IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-1899
2019 NZHC 3487

UNDER	The Consumer Guarantees Act 1993, the Fair Trading Act 1986, the Building Act 1991 and the Building Act 2004
BETWEEN	THE MINISTER OF EDUCATION and Others First to Fourth Plaintiffs
AND	JAMES HARDIE NEW ZEALAND First Defendant
	STUDORP LIMIITED Second Defendant
	CARTER HOLT HARVEY LIMITED Third Defendant
	CSR BUILDING PRODUCTS (NZ) LIMITED Fourth Defendant

……/continued

Hearing:	13 and 15 November 2019
Counsel:	NF Flanagan, J Carlyon and MM Moon for plaintiffs DM Salmon and M Heard for third defendant
Judgment:	20 December 2019

JUDGMENT (NO. 5) OF FITZGERALD J
[Challenge to privilege claims]

This judgment was delivered by me on 20 December 2019 at 2:30 pm, 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 a number of my previous judgments and will not be repeated here.

[2] The parties have completed a significant discovery in these proceedings. Each has since filed an application challenging the other party's claims to privilege over discovered documents on the basis of privilege for preparatory materials for proceedings (litigation privilege).[1] By way of summary:

(a) The Ministry challenges Carter Holt's claim of litigation privilege in relation to documents and communications concerning complaints made to Carter Holt about Shadowclad. A small number of such documents were inadvertently included in documents made available by Carter Holt to the Ministry for inspection. By agreement, they were provided to me to review, though obviously without Carter Holt waiving its claim of privilege. The Ministry says the disclosed documents cannot be the subject of litigation privilege, not being prepared in the context of apprehended proceedings, nor prepared for the dominant purpose of such proceedings in any event. The Ministry says the fact Carter Holt has claimed privilege in relation to them calls into question its privilege claims over a large number of similar documents.

(b) Carter Holt challenges the Ministry's claim of litigation privilege in relation to various expert reports prepared for the Ministry in the context of its building improvement programme for leaking schools. Carter Holt says the reports were not prepared in the context of actual or apprehended proceedings, nor was their dominant purpose for preparing for such proceedings in any event. Rather, Carter Holt says the dominant purpose of the reports was to inform the Ministry on the scope and requirements for remediating leaking school buildings. To the extent the reports gathered information for any apprehended

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1 Evidence Act 2006, s 56.

proceedings, Carter Holt says this was very much a secondary purpose only.

[3] Each party's challenge (potentially) relates to a large number of documents (in excess of 1,400 reports in the case of Carter Holt's challenge to the Ministry's privilege claims, and over 1,000 documents in the context of the Ministry's challenge to Carter Holt's privilege claims). Whether privilege attaches to a document is a document-by-document inquiry. I accordingly cannot make rulings on individual documents, other than the small number of inadvertently disclosed documents which are the subject of the Ministry's application. The parties accordingly acknowledged that the outcome of this judgment is likely to be findings which inform any necessary re-review of related documents over which each party has claimed litigation privilege.

[4] Before turning to the applications themselves, I first set out an overview of the principles applying to litigation privilege. I then address the Ministry's challenge to Carter Holt's privilege claims, before turning to Carter Holt's challenge to the Ministry's privilege claims. At the conclusion of this judgment, I provide some brief observations on residual issues arising on the applications which, given the findings I have made, do not require formal determination.

Litigation privilege — overview

[5] Section 56 of the Evidence Act 2006 (the Act) relevantly provides:

> **56 Privilege for preparatory materials for proceedings**
>
> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the "proceeding").
>
> (2) A person (the "party") who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
>
> (a) a communication between the party and any other person:
>
> (b) a communication between the party's legal adviser and any other person:
>
> (c) information compiled or prepared by the party or the party's legal adviser:

(d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.

[6] It is common ground that a claim for privilege under the section accordingly requires:

(a) that at the date the document was prepared, litigation was reasonably apprehended; and

(b) that the document was prepared for the dominant purpose of preparing for litigation.

[7] Whether litigation is reasonably apprehended is a question of fact. The applicable test is an objective one of "whether a reasonable person in the position of the party in question, and possessed of the same information at that time, would have regarded the future commencement of litigation as probable"[2] There must be a "real likelihood" of litigation.[3] A "mere possibility" or "vague apprehension" that litigation could occur in the future is insufficient.[4]

[8] Given issues which arise on the Ministry's opposition to Carter Holt's application, it is necessary to discuss the dominant purpose aspect of the test in a little more detail, and to track through the key cases upon which the Ministry relies.

