IN THE COURT OF APPEAL OF NEW ZEALAND

CA238/2014
[2015] NZCA 321

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:	3, 4 and 5 March 2015
Court:	Randerson, Stevens and Cooper JJ
Counsel:	D J Goddard QC, I M Gault and J Q Wilson for Appellant J A Farmer QC, N F Flanagan and K C Chang for Respondents
Judgment:	23 July 2015 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. The third cause of action in relation to negligent misstatement is struck out. The appeal is otherwise dismissed.

B The appellant must pay the respondents one set of costs for a complex appeal on a band A basis and reasonable disbursements. We certify for second counsel.

Table of Contents

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] Product liability as a basis for a common law tort claim was established by the House of Lords in the landmark case of *Donoghue v Stevenson*.[1] Since then, a manufacturer of defective products has been subject to a duty to take care in designing and manufacturing products regardless of the nature of the product, and whether or not consumers were in a contractual relationship with the manufacturer.

[2] Schools owned or administered by parties related to the Ministry of Education (together, the respondents) have been affected by weathertightness issues. They have filed a product liability claim against four manufacturers, including the appellant, Carter Holt Harvey Ltd (Carter Holt).[2] They say the cladding sheets and cladding systems installed in various schools throughout New Zealand are defective and were designed and manufactured by Carter Holt in circumstances giving rise to a tortious duty of care and other causes of action.[3] We were told a large number of schools may be affected, possibly upwards of 1,400.[4]

[3] The plywood cladding sheets (called shadowclad) and cladding systems were used by architects and builders in the construction of the exterior walls of numerous school buildings. The respondents claim the shadowclad and the cladding systems are inherently defective and have caused damage because shadowclad allows water to enter, particularly when it is installed without a cavity behind it. Until 2005 shadowclad was a stand-alone product and Carter Holt did not provide any extra parts to go with the cladding sheets. Since 2005 Carter Holt has also provided

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1 *Donoghue v Stevenson* [1932] AC 562 (HL).

2 The claims against the manufacturers other than Carter Holt have been settled and those parties are no longer involved in the proceeding.

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

4 Appended to the fourth amended statement of claim is a spreadsheet listing schools and corresponding school buildings the Ministry has identified as suffering from defects. Over 600 schools are listed. This spreadsheet also lists, where known, relevant particulars of the damage present in the building and how this came about. This information is compiled from the buildings already inspected by the Ministry; many more schools may still be affected.

flashings that could be installed with the cladding sheets as part of the cladding systems.

[4] Carter Holt applied unsuccessfully in the High Court to strike the claim out.[5] It now appeals the judgment of Asher J, arguing that the tort claims (based on negligence, negligent misstatement and negligent failure to warn) and a claim under the Consumer Guarantees Act 1993 (the CGA) should have been struck out. Carter Holt also contends that all claims where the cladding was installed more than ten years before the proceeding was filed should have been struck out under s 393 of the Building Act 2004 (the longstop provision).

[5] The respondents plead five causes of action against Carter Holt:

(a) Carter Holt was negligent in designing, manufacturing, importing, and/or supplying the defective cladding sheets and cladding systems. Carter Holt owed a duty of care to the 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".[6]

(b) Carter Holt breached the guarantees set out in ss 6, 8, 9 and 13 of the CGA.

(c) Carter Holt owed a duty to the respondents to take care not to make false, misleading or negligent statements in relation to the cladding sheets or cladding systems that would result in damage to the school buildings.

(d) Carter Holt knew or ought to have known (as manufacturer and designer) about the design defects in the cladding sheets and/or cladding system, and negligently failed to warn the respondents about the "risk

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5 *The Minister of Education v Carter Holt Harvey Ltd* [2014] NZHC 681 [strike-out judgment].

6 This is a reference to both the Building Act 1991 and the Building Act 2004 which we discuss later in this judgment. The term Recognised Building Standards is a defined term in the pleadings, which we deal with below at [65]. The reference to the Building Code is to the Code appearing as Schedule 1 to the Building Regulations 1992, below at [64].

characteristics" of the cladding sheets and cladding systems that could cause damage to the school buildings.

(e) Carter Holt breached s 9 of the Fair Trading Act 1986 by providing information that was misleading or deceptive as to the nature, characteristics and suitability of the cladding sheets and cladding systems.

[6] The strike-out application related only to the first to fourth causes of action. The Fair Trading Act cause of action will therefore proceed to a hearing in the High Court.

[7] The issues for determination on appeal are whether the High Court erred in its determinations that it was arguable:

(i) Carter Holt owed a tortious duty of care to the respondents in respect of the pleaded loss for the purpose of the negligence claim.

(ii) Carter Holt owed a duty of care to the respondents under the tort of negligent misstatement.

(iii) Carter Holt owed a duty of care to the respondents under the tort of negligent failure to warn.

(iv) Carter Holt had a claim under the CGA.

(v) The longstop limitation period under s 393 of the Building Act did not apply to bar any part of the respondents' claim.

[8] A second appeal relating to particulars was also filed in this Court.[7] This appeal was by the respondents against parts of Fogarty J's judgment ordering them to provide certain particulars of these claims.[8] Carter Holt cross-appealed against parts of a second judgment of Fogarty J, which declined to order the provision of further

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7 CA635/2014.

8 *Minister of Education v James Hardie New Zealand* [2014] NZHC 2432.

particulars of certain other aspects of the claim.[9] We were informed during the hearing that both the appeal and the cross-appeal on these questions had been settled.

Striking out

[9] There was no dispute as to the law applicable to a strike-out application. This Court in *Attorney-General v Prince & Gardner* conveniently summarised the applicable principles:[10]

> (a) A strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even though they are not or may not be admitted.
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> (b) Before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.
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> (c) The jurisdiction is one to be exercised sparingly, and only in a clear case where the court is satisfied it has the requisite material to safely make a decision.
>
> (d) The fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction.

[10] In a case where a novel duty of care is alleged, the court should be cautious about striking the claim out.[11] This is particularly true where the facts alleged in the statement of claim cover a range of different factual circumstances. Where potentially new duties of care are in issue in a strike-out context, a range of public policy questions are to be considered. Special care is warranted because the inquiry is to be made on the basis of as yet untested pleaded facts, as opposed to facts proved at trial.

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9 *Minister of Education v James Hardie New Zealand* [2014] NZHC 3344.
10 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267.
11 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [35] and [53].

[11] This Court in *Blain v Evan Jones Construction Ltd* considered the approach to be taken in a strike-out application, where there was no existing duty of care owed by a building company to a local council.[12] The Court said:[13]

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

[12] In the case of an application to strike out on the basis that a particular duty of care does not exist, Elias CJ and Anderson J in the Supreme Court opined that the question for the court is:[14]

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

[13] The same Judges concluded the test on a strike-out was that the case should only be precluded from proceeding where it is "so certainly or clearly bad".[15] The court must be particularly careful in areas where the law is confused or developing. We agree with Asher J's observation that where the parameters of a duty of care are developing, as is the case with liability for leaky buildings, a court should be cautious of pre-empting a full contextual analysis of duty of care issues which can only occur at a trial.[16]

Background

[14] The respondents contend Carter Holt's cladding sheeting product is defective. They challenge any characterisation that this is, in essence, a claim about leaky buildings, subject to regulation by the Building Act or Code. Irrespective of whether the product complies with the Building Code, the respondents contend the use of shadowclad in the construction of schools causes damage to those buildings and consequential health risks to the occupants.

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

13 At [33].

14 *Couch v Attorney-General*, above n 11, at [2] (emphasis in original) and [35]–[38]; *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [*The Grange*] at [25] and [146].

15 *Couch v Attorney-General*, above n 11, at [33], citing *W v Essex County Council* [2001] 2 AC 592 (HL) at 601.

16 Strike-out judgment, above n 5, at [9].

[15] Carter Holt contends this is a claim about leaky buildings. It says that as a manufacturer it was not subject to any regulation by the Building Act or Code. The construction of the buildings (with its product) was the result of an extensive chain of contracts, the existence of which precludes the imposition of liability or any claim that a duty of care is owed to the respondents. Carter Holt says that generally it sold the product to wholesalers who in turn on-sold to the building trade.

[16] The method of construction of the schools in question was set out in broad terms in an affidavit before the Court. The Ministry did not purchase the relevant construction materials for the schools and in some cases, neither did the schools themselves. Where shadowclad was supplied and installed, the respondents say there is an individual set of documentation and files for each school. The Ministry does not have a centralised database of this information. It seems each school had control and management over its specific construction project, subject to a degree of higher level oversight by the Ministry. The Ministry alleges that roughly 5000 buildings are implicated in its claim. Its involvement in the defective product claim arose through its building improvement programmes, whereby it takes responsibility for investigating defective workmanship issues.

Pleadings

[17] The respondents claim that all building works concerned were commissioned by the Ministry of Education and the Secretary for Education, through the Boards of Trustees (BOTs) of the various schools. The BOTs engaged design, building and other professionals to undertake the relevant building work. The Ministry says that after conducting regional and national surveys, it identified weathertightness issues in school buildings.

[18] As a result of these surveys the Ministry has identified systemic defects and characteristics in the cladding sheets and cladding systems installed on the school buildings.[17] It contends Carter Holt designed and manufactured the cladding

[17] Carter Holt, for its part, denies this claim and indicates the defects are in the nature of architectural failures, incompetent installation, failure of other elements of the exterior of the relevant buildings and lack of maintenance.

sheeting and cladding systems (which constitute all the appropriate accessories, jointing system, finishing materials and technical specifications).

[19] The respondents allege they relied on a number of specified promotional materials. The statement of claim pleads the cladding sheeting was purchased and installed on school buildings, which are described in a schedule to the statement of claim. The respondents contend the cladding sheeting contained a number of inherent defects, including:[18]

(a) It 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 (by, amongst other things, capillary action and uptake of moisture by air diffusion, air movement, absorption and liquid flow).

(b) It fails to incorporate adequate drainage paths and drying and tends to transfer absorbed moisture to adjacent timber framing and building papers. This transfer of moisture over time is likely to cause moisture to build up and wet adjacent building materials, causing them damage.

(c) It is not adequately durable; the light organic solvent preservative levels in shadowclad were too low and ineffective to prevent fungal rots. The cladding sheeting is therefore prone to fungal rot, which destroys its integrity.

(d) Lower bottom and other edges of the shadowclad sheet are prone to moisture absorption.

(e) The detailing of the interface between shadowclad sheets and other components of the system is intolerant to "real world conditions and practices".

[18] Carter Holt denies any of these inherent defects exist.

[20] These "real world building conditions and practices" are defined in the statement of claim. They are design and construction conditions and normal building practices, which include:

(a) changes to the dimensions of buildings caused by temperature or moisture in the weather conditions experienced in New Zealand;

(b) the levels of precision and performance that are reasonably achievable by average, competent builders; and

(c) the level of precision that is reasonably achievable using standard tools and devices in the industry.

[21] The respondents plead the cladding sheeting was fixed to buildings directly, in accordance with the technical specifications and that as a result the buildings routinely failed to achieve compliance with Recognised Building Standards.[19] This fixing of the defective cladding sheeting creates what the respondents plead are "risk characteristics", which in turn cause the buildings to fail to meet code compliance standards and create health risks for staff and students. This is in breach of the pleaded representations made by Carter Holt that the cladding sheeting was fit for purpose, would achieve code compliance and would be weathertight. These are pleaded alongside failures to address or rectify these issues, which in turn caused the pleaded loss to the plaintiffs.[20]

First issue — manufacturer's liability for negligence

[22] The respondents allege Carter Holt owed them a duty of care in designing, manufacturing and supplying the cladding sheets and cladding systems, which were then used in and on school buildings. Carter Holt denies it owed any such duty. As noted above, Carter Holt seeks to characterise the claim as a defective building claim. It is about school buildings that have failed or will fail to achieve compliance with the Building Code due to alleged defects in shadowclad and its suitability for

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19 See below at [65].

20 This "loss" is particularised broadly as including the cost of repairing and replacing the cladding sheets, the cost of repairing and replacing the structural elements of the buildings and the cost of preventing risk or harm to staff and students (among other particulars).

use as directly fixed cladding in the construction of those buildings. The respondents say, however, this is a product liability claim. The cladding sheeting and systems are inherently defective; using shadowclad as intended by the manufacturer causes damage to the respondents' property and risks the health of the users of those buildings. While the respondents accept there may also be other causes of the defects in some cases, such as failures by building professionals (builders, designers, architects), the defects in shadowclad exist independently of that building work. They contend the design or construction of the building is irrelevant to the presence of inherent defects in the cladding and the damage it causes.

High Court decision

[23] Both parties proceeded in the High Court on the basis of the accepted approach in New Zealand to determining whether it is fair, just and reasonable to impose a duty of care. That approach adopts a two-stage analysis, focusing on two broad fields of enquiry:[21]

(a) The proximity between the parties; and

(b) The policy considerations at play that may tend to negate, restrict or strengthen the existence of a duty.

