

High Court rules claims against cladding suppliers do not expire after 10 years

Comment

In a landmark decision, the High Court has decided that claims against cladding suppliers are not subject to the 10 year limitation on claims in the Building Acts.

Section 393 of the Building Act 2004 (and its predecessor, section 91 of the Building Act 1991) imposes a 10 year limitation period on claims for defective 'building work'. The 10 year timeframe begins as soon as the act or omission on which the claim is based occurs. But Asher J found this legislation does not extend to indirectly supplied building components in a case decided this month.

Asher J came to that conclusion in a case involving claims for damages brought by the Minister of Education and others against Carter Holt Hervey Limited (CHH). CHH supplied a cladding product known as 'shadowclad' which was used in the construction of a number of school buildings around New Zealand. When the plaintiffs brought the claim to Court, CHH said that the claims alleging negligence and other causes of action could not succeed including because they were time-barred under the 10 year 'long-stop' limitation period on claims in respect of building work.

The High Court has now decided that the 10 year long-stop limitation period does not apply because CHH was not involved in 'building work' under the Building Act.

The Judge also addresses the tenability of the plaintiffs' claim based on CHH's allegedly negligent manufacture and supply of cladding sheets and cladding systems installed in various school buildings throughout New Zealand.

The Judge declined to strike the claims out, emphasising that the claims raised issues of fact which must proceed to trial.

Background

The background is set out, helpfully, by the High Court Judge, Asher J, in his judgment. We set out the relevant passages of the judgment in full:

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

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

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

The plaintiffs brought an action for damages against CHH. The plaintiffs alleged that CHH owed them a duty of care in designing, importing, manufacturing, and/or supplying the cladding sheets and cladding systems

that were defective. Specifically, the plaintiffs alleged that CHH owed a duty to ensure the cladding sheets complied with relevant building standards and requirements under the Building Acts and Code.

The plaintiffs also alleged that CHH breached its duties of care by negligently misstating the 'nature, characteristics and suitability' of the cladding sheets and cladding system.

Lastly, the plaintiffs alleged breaches of various statutory guarantees under the Consumer Guarantees Act 1993 (CGA) and misleading or deceptive conduct under the Fair Trading Act 1986 (FTA).

In response, CHH applied to strike out all but the claims under the FTA. It argued that it owed no duties of care in negligence or negligent misstatement; that the CGA does not apply in relation to buildings; and that none of the causes of action (save under the FTA) could succeed because they were time-barred under the 10 year long stop limitation period under s393 of the Building Act 2004.

The duty of care issue

Asher J refused CHH's application. This was decided on the following basis:

Asher J agreed with CHH's counsel that (by contrast with the Councils), the Building Act did not explicitly impose duties on suppliers of building components, but stated that there may be a common law duty of care based in part on recognised building standards that applied in the industry at the relevant time. Asher J also acknowledged that it was open to the plaintiffs as commercial parties to protect themselves against defects in the cladding by obtaining contractual warranties, but stated that that factor was not determinative of whether a duty of care in negligence was owed.

Asher J pointed to the ‘considerable degree of commercial separation’ between the Minister of Boards and CHH, and to the relative ‘vulnerability’ of the Minister and Boards due to an inability to detect latent defects in the cladding sheers and cladding system. On that basis, the Judge held that the parties were sufficiently ‘proximate’ in their relationship that a duty of care could exist.

Asher J then turned to consider the relevant policy factors for and against the existence of a duty of care. Factors weighing in favour of a duty of care being owed by CHH as a product supplier included:

- The obvious foreseeability of loss;
- The risk of physical damage and/or damage to the health of occupants as a result of water ingress; and
- The public benefits of a duty of care to promote careful development and testing of products, and accurate marketing as to their qualities.