[9] I first refer to the English Court of Appeal's decision in *Re Highgrade Traders Ltd*.[5] In that case, the premises and stock of a family company had been destroyed by fire. The insurance company which insured the company's premises and stock was suspicious of the circumstances surrounding the fire and suspecting arson, had two preliminary reports prepared by its loss assessors as to the cause of the fire. The

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2 *E Sport Yachting Ventures Ltd v Southern Spars Ltd* HC Auckland CIV-2008-404-1120, 29 July 2011 at [21], citing *Commerce Commission v Caltex New Zealand Ltd* HC Auckland CL33/97, 10 December 1998 at 3; *Public Trust v Hotchilly Ltd* HC Wellington CIV-2009-485-704, 31 March 2010 at [20]; *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 606 and *Laurenson v Wellington City Corporation* [1927] NZLR 510 at 511.

3 *Financial Markets Authority v Hotchin* [2014] NZHC 2732 at [46], citing *United States of America v Phillip Morris Inc* [2004] EWCA Civ 330.

4 *Pernod Ricard New Zealand Ltd v Lion-Beer, Spirits & Wine (NZ) Ltd* [2012] NZHC 2801 at [30]-[33]; *Financial Markets Authority v Hotchin*, above n 3, at [46]; *United States of America v Phillip Morris Inc*, above n 3, *E Sport Yachting Ventures Ltd v Southern Spars Ltd*, above n 2, at [21].

5 *Re Highgrade Traders Ltd* [1984] BCLC 151 (CA).

insurer subsequently consulted its solicitors. Correspondence from the solicitors at the time noted that litigation was likely to ensue and advised that a "fully detailed report and detailed witness statements" should be obtained from the loss adjusters and forwarded to the solicitors. A detailed report was duly prepared by the loss adjusters, which formed part of the materials put before the solicitors. A report was also obtained from a firm of accountants as to the financial status of the company prior to the fire. A further report from forensic experts was also sought on the cause of the fire. The solicitors then formally advised that the company's claim should be denied. The reports the subject of the privilege challenge were the detailed loss adjuster's report; the accountants' report as to the financial status of the company, and the expert forensic report.

[10] In considering whether litigation privilege attached to those reports, there was no real dispute that at the times they had been prepared, litigation was (at least) reasonably apprehended. The focus of the Court's decision was on whether the dominant purpose of the preparation of those reports was to prepare for the litigation. Oliver LJ said the following:[6]

> What, then, was the purpose of the reports? The learned Judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the inquiries can only be determined by asking why the needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow. The claim had been made and there was no indication that it was not going to be pressed, particularly after Mr MR's acquittal. It is, as it seems to me, entirely unrealistic to attribute to the insurers an intention to make up their minds, independently of the advice which they received from their solicitors, that the claim should or should not be resisted. Whether they paid or not depended on the legal advice which they received, and the reports were prepared in order for that advice to be given. The advice given would necessarily determine their decision and would also necessarily determine whether the anticipated litigation would or would not take place.
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> …
>
> [The High Court Judge] seems here, as I read his judgment, at this point to have been of the opinion that *Waugh's* case established that it was only if the

6 At 173-174.

> documents were brought into existence for the dominant purposes of actually being used as evidence in anticipated proceedings that privilege could attach and that **the purpose of taking advice on whether or not to litigate (which is, in substance) what the decision to resist the claim amounted to)** was some separate purpose which did not qualify for privilege. That, in my judgment, is to confine litigation privilege within too narrow bounds …No doubt the purpose was 'dual' in the sense that the documents might well serve both to inform the solicitors and as proofs of evidence if the proceedings materialised. But, in my judgment, the learned judge failed to appreciate that the former purpose was itself one which would cause the privilege to attach. …**There was no purpose for bringing the documents into being other than that of obtaining the professional legal advice which would lead to a decision whether or not to litigate**. That, in my judgment, was a sufficient purpose on its own to entitle them to privilege **quite apart from any subsidiary purpose which they might serve in any litigation which might ensue** as a result of the decision.
>
> [Emphasis added]

[11] I have recited the facts and decision in *Re Highgrade Traders* in some detail, given the Ministry's reliance on more recent decisions in this jurisdiction which cite that decision for the proposition that an "inseparable duality of purpose" can give rise to litigation privilege.[7] But I do not read the decision in *Re Highgrade Traders* in that way. Rather, it confirms the need for a dominant purpose, and it is clear that Oliver LJ's conclusion was that the *only* purpose for which the reports came into being was to enable the insurers' solicitors to advise on whether or not to litigate. Indeed, Oliver LJ concluded that what the High Court had found to be the dominant purpose, namely establishing the cause of the fire, did not in fact exist as a purpose in its own right. Further, Oliver LJ was clear that a secondary purpose was the reports' use in the litigation.