[24] On the issue of proximity, Asher J focused on the questions of foreseeability and vulnerability. In the strike-out application, the Judge considered foreseeability of loss was clearly established.[22] He then turned to consider whether the parties were in a sufficiently close and proximate relationship for a duty of care to arise, noting:

(a) The Building Acts do not impose duties on the supplier of building components, although this was not determinative of proximity.

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[21] *The Grange*, above n 14, at [149]–[152] and [161]; *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [184]; *Rolls-Royce News Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) [*Rolls-Royce*] at [58]; and *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) [*South Pacific*] at 293 and 312–317.

[22] Strike-out judgment, above n 5, at [13].

(b) While acknowledging that the inability to allocate risk in commercial contracts points away from proximity, the relationships between the parties in this case disclosed a different commercial and contractual setting from other cases, such as *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* (*Rolls-Royce*).[23]

(c) Other fact-specific considerations, such as vulnerability, pointed in favour of there being sufficient proximity. The plaintiffs were vulnerable in the sense any inspection for defects could be conducted only by experts. Further, it was arguable they could not be expected to take protective measures themselves, given the "degree of separation and multiplicity of components" involved in the construction process at issue.[24]

[25] Accordingly, Asher J found it was arguable there was sufficient proximity between the parties. Turning to the policy issues, the Judge addressed the various operative factors: damage to buildings and health, the risk of unfair apportionment of responsibility, commercial certainty, and the risk of cutting across other areas of law.[25] Having regard to the warnings of the Supreme Court against striking out novel duties of care unless clearly untenable, he concluded there was an arguable case that Carter Holt owed a duty of care in the circumstances. He accepted the issue was finely balanced.

Submissions on appeal

[26] Mr Goddard QC for Carter Holt challenges the existence of a duty of care on both limbs: the relationship was not sufficiently proximate and policy considerations do not support the establishment of a duty.

[27] In respect of proximity, Mr Goddard submits first that no duty of care is owed by a cladding supplier to a building owner because the risk that a manufactured product is not suitable for a particular use or purpose is precisely the type of risk that

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23 *Rolls-Royce*, above n 21 and strike-out judgment, above n 5, at [40].
24 At [45]–[46].
25 At [50], [57], [60] and [65] respectively.

can be, and generally is, allocated by contract between the parties buying and selling the product. This "contractual allocation of risk" reasoning is a key premise in Carter Holt's case.

[28] The submission proceeds from an analogy with *Rolls-Royce*. That case, Mr Goddard contends, was a contractual chain case, in which the most significant factor in determining proximity was the close (but not direct) contractual relationship between the parties. It is the contracts comprising this contractual chain that should control the allocation of risk, unless for some very "special reason" it is fair and just for that risk to be controlled additionally by tort.[26]

[29] Accordingly, Mr Goddard contends the respondents entered into contracts with head contractors (and possibly other parties) that could have provided for allocation of risk of building defects. It is the contracts with these parties that should control the risk of building defects in this case. Carter Holt contends its terms of trade and supply agreements with building merchants contain limitations of its liability. In turn, the builders and contractors purchased the building supplies from those intermediaries, subject to sale agreements in which liability could have been (and possibly was) limited. As such, Carter Holt contends the allocation of risk should follow these contracts alone; nothing warrants the addition of liability by way of a duty of care in tort.

[30] With reference to *Rolls-Royce*, Mr Goddard submits the respondents here were in a relationship of lesser proximity, with less immediate contractual ties. This should tell against a finding of proximity, particularly in the absence of a "special reason" to cut across the contractual arrangements.

[31] As a second factor relevant to the establishment of proximity, Mr Goddard submits that the schools are not vulnerable in any relevant sense. He contends a party is not vulnerable in the relevant sense if there was the opportunity to distance

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[26] Mr Goddard relies as authority for this "very special reason" requirement on *South Pacific*, above n 21, at 308 and 318–319; *Rolls-Royce*, above n 21, at [103]–[104]; and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 313 ALR (HCA) [*Brookfield Multiplex*] at [132].

itself from the relevant risk by contracting to allocate it to some other person.[27] With reference to the contractual chain, Mr Goddard contends the respondents could have contracted for "some other person" to assume the risks of the building defects, had it been willing to pay for it. There is no pleading of any disadvantage on the part of the respondents preventing them from contracting in this way. Mr Goddard urges against a finding that the respondents were vulnerable in any sense.

[32] The relevant building legislation is a third factor said to weigh against the finding of sufficient proximity.[28] The duty in tort here would not follow existing statutory duties since suppliers of building products who do not perform building work are not the subject of obligations under the Building Act 2004. The concern here is the creation of new obligations to new parties, overriding contract and without the support of statute.

[33] Mr Goddard contends the nature of the loss in question does not support a finding of sufficient proximity. He challenges the respondents' argument before the High Court that the present case is distinct from *Rolls-Royce* in terms of proximity because the claim encompasses not just the quality of the product supplied, but the consequential damage that faulty product has caused to the school buildings. The appellant argues any complaints as to the quality of the product are of the kind that should normally be addressed in contractual terms and warranties. At most, the cladding sheeting has simply failed to prevent damage, rather than having caused any damage.

[34] Addressing the second limb of analysis, the relevant policy considerations, Mr Goddard submits that if a duty of care were to be found to exist, Carter Holt would owe a greater duty of care in respect of shadowclad to subsequent purchasers or downstream building owners, than it would to its direct customers. This would

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[27] Relying on *Brookfield Multiplex*, above n 26, at [34] per French J, [51]–[60] per Hayne and Kiefel JJ, [140]–[156] per Crennan, Bell and Keane JJ and [181]–[185] per Gageler J.

[28] This is to be contrasted with the situation in *Spencer on Byron*, above n 21, in which the Supreme Court considered the law of negligence "stands behind" the statutory duties imposed, and found a person performing building work may owe a duty of care independent of contract to take reasonable care to comply with those obligations imposed by building legislation: at [104], [162] and [193].

cut across other fields of law, particularly contract, would imperil commercial certainty, and would render the common law incoherent.[29]

[35] Specifically, imposing a duty of care for the costs of replacing the cladding or the cost of repairs to the framing to which it is attached in these circumstances would cut across:

(a) The contractual allocation of risk agreed to, and paid for, between the parties. Commercial parties should be entitled to expect the risk allocation they have negotiated and paid for will not be disturbed by the courts.[30]

(b) The statutory regime carefully governing deemed warranties in relation to building work, especially ss 396–399 of the Building Act 2004 (and now Part 4A).

(c) The CGA, and the balance it strikes in relation to the circumstances in which it is appropriate for manufacturers of goods to owe duties to the ultimate purchasers of goods.

[36] Moreover, the nature of loss at play should not be a policy factor supporting a duty of care. Mr Goddard emphasises:

(a) For all defective buildings, any compensation awarded is for the cost of repairing/replacing the cladding. This is a quality issue, not a "damage to persons/property" issue; in no meaningful sense has the cladding product itself caused damage to school buildings.[31]

(b) No actual harm to any person has yet occurred – in respect of potential future harm, that risk can be dealt with by remedial actions, namely that the respondents can and should stop using the buildings

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29 Citing *Brookfield Multiplex*, above n 26, at [69].
30 Relying on *Rolls-Royce*, above n 21, at [118].
31 We address the importance of this distinction later.

> pending repair. The cost of alternative premises would then be a purely economic/financial loss to the respondents.

[37] Finally, Mr Goddard contends that if a duty of care is imposed in this case, this would render New Zealand's law out of step with jurisdictions such as England and Australia, where the courts have refused to impose a duty in similar situations.[32] Thus, taking these factors together, Mr Goddard submits it would not be just and reasonable to impose a duty of care on Carter Holt in relation to the losses claimed.

Our evaluation

[38] As the Supreme Court has emphasised, the two-stage analysis used to determine whether a duty of care is imposed provides a framework, not a straitjacket.[33] The concept of proximity looks at factual and policy aspects of the relationship between the parties, following which the second stage looks at external considerations. There is no bright line between these "stages": factors may relevantly be assessed at either stage, or both.[34]

[39] The important insight New Zealand (and Canadian) cases have brought to the framework is that when a court is considering foreseeability and proximity in the first stage:[35]

> … it is concerned with everything bearing upon the relationship between the parties and that, when it moves to whether there are policy features pointing against the existence of a duty of care – that is, whether it is fair, just and reasonable to impose a duty – the court is concerned with externalities – the effect on non-parties and on the structure of the law and on society generally.

[40] We turn to assess this first stage.

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[32] See, for example, in the United Kingdom *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 (HL) at 206–7 and 214 and *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL) at 399 and in Australia, *Brookfield Multiplex*, above n 26 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 165, (2004) 216 CLR 515.

[33] *The Grange*, above n 14, at [149]. See further *Rolls-Royce*, above n 21, at [58]; *South Pacific*, above n 21, at 294.

[34] *The Grange*, above n 14, at [149].

[35] *The Grange*, above n 14, at [156] per Blanchard J, McGrath and William Young JJ and at [218]–[220] per Tipping J. And in Canada, see *Cooper v Hobart* [2001] 3 SCR 537; *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210; *Canadian National Railway v Norsk Pacific Steamship Co* [1991] 1 SCR 1021 at 1151; and *Kamloops v Nielsen* [1984] 2 SCR 2.

Foreseeability

[41] A plaintiff alleging a duty of care in a novel situation must satisfy the court that loss was a reasonably foreseeable consequence of the defendant's acts or omissions.[36] However, as Blanchard J has noted, foreseeability in novel cases is "at best a screening mechanism, to exclude claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss".[37]

[42] Applying accepted strike-out principles to a claim for a novel duty, Asher J found foreseeability of loss was clearly established.[38] A manufacturer such as Carter Holt can be taken to have foreseen shadowclad would be used on buildings. If shadowclad or the cladding system were defective, such that they failed to fulfil their weathertightness function or caused water to enter buildings, that could lead in due course to a weakening and rotting of the component structures and the development and growth of fungi in those buildings capable of damaging human health.

[43] We agree. Foreseeability is established. As a designer and manufacturer of shadowclad and associated cladding systems, Carter Holt must have been able to foresee that negligence on its part may very well result in the types of losses the respondents have suffered.

[44] For completeness, we note that the defects and risk characteristics pleaded by the respondents must be accepted for the purpose of strike-out. This is, as the respondents contend, an allegation that shadowclad and the appellants' other cladding products have been defectively designed and manufactured. Of course, the risk characteristics arising from design and manufacture of products will often be the result of deliberate business and other decisions reflected in the pricing of the product. However, proof or otherwise of such defect will be a matter for trial.[39] For present purposes, we accept the pleaded defects are capable of supporting a claim in negligence.

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36 *The Grange*, above n 14, at [157].

37 At [157].

38 Strike-out judgment, above n 5, at [13].

39 See Stephen Todd (ed) *Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [6.5.02](2); GHL Fridman, Erika Chamberlain and Andrew Botterell *The Law of Torts in Canada* (3rd ed, Carswell, Ottawa, 2010) at 518; and Bruce Feldthusen and Allen M Linden *Canadian Tort Law* (9th ed, LexisNexis, Toronto, 2011) at 612.

Proximity

[45] Proximity is a more difficult question: it requires the court to consider the closeness between the parties and the salient features of their relationship, to determine whether the defendant was someone appropriately placed to take care to avoid damage to the plaintiff.[40] As Blanchard J for the majority in *North Shore City Council v Attorney-General* (*The Grange*) stated:[41]

> … the concept of proximity enables the balancing of the moral claims of the parties: the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected from an undue burden of legal responsibility.[42] A particular concern will be whether a finding of liability will create disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff. Another concern is whether it will expose the defendant and others in the position of the defendant to an indeterminate liability. The latter consideration may, however, be better examined at the second stage of the inquiry: whether the finding of a duty of care will lead to similar claims from other persons who have suffered, or will in the future suffer, losses of the same kind, but who may not presently be able to be identified.

[46] Thus, proximity is concerned with the closeness of the connection between the parties: it fulfils a controlling function, limiting the potential ambit of a defendant's liability.[43] In this sense it is linked to the policy concern of guarding against the imposition of indeterminate liability.

(a) The parties' relationship

[47] The starting point for proximity is the factual relationship between the parties. 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.

[48] The pleadings allege shadowclad is a specialist building product. It is alleged the specifications published by Carter Holt show that the nature and use of its cladding products is not necessarily within common knowledge, even amongst building professionals. Moreover, it is alleged the detailed, technical nature of the

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40 *The Grange*, above n 14, at [158]; Todd, above n 39, at [5.3.02](1); *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (HL) at 411.

41 *The Grange*, above n 14, at [159].

