IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-1899
[2020] NZHC 47

UNDER	Consumers Guarantees Act 1993, the Fair Trading Act 1986, the Building Act 2004
BETWEEN	THE MINISTER OF EDUCATION AND OTHERS First to Fourth Plaintiffs
AND	JAMES HARDIE NEW ZEALAND First Defendant
	STUDORP LIMITED Second Defendant
	CARTER HOLT HARVEY LIMITED Third Defendant
	CSR BUILDING PRODUCTS (NZ) LIMITED Fourth Defendant

Hearing:	24 January 2020
Counsel:	NF Flanagan and J Carlyon for plaintiffs DM Salmon, M Heard and H Bush for third defendant
Judgment:	31 January 2020

JUDGMENT (No. 6) OF FITZGERALD J
[Ministry's application for leave to amend pleadings]

This judgment was delivered by me on 31 January 2020 at 3:30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:	Meredith Connell, Auckland LeeSalmonLong, Auckland

AND	AUCKLAND COUNCIL AND OTHER TERRITORIAL AUTHORITIES LISTED IN SCHEDULE 1 TO THE FIRST AMENDED STATEMENT OF CLAIM BY THIRD DEFENDANT AGAINST FIRST TO FIFTIETH THIRD PARTIES First to Fiftieth Third Parties

Introduction

[1] The background to this litigation is set out in previous judgments and will not be repeated here.[1]

[2] The Stage 1 trial in this matter is due to commence in approximately three months' time. On any view, it will be a significant hearing. It is scheduled to run for approximately six months. A key issue for determination is the Ministry's allegation that Carter Holt's Shadowclad product, when used to clad school buildings without a cavity, is inherently defective; or in other words, not fit for purpose.

[3] The Ministry applies for leave to amend the sixth amended statement of claim, to include an allegation that, at various points in time, Carter Holt knew that Shadowclad was defective.[2] Carter Holt opposes a number of the proposed amendments (though not all of them), on the basis they introduce new alleged defects into the claim. Given a key aspect of the evidence on whether Shadowclad is defective will be extensive testing and similar experiments, Carter Holt says it is too late for the Ministry to introduce new alleged defects into its claim, given Carter Holt will not have sufficient time to carry out testing to rebut the new allegations.

The proposed amendments – further detail and the parties' positions

The proposed amendments

[4] Key issues at the Stage 1 hearing will be whether Carter Holt, as a product manufacturer, owed the Ministry a tortious duty of care; and if so, whether Carter Holt breached that duty. Key to the Ministry's claim on breach is the way in which it says Shadowclad is inherently defective. The Ministry pleads a range of alleged defects in Schedule 2 to its sixth amended statement of claim. That schedule of defects has been central to the Ministry's case from the outset.

[5] Carter Holt denies its product is defective in the manner alleged by the Ministry. Carter Holt also says that it cannot have been negligent in manufacturing

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1 See for example, *The Minister of Education v James Hardie Ltd* [2018] NZHC 1481 at [1]–[21].

2 Leave is required given the proposed amendments are being made after the close of pleadings date.

and supplying Shadowclad in any event, given Shadowclad complied with Acceptable Standard E2/AS1 (the Standard), being a means of demonstrating compliance with the New Zealand Building Code (and in particular, cl E2: external moisture).

[6] The Ministry says the existence of the Standard does not mean Carter Holt did not breach its duty of care because, inter alia:[3]

> In the event that Shadowclad complied with the Standard, that is merely one factor to be considered in determining whether Carter Holt Harvey breached its duty of care and is outweighed by those factors particularised at paragraphs [38] to [48] above [being, in broad terms a range of defects and how they are said to lead to weathertightness failures].

[7] The Ministry now wants to add the following text to the end of the above paragraph:

> …, and the fact that Carter Holt Harvey knew that Shadowclad was defective.
>
> **Particulars of knowledge**
>
> (a) Carter Holt Harvey knew that batches of Shadowclad were insufficiently treated in:
>
> (i) March 2002;
>
> (ii) December 2009;
>
> (iii) April 2010;
>
> (iv) September 2010;
>
> (v) March 2011;
>
> (vi) May 2011;
>
> (vii) June 2013.
>
> (b) Carter Holt Harvey knew in April 2005 that preservative leached from Shadowclad in use.
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> (c) Carter Holt Harvey knew in August 2012 that galvanised nails were incompatible with Shadowclad, despite their being recommended for use with it;
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> (d) Carter Holt Harvey knew in August 2010 that its installation materials was [sic] inadequate.

