v Auckland Council*[80] suggesting that a council does, in fact, perform building work when it issues a code compliance certificate or performs other regulatory functions. He said

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[79] The reference to the chief executive is to the chief executive of the Government Department responsible for the 2004 Act, the Ministry of Business, Innovation and Employment.

[80] *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [26]–[27].

even if the dicta were correct, his argument would still be valid in relation to the BIA and the chief executive.

[123] Mr Goddard said this distinction between building work and the performance of regulatory functions was also supported by s 91(4) of the 1991 Act. That provision assumed that the longstop applied to the BIA when it issued generic accreditation certificates, even though such a task was clearly not the performance of building work as defined. He also pointed out that, as a result of recent amendments made to the 2004 Act, there is now a clear statutory distinction drawn between the responsibilities of a person carrying out building work and the responsibilities of a building consent authority.[81]

[124] We do not see the position of regulators as assisting us in the very different circumstances of this case. Regulators would no doubt rely on this Court's observations in *Osborne*, as well as the reference to the performance of functions under the 2004 Act or the 1991 Act in s 393(1)(b) and argue that the longstop applies to the latter category of functions. We do not see the interpretation advanced by the respondents as dependent on a finding that the longstop applies only where the defendant itself has carried out building work.

[125] We accept Mr Goddard's argument that the focus of s 393(2) is on the proceedings, so it can apply to proceedings that relate to building work even though the defendant did not actually undertake the building work. But that still does not lead us to conclude that the longstop applies to a manufacturer and supplier of building products. In their case, the claim relates to the design, manufacture and supply of a defective product, which has caused damage. The fact that the product has been used in the construction of a building does not mean that the civil proceedings against the manufacturer/supplier are proceedings relating to building work. They are proceedings relating to negligent manufacture and the supply of defective products, to which the usual rules that limitation periods arise on discoverability apply.

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[81] Building Act 2004, ss 14E and 14F.

Contribution

[126] Mr Goddard argued that the application of the longstop provision to those involved in building work but not to CHH would potentially deprive CHH of the right to seek contribution from those responsible for affixing its cladding sheets to the respondents' buildings and others involved in the building projects. He referred to a number of High Court cases in which it had been found that the longstop provision prevented contribution claims under s 17(1)(c) of the Law Reform Act 1936 because such proceedings were "civil proceedings", and they related to building work.[82] Mr Goddard said that it would be clearly unfair if CHH were to be required to meet 100 per cent of the liability in relation to any claim made against it in circumstances where it potentially could have sought contribution from those involved in building work who were also at fault.

[127] There is no appellate authority on this point and we do not therefore express a view as to whether a contribution claim would be time barred by the longstop provision. Mr Goddard pointed out that, even if it were not, that would have the anomalous effect of exposing those involved in building work who would otherwise have the benefit of the longstop to claims outside the 10 year period covered by the longstop. So, whatever view is taken of the contribution issue, the outcome is anomalous. That anomaly would be prevented if the longstop were extended to manufacturers and suppliers of building products such as CHH in this case.

[128] We accept that the position in relation to contribution illustrates that the longstop provision may apply to some, but not all, potential defendants. But that is the consequence of the legislature determining that the longstop applied to some, but not all claims relating to buildings. We do not think that this should lead to the extension of the longstop. The longstop provision is, in effect, an impediment to the obtaining of a remedy against a defendant against whom negligence can be established. The fact that some defendants do not get the benefit of the longstop is

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[82] *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 17 August 2010; *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006; and the other High Court cases noted in that judgment. The contrary view was taken in *Cromwell Plumbing & Drainage Services Ltd v De Geest Brothers Construction Ltd* (1995) 9 PRNZ 218 (HC). Section 34 of the Limitation Act 2010 applies to such claims.

not a reason to interpret it broadly to extend the benefit to those parties at the expense of plaintiffs.

Conclusion on s 393(2)

[129] We conclude that the reference in s 393(2) to civil proceedings "relating to building work" means proceedings of the kind described in s 393(1). In this case, CHH would need to establish that the respondents' claims come within s 393(1)(a). It has failed to do so.

[130] There is an extensive analysis of the statutory history of s 91 of the 1991 Act in the judgment of Glazebrook J in *Klinac v Lehmann*.[83] In that account, Glazebrook J records that the limitation period was initially intended to be 15 years but was, by the time of the second reading of the Building Bill 1991, reduced to 10 years. The reason given for this in the speech of the then Minister of Internal Affairs, Hon Graeme Lee, indicated that this was "for reasons primarily related to insurance as insurance for a 15 year period would not have been available".[84] That indicates the focus of the provision was on building certifiers which, under the 1991 Act became entitled to provide certification of buildings previously exclusively entrusted to local authorities. As it turned out 10 year insurance was not available either,[85] so the rationale for reducing the longstop period did not turn out to be a valid one.

[131] The Limitation Act 2010 now provides for a generic longstop period of 15 years, subject to an exception for fraud. Suppliers in the position of CHH will be able to rely on that provision.[86] Now that the role of building certifiers has been discontinued and the Limitation Act has its own longstop provision, there may be a case for considering whether or not there should be a specific longstop provision in the 2004 Act.[87]

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83 *Klinac v Lehmann*, above n 74, at [13]–[26].

84 At [21], citing (20 November 1991) 520 NZPD 5490.

85 This is discussed in *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA) at [31] and [84].

86 Limitation Act 2010, s 11(3)(b).

87 Section 14(a) of the Weathertight Homes Resolution Services Act 2006 contains a similar 10 year period for the commencement of claims measured from the date the house was built.

Result

[132] For the reasons we have given, we dismiss CHH's appeal. We allow the respondents' cross-appeal and quash the Court of Appeal's order striking out their negligent misstatement claim.

Costs

[133] The appellant must pay to the respondents (collectively) costs of $45,000 and reasonable disbursements, to be fixed if necessary by the Registrar.

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