42 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 532.

43 Todd, above n 39, at [5.3.02].

specifications indicate it is qualified building professionals, not end-users, who will purchase shadowclad in the ordinary course. The pleading is that, while shadowclad is available for purchase by the ultimate consumer, Carter Holt anticipated that shadowclad would commonly be acquired by building professionals on behalf of consumers, including schools:[44] it was acquired in this manner by the respondents.

[49] The alleged defects are not visually apparent and it is unlikely to have been within the skill or expertise of the respondents or their contractors to determine or identify these risk characteristics upon examination. It is alleged the defects as pleaded are latent: the harm occurs only after some time, and the inherent defect of the product itself needs to be established by scientific analysis. Accordingly, the pleading is that any inspection or examination of the products by representatives of schools or building professionals acting on their behalf would not have been a meaningful opportunity to prevent the harm that occurred.

[50] The allegation is that the usual purpose of cladding sheeting is to affix it to the façade of buildings for various purposes including aesthetics, insulation, weathertightness, and in some cases, for structural support. Thus shadowclad was specifically promoted for use as an exterior cladding product, including for use on light buildings, which includes many school buildings. Other features pleaded include:

(a) The product was intended for exterior coverage to be applied on to building framing with a range of objectives, including structure, insulation and weatherproofing.

(b) The internal content or make up of the product was scientifically or technically complex and not immediately obvious to a layperson.

(b) Contractual matrix

[51] The contracts between the parties are another feature defining their relationship. Carter Holt has placed great emphasis on this contractual matrix.

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[44] See earlier at [16] for our discussion of the construction and contractual process typically followed in construction of this type by schools.

Mr Goddard submits that the case can be analysed as "a contractual chain case" of the same type as was considered in *Rolls-Royce*". He says the contractual matrix at play in *Rolls-Royce* led the Court to find the relationship was of insufficient proximity to support a duty of care. This case is like *Rolls-Royce* in that sense, and there must be a "very special reason" present here to distinguish this case and support a finding of proximity. Otherwise, the contractual position is determinative.

[52] We do not accept that view. Specifically, we reject that the contractual matrix is determinative, either as a matter of principle, or as matter of fact in this case. As a matter of principle the question of proximity seeks to investigate *everything* bearing on the relationship between the parties. The mere existence of some kind of contractual relationship cannot dispense with that question. It would be to misinterpret *Rolls-Royce* to conclude the Court's reasoning began and ended with the presence of contractual links between various parties. Those links (particularly the content of the applicable contracts) must be placed in the context of the relationship, alongside everything else bearing on that relationship.

[53] This is supported by the Court's reasoning in *Rolls-Royce*. It was not merely the existence of the contracts that was compelling, but the content (their detailed provisions, including dispute resolution mechanisms), the negotiations leading to them, the interrelationship between the key contracts at play, the nature and relationship of the parties outside the contractual structure (equality of bargaining power and commercial status of the parties), and the explicit reasons for structuring the contracts as such.[45]

[54] To the extent that contractual matrix is a relevant feature in the determination of this appeal, there are a number of factors distinguishing this case from *Rolls-Royce*. These support our conclusion that the contractual arrangement does not weigh determinatively against proximity.

[55] *Rolls-Royce* dealt with a situation in which A contracted with B, B contracted with C, and A sought to allege C had a duty to A to take reasonable care to perform its contract with B, to which A was not a party. The Court found there was no such

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[45] *Rolls-Royce*, above n 21, at [103]–[111].

duty owed to a non-contracting party. This conclusion was reached for many reasons. Importantly, all three parties negotiated directly for the contractual setting that prevailed and intended for their own benefit to structure relations in this fashion. This unusual contract structure was a key factor pointing away from the finding of tortious liability.[46] Further, the contracts themselves were subject to carefully agreed technical specifications, the existence of which the Court found to be an impediment to creating tortious quality standards to overlay them.[47] The breach in question was the presence of a number of alleged defects suffered by the plant constructed pursuant to the contracts, in that it failed to meet the contractual specifications. This Court in *Rolls-Royce* noted:[48]

> The other defects [unrelated to technical specifications] identified are alleged general defects in the plant itself, but there is no allegation that any of them is dangerous. All arose during the defects liability period and there is no allegation of latent defects. There is also no allegation of any physical damage to the property of Carter Holt, other than physical damage to components of the plant itself, allegedly caused by defects in other parts of the plant. There are no allegations of possible future damage to other property that might be caused by defects in the plant.

[56] The present case is readily distinguishable. While the contractual framework was clearly placed before the Court in *Rolls-Royce*, this Court does not have the benefit of the details of all the contractual arrangements. It is clear that in some cases the situation is more complex, in that the Ministry (as the Crown's representative) owns school buildings and pays for the construction, but authorised individual BOTs and school management bodies to organise, implement and facilitate the contracts in respect of that construction.[49]

[57] The information we do have indicates an entirely different contractual environment to that featured in *Rolls-Royce*. The "chain" of contracts leading to the construction of school buildings and the installation of shadowclad on those buildings appears to have been diffuse and decentralised.

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46 *Rolls-Royce*, above n 21, at [103]–[104].

47 At [68]–[69] and later at [106]–[107].

48 At [55].

49 See for example the *Property Occupancy Document for state (non-integrated) schools*, gazetted under s 70 of the Education Act 1989, under which the Ministry of Education's building ownership and occupancy of schools is regulated. See also *Ministry of Education v Econicorp Holdings Ltd* [2010] NZCA 450, [2012] 1 NZLR 36 at [7]–[19], establishing the factual background and contractual context of the construction of a school hall, analogous to many of the processes adopted in the schools at issue in this proceeding.

[58] In contrast, the contractual chain in *Rolls-Royce* was short and closely linked. The parties were known to each other, of equal commercial standing and bargaining power and engaged in negotiations to allocate liability. Contracting to protect each of their respective interests was an accessible and viable choice, of which the parties availed themselves. Whether the Minister of Education (the first respondent), or the Ministry generally, or its representatives, had the same choice, namely to contract with each and every builder, project manager, or contractor, cannot be answered in the same way.

[59] This question has, to some extent, already been considered by this Court in *Minister of Education v Econicorp Holdings Ltd*.[50] A majority concluded that a tort claim for negligence in the construction of a defective school hall could not be struck out on a *Rolls-Royce* analysis. Reference was made to "the underlying policy of encouraging local participation in decision-making" in terms of the construction of school buildings and devolution of responsibility in terms of key decision-making to various BOTs, while the Minister established overhead check mechanisms to ensure an appropriate degree of care and skill.[51] Moreover, it was noted there were substantial differences between the situation in *Rolls-Royce* and the construction of a school:[52]

> (…)
>
> (b) Although there was a construction contract between [the building company] and the Board, and a design contract between [the building company] and [the design company], 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 [the building company] 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. Accordingly it was difficult to

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50 Above n 49.

51 *Minister of Education v Econicorp Holdings Ltd*, above n 49, at [47]–[48]. We note at [12] the Ministry circular on property management distributed to all Boards, emphasising "self-management", requiring boards to manage construction projects to completion. Further, at [13] onwards this Court set out in detail the various contracts entered into between the BOT of the school in question, the builders, contractors and suppliers, and the Ministry. We emphasise that each of the schools at issue in this case presumably entered into similar contractual arrangements, with many different builders, contractors, project managers and suppliers.

52 At [61]. The Supreme Court subsequently refused Econicorp's application for leave to appeal this Court's decision, holding that the matter should proceed to trial: *Econicorp Holdings Ltd v Ministry of Education* [2011] NZSC 148.

> say that there was an assumption of responsibility by Rolls-Royce or reasonable reliance by CHH. …

[60] The Court in *Rolls-Royce* had a clear picture of the relationship between the parties. It was possible to determine whether a duty of care existed at the strike-out stage. The affidavit evidence filed for the present strike-out application illustrates the factual uncertainty regarding the contractual chains of supply to the respondents in respect of any given school.[53] To the extent we can infer from the affidavit evidence, the contractual situation is materially different from that in *Rolls-Royce.* Whether it was even possible to contractually allocate risk in the way Carter Holt contends, whether it was reasonable to expect the respondents to do so, and whether such allocation in the circumstances would be effective to prevent and deter the defects of the kind alleged in the future are issues to be examined further at trial. The limited material available to us does not suggest a contractual situation that makes the duty unarguable and untenable.

[61] Further, the Supreme Court in *Sunset Terraces* has noted with approval statements to the effect that a manufacturer of goods could be liable to a party with whom the manufacturer has no contractual relationship.[54] This is particularly the case in situations where a reasonable opportunity for intermediate examination is lacking.[55]

[62] We do not view the contractual matrix as precluding proximity at this preliminary stage. Neither do we accept Mr Goddard's submission that the present case is analogous to the contractual arrangements in *Rolls-Royce*. The two cases could hardly be more different, at least on the material currently available.

[63] We accordingly do not view it as untenable that Carter Holt would owe a duty to an end-consumer to manufacture its product carefully. Tortious liability to a

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[53] We consider evidence surrounding the contractual arrangements between the Ministry and all the schools is a matter for determination at trial: *Blain v Evan Jones Construction Ltd*, above n 12, at [32] per O'Regan P (as he then was).

[54] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] at [33], citing *Dutton v Bognor Regnis Urban District Council* [1972] 1 QB 373 (CA) at 393 (referring, in support, to Lord Denning in *Donoghue v Stevenson*, above n 1).

[55] *Sunset Terraces*, above n 54, at [76]–[78], referring to *Donoghue v Stevenson*, above n 1, at 599 and *Jull v Wilson and Horton* [1968] 1 NZLR 84 (HC).

consumer may potentially exist, notwithstanding the various contractual relationships by which Carter Holt's products reached them.

(c) The statutory framework

[64] The second issue in terms of proximity is the statutory context. In the High Court reference was made to the statutory framework regulating building work in New Zealand.[56] The Building Code is integral to the operation of both Building Acts.[57] The Code sets out certain minimum functional requirements and performance criteria of buildings and building elements. Of particular relevance is cl E2, which provides for exterior walls to be such as to prevent the penetration of water into a building.

[65] As we have already seen, the pleading alleges a duty of care to design and manufacture products that are compliant with the Building Acts and the Building Code. The pleading also alleges alternatively the need to comply with Recognised Building Standards. This is a term defined in the pleading to allege standards including standards for timber framed buildings, timber and wood-based products for use in buildings, chemical preservation of round and sawn timber, the painting of buildings and verification methods.[58] These are promulgated through Standards New Zealand – governed by the Standards Council, operating under the Standards Act 1988.

[66] Justice Asher noted that, unlike the position in relation to builders, architects and designers (or even councils, who carried out "building work" as defined),[59] there were no duties imposed by the Building Acts on the suppliers of building components.[60] The Judge accepted the position of suppliers of building components in the 2004 Act is different to that of Councils. To that extent, the provisions of the

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56 Strike-out judgment, above n 5, at [16].
57 Building Regulations, sch 1.
58 Namely those set out in sch 6 to the fourth amended statement of claim.
59 Building Act 2004, s 17 and the definition of "building work" in s 2.
60 That is, at least, until 2013: s 14G of the Building Act 2004 was inserted from 28 November 2013 by the Building Amendment Act 2013, s 7, setting out certain responsibilities imposed upon product manufacturers and suppliers. These responsibilities do not apply to the present dispute.

2004 Act do not point towards the finding of a duty. Justice Asher considered this was not, however, determinative of proximity.

[67] Mr Goddard relies on the absence of statutory regulation of building suppliers and manufacturers to support the proposition that creating a new duty of the kind proposed would be unfair and unjust, for it would create a new obligation to which the parties did not agree and cut across contractual arrangements made in reliance on the absence of any further duties. The absence of legislative contemplation of the need for duties in this area weighs against the requisite proximity.

[68] We agree with Asher J that the absence of breaches of relevant provisions of the Building Acts or the Building Code imposing duties on building suppliers is not decisive of proximity in this situation. The question of proximity is an investigation of the relationship between the parties. The presence of a statutory obligation to take care in respect of a particular act or omission is a factor indicating it is reasonable to foresee potential harm in relation to those acts or omissions (and the people in respect of whom they are made). But the absence of any direct statutory obligations is not decisive against a duty of care.