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[3] Sixth amended statement of claim, at [60](f).

Carter Holt's position

[8] Carter Holt does not oppose the new pleading of knowledge *per se*, or the proposed allegations at (a)(i), (b) and (d) above. But it says the proposed amendments concern Carter Holt's knowledge that Shadowclad was "defective", which in the context of the Ministry's claim, can only be by reference to the list of alleged defects in Schedule 2. Carter Holt says the pleaded knowledge on the dates set out at (a)(ii) to (vii) above is based on documents which the Ministry says will show Carter Holt knew some batches of Shadowclad had insufficient levels of azoles preservative.

[9] In this context, Carter Holt says that the Ministry's allegations concerning preservative treatment of Shadowclad, and its particularisation of those allegations, have always concerned *tin*-related treatments. There have been no alleged defects concerning azole-related treatments. It says it is too late to include an alleged defect concerning insufficient levels or performance of azole-related treatments, particularly given that will only be a "defect" if it caused Shadowclad to be unfit for purpose (namely being prone to fungal rots). Carter Holt says that if issues with azole treatments had been pleaded from the outset (or at least at an earlier point in time), it would have conducted detailed testing of Shadowclad treated with azole-related treatments, to rebut any suggestion that insufficient levels of that treatment mean the product is defective. Carter Holt points to the fact that in defence to the allegations concerning tin based preservatives, its evidence (served a little over a month ago) includes the results of a 36-month weathering trial of tin treated Shadowclad samples. It says it is simply too late to replicate such evidence with samples treated with azoles.

[10] Carter Holt also queries the merits of any claims concerning azole treatments, stating that four of the six documents relied on by the Ministry are not even relevant to Shadowclad, or Shadowclad treated with azoles. And in relation to the remaining two documents, Carter Holt says they simply show that on two occasions, it was aware that batches of Shadowclad had taken up insufficient levels of azole-based preservative. It says this shows only that its quality control process was working, and it cannot be translated into knowledge of an inherent and systemic defect in Shadowclad.

[11] On the allegation concerning incompatibility with galvanised nails, Carter Holt says this similarly features nowhere in the pleaded Schedule 2 defects. Again, in the context of a hearing which will focus to a large degree on testing and testing results of Shadowclad, Carter Holt says it would have wanted to carry out experiments on Shadowclad's use with galvanised nails, to rebut any suggestion that use of Shadowclad with such nails leads to it being unfit for purpose. Carter Holt says that in reliance on the pleaded alleged defects, it has not carried out any such experiments or addressed them in its evidence to date.

[12] Finally, Carter Holt notes that the Ministry has also not advanced any evidence of testing related to azole-based treatments or Shadowclad's use with galvanised nails. It says this further highlights that neither party understood Schedule 2 to include alleged defects concerning those matters.

[13] The Ministry denies there is anything new in its pleadings – other than of course the allegation that Carter Holt's knowledge at the various dates listed is another factor negating the effect of any compliance with the Standard. It says concerns regarding preservative treatments have always been a feature of Schedule 2, and the pleaded defects concerning preservative treatments have never been limited to tin-related treatments. Further, the Ministry notes that Shadowclad's incompatibility with galvanised nails is already referenced in the claim, namely the reference in Schedule 3 ("Misleading Descriptions") to Carter Holt's statement, said to be misleading, that:

> 15 Years Durability: As cladding will be obtained from painted, "stained" or unpainted Shadowclad fixed with galvanised flat head nails.

[14] This statement is said to be misleading by reference to, inter alia, the Schedule 2 defects.

[15] The Ministry says that even on the basis the underlying alleged defects are "new" (as Mr Flanagan, counsel for the Ministry, invited the Court to assume for the purposes of the application), there is no real or significant prejudice to Carter Holt and the interests of justice mean the amendments should be allowed. It notes the proposed amendments were flagged only a matter of days after the close of pleadings date, and therefore very soon after the Ministry could have amended as of right in any event.

