BEATING THE LONG-STOP?

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In a recent decision (*Minister of Education & Ors v Carter Holt Harvey Limited* [2014] NZHC 681 (4 April 2014) the High Court allowed leaky building claims against a manufacturer of a cladding system to continue to trial even though the claims related to buildings constructed more than ten years before the issue of proceedings. While the decision has been appealed, it may open the door for leaky building claims against cladding manufacturers, where all rights against other parties involved in the building's construction would be prevented by the "long-stop" defence in the *Building Acts* 1991/2004 (ss.91/393 respectively).

The case centred on school buildings affected by 'leaky building' syndrome. Plaintiffs comprising the Minister, Secretary, and Ministry of Education, and Boards of Trustees of a number of affected schools, sued cladding manufacturers, including the manufacture of "shadowclad", an exterior cladding panel used extensively in the construction of schools throughout New Zealand. Three of the cladding manufacturer defendants settled, leaving Carter Holt Harvey to apply to strike out the proceeding.

CAUSES OF ACTION

The plaintiffs alleged five causes of action against Carter Holt: negligent design and manufacture of the cladding system; breach of the *Consumer Guarantees Act* 1993; negligent misstatement of the nature, characteristics, and suitability of the system; negligent failure to warn of risks involved in the cladding system; and breach of the *Fair Trading Act* 1986 in relation to providing information about the nature, characteristics and suitability of the system.

Carter Holt submitted that none of the first of these causes of action could succeed and that all of the negligence-based claims were time-barred pursuant to the ten-year long-stop (Section 393 of the *Building Act* 2004).

Justice Asher. considered in detail whether a duty of care could exist between the cladding manufacturer or supplier with no direct contractual link to the owner of the building in which the (allegedly) defective cladding had been installed. He noted that the imposition of a duty could see building suppliers bearing an "undue and disproportionate responsibility" if the parties more directly involved in the construction of the leaky building becoming insolvent prior to trial, or could obtain the protection of the long-stop, where the building suppliers could not.

The Court was not persuaded to strike-out the negligence causes of action because it was prepared to find that the necessary proximity for a duty of care to arise existed, noting Justice Tipping's observation in *Spencer on Byron (Body Corporate 207624 v NSCC* [2012] NZSC 83 (11 October 2012)) that once proximity is established a duty of care should be found to exist unless it would turn out not to be in the public interest.

In relation to the *Consumer Guarantees Act* it held that while Carter Holt was not a supplier within the meaning of that Act it was clearly a manufacturer so that it was arguable that there could have been a failure to comply with guarantees set out in the Act.

The Court was also prepared to accept that both the negligent misstatement and negligent failure to warn causes of action were arguable and did not strike them out, though it saw them as peripheral to the main negligence claim.

WORDING OF THE *BUILDING ACT*

But perhaps the feature of this case most interesting to practitioners in this area is the Court's rejection of Carter Holt's submission that the negligence claims were time-barred due to the operation of the long-stop. This involved a detailed analysis of the wording and intent of the *Building Act* 2004 and the long-stop including reference to its Parliamentary background. Parliamentary debates confirmed that, as apparent from the definition of building work the words 'building work' meant design and construction work associated with specific buildings, rather than the supply of building components. Both counsel had already accepted that the supply of building materials did not fall within one of the four definitions of building work under the *Building Act* (ie construction, alteration, demolition, or removal of a building. The Court also held that the use of the singular 'building' in the definition of 'building work' meant was deliberate. As the manufacture and supply of the cladding sheets and system did not relate to a specific building, rather "future, unspecified buildings", this meant that the long-stop could not apply.

The Court then considered three other decisions *(Thomson v Christchurch City Council* [2008]HC Christchurch CIV-2010-409-2298, *Body Corporate 192346 v Symphony Group* [2005] HC Auckland CIV-2004-404-232 , *Deeming v Eig-Ansvar Ltd* [2013] NZHC 955) which it held all indicated that "the long stop does not extend to indirectly supplied building components" (at [140]).

The Court held at [148] that the manufacture and supply of cladding systems was not building work as defined in the *Building Acts* 1991/2004 and that such work must relate to a particular building and not manufacture and supply of generic product for unspecified buildings in New Zealand, so that the long-stop did not apply. It dismissed the application to strike out.

ANALYSIS

The decision may re-open the door for leaky building claims previously slammed shut (as against the parties who built the houses) by the long-stop. It remains to be seen whether this will result in a new wave of previously time-barred claims. First, it only relates to houses clad in 'shadowclad'. Second, the threshold for proving negligent manufacture of such products must be high (we are not talking a snail in a bottle). At trial, it will be no doubt be argued strenuously that the failures of such buildings were always in the installation of a perfectly good product (although the evidence which the plaintiffs held was presumably a significant reason why a settlement was reached with the other three defendants, all substantial players in the area). Third, an appeal has apparently been filed. If, however, the case is settled prior to an appeal being argued, or an appeal is unsuccessful, so that this decision remains, the door has been left ajar for plaintiffs with the necessary evidence, resources, and commitment to taking the difficult issue of negligent manufacture of cladding systems to trial, if necessary. NL