[69] The Building Act 2004 replaced the 1991 Act. For present purposes, it shared some key features of its predecessor. Most notably, subpart 4 of the Act sets out in detail the responsibilities of owners, builders, designers and consent authorities under the Act and the Code. The Building Code itself is retained in pt 2, s 15. Section 3 sets out the purposes of the Building Act, including 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 the health and safety of building users, construction in a manner that promotes sustainable development and to promote the accountability of owner, designers, builders and building consent authorities in ensuring work is compliant with the building code.[61] Sections 11–14 set out the regulatory roles of agencies such as

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[61] The principles and purposes of the Building Act 1991 capture essentially the same concepts, with more detail in respect of particular aspects to which regard must be had (including, for example, making provision in a building for storage and processing of hazardous substances, protecting other property from physical damage resulting from construction and meeting access needs for individuals with disabilities).

building consent authorities, territorial authorities and regional authorities under the 2004 Act. Part 2 provides a comprehensive set of provisions in respect of building, including acceptable solutions and verification methods, warnings, project information memoranda, building levies and other administrative concepts. Part 3 sets out in detail regulatory responsibilities and accreditation procedures. Part 4 addresses generally the regulation of building practitioners.

[70] The Building Acts thus establish performance standards for building work and provide for regulatory consent and oversight. Neither Act imposes direct obligations on manufacturers and suppliers of building products. Nevertheless it would be odd if Carter Holt, in producing building products intended for use in code-compliant buildings (to be purchased by individuals who are subject to duties under the Building Act) would have no regard to that Act. This is pertinent to Mr Goddard's submissions that Carter Holt's freedom of contract is not curtailed by the Building Acts, contending Carter Holt's only source of obligation is the contracts it creates. Despite the absence of any duties imposed by the Acts on the suppliers of building products, the standards the Acts impose are relevant to questions of proximity, foreseeability of harm, and the contemplated end-users of products used in buildings, who ought to be protected from that harm.

[71] *Ministry of Education v Econicorp Holdings Ltd* offers some useful guidance on the question of statutory context. The majority identified as one consideration relevant to proximity the fact the parties were not necessarily truly commercial parties. The behaviour of the Ministry and school boards was informed by their responsibilities which had been legislatively implemented and maintained by successive governments. Arnold J noted:[62]

> Unlike the situation in *Rolls-Royce*, it is a public law relationship, in the sense 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.

[72] The same is true of the present context. The statutory framework is not just limited to the Building Acts, but also includes those statutes governing the public

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62 *Ministry of Education v Econicorp*, above n 49, at [45]–[47].

law relationship between the Ministry, school boards, and contractors.[63] These may inform the obligations at play, in light of the proximity these parties had to one another. The absence of a statutory duty does not rule out a tortious duty and nothing has been submitted to indicate a duty is clearly untenable on the relevant legislation. These are issues best determined at trial.

(d) Vulnerability

[73] Carter Holt submits the respondents are not vulnerable because they could have contracted for other parties to assume the risk of building defects. This draws on the line of reasoning adopted by the High Court of Australia in *Brookfield Multiplex*.[64] The High Court in that case held that to establish a plaintiff was not vulnerable, it was enough to show they were able to protect themselves through contract from the consequences of a risk. Accordingly, the respondents here are not vulnerable because they could have sought greater warranties from the contracts in which they entered and that they are now seeking to circumvent, but chose not to.

[74] This approach to vulnerability is not one that has found favour in New Zealand.[65] This may explain why Asher J treated this issue in a far narrower sense than submitted by Carter Holt. The Judge framed the question as whether the respondents could have been expected to know of, and take steps to protect itself against, the risks in shadowclad. We agree with the Judge's conclusion that the respondents could not have done so. It is the respondent's position that the defects were latent and identifiable only by expert examination. It is arguable the respondents were not in a position to protect themselves from these risks and it is therefore arguable Carter Holt owed a duty to them in light of that inability.

[75] Even so, accepting for argument's sake that Carter Holt's characterisation of vulnerability is correct, we are not persuaded it significantly affects the issue of

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63 For example Education Act 1989, ss 69 and 70–70C (governing the occupancy of property and buildings), ss 75 and 76 (concerning the respective powers and functions of boards and principals), s 78 (the regulations relating to control and management of schools), pt 8 of the Education Act generally (concerning finances) and particularly pt 9 (concerning the powers and organisation of school boards and their authority).

64 *Brookfield Multiplex*, above n 26, at [54]–[58] and [181]–[187].

65 *Spencer on Byron*, above n 21, at [156] and [199]–[201] per McGrath and Chambers JJ. An argument based on vulnerability was also rejected by this Court in *Econicorp*, above n 49, at [45].

proximity. First, the notion that the respondents could have procured warranties through their contracts begs many questions, including the possibility of doing so, with viable contracting partners, who were themselves in a position to offer such warranties, and who would be willing to give them.[66] Secondly, the Carter Holt submission that in a negligence claim the schools or owners of the builders ought to have obtained a warranty does not have merit. The real issue is the existence or otherwise of a tortious duty of care to which different considerations apply.[67]

[76] Carter Holt's contention that the possibility of contractually negotiating for quality warranties removes any potential duty does not render the respondents' claim untenable. We reject the notion that any relevant vulnerability is met by the suggested ability to negotiate for warranties.

Policy factors

[77] At the second stage of the inquiry, the court may assess considerations external to the relationship between the parties to ascertain if the imposition of a duty of care would be fair, just and reasonable. Blanchard J explained in *The Grange* why these policy factors may justify the court declining to impose a duty in tort:[68]

> … It will do so because a factor or factors external to that relationship (perhaps indeterminate liability) would make it not fair, just and reasonable to impose the claimed duty of care on the defendant. At this last stage of the inquiry the court looks beyond the parties and assesses any wider effects of its decision on society and on the law generally. Issues such as the capacity of each party to insure against the liability, the likely behaviour of other potential defendants in reaction to the decision, and the consistency of imposition of liability with the legal system more generally may arise.

[78] Carter Holt submits policy considerations support its strike-out claim.[69] Although to some extent such submissions overlap with considerations which are also relevant to the discussion about proximity, we address them here for completeness.

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66 Carter Holt has itself conceded it would not have granted any such warranties.

67 As discussed by the Supreme Court in *Spencer on Byron*, above n 21, at [188]–[192]. See particularly at [189] and Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46.

68 *The Grange*, above n 14, at [160].

69 Citing *Brookfield Multiplex*, above n 26.

(a) Incoherence, commercial certainty and contractual chains

[79] The main policy factor Carter Holt relies on as pointing against a duty of care is the undesirability of cutting across the law of contract. This is said to be likely to damage commercial certainty and the coherence of the common law. Carter Holt contends risks of the kind in question are best allocated by way of contract and that should have been done in this case. To allow tort to cut across that contractual realm would be problematic. Commercial parties would no longer be able to rely on the certainty of their contractual negotiations. It alleges further that this would take New Zealand's law of tort and contract out of step with England and Australia, where claims like this would not succeed.

[80] We accept these are relevant policy factors. They deserve careful and comprehensive analysis. However, this should occur in context, at trial. We reject the submission these factors operate with such certainty as to render the duty unarguable. We have already dealt with the issues emanating from the question of the contractual matrix when dealing with proximity. We are satisfied that a duty of care arguably may exist in respect of manufacturers' liability on orthodox negligence principles. We are also satisfied New Zealand law has developed independently of the influence of other jurisdictions.[70] Moreover, tortious liability is arguably capable of operating independently of the contractual context. Any unfair allocation of risk is a factor that, if proved, may point against a duty of care. The crucial point is that it is at least arguable that fairness would dictate a tortious duty be imposed.

[81] We are supported in this view by the development of negligence in the context of the liability of manufacturers. Although historically treated as falling into a special category of duty, we see it as a particular application of general negligence principles in a specific setting.[71] Traditionally, claims against manufacturers arose in contract alone and were restricted to those in a direct contractual relationship with

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70 *Sunset Terraces*, above n 54, at [7]–[8] per Elias CJ and [49]–[50] per Tipping J, *Spencer on Byron*, above n 21, at [65]–[68]; *The Grange*, above n 14, at [152]–[155], noting the divergence of New Zealand law from other jurisdictions in this regard.

71 Todd, above n 39, at [6.5.01](01).

the manufacturer.[72] A number of limited heads of liability in tort developed to give some protection to consumers.[73]

[82] However the modern trends towards mass production of consumer products meant that a direct contractual nexus between manufacturers and consumers has become rare.[74] Accordingly, as seen in *Donoghue v Stevenson*, the liability of manufacturers has expanded to capture a wider range of defective products.[75] All manufacturers are subject to an ordinary duty to take care in designing and manufacturing products, regardless of what the product was and whether or not consumers were in a contractual relationship with the manufacturer. The duty applies irrespective of the level of danger or otherwise inherent in the product.[76] These considerations still apply to the bounds of product liability today.

[83] The relationship between the consumer and the manufacturer in terms of direct contractual chains, therefore, is not determinative. An end-user may be able to establish liability against a defendant manufacturer in negligence by proving the orthodox elements requiring proof.[77] As a matter of policy, we consider for the purposes of strike-out there to be an arguable duty, established on the facts before us.

(b) Loss and damage claimed

[84] Although in the context of defective buildings poor workmanship generally does not lead to physical damage, Asher J considered such failures may result in damage developing as a consequence of the defects. This would include damage to structures as a result of water ingress.[78] The Judge found such physical damage is a factor weighing in favour of a duty of care.

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72 Todd, above n 39, at [6.5.01](01)–[6.5.02](02); Feldthusen and Linden, above n 39, at 612.

73 Such as, for example, liability for making false representations as to the safety of a product, liability for selling a product knowing it was dangerous and a duty to warn liability for "inherently dangerous" articles such as guns and explosives: see Todd, above n 39, at [6.5.02](01); Fridman, Chamberlain and Botterell, above n 39, at 518.

74 Todd, above n 39, at [6.5.01](01); Fridman, Chamberlain and Botterell, above n 39, at 518.

75 Todd, above n 39, at [6.5.01](01); Fridman, Chamberlain and Botterell, above n 39, at 519.

76 The inherent or special danger of a product can be relevant in determining the *standard* of care: Todd, above n 39, at [6.5.02](02); Amanda Stickley *Australian Torts Law* (3rd ed, LexisNexis Butterworths, Australia, 2013) at 170; and Fridman, Chamberlain and Botterell, above n 39, at 520 and 533.

77 *Wrightson NMA Ltd v Small* CA208/89, 19 July 1991; Fridman, Chamberlain and Botterell, above n 39, at 520–522.

78 Strike-out judgment, above n 5, at [56].

[85] Carter Holt challenges that conclusion. It contends the nature of loss in this case does not constitute a policy factor favouring a duty of care. Rather, the true nature of the respondents' claim is that the cladding products do not perform as they should have, and will cause loss to the respondents associated with remedial measures — that is, the cost of repairing and replacing the cladding. As such, Carter Holt contends there is no meaningful sense in which the cladding has *itself* caused damage to the buildings: to the extent there is a health risk, the respondents always have the ability to perform remedial work.

[86] The submissions draw on the historic distinction in tortious liability between physical damage and economic loss. Courts have characterised costs incurred by a plaintiff in repairing a defective chattel as "economic loss". This was because the costs of repair of the chattel do not arise from injury to persons or damage to property beyond the defect in the chattel itself.[79]

[87] It is true the line between pure economic loss and damage to physical property (or persons) can be unclear.[80] The rationale for the distinction has been described by Stephen Todd as rooted in the fundamental point that tort cannot give a remedy simply for a breach of contractual obligations as to the quality of the product.[81] Traditionally, a tortious duty only arises when a defect in a product causes harm to other property or persons external to the product.

[88] This distinction was articulated by Lord Keith in *Murphy v Brentwood*, where he opined that the cost of repair of the defective product itself cannot be characterised as a recoverable loss because the owner of the defective article could simply discard it and remove the danger.[82] This reasoning, however, has been the

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79 *Winnipeg Condominium Corp No 36 v Bird Construction Co* [1995] 1 SCR 85, citing *Rivtow Marine Ltd v Washington Iron Works* [1974] SCR 1189 at 1205–1207.

80 Todd, above n 39, at [6.5.02](03); *NZ Food Group (1992) Ltd v Amcor Trading (NZ) Ltd* (1999) 9 TCLR 184 (HC); *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1 (CA); Fridman, Chamberlain and Botterell, above n 39, at 350, citing *Dutton v Bognor Regis United Building Co Ltd*, above n 54, at 396; and Cooke, above n 67.

81 Todd, above n 39, at [6.5.02](03). This reflects the principle, of course, that there is no duty in tort to comply with contractual obligations.

82 *Murphy v Brentwood District Council*, above n 32, at 926–928.

subject of judicial criticism.[83] Courts in Canada and England have sought to develop alternative tortious doctrines to deal with the difficulty concerning the nature of damage that is or should be considered foreseeable in the case of defective chattels.[84]

[89] Similar issues arise in respect of preventative damages, namely, that being the cost incurred by a building owner in repairing a defect before it causes future damage or loss to a property.[85] Tipping J explained the policy behind the recoverability of such damages thus:[86]

> 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 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 pre-emptive expenditure as well as expenditure necessary to reinstate or repair physical damage which has actually occurred. In 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 in resulting solely from economic loss there is no good reason for denying a duty of care.