Further, it says significant delays in Carter Holt's discovery meant it was only reviewing the relevant documents (and a large number of other documents discovered by Carter Holt) at a very late stage. The focus on that exercise meant there was not the capacity to consider the potential impact on the pleadings at that time. The Ministry further notes that no significant prejudice has been shown if leave to amend is granted; if the Court is of the view that Carter Holt ought to be permitted to serve further evidence, the Ministry will take a reasonable and responsible approach to that. The Ministry says there is no credible basis to suggest the Stage 1 trial date would be placed in jeopardy if leave were granted.

[16] The Ministry accepts that its own evidence does not address testing of Shadowclad treated with azoles, or its compatibility with galvanised nails. But it says that does not reflect its own reading of the pleadings, but rather that it is content to rely on Carter Holt's own documents to prove its case on these particular defects. Finally, it says nothing significant can be taken from Carter Holt's evidence as to whether the documents relied on by the Ministry are relevant to or support the alleged defects, given such matters are properly for trial.

Application for leave to amend – approach

[17] In *Elders Pastoral Ltd v Marr*, the Court of Appeal stated that a party applying for leave to amend their pleadings after the close of pleadings date will need to "surmount the three formidable hurdles" of showing that doing so:[4]

(a) would be in the interests of justice;

(b) will not significantly prejudice other parties; or

(c) cause significant delay.

[18] More recently, this Court has identified the following matters as relevant in an application to amend:[5]

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4 *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 at 385.
5 *Monster Energy Company Ltd v Ox Group Global Pty Ltd* [2016] NZHC 2124 at [28].

(a) the merits of the proposed pleading;

(b) whether irreparable damage would be suffered by the applicant;

(c) the timing of the application and magnitude of, and reasons for, the delay;

(d) the risk of significant prejudice to other parties;

(e) the effect on public resources reflected in the impact on case management and the timetable to trial;

(f) the importance of the principle that the parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceedings; and

(g) the interests of justice, an overarching consideration.

Discussion

[19] As a preliminary point, the proposed pleading concerns *knowledge*. But that relates to Carter Holt's alleged knowledge that Shadowclad was "defective" in certain ways at certain points in time. I agree with Carter Holt that the reference to Shadowclad being "defective" must be read as being by reference to the alleged defects set out in Schedule 2 to the sixth amended statement of claim.

Azole based treatments

[20] The alleged defects concerning levels or efficacy of preservative treatments are set out in paragraph 4 of Schedule 2 as follows:

> Shadowclad is not adequately durable:
>
> (a) The light organic solvent preservative levels in Shadowclad were too low and ineffective to prevent fungal rots:
>
> i. at all relevant times, exterior timber cladding was required to be treated to H3.1 or H3.2 standard for preservative treatment (and Carter Holt Harvey

represented that Shadowclad was treated to H3.1 or H3.2 requirements); and

ii. where the Cladding Sheets were treated to H3.1, the standard required a 0.08 percentage by mass retention level for tin related treatments to not less than 90% of samples tested. The treatment level of Shadowclad sheets is consistently substantially below 0.08.

(b) Shadowclad is prone to fungal rots, which destroy the integrity of the cladding.

Particulars

i. The preservative treatment levels are insufficient to inhibit fungal rot, making the sheets prone to fungal rot.

ii. At all material times, the treatment of Shadowclad to hazard class H3.1 using the LOSP treatment method, with tributyltin as the active ingredient, provided inadequate protection for New Zealand weather conditions, due to:

A. its poor performance in situations where Shadowclad is consistently wet for prolonged periods; and

B. the known tendency of tributyltin to rapidly deplete.

[21] Paragraph 4(a) alleges that the treatment level of Shadowclad with "tin related treatments" was consistently below that required by the relevant standard, H3.1. On its face, this alleged defect does not relate to azole-related treatments.

[22] When read in the context of paragraph 4(a), paragraph 4(b) is directed at preservative treatments levels being consistent with the Standard, but even so, providing inadequate protection for New Zealand weather conditions (given those matters pleaded at sub-paragraphs A and B). Mr Flanagan is right to say that paragraph 4(b)(i), at least on its face, is not limited to any particular *type* of treatment, or expressed to be a more general statement of which paragraph 4(b)(ii) is merely further detail. He also confirmed that the Ministry does not allege that treatment with azole-related treatments to the requisite level will still be insufficient.

[23] But despite this, I consider a fair and proper reading of pleaded defect 4 as a whole does not suggest that azole-related treatments are in issue (in either of the ways alleged in relation to tin):

(a) Paragraph 4(a) concerns defects arising when Shadowclad does not meet the level of preservative required by H3.1 (or 3.2). And that allegation is plainly limited to tin-related treatments. Sub-paragraphs (i) and (ii) are clearly intended to give further detail to the generalised allegation in the opening lines of paragraph (a).

