

Court of Appeal refusal to strike out Carter Holt leaky building case good news for homeowners

The Court of Appeal judgment received late last week in the *Carter Holt* case is good news for owners of leaky homes, as it upholds the High Court decision that a product liability claim against a cladding manufacturer is arguable and is not subject to the 10 year limitation period under the Building Act.

In relation to limitation, Carter Holt argued that High Court was wrong to find the 10 year period did not apply to bar any part of the plaintiff's claim. The Court of Appeal rejected that argument, saying: *"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...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."*

As to duty, the Court of Appeal also rejected Carter Holt's argument that the High Court had been wrong to find a duty of care owed to the plaintiffs is arguable. The Court agreed with the High Court that there are a number of factors pointing against the existence of a duty of care, but held that, despite these factors, the key factors of "foreseeability" (of loss as a consequence of the defendant's acts or omissions) and "proximity" (the closeness between the parties and the salient features of their relationship) were arguable. Relevant policy considerations also supported the existence of a duty of care.

The Court of Appeal upheld the High Court's finding that allegations as to Carter Holt's alleged knowledge of the "risk characteristics" of its product supported an argument that there was

also a negligent failure to warn. The Court said: *"We agree with Mr Farmer [counsel for the plaintiff/respondents] that the respondents' allegation is that the defects pleaded can cause harm to persons and property and that a failure to warn of the risks could give rise to liability in tort."*

A separate "negligent misstatement" cause of action was struck out as untenable given a lack of specific reliance on representations by Carter Holt, and as not adding anything to the product liability claim.

Claims under the Consumer Guarantees Act were also upheld as arguable.

While Carter Holt may yet appeal to the Supreme Court, this decision should assist those contemplating a claim against a cladding manufacturer.