[90] Where repair includes replacing or repairing the original chattel, there are compelling policy reasons why this should be included in the type of damages

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83 *Winnipeg Condominium Corp No 36 v Bird Construction Co*, above n 79, at [40] per La Forest J – addressing particularly the false choice that exists between discarding a long-term investment, such as one's home, rather than repairing the defect. The emphasis in that statement is on the fact that the cost of repairing a defective building is often outweighed by the cost of replacing the building, within the reasonable life of the building. The cost of repairing defects is then a reasonably foreseeable expense incurred as a result of a builder's negligence, for example.

84 See for example, *D & F Estates Ltd v Church Commissioners for England*, above n 32, at 207 in which Lord Bridge noted the "complex structure" theory – in which a defective chattel is considered to be inextricably linked with other goods in a complex structure, thereby linking the defect in the chattel to harm caused in the wider structure. This has been the subject of much criticism: see *Winnipeg Condominium Corp No 36 v Bird Construction Co*, above n 79, at [15]. Lord Bridge later retreated from this theory: see *Murphy v Brentwood District Council*, above n 32, at 926–928. In Canada, the Supreme Court instead developed a "dangerous defects" approach, in respect to the concept of the complex structure: where defects resulting from negligence pose a real and substantial danger to the occupants of the building, the reasonable cost of repairing the defects and putting the building back in a non-dangerous state are recoverable in tort: see Fridman, Chamberlain and Botterell, above n 39, at 538, citing *Rivtow Marine Ltd v Washington Iron Works*, above n 79.

85 See for example *Spencer on Byron*, above n 21, at [45]. Similar points were made in the dissent in *Rivtow Marine Ltd v Washington Iron Works*, above n 79, at 1216–1220 and have subsequently been widely endorsed: see Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 (HL) at 759 and in Canada in *Canadian National Railway v Norsk Pacific Steamship Co*, above n 35, at 310 and 312; *Winnipeg Condominium Corp No 36 v Bird Construction Co*, above n 79, at 211–214 and *Kamloops v Nielsen*, above n 35, at 679.

86 *Spencer on Byron*, above n 21, at [45].

claimable. As Chambers J said in *Spencer on Byron*, the recoverable damages should include the cost of making good the defect, as essential to the repair of the property that had been damaged by it.[87]

[91] The distinction between damage to the chattel and damage to other property still causes difficulty in other jurisdictions. However, the courts in New Zealand are no longer wedded to the distinction. Its value has been questioned, particularly in the context of establishing the scope of a duty.[88] New Zealand tort law has developed to a point where damages caused to other parts of a building to which a defective chattel is attached may be recoverable.[89] We consider it is arguable that recoverable loss could also extend to measures taken to prevent future damage and adverse health effects to those who occupy or visit the premises in which defective products have been installed.

[92] This would allow a plaintiff to recover not only the costs of repairs to damaged parts of the building resulting from the defective goods but also the costs of repairing or replacing the damaged goods. Additionally, a plaintiff could be able to recover the costs of taking measures to prevent potential harm or damage before it actually occurs.

[93] In summary, we consider this position as to loss to be arguable for the following reasons. New Zealand courts have firmly rejected a clear delineation between economic loss and physical damage in terms of recoverable loss. It would be similarly artificial to uphold a distinction between the defective chattel and the harm it will cause by the very nature of its defect, as well as the preventative measures that could be taken to prevent that harm. We are satisfied that the nature of loss is not a policy factor which supports striking out the claim as untenable. The nature of loss is not a distinction that holds weight in New Zealand as distinguishing actionable tortious claims from those that are not. The nature of the loss does not render this claim untenable.

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87 At [145].

88 *Sunset Terraces*, above n 54, at [30]–[32] and *Spencer on Byron*, above n 21, at [12], [41] and [45].

89 The factual aspect of this proposition is an allegation in the statement of claim.

(c) Health and safety

[94] The importance of protecting the health and safety of those who use and occupy buildings has long been a pillar on which duties of care relating to defects in buildings have been based.[90] As recognised by the Supreme Court, the cost of protecting the health and safety of building occupants is borne by building owners. It is the building owners who must sue. As Tipping J stated in *Sunset Terraces*:[91]

> 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.

[95] There are relevant safeguards for the health and safety of all people who come onto school property which can be found in the Health and Safety in Employment Act 1992 (HSE Act) and the Ministry of Education's Health and Safety Code of Practice for State and State Integrated Schools (the Code). A school is a workplace for the purposes of the HSE Act and the Code.[92]

[96] The responsibilities of school boards under the HSE Act include taking all practicable steps to ensure the safety of employees while at work;[93] identifying any existing and new hazards;[94] and taking practicable steps to ensure the safety of others who may come into contact with the place of work or be in the vicinity.[95] Relevant to the issue of preventative damages are the Guidelines to the Health and Safety in Employment Act which require those responsible to be proactive, and to actively seek ways to make buildings, such as a school, a safe place, rather than waiting until something goes wrong. Given the clear health and safety considerations applicable in the target market for the products, we consider it arguable a manufacturer such as Carter Holt should bear responsibility in tort for the design and manufacture of products carrying risk to the health of the occupants of buildings such as schools.

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90 *Spencer on Byron*, above n 21, at [163]–[165].

91 *Sunset Terraces*, above n 54, at [53]. See also [37]–[45] generally.

92 See the Health and Safety in Employment Act 1992 [HSE Act], s 2 and *Ministry of Education Health and Safety Code of Practice for State and State Integrated Schools*, s 2. The Code is mandatory as it is notified under s 70 of the Education Act 1989 and confirms the minimum standards to ensure compliance with both the Building Act 2004 and the HSE Act.

93 Section 6.

94 Section 7.

95 Sections 15 and 16.

These factors are therefore relevant policy considerations and arguably weigh in favour of the imposition of a duty.

(d) Statutory framework

[97] We have already accepted relevant applicable statutes will inform the policy assessment of any duty of care at trial. Our discussion of the relevance of the Building Acts does not need to be repeated. We note only that the relevant statutes can inform not only the factual relationship of the parties, but may also relate to extraneous policy considerations.

[98] There may be other forms of statutory liability at play, other than the Building Acts. As noted in *Econicorp*, the public policy considerations relating to the public law framework involving the respondents, the BOTs and relevant school bodies and those they contract to perform building work will bear on the presence and extent of any potential duty. These are all arguably relevant policy considerations.

Conclusion on negligence duty

[99] We agree with Asher J that there are a number of factors pointing against the existence of a duty of care. These include the supply of building components, by commercial parties subject to no duties under the 2004 Act, who had the potential capacity and opportunity to negotiate for the contractual terms desired.

[100] Despite these factors, we consider on a strike-out basis the key factors of foreseeability and proximity have arguably been made out. Some policy factors may be equivocal. However, there are also relevant policy considerations that support the existence of a duty of care. We are satisfied Asher J was correct in refusing to strike out the first cause of action. This ground of appeal fails.

Second issue — negligent misstatement

[101] Negligent misstatement is a genus of the tort of negligence, developed to extend a duty of care to situations of foreseeable economic loss resulting from false or incorrect statements. The Ministry has pleaded this cause of action separately

from the main negligence claim. Determining whether there is an arguable cause of action for negligent misstatement generally requires the same two-stage approach. There are, however, some important differences. For that reason, we commence this third issue by first setting out the pleadings, before assessing its substance.

Pleadings

[102] The respondents claim that Carter Holt owed them at all material times a duty to take care not to make false, misleading or negligent statements in relation to the cladding sheeting that would result in damage to school buildings. This duty of care is pleaded to have arisen out of the following circumstances:

(a) Carter Holt has specialist expertise and knowledge of the cladding sheets and building elements and designed, manufactured, promoted and supplied the cladding sheets for use in building work (particularly light buildings, of which school buildings are a type).

(b) Carter Holt produced and supplied specifications, setting out guidance for the installation of the cladding sheets.

(c) Carter Holt carried out specified promotional activities, a defined term in the pleadings. The definition of "promotional activities" includes providing descriptions and representations about its cladding sheeting within the specifications supplied, marketing directly to consumers, architects, and building contractors through Carter Holt's employees and agents, publishing and supplying brochures and other promotional materials for distribution in the market and publishing and supplying advertisements on the internet, magazines or television commercials.

(d) These promotional activities are said to have included descriptions or representations about the products that would lead a reasonable person to believe that the products, when directly affixed to a building frame (without a cavity) of a light building would, as set out in the specifications as the pleadings allege:

(i) achieve compliance with Recognised Building Standards, the Building Code Requirements, and the Building Acts;

(ii) in the case of Cladding Systems only (and not Cladding Sheets), be tolerant to Real World Building Conditions and Practices, taking into account that buildings are never designed and constructed perfectly;

(iii) have a serviceable life that meets the Building Code Requirements;

(iv) provide a weathertight exterior to the buildings on which they are installed;

(v) provide a durable exterior to the buildings on which they are installed;

(vi) in the case of Cladding Systems only (and not Cladding Sheets), be tolerant to inevitable and normal building movement, wind conditions, and natural environmental conditions;

(vii) not rot, corrode, and/or degrade, or cause other building elements to rot, corrode, and/or degrade;

(viii) require a low level of maintenance.

(e) The Ministry relied on these representations made by Carter Holt in relation to the cladding sheeting, in Carter Holt's capacity as the designer, manufacturer and supplier of the cladding sheets. Crucially, the respondents claim their reliance is inherent in their allowing the cladding sheeting to be installed on the school buildings.

(f) The particulars of this reliance include that Carter Holt ought to have known of the respondents' reliance and that, given the defects in the cladding sheeting (pleaded elsewhere in the statement of claim),[96] it was foreseeable the respondents would suffer damage in relation to the false representations as to the cladding sheets.

[103] The particulars in relation to the reliance pleading are as follows:

> The Plaintiffs relied on the Representations (insofar as they relate to Cladding Sheets) and Particular Descriptions in or around the Year of Supply, by purchasing the Cladding Sheets and/or allowing the Cladding Sheets to be installed on the School Buildings.

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[96] See above at [19].

[104] The breach of this duty as pleaded is said to have caused the respondent to suffer the same loss pleaded in the other causes of action.[97]

High Court decision

[105] Justice Asher refused to strike out this cause of action. Carter Holt's argument was that the plaintiffs had to establish a "special relationship" between it and the respondents and further that Carter Holt assumed responsibility to the respondents to take reasonable care in the truth of its statements about the cladding sheeting.[98] It contended the Supreme Court in *The Grange* required an affirmative assumption of responsibility by Carter Holt, which was not pleaded.

[106] Justice Asher accepted there was a requirement of a "special relationship", imposing an additional requirement beyond the usual analysis for a typical negligence claim.[99] However, he considered that in the context of the supplier of a specialist building product, the designer and manufacturer of that specialist product possesses a special skill upon which it can be expected there will be reliance.[100] He noted the absence of any ability to establish the qualities of the product by inspection, concluding it was foreseeable that consumers like the respondents would rely on Carter Holt's statement as to the quality of its systems.

[107] The Judge referred to *Spencer on Byron*, in which McGrath and Chambers JJ acknowledged that despite having a limited role to play in negligence generally, reliance is an essential feature in the chain of causation in respect of negligent misstatement.[101] Justice Asher acknowledged that any analysis as to reliance will be fact-dependent, and will turn on the information the respondents received and acted upon. He reasoned that the "general circumstances" in this case are enough to raise the possibility of sufficient reliance, however noting the "real issue" would be the negligence pleading in the first cause of action. Despite considering this cause of action to be "peripheral", he declined to strike it out.[102]

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97 The loss being a defined concept in the pleadings. See above at [21] and n 20.
98 Relying for this submission on *Hedley Byrne & Co Ltd v Heller* [1964] AC 465 (HL) at 529.
99 Citing here *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [32] and *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA).
100 Strike-out judgment, above n 5, at [96].
101 *Spencer on Byron*, above n 21, at [199].
102 Strike-out judgment, above n 5, at [98].

Submissions on appeal

[108] Carter Holt's starting point is that it was entitled to proceed on the basis that its terms of trade limited its liability to its warranties as to quality or performance, subject only to statutory schemes, such as the CGA or FTA. It argues that a negligent misstatement claim could only succeed if there were a special relationship between Carter Holt and the respondents, such that Carter Holt had assumed responsibility to the respondents to take reasonable care about the truth of its statements about shadowclad.[103] There being no pleading of an affirmative assumption of responsibility by Carter Holt or of any other facts capable of founding such a relationship, the claim should have been struck out.[104]

[109] Carter Holt submits further there was no pleading of sufficient reliance by the respondents. Relying on the decision in *Caparo Industries plc v Dickman* as to the need for a reasonably defined class of persons said to have relied on the alleged statements,[105] Mr Goddard submits that the potential class of "reliers" goes far beyond anything contemplated by previous authorities. Specific reliance by the respondents being an essential element of the cause of action, and the respondents having confirmed they do not plead specific, but merely general reliance, the claim must fail.[106]

[110] The respondents, in defence of the decision not to strike out the negligent misstatement cause of action, submit:

(a) The subsequent authorities suggest the "special relationship" test in *Hedley Byrne & Co Ltd v Heller* does not impose any additional requirement beyond the typical negligence analysis – it merely requires further detail relative to the question of proximity in cases

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103 Relying on *The Grange*, above n 14, at [189] per Blanchard, McGrath and William Young JJ.