(b) While paragraph 4(a) is directed to issues said to flow from treatment levels being *below* that required by standard H3.1 (or H3.2), a fair reading of paragraph 4(b) as a whole is that it is directed to issues said to flow *even if* Shadowclad is treated with tin-related treatments to the required level. Were it not, then sub-paragraph (i) would be a repeat of the allegation in paragraph 4(a) in relation to tin-related treatments, but also a free-standing such allegation in relation to "below the required level" of all other (unnamed) treatments, such as azoles. This would be a curious approach to the pleading.

(c) In addition, having referred expressly to tin-related treatments in the context of the alleged effect of treatments below the required level (in paragraph 4(a)), it was not unreasonable for Carter Holt to proceed on the basis that this particular allegation did not extend to other, non-tin related treatments.

(d) Further, that paragraph 4(b) as a whole is directed to issues said to flow *even if* Shadowclad is treated to the requisite levels is reinforced by how paragraph 4 of Schedule 2 was developed. As originally filed, (then) paragraph (iv) of Schedule two was directed to (a) the light organic solvent preservative (LOSP) levels in Shadowclad being too low and ineffective to prevent fungal rots, and (b), Shadowclad being prone to fungal rots. The former was directed at *inadequate* levels of LOSP levels, the latter an inherent characteristic of Shadowclad.[6]

(e) Following an application by Carter Holt for further particulars of how the treatment of Shadowclad failed to comply with the Building Code

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6 Counsel for Carter Holt has confirmed that azoles are an LSOP treatment.

and how LSOP levels compared to the Code requirements (directed at (iv)(a)) and of the allegation that Shadowclad is prone to fungal rot (directed at (iv(b)), the Ministry filed its third amended statement of claim. This introduced paragraphs 4(a)(i)and (ii) in their current form (i.e. limited to tin), as well as 4(b)(i). In this context, it was reasonable to understand the pleading differentiated between alleged "below the required level" of LSOP (and that allegation being limited to tin), and the treatment simply being insufficient to inhibit fungal rot. In other words, it is not a natural reading of alleged defect 4 as a whole that an allegation of "below the required level" of treatment in relation to *all other* treatment types (including azoles) is captured by 4(b)(i), with tin (expressly) captured at 4(a).

(f) This understanding would have been further reinforced by the introduction of 4(b)(ii) in the fifth amended statement of claim. While not expressly stated to be further detail of 4(b)(i), it would not have been unreasonable to understand it in this way, particularly given the original distinction between alleged inadequate preservative levels and an inherent characteristic of Shadowclad. In other words, the allegation that *even with* the required level of tin, Shadowclad is still prone to fungal rot suggests an inherent defect in Shadowclad itself, rather than anything to do with insufficient treatment.

[24] For completeness, in its written submissions, the Ministry said the allegation relating to under-treatment with azole-based preservatives is also already captured by defect 1 in Schedule 2 (though the focus of argument at the hearing was on defect 4, as discussed above). But as Carter Holt notes, the focus of defect 1 is that irrespective of preservative treatments, Shadowclad is said to be "inherently prone to absorbing significant amounts of moisture" by, for example, capillary action through end grain timbers at all edges. This defect does not relate to alleged "below the required level" of preservative treatments, and what the effect of such under-treatment is said to be.

[25] I have previously noted that in a case of this nature, and where the Ministry has particularised (in Schedule 2) the alleged "headline" defects and how those defects

are said to come about, Carter Holt is entitled to rely on Schedule 2 when assessing the case it has to meet, and ought not to have to "guess" in that regard.[7] On its face, and when alleging defects arising from alleged under-treatment with preservatives, Schedule 2 does not refer to azole-based treatments, but expressly refers (twice) to tin-based treatments.

[26] On this basis, Carter Holt's evidence in response to the claims made against it is limited (in the context of allegations concerning preservative treatments) to tin-related treatments. Similarly, the Ministry does not advance any evidence of testing of azole-related treatments. This reinforces that "below the required level" of azole-related treatments was not the original focus of the pleadings.