Factors weighing against a duty of care included:

- The absence of any explicit duties on suppliers of building components under the Building Act (compare the specific duties placed by the Act on territorial authorities);
- The ability of the plaintiffs to obtain contractual warranties;
- The risk that building suppliers will end up bearing an undue proportion of responsibility for leaky buildings, especially if suppliers cannot rely on the 10 year limitation period (as to which, see below).

Weighing those matters, Asher J concluded that the negligence claims, though finely balanced, could not safely be struck out: the facts were ‘capable’ of supporting the alleged duty of care.

As to the plaintiffs’ claims of negligent misstatement and negligent failure to warn, the Judge accepted that these claims were somewhat ‘peripheral’ to the main negligence claim, but stated that the claims should go to trial. The Judge referred to the ‘special skill’ of product manufacturers, saying: *In the context of a supply of a specialist building product, the designer and manufacturer of a cladding system does have a special skill that it can be expected will be*

relied on in relation to the proposed functionality and performance of the product. There is no ability to establish the qualities of such a product by inspection. In my view it was arguably specifically foreseeable that consumers like the plaintiffs would rely on the statements as to quality and systems provided by Carter Holt.

On the alleged duty to warn, the Judge noted that CHH’s knowledge of problems would be a key factual issue and cautioned:

There is nothing to indicate that [Carter Holt] was aware of any problem with its product, and indeed that is not pleaded... A duty only arises when the manufacturer had knowledge about the danger that the consumer could not reasonably be expected to possess because the purpose of the duty to warn is to address, or ameliorate, this imbalance.

However, whether CHH possessed such knowledge was a factual issue for trial.

In relation to the CGA claims, Asher J found that these claims involved issues of fact that must be resolved at trial. The Judge held that as the source of the cladding sheets CHH could not be liable under the CGA as a “supplier” or intermediary of goods, but that it could nevertheless be liable as a manufacturer. In particular, the statutory guarantee of acceptable quality under s6 of the CGA applies equally to suppliers and manufacturers of goods (both parties accepted that the cladding fell within the definition of “goods” under the Act).

Asher J also rejected an argument from CHH’s counsel that there was no right or remedy available under the CGA because the cladding was supplied as a whole or part of a whole building which is not “goods” under the Act. Asher J held that the fact the goods may have been incorporated ultimately into whole buildings does not necessarily mean that the Act could not apply.

The 10 year long stop decision

Finally, CHH argued that because the claims “related to” building work they were time-barred under the 10 year limitation period applying under s393 of the Building Act 2004 (and its predecessor, s91 of the Building Act 1991).

The Judge noted that the prerequisites to the long stop applying are:

- Civil proceedings;
- Relating to “building work”; and
- 10 or more years elapsing from the date of the act or omission on which the claims are based.

The Judge also noted that both parties agreed that the supply of building components was not “building work” as defined in the Building Act, but that it was CHH’s argument that the phrase “related to” meant that the 10 year limitation period extended to cover claims in negligence against product suppliers.

The Judge rejected that argument, holding that the focus of the Building Act and the “long-stop” was on those directly connected to the construction of a building.

Asher J observed that it would require an extremely broad interpretation to find that the manufacture of a generic product was “for or in connection with” such work. He noted the performance requirements for building elements included specific timeframes for performance of 15 or 50 years, which indicated the legislation draws a distinction between building work and building elements.

The Judge was not satisfied that the phrase “relating to” relied on by CHH was intended to widen the definition of building work such that the long-stop would cover claims against building suppliers.

The Judge upheld a string of High Court decisions distinguishing between building work and building products for the purposes of s393/s91 of the Building Acts.

On this basis, Asher J concluded that the 10 year long-stop does not apply to the duties of care as the supply of cladding is not building work, and does not relate to a specific building or buildings.

The Court’s ruling will therefore provide a powerful precedent for leaky building owners whose claims against those involved in the construction of the building may otherwise be time-barred under the 10 year limitation period.

Case: Minister of Education & Others v Carter Holt Harvey Limited [2014] NZHC 681