104 He also referred to the contractual matrix as precluding any liability in negligent misstatement – given our exhaustive treatment of this above, we do not address it here.

105 *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 638, cited with approval in *The Grange*, above n 14, at [189].

106 Relying on the decision of this Court in *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at [55]–[60]. That case concerned claimed liability of auditors of a failed finance company for a report (contained in a prospectus) as to the state of affairs and financial position of the company issuing the prospectus. The respondents in the present case confirmed their pleading as to reliance is limited to general reliance in a joint memorandum dealing with particulars.

involving negligent statements alone (which are a separate and often difficult class of actions in negligence).

(b) To the extent it is necessary to prove a special relationship, this existed between the parties: Carter Holt was in the position of specialist manufacturer, on whose judgment or skill others would reasonably rely, and owed a duty to parties seeking information about their product.

(c) In the absence of any ability of the respondents to inspect and accurately assess the reliability of Carter Holt's representations, it was reasonable for the respondents to treat its technical and promotional materials as the most reliable source of information on the cladding products.

(d) The representations and descriptions on which the respondents plead general reliance were clearly intended as advice as to the suitability of shadowclad. It was reasonably foreseeable these statements would be seen and relied upon by the respondents or their agents.

(e) There is no need for a direct relationship between the maker of a statement and the recipient of that statement. It is legitimate for the representations to be passed through intermediaries to the end consumer.

[111] Accordingly, the cause of action should proceed to trial and be determined with reference to the factual circumstances to ascertain its validity.

Evaluation

[112] Since the possibility of recovery of pure financial loss incurred pursuant to reliance on negligent statements was confirmed in *Hedley Byrne & Co v Heller & Partners Ltd*, the courts have struggled to identify the precise parameters of the tort.[107] It is appropriate therefore to start with the elements of the tort, which are:

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[107] *Hedley Byrne & Co v Heller & Partners Ltd*, above n 99. See Todd, above n 40, at [5.8.04]–[5.8.05].

(a) a false or misleading statement;

(b) made in circumstances where a duty of care is owed to the plaintiff;

(c) reasonable reliance on the statement by the plaintiff; and

(d) with resulting loss to the plaintiff.

[113] Whether the courts will impose a duty of care in a given case requires consideration of the same two questions already discussed: proximity and policy considerations. The establishment of requisite proximity required to impose a duty of care in the context of careless statements is particularly important. The concern is that statements have the potential to give rise to indeterminate liability to an indeterminate number of people.[108]

[114] Carter Holt asserts that a "special relationship" must be established by way of "voluntary assumption" of a duty and that these are questions going to the presence or otherwise of proximity between the parties. This is in accordance with the view expressed by this Court in *Attorney-General v Carter.* Speaking for the Court, Tipping J confirmed that in cases of negligent misstatement the conventional two-stage approach under the headings of proximity and policy should be employed to determine the outcome of the duty of care issue.[109] He added that the concepts of assumption of responsibility, foreseeability and reasonable reliance are used to assist the court in reaching a principled and reasonably predictable answer to this proximity enquiry. As Tipping J noted:

> [25] The concept of reliance is involved in determining whether there has, in the particular case, been an assumption of responsibility, whether actual or deemed. In some, albeit relatively rare cases, the defendant's assumption of responsibility is voluntary. In other words the defendant is found to have undertaken to exercise reasonable care. In such circumstances, which are analogous to, but short of, contract, it is both reasonable and foreseeable that the plaintiff will rely on the undertaking.
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> [26] In most cases, however, there will be no voluntary assumption of responsibility. The law will, however, deem the defendant to have assumed

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[108] *Ultramares Corp v Touche* (1931) 255 NY 170. See also Feldthusen and Linden, above n 39, at 451.

[109] *Attorney-General v Carter*, above n 99, at [30]–[32].

> responsibility and find proximity accordingly if, when making the statement in question, the defendant foresees or ought to foresee that the plaintiff will reasonably place reliance on what is said. Whether it is reasonable for the plaintiff to place reliance on what the defendant says will depend on the purpose for which the statement is made and the purpose for which the plaintiff relies on it. If a statement is made for a particular purpose, it will not usually be reasonable for the plaintiff to rely on it for another purpose. Similarly, if the statement is made to and for the benefit of a particular person or class of persons, and the plaintiff is not that person or within that class, it will not usually be reasonable for the plaintiff to place reliance on it so as to oblige the defendant to assume responsibility for carelessness in its making.

[115] The second aspect involves the policy considerations at play. The need to limit the scope of the tort is of great importance. The number of economic losses that might arise in reliance on a single negligent statement could be considerable, making it inappropriate to impose liability on a negligent statement-maker.[110] The concepts of assumption of liability, foreseeability and reasonable reliance therefore operate as checks on the extension of liability under the enquiry of proximity. As with negligence generally, these factors may overlap to a considerable extent. The ultimate question remains whether the parties were in a relationship of sufficient proximity to justify the imposition of a duty of care in relation to the statements of the defendant, which, given the nature of such a statement, requires a particular and defined duty of care.

[116] The key limiting factor in the present context is reliance. Its central role to the question of proximity in negligent misstatement was captured by the Supreme Court in *The Grange*, drawing on the following statement from Lord Oliver's speech in the House of Lords in *Caparo*:[111]

> [T]he necessary relationship between the maker of a statement or giver of advice ("the adviser") and the recipient who acts in reliance upon it ("the advisee") may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and (4) it is so acted upon by the

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110 *Hedley Byrne*, above n 98, at 537.

111 *The Grange*, above n 14, at [189], citing *Caparo Industries plc v Dickman*, above n 105, at 638.

> advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive …

[117] There are two aspects to the question of reliance informing our enquiry as to whether there is reliance in the present case. The first is whether the statement made was reasonably capable of being relied upon. This is a question of law, contextualised by the question of assumption of responsibility, foreseeability of reliance and reasonableness of that reliance. The second is whether, in fact, there was reliance causing loss to the claimant. This is a factual question, informed by principles of causation. This is helpfully summarised by Australian authors Balkin and Davis, thus:[112]

> The plaintiff must show not only (as a question of law) that the statement was such as might have been relied on but also (as an issue of fact) that the statement was indeed relied on to provide not merely the occasion for the loss to be suffered, but its cause.

[118] On the basis of the pleadings before us, we are not convinced either of these limbs can be established. We address them in turn.

Reasonably capable of being relied upon?

[119] In terms of whether a statement was reasonably capable of being relied upon, the focus is on both the assumption of responsibility by the statement maker and the foreseeability of the person who might be expected to rely on the statements. The dangers of indeterminate liability in negligent misstatement have led to the question of foreseeability operating as a strict limitation on the plaintiff or classes of plaintiffs to whom the duty extends. 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 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.

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[112] R P Balkin and J L R Davis *Law of Torts* (5th ed, LexisNexis Butterworths, Australia, 2013).

[120] The rationale of requiring the plaintiff to prove foreseeable harm to a class of individuals as a result of the misstatements in question was cogently addressed by Lord Bridge in *Caparo*:[113]

> The situation is entirely different where a statement is put into more or less general circulation and may foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes when the maker of the statement has no specific reason to anticipate. To hold the maker of the statement to be under a duty of care in respect of the accuracy of the statement to all and sundry for any purpose for which they may choose to rely on it is not only to subject him, in the classic words of Cardozo CJ to "liability in an indeterminate amount for an indeterminate time to an indeterminate class" (Ultramares Corporation v Touche (1931) 174 NE 441, 444); it is also to confer on the world at large a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributable to the maker of the statement. 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 that 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 (e.g. 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.

[121] The respondents have not pleaded membership of a specific class, in respect of whom Carter Holt can be said to have reasonably foreseen they would rely on its statements. The pleading is in very general terms. It refers to a generic, diffuse representation, made apparently to the world (consumers at large), not limited to any specific transaction or context. Liability on this basis risks indeterminacy. The statement of claim as drafted does not limit in any way who can rely on the statement or for what purpose. There is no attempt to identify who the relevant end-user class might be, or how Carter Holt might identify the individuals in the class to whom it could be liable. The authorities demonstrate the law of tort is not

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113 *Caparo Industries plc v Dickman*, above n 105, at 620–621.

willing to impose a duty on the basis of so broad and disparate a representation, made to a vague class of individuals.[114]

[122] Foreseeability and proximity through a definable class are essential elements of establishing an actionable duty of care in relation to negligent misstatements. We are not satisfied that the claim as pleaded could succeed. In this context the respondents did not suggest at the hearing that any more specific particulars of reliance might become available.

Reliance in fact?

[123] In terms of the second limb, we acknowledge that actual reliance need not be proved; reliance can be inferred where reasonably supported by the facts and evidence. This is, however, distinct from a pleading of inherent or assumed reliance — that being reliance assumed from a relationship of such proximity, vulnerability, or an established practice of dependence on the statement-makers' accuracy that reliance need not be specifically proved. We are not dealing with such a case here.[115] The general promotional materials referred to by the respondents do not constitute the kind of relationship on which the law of tort will be prepared to recognise an assumed situation of reliance by a relevant class.

[124] Rather, the question is whether the respondents have taken any action in reliance on the statements they received, such that harm has occurred. The ensuing harm is crucial to the cause of action, because misrepresentations alone do not injure anyone directly. This in turn links to the further question of whether loss would have

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[114] We leave aside for present purposes the question of the expectation of reliance, in the sense the recipients of the representation would not seek further information about, or seek to consult over, the appropriateness of the product – there is no information as to Ministry processes or whether any consultation would occur and we do not think this assists the analysis.

[115] See for example *Boyd Knight v Purdue*, above n 106, at [57]–[61], rejecting the claim of "reliance in a general sense" by an investor on the financial statements made for a company by an auditor. See also *South Pacific*, above n 21, at 318, emphasising the close proximity between the investigator and the insured – as a matter of practice the insured has to rely on the carefulness and probity of the investigator. Finally, see *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA) in which the Drainage Board was said to act habitually without an express request by the Council in question. The habitual practice established consistent reliance in a manner akin to what would have occurred had there been actual requests for information. Cases of this assumed or implied reliance are, however, "strictly limited" – they stem from relationships featuring vulnerability or ignorance of a particular kind, an (almost) immediate proximity between the statement-maker and relier, and in some cases are supplemented by obligations in statute: see Balkin and Davis, above n 112.

arisen if care had been taken by Carter Holt. There is no pleading, beyond the very general claim, that the pleaded reliance caused the loss to the respondents.

[125] We consider there is no basis for reliance as a matter of fact on representations by Carter Holt that can be said to be arguably causative of the loss. As noted, the pleadings contain no description and point to no particulars of actual reliance by the plaintiffs or any of their agents. There are no particulars sufficient to establish facts capable of giving rise to factual reliance by inference. The pleaded reliance is general. This does not establish a proper basis for the required reliance.[116]

[126] Finally, we note Mr Farmer's acknowledgement on behalf of the respondents that he could point to no authority in which liability for negligent misstatement had been established where effectively the source of reliance is statements made to the world and not to any particular class of persons, or for any specific building or project contemplated by the maker of the statement.

[127] We are therefore satisfied the negligent misstatement claim should be struck out. We do not consider it necessary to determine whether the statements made by Carter Holt were reasonably capable of being relied upon by the respondents or their agents. The current pleading provides an insufficient basis for arguability of deemed assumption of responsibility to the respondents for the statements made by Carter Holt. Neither do the pleadings clearly support the view the respondents were entitled to rely on those statements for the purpose they did.

[128] We do not see the claim for negligent misstatement as adding anything to the product liability claim. To the extent of the negligent misstatement claim, Carter Holt's appeal succeeds. This ground of appeal is allowed.

Third issue — negligent failure to warn

[129] In the context of product liability of manufacturers as it has developed, the tortious duty of care may include a duty to warn customers or users if the product

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[116] Leaving aside the questions of foreseeability and indeterminate liability that such a pleading raises.

has dangerous features or potentially harmful qualities. Such liability has been found to exist in a range of different factual situations.[117]

[130] The underlying rationale for the duty flows from an imbalance in the information held by a manufacturer (and hence knowledge) as compared with the consumer or user about the risks or dangers inherent in the use of the product. The authorities suggest more than just an imbalance is required — the manufacturer will almost always possess greater knowledge about the product they manufacture than the consumer. Traditionally therefore the duty to warn has been held to arise in circumstances where the manufacturer holds knowledge or information about the danger that the consumer could not reasonably be expected to possess. The imposition of a duty to warn is needed to address or rectify the imbalance.