[27] If insufficient levels of azole-related treatments was always intended to form a part of Schedule 2, there is no apparent reason why this could not have been squarely pleaded at an earlier date, so that Carter Holt was properly on notice of the allegation and thus what testing evidence it might want to adduce in response. Ultimately, insufficient levels of azole-based treatments appears to be somewhat of an "after thought," arising from the Ministry's review of some of Carter Holt discovered documents, rather than a central allegation of the Ministry's own case. The Ministry confirmed in February 2018 that it had prepared "a battery" of evidence concerning Shadowclad's alleged inherent defects. As noted, none of the evidence it has served to date includes testing of non-tin related treatments.

[28] On the basis the allegation is new, therefore, is there significant prejudice to Carter Holt in permitting it to now be made? I am satisfied there is a real risk of such prejudice. There is no doubt the evidence at the Stage 1 trial will focus heavily on expert testing of Shadowclad. It is therefore not unreasonable for Carter Holt to say that had it known that part of the Ministry's case was that insufficient levels of azole-related treatments meant Shadowclad was not fit for purpose, it would have carried out testing to rebut such an allegation (as it has done with its 36-month trial of tin-related treatments). Further, I agree with counsel for Carter Holt when he says the testing would have needed to assess whether "below the required level" azole

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[7] See, for example, my observations in *The Minister of Education v James Hardie Ltd (No. 4)* [2019] NZHC 1760 at [34].

treatment had any effect on Shadowclad's performance; in other words, *even if* some batches of Shadowclad retained less than the specified level of azole treatment, what, if any, effect did that have on Shadowclad's ability to inhibit fungal rot? And that testing would no doubt have needed to assess the consequences of a range of different levels of azole-related treatments, how that compared to the levels revealed in the documents on which the Ministry relies, and whether it evidences a systemic and inherent flaw in Shadowclad. It would not be appropriate in my view, for a case to be advanced against Carter Holt that insufficient levels of azole-related treatments lead to Shadowclad being prone to fungal rot, in circumstances where Carter Holt has not had a proper opportunity to prepare evidence in response.

[29] I note the Ministry's position that if the Court is satisfied Carter Holt should be permitted to put on further evidence, the Ministry will take a reasonable and responsible approach to that. But this somewhat misses the point. Preparing expert evidence on wholly new topics at this juncture, only a few months out from the start of an extremely lengthy and complex trial, is prejudicial in and of itself, putting aside that it seems there is simply insufficient time in any event (given the time period over which Carter Holt has prepared its tin-related treatment evidence). There would also then need to be time for the Ministry to put on evidence in reply. The parties and their experts should not be distracted by such tasks when they will no doubt be focused on matters such as completing the Ministry's existing reply evidence; completing the various discovery tasks; preparing for trial, and the experts considering each other's evidence and preparing for and engaging in expert caucusing. And I am not persuaded the position is any different if one "measures" the timeframe from when Carter Holt was first put on notice of the proposed amendments (in early November 2019), which, given the intervening holiday period, does not add any significant time into the analysis.

[30] In relation to those factors relevant to whether leave ought to be granted:[8]

(a) At least on the face of the materials advanced by Carter Holt on the present application, the documents the Ministry proposes to rely on do

[8] See [18] above.

not appear to provide a very strong platform for suggesting systemic under-treatment of Shadowclad with azole-related treatments,[9] nor what the effects that might be in any event. But I am conscious that issues like this cannot realistically be assessed on an interlocutory application. I accordingly view this factor as neutral.

(b) I do not consider irreparable damage would be suffered by the Ministry if leave is not granted. As noted, issues concerning azole-related treatments has never been a focus of the Ministry's pleaded case. Nor is it a feature of the expert testing evidence the Ministry intends to adduce at trial. That evidence is no doubt directed to what the Ministry considers to be the key elements of its case. This factor weighs against leave being granted.

(c) I accept that notice of the proposed amendments was given only a few days after the close of pleadings date, and that the amendments arise from review of Carter Holt's discovered documents, and that in turn, there have been delays in Carter Holt completing its discovery. That said, however, the Ministry has clearly been testing Shadowclad in a variety of ways over the last several years. Insufficient levels of azole-related treatments has never featured, expressly at least, as part of its case. For these reasons, and as noted earlier, there is no apparent reason why alleged issues arising from insufficient azole-related treatments could not have been squarely pleaded earlier. This factor is therefore neutral.

(d) I have addressed above the real risk of significant prejudice to Carter Holt. This weighs (heavily) against leave being granted.