[131] The respondents allege Carter Holt failed to warn of the risk characteristics of the cladding sheeting and cladding system products. Carter Holt denies the existence of any duty. It contends further the products are not dangerous to people or property and the duty to warn does not extend to the alleged defects in items that merely reduce their economic value.

[132] Justice Asher approached this cause of action as "very much an alternative".[118] He found it was unlikely to give rise to different issues than those that already arise in relation to the main negligence claim. Thus if there is no duty of care in relation to the manufacturer's liability cause of action, there is unlikely to be any liability for a failure to warn. The Judge accepted there was undoubtedly an imbalance of information between Carter Holt and the respondents because Carter Holt, as the designer and manufacturer, had information about the strengths and weaknesses of their products that the respondents would not be able to evaluate.

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117 For examples of the duty, see *Watson v Buckley* [1940] 1 All ER 174 (Assizes) (risk of serious reaction from using hair dye); *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88 (QB) (risk of explosion if chemicals came in contact with water); *Lambert v Lastoplex Chemicals Co* [1972] SCR 569 (risk of fire from fast drying lacquer sealant); *E Hobbs (Farms) Ltd v Baxenden Chemical Co Ltd* [1992] 1 Lloyd's Rep 54 (QB) (risk of fire from a wall coating product); *Carroll v Fearon* [1998] PIQR 146 (CA) (likelihood of tyres exploding); *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, above n 35 (flammability of pipe cladding sold for use on oil-rigs); *Hollis v Dow Corning* [1995] 4 SCR 634 (breast implants likely to rupture after installation); and *Pou v British American Tobacco (NZ) Ltd* HC Auckland CIV-2022-404-1729, 3 May 2006 (whether duty to warn of risks of smoking).

118 Strike-out judgment, above n 5, at [100]

However, the Judge accepted that the authorities impose a duty of care only when the manufacturer has knowledge about the danger that the consumer could not reasonably be expected to possess. Accordingly, the Judge held:

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

[133] Mr Goddard submits Asher J was right that, if there is no duty of care of the kind pleaded in the first cause of action, it would be surprising if there was a duty to warn consumers about the alleged shortcomings in the products. The same proximity and policy factors apply to the imposition of such a duty. Moreover, the authorities do not support the imposition of a duty to warn about characteristics of a product that go to its quality and/or its suitability for a particular use, in circumstances where the product does not create a danger or risk to persons or to other property. No relevant danger or risk is pleaded here.

[134] Mr Goddard also submits the Judge was right to find that a duty to warn arises only when a manufacturer has knowledge about a danger inherent in the use of a product that the consumer could not reasonably be expected to possess. However, he contends no knowledge is pleaded on the part of Carter Holt of any relevant danger or risk. Therefore, in the absence of any pleading of facts capable of founding a duty to warn, this cause of action should have been struck out.

[135] The difficulty with this submission is that the respondents have pleaded Carter Holt knew or ought to have known its products had a range of risk characteristics and that, if they were installed on school buildings, they could or would cause damage to those buildings.[119] Like Asher J, we consider the pleadings raise sufficient factual issues relating to the risk characteristics and knowledge of such on the part of Carter Holt that it is at least arguable the facts might give rise to a

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[119] The alternative pleading of "ought to have known" may well not be sufficient. But this overlooks the specific plea of actual knowledge. The true state of Carter Holt's knowledge of risks may not be known until after discovery.

duty to warn consumers about them. Of course, the reality of this is a matter to be established at trial.

[136] We do not see Mr Goddard's point as to the level of the relevant risk or danger as decisive at this strike-out stage. As the judgment of Chambers and McGrath JJ in the Supreme Court in *Spencer on Byron* illustrates, the courts in New Zealand have never drawn a distinction between dangerous defects and other defects in buildings.[120] We agree with Mr Farmer that the respondents' allegation is that the defects pleaded can cause harm to persons and property and that a failure to warn of the risk characteristics could give rise to liability in tort.

[137] Whether this is an additional or alternative cause of action, the existence of a duty of care for failure to warn will depend on all the circumstances and the facts to be proved at trial, as will the extent of any overlap with the first cause of action. For the above reasons this ground of appeal also fails.

Fourth issue — claims under the CGA

[138] The respondents claim Carter Holt, as the supplier of shadowclad and cladding systems, breached statutory guarantees owed to them under ss 6, 9 and 13 of the CGA.[121] Each of these provide for possible redress against a manufacturer for breaches of the guarantees in question, following the supply of the goods to a consumer.

[139] The CGA claims were initially advanced by the respondents on the basis of indirect supply. This is no longer the case. An earlier concern by Carter Holt as to the particulars of how shadowclad was supplied now seems to be the subject of agreement between the parties.

[140] In the High Court, Asher J found it was arguable consumers who acquire goods without contact with the manufacturer may still have a claim against the manufacturer. Carter Holt is to be treated as a manufacturer, carrying out the

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120 *Spencer on Byron*, above n 21, at [146].

121 There was a further claim under s 8 of the Consumer Guarantees Act 1993 [CGA], but this was not struck out by Asher J as he considered the pleadings were likely to be amended further. Section 8 is not advanced before us, and we take the same view as Asher J.

business of assembling, producing or processing goods.[122] He also considered it arguable that shadowclad fell within the definition of "goods" in s 2 of the CGA, even though the cladding may been incorporated into a whole building.[123]

[141] Justice Asher considered that the purpose of subpara (c) of the definition of "goods" in s 2 of the CGA, which removes from the definition of goods "whole buildings", was to exclude homes or offices that are sold as such, rather than their individual parts, in order to protect vendors and their agents. This provision might have applied had the respondents purchased a complete school building from another party. However if shadowclad had been supplied to the respondents, their agents, contractors or to builders in their employ directly, and later installed in a building constructed for the Minister, that would constitute supply of components of a building, and not the building itself.[124] That was a question that could only be answered at trial, with reference to the individual agreements for supply. Justice Asher accordingly declined to strike out the claim.[125]

Submissions on appeal

[142] Carter Holt challenges Asher J's conclusion that it was arguable "components of a building" were supplied. Carter Holt's submission is twofold: first, the CGA does not and cannot apply where a supplier acquires goods from a manufacturer, and uses those goods to produce a different product that is then supplied to the relevant consumer. Carter Holt can only be liable as a manufacturer if what it manufactures and supplies (cladding sheeting) is in turn supplied to a consumer. It is not liable as a manufacturer where the goods it supplies are used to produce a different product.[126] The end-consumer of a product with multiple components cannot pursue the manufacturer of each individual component: there is no obligation owed by those manufacturers, because they have not manufactured the relevant good. Carter Holt

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122 As provided by the definition of "manufacturer" in the CGA, s 2.

123 Section 2 defines goods as "not [including] a whole building, or part of a whole building attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation".

124 At [88]–[89].

125 He noted, in doing so, he was not prepared to conclude at the strike-out stage that any of the exceptions in s 26 of the CGA applied: at [86].

126 Mr Goddard gives the example of a manufacturer of wood supplying to a chair company, which in turns sells the chair to a consumer: the consumer will have no claim against the wood manufacturer for breaches of the CGA in respect of the chair.

contends in this case, the relevant supply for the purposes of the CGA claim was a building, pursuant to a construction contract. The cladding sheeting was supplied to an intermediary, who combined it to produce something entirely different (a building), thereby severing any ties between the manufacturer and the end product. Further, the respondents have not pleaded any supplies of cladding sheets to a plaintiff (or relevant agent) that might circumvent this difficulty. Since such a pleading is essential to the CGA claim, its absence means the claim should be struck out.

[143] Secondly, Mr Goddard submits what has been supplied to the respondents are whole or parts of whole buildings. The CGA does not apply to supply of buildings and must be struck out.

[144] Carter Holt's submissions on this ground of appeal relate in large part to the need for further particulars in respect to the pleadings of supply. Both challenges to the CGA claim emanate from a lack of specificity about how the shadowclad reached its endpoint in respect to each school. While that may be true, we do not consider that to be decisive at this strike-out stage. The issues identified by Carter Holt in relation to the application of the pleaded statutory guarantees are, as Asher J correctly concluded, factual ones for the trial. Whether liability applies under any one or more of the guarantees in ss 6, 9 or 13 (or even 8) will ultimately depend on the nature of the supply of shadowclad and cladding systems and the circumstances in which those occurred. These require evidence and careful examination at trial. On the evidence before us as to the variety of contractual arrangements and circumstances of supply, it is not untenable to propose cladding was supplied in a manner bringing it within the ambit of the CGA and that it constituted a good to which the CGA applies.

[145] We are satisfied these are issues for trial and should not be struck out. This second ground of appeal fails.

Fifth issue — are parts of the proceeding time-barred?

[146] The issue on appeal is whether the High Court erred in holding that the longstop limitation period under s 393 of the Building Act 2004 did not apply to bar

any part of the respondents' claim. This question turns on whether the 10 year longstop provision contained in both s 91 of the 1991 Act or s 393 of the 2004 Act applies.

[147] A crucial point of interpretation is the meaning of the phrase "relating to building work" in s 393(2). The section itself provides:[127]

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

[148] There are accordingly three prerequisites to the application of the longstop limitation. First, a civil proceeding; second, one that relates to building work; and third, the elapse of 10 years or more from the act or omission on which the proceedings are based. It is common ground that the first and third requirements are

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[127] The structure of s 91(2) of the Building Act 1991 is broadly similar in that the 10 year limitation applies to civil proceedings relating to building work.

met. The question is whether it can be said these are proceedings relating to building work.

[149] The claims in issue were first filed in late 2013. The appellants contend that any buildings upon which the cladding was installed before 12 April 2003 are time-barred, being outside the longstop period.

[150] We refer first to the purposes and principles of the legislation and some relevant definitions. Section 3 of the 2004 Act provides for purposes:

> **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.

[151] 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.
>
> (Emphasis added)

[152] The 2004 Act distinguishes between building work and building methods or products. The latter are defined without reference to building work to mean "building methods, methods of construction, building design or building materials".[128] The 2004 Act provides for a Building Code which sets out the detailed requirements applicable to buildings.[129] There was a similar provision contained in s 48 of the 1991 Act.[130] The Building Code is concerned with performance requirements for buildings and refers to specific requirements for "building elements" and various different requirements for "buildings" or "building work". "Building Elements" are defined in the Building Code to mean:[131]

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

[153] There is no dispute cladding sheets are building elements for the purposes of the category established in the Code and specific time-frames are provided for their minimum performance (of either 15 or 50 years).[132]

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128 Building Act 2004, s 20.

129 Section 400.

130 As contained in sch 1 of the Building Regulations.

131 Building Regulations, sch 1, cl A2.

132 Building Regulations, sch 1, cl B2.3.1. This clause appears in a section entitled "Performance". It relates to "building elements", requiring that such elements must, with only normal maintenance, continue to satisfy the performance requirements in the code for the lesser of the specified intended life of the building if stated, or the life of the building being not less than 50 years in certain circumstances (if the elements provide structural support to the building, are difficult to access or replace, or failure of those elements to comply with the code would go undetected during normal use and maintenance) or 15 years in other circumstances (if the building elements are moderately difficult to access or replace, or failure of those elements would go undetected during normal use, but would be easily detected during normal maintenance).

High Court judgment

[154] Justice Asher determined the proceeding was not time-barred. After setting out and examining the relevant provisions and legislative materials, he concluded that the marketing and supply of generic building products for subsequent use in "unspecified and unknown" buildings could not be said to relate to the construction, alternation, demolition or removal of a building. The manufacturing of cladding generally, then, could not constitute "building work". This aligned with the differentiation between building elements and building work maintained in the Act and Code.

[155] Further, Asher J did not consider the inclusion of the words "relating to" in the longstop provision warranted expanding the definition of building work to include Carter Holt's activity in this case.[133] The Judge noted that Building Industry Authority determinations, building consents and code compliance certificates were included within the term "building work" before the words "relating to" were added to s 393(2) in 1993. Accordingly he did not see the words "relating to" as extending the definition of "building work" as Carter Holt had suggested. The Judge found that s 393(3) of the 2004 Act contemplates the longstop extending to claims brought against a territorial authority, building consent authority, regional authority or the chief executive in relation to the issue of a building consent or a code compliance certificate or a determination. This provision is express recognition that the specific provisions in the 2004 Act relate to the actions of these persons and they fall within the extended definition of "building work". Accordingly, apart from the acts or omissions expressly referred to in s 393, the Judge did not see the words "relating to" in either their natural meaning or wider context as extending the definition of "building work".[134]

[156] The Judge then determined that "building work" referred to building work in the singular, intending to capture building work performed on a specific building.

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133 He considered and rejected Mr Goddard's submission that the fact previous cases had accepted determinations of the previously existing Building Industry Authority as "relating to building work" justified a similar acceptance in the present case.

134 Strike-out judgment, above n 5, at [127].

This was consistent with the view of the majority in *The Grange*.[135] He was satisfied the longstop referred to work connected with a particular building job, and accordingly could not be extended to Carter Holt's work in this case. He was not persuaded to a contrary view by the authorities relied upon by Mr Goddard, concluding:

> [143] It is necessary as a matter of legislative interpretation to draw a boundary around the meaning of the phrase "relating to building work". On the one hand it cannot have been the case that the manufacture of anything that was designed to be in a building could be treated as "relating to building work". If that were so not only would nails, paint, glass and other materials that are generally on the market be included, but also, theoretically, so could certain chattels and fixtures such as internal lightbulbs and internal security systems designed for buildings.
>
> [144] It is not possible to propose any neat phrase or cut-off line which could apply. However, there is a natural distinction between work, design and products intended for a particular building and generic products that are available on the general market and are not destined for a particular building, which would include cladding and cladding systems.
>
> [145] I am satisfied that these proceedings do not relate so much to the installation of the cladding. They relate to the qualities of the cladding itself. The reference to "systems" in the statement of claim appears to add little. The allegations are that the product is prone to certain types of fungus which break down the internal structure of the product, that the product is prone to losing tensile strength and bracing capacity, that it shrinks when it dries and can rupture, and that it has insufficient levels of preservatives. The problems do not relate in any direct way to the process of construction of the building.

Submissions on appeal

[157] Mr Goddard submits that the critical question is not whether producing or manufacturing the cladding sheeting constitutes "building work" but rather whether the proceeding as a whole can be said to be a civil proceeding relating to building work. He submits this was not an issue addressed by the High Court. The claim is that the school buildings do not comply with the Code: the respondents seek to attribute responsibility for defective building work to a supplier of materials used in carrying out that building work. That is of necessity a claim about building work. Further, the loss claimed relates to remedial building work on these allegedly defective buildings, which also points to the fact the claim is one relating to building work.

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[135] At [129]–[130], citing *The Grange*, above n 14, at [209]–[210].

[158] Thus Mr Goddard emphasises the High Court focused on the wrong issues in relation to the longstop: the issue is not whether Carter Holt has performed building work nor whether the manufacture and supply of cladding sheets is related to building work.[136] Carter Holt says the essence of the respondents' claim is that the cladding products and systems were used in building work performed on the school buildings and that building work is defective. The respondents seek to hold Carter Holt liable for the cost of remedying defects in the buildings.

[159] Carter Holt contends, therefore, as a matter of ordinary language and common sense, this is a claim that relates to building work on the school buildings. Mr Goddard emphasises particularly the distinction between the qualities of the cladding sheeting (that it is defective) and the process of construction of the buildings: the claim relates to the construction of the buildings using shadowclad. If the cladding had not been used to construct the buildings, there would be no claim. Therefore, the claim must relate to building work. Additionally, the central complaint upon which the respondents' case rests is the compliance of the buildings with statutory requirements imposed on building work. Therefore the claim must be one relating to building work.

[160] Mr Goddard says the respondents' contention as to the nature of the proceedings would circumvent Parliament's policy intentions in establishing the longstop. Particularly, it would confine the longstop to claims against only people who have themselves performed building work. This would be arbitrary from a policy perspective. This is because it would mean the longstop provision operates to protect those directly involved in defective building work, but not suppliers of materials and generic designers who are also sued on the basis that they have some responsibility for the same defects in the same defective building. Moreover, it would:

(a) Not apply to product certificates, even though it would apply if the same assurance was given on a one-off basis in relation to a particular

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[136] This is seen as how the Judge approached the issue in, for example [109], [124], [143]–[144], [148] and [152] of the strike-out judgment, above n 5.

building, or if a council negligently determined that the code would be complied with using the relevant building product/method;

(b) Not apply to the chief executive if sued in respect of a defective building constructed in reliance on a national multiple use consent, even though it would apply to an otherwise identical one-off consent given by a council for the same building; and

(c) Apply to a person who warrants compliance with the Code after building work is done as in *Gedye v South*, but not to a person who promises or represents in advance that their building product will achieve compliance with the Code.[137]

[161] Outcomes such as this, says Carter Holt, would be unfair and there is no coherent policy rationale that could justify them. Section 393 should be read in accordance with the ordinary meaning of its text, in order to achieve the policy goal for which it was intended, namely the barring of all building-related claims, generally. Mr Goddard supports this position with reference to authorities, contending that case law supports the broader notion of a proceeding relating to building work it advances.[138]

[162] Finally, Carter Holt contends the finding that the longstop could not apply in this case because the proceeding was not related to particular buildings is incorrect. Mr Goddard submits the claim in question does relate to building work on particular buildings, namely the construction carried out on each of the individual schools listed in the statement of claim. It is not the same situation as those in which there was no particular building — such as a claim in respect of building control systems generally, adopted by the Building Industry Authority in its reviews and reports.[139]

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137 Referring here to *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271.

138 *Gedye*, above n 137, at [41]–[48]; *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 at [11]–[25]; *Hamilton City Council v Rogers* A92/97, 23 April 1998 (HC) at 5–6 in which the Court held proceedings for breach of a contractual warranty or representation as to compliance, quality or workmanship of earlier building work were civil proceedings relating to building work. The Court in those cases distinguished between the relevant act or omission of the defendant on which the proceeding was based, and the physical on-site building activities, emphasising the subject matter need not be exclusively the latter to constitute building work.

139 *The Grange*, above n 14, at [205]–[210]

On that basis, Mr Goddard contends the longstop should apply, and all the claims be struck out, 10 years having elapsed.

Evaluation

[163] We agree with the Judge's decision. There is no need to burden this already lengthy judgment with further exegesis. We will make brief mention of the relevant statutory policy and then address the arguments advanced by Carter Holt.

[164] We are satisfied that policy considerations behind the longstop support the view Parliament did not intend it to apply to building products, manufacturers and suppliers.[140] Although Carter Holt has suggested that the impetus for the limitation was "the problems engendered by the discoverability approach in the context of negligence claims pertaining to building work and building control",[141] the parliamentary materials suggest that drivers for a longstop limitation involve limiting local authority liability for defects many years after a building had been built and enabling building certifiers referred to in the 1991 Act to obtain professional indemnity insurance.[142]

[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. The question then, is whether anything related to building work is

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140 The concept of a longstop was raised in 1991 Building Bill following receipt by the select committee of a submission from the Inter-Professional Committee on Liability, requesting a longstop limitation. The Inter-Professional Committee represented the New Zealand Institute of Architects, Institution of Professional Engineers New Zealand, New Zealand Institute of Surveyors and New Zealand Institute of Valuers.

141 Citing *Gedye v South*, above n 137.

142 See Building Bill 1990 (54-2) and correspondingly Building Bill 1990 (54-2) (select committee report). See also the submissions to the Internal Affairs and Local Government Select Committee of the Inter-Professional Committee on Liability (February 1991 and 15 March 1991), Carter Holt Harvey and the Manufacturers Federation Inc, Carter Holt Harvey Ltd (February 1991) and New Zealand Manufacturers Federation Inc (5 February 1991). See also (31 October 1991) 520 NZPD 5304, (20 November 1991) 520 NZPD 5490 and in respect of 1993 amendments, (17 August 1993) 537 NZPD 17479. See generally Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988).

identifiable in the claim before us, such that this can be said to be a civil proceeding that relates to it.

[166] The manufacture and design of cladding sheeting 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.[143] That relevant act or omission must itself be sufficiently connected to the building work to align with the parliamentary purpose intended in the longstop. 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.

[167] 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.

[168] We draw support by analogy from the cases relied upon by Mr Goddard. In *Gedye v South*, for example, the act or omission in question related to a breached contractual warranty as to the quality of building work completed.[144] The appellants in that case could not invoke the longstop as the substance of the proceeding was a claim in misrepresentation, as opposed to the building work itself, despite the underlying issue being faulty building work. We are satisfied that there, as here, the act or omission of the defendant as pleaded must itself relate to building work for the longstop to be invoked.

[169] Further, Mr Goddard's reliance on the time-barring of actions of regulatory authorities as evidence that something outside of actual building work can be subject

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143 As noted by Glazebrook J in *Klinac v Lehmann*, above n 138, at [11]–[25].
144 *Gedye v South*, above n 137.

to the longstop is, in our view, misplaced. The proper analysis in respect of the time-barring of claims against regulators (such as in relation to accreditation certificates), is that where their act or omission is a statutory function prescribed by the Building Act, it is likely to be captured by s 393(1)(b) and will be time-barred.[145] The application of the longstop to regulatory authorities does not, in our view, assist Carter Holt in this case. We would uphold Asher J's conclusion on this point.

[170] We make two further points in relation to building work and the longstop in the 2004 Act. First, Mr Goddard accepted that in supplying materials, Carter Holt was not undertaking "building work" for the purposes of these Acts. He used that argument to support a submission that a duty of care was not available in the circumstances of a supplier, because Carter Holt was not subject to Building Act obligations. However, in relation to the longstop argument, Mr Goddard contends these proceedings "relate to" building work, even though Carter Holt was not carrying on building work.

[171] Secondly, the natural meaning of s 393 is that it is intended to apply to the two categories of proceedings, described in s 393(1)(a) and (b).[146] The Limitation Act 2010 is to apply to both categories of proceedings. Section 393(2), in context, is not intended to expand the scope of the proceedings to which the Limitation Act applies. Rather, it provides a separate longstop limitation for proceedings that would otherwise fall under subsection (1).[147] Nor does section 393(3) suggest any widening of the scope of subsection (1). Rather, it specifies that, for the purposes of subsection (2), the date of the act or omission on which the proceedings are based is the date of certificates or determinations by an agency carrying out functions under the Act. This is no more than an elaboration to define when time runs for two particular functions under the Act. 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.

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145 Building Act 2004, s 393(1)(b).

146 Being proceedings arising from building work associated with the design, construction, alteration, demolition or removal of any building; and those performing functions under the Building Act relating to the construction, alteration, demolition or removal of buildings.

147 This differs from the 15 year longstop provision in s 11(3)(b) of the Limitation Act.

[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(6) and not to manufacturers and suppliers of products.[148] Like Asher J, we consider the focus of the Act is on those parties directly connected to the construction of a building.

[173] For the most part it will be easier for plaintiffs generally 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 (as defined in the 2004 Act) has made it easier for product manufacturers to avoid liability.[149] Yet the imposition of a statutory limitation is a balancing exercise between the interests of plaintiffs and defendants. We agree with Mr Farmer's submission that it is inevitable that the operation of a longstop limitation will benefit one party to the detriment of another, as is demonstrated by the position of the defendants in *Gedye v South*.[150]

[174] We are satisfied that claims against product manufacturers and suppliers for building materials were not intended to be covered. While that may produce an outcome that manufacturers perceive as unjust, we are required to apply the wording of the legislation to the limitation provision in s 393 of the 2004 Act. We are satisfied the interpretation adopted by Asher J as to whether the proceeding here relates to building work was correct.

[175] For the above reasons the fifth ground of appeal fails.

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148 See above n 60, noting the enactment of s 14G by the Building Amendment Act 2013.

149 This was the position in the present case until three of the four defendants in the present proceeding settled with the plaintiffs.

150 See *Gedye v South*, above n 137: the defendants were unable to benefit from the longstop, but also were unable to claim contribution from any of the parties actually carrying out the building work (who did benefit).

Result

[176] The appeal is allowed in part. The third cause of action in relation to negligent misstatement is struck out.

[177] The appeal is otherwise dismissed.

Costs

[178] Although Carter Holt has succeeded in one aspect of its appeal, it has failed on the bulk of its challenges. The balance of overall success lies with the respondents. Accordingly the appellant must pay the respondents one set of costs for a complex appeal on a band A basis and reasonable disbursements. We certify for second counsel.

Postscript

[179] This proceeding is unique in that it relates to a large and potentially complex claim against a manufacturer in relation to a significant number of schools. The length and scale of the proceeding, if it is litigated in the conventional manner, has the potential to be very cumbersome and costly for the parties. It would also present the High Court with significant resourcing issues. The parties recognise this and have shown a commendable degree of cooperation to date. However, it is clear that intensive case management will be needed along with innovative solutions to ensure that the proceeding is conducted in a manageable and cost-effective way.

[180] Counsel raised as one possibility the prospect of identifying categories of various contractual arrangements. No doubt other steps could be devised to ensure the litigation is handled efficiently and fairly in accordance with the objectives of the High Court Rules. All this is a matter for the parties, their legal advisers and the High Court to address.

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