(e) Granting leave, and the consequent need to prepare further expert evidence on new topics now, could well have an adverse impact on case management, by unnecessarily distracting the parties, and their experts,

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9 That is, rather than some batches identified at particular points in time which did not have the requisite level of preservative.

from the ranges of tasks to be attended to in the lead up to (a very significant) trial. It is not possible to assess whether granting leave would cause an adjournment of the Stage 1 trial in May. But I consider it reasonably unlikely. Overall, however, this factor weighs (slightly) in favour of declining leave.

(f) Plainly the Ministry ought to have every opportunity to bring the "real controversy" to trial. But I am satisfied it will have that opportunity, even if leave is not granted. The core of its case (in terms of the alleged inherent defects in Shadowclad) are those pleaded in Schedule 2. Azole-related treatments do not feature, expressly at least, in that Schedule. And it can be expected that the Ministry has directed its evidence to what it considers to be the "real controversy" between the parties.

[31] For these reasons, I consider the overall interests of justice mean that leave ought not to be granted to those amendments at paragraphs 54 (f)(a)(ii) to (vii) and 60(f)(a)(ii) to (vii) of the proposed seventh amended statement of claim.

Galvanised nails

[32] Many of the above observations apply equally to the proposed amendment concerning Shadowclad's alleged incompatibility with galvanised nails.

[33] Mr Flanagan again invited me to proceed on the basis the allegation is new (despite the Ministry's written submissions suggesting that Shadowclad's alleged incompatibility with galvanised nails having been put in issue via Schedules 3 and 7 of the sixth amendment statement of claim). Mr Flanagan was right to approach the issue in this way. Somewhat indirect and opaque references to galvanised nails in Schedules 3 and 7 of the sixth amended statement of claim are not sufficient to put Carter Holt on notice that part of the Ministry's case as to why Shadowclad is inherently defective is because it is incompatible with galvanised nails. That allegation, or indeed anything to do with using Shadowclad with galvanised nails, does not feature in the Schedule 2 list of alleged defects. Again, if this is one way in which Shadowclad is said to be inherently defective, there is no apparent reason why this

could not have been squarely put in issue earlier; particularly given the period over which the Ministry has been testing and examining the product.

[34] Nor does the Ministry's evidence comment on or contain testing or similar evidence of Shadowclad's alleged incompatibility with galvanised nails. Like the absence of testing of non-tin related treatments, this reinforces that this alleged defect has never been central to the Ministry's case. If leave is declined, there is no doubt the "real controversy" will still go to trial.

[35] Further, if the allegation is to be made, Carter Holt ought to have a proper opportunity to put on whatever expert evidence it considers necessary to rebut it. Carter Holt confirms that, based on the pleadings to date, it has not carried out any experiments or testing of Shadowclad's use with galvanised nails. While it has not said how long or extensive any such testing would be, I consider there to be significant prejudice, at least in a case such as this, for new alleged defects to be introduced into the claim, requiring new testing and experiments, only a few months prior to trial. And even if there were sufficient time for Carter Holt to carry out such testing, it would be a not insignificant distraction from what will no doubt be a fairly intense lead up to the Stage 1 trial.

[36] It is not possible to assess the merits of the proposed allegation. But given the allegation is new, and taking into account those matters discussed at [34] and [35] above, the factors relevant to an application for leave to amend weigh clearly against leave being granted in relation to this proposed amendment also.

Result and costs

[37] By consent, the Ministry's application for leave to amend the sixth amended statement of claim is granted in respect of the amendments proposed at paragraphs 54(f)(a)(i), (c) and (d) and 60(f)(a)(i), (c) and (d). The balance of the application is declined.

[38] There is no reason why the costs of the application ought not to be determined now. At least on the basis of the materials currently before the Court, costs ought to

follow the event in the ordinary way, on a 3B basis.[10] Again, on the materials presently before the Court, I cannot see any basis for increased or indemnity costs. I would certify for second (but not third) counsel.

[39] If the parties cannot agree costs, Carter Holt is to file and serve a memorandum on costs within 10 working days of the date of this judgment. Any memorandum in response from the Ministry is to be filed and served within a further five working days. I will thereafter determine costs on the papers.

Fitzgerald J

[10] I do not consider 3C to be appropriate. There was nothing particularly complex about the present application, and it was dealt with in a fairly brief amount of time.