[12] *Re Highgrade Traders* was decided shortly before the New Zealand Court of Appeal's decision in *Guardian Royal Exchange*, still considered to be a leading decision in this jurisdiction on litigation privilege.[8] In *Guardian Royal Exchange*, an insurance claim had been lodged after a house fire. The insurer was suspicious of arson from the outset, but pending further investigations, had not committed itself to a definite attitude to the claim.

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7 See the discussion below at [28]-[29].

8 *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart*, above n 2.

[13] The insurer formed the view it would need legal advice on whether to accept or reject the claim. Assessors were therefore instructed to prepare a report addressed to the insurer's solicitors. Further reports were obtained (some of which were also addressed to the insurer's solicitors) directed to the question of what evidence was available to support the claim of arson. Cooke J (as he was then) observed that the evidence fell short of suggesting that at that time, the claim was likely to be rejected. His Honour stated:[9]

> But the important fact for present purposes is that, during the period covered by the documents, none of the writers was able to express the opinion that investigations had reached a stage when the defendant should deny liability.

[14] As to the purpose for which the reports had been prepared, his Honour stated:[10]

> … it is evident that they have been prepared for mixed purposes. Their immediate purpose was to enable the defendant to decide whether or not to accept liability. No doubt this decision would be made after taking legal advice; indeed some of the reports were actually made to the defendant's solicitors. But that does not mean that, to adopt one of Scarrett CJ's phrases in *Laurenson v Wellington City Council* [1927] NZLR 510, they were compiled "in a bone fide belief that litigation will probably ensue." Litigation was no more than a possibility.
>
> Primarily they were to enable the defendant and its legal advisers to make up their minds to whether or not to contest the claim. Secondly they were for the use of the advisers in defending an action if it were decided to deny liability.

[15] And later:[11]

> … I do not think that they should be characterised as having been brought into existence for the dominant purpose of submission to legal advisers in connection with litigation.

[16] As to whether New Zealand courts should adopt the (English) dominant purpose test, or some lesser "appreciable" purpose test, Cooke J concluded:[12]

> … I would propose as the New Zealand rule that, when litigation is in progress or reasonably apprehended, a report or other document obtained by a party or as legal adviser should be privileged from inspection or production in evidence if the dominant purpose of its preparation is to enable the legal adviser to conduct or advise regarding the litigation.

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9 At 599.
10 At 599.
11 At 600.
12 At 602.

[17] The question of litigation privilege in the context of insurance claims was still vexing the senior courts in 1987. In *General Accident Fire & Life Assurance Corporation Ltd v Elite Apparel Ltd*, McMullin J, writing for the Court of Appeal, summarised the approach in *Re Highgrade Traders* and *Guardian Royal Exchange* as follows:[13]

> In the *Highgrade* case it was accepted that privilege, called "litigation privilege" attached to any document which the party asserting the privilege could show had been prepared for the dominant purpose of obtaining information to be submitted to the client's professional legal advisers for the purposes of obtaining advice on pending or anticipated litigation, and that the privilege extends to documents brought into being for the purpose of being laid before a solicitor in order to obtain his advice with regard to contemplated litigation. A similar view was the basis of the decision of this Court in *Guardian Royal Exchange...*

[18] Importantly for the purposes of the discussion later in this judgment, McMullin J recorded Oliver LJ's approach to be that where a duality of purpose is discerned, the Court must determine what is the dominant purpose.[14]

[19] Lest there be any lingering doubt as to whether dual purposes might satisfy the test for litigation privilege, the need for a dominant purpose was made clear in *Dinsdale v Commissioner of Inland Revenue.*[15]

[20] In that case, ANZ Bank Group had been threatened with prosecution by the Inland Revenue Department for failing to produce relevant documents in response to statutory notices issued by the Department. In response, the bank put in place a process to search for relevant documents, which included interviews with bank employees. The search and interviews were carried out by an accounting firm, having been instructed by ANZ's solicitors "to assist us in this matter … in relation to a threatened prosecution of our client". The solicitors' letter to the accountants recorded that all communications would be subject to litigation privilege.

[21] A partner from the firm of solicitors sat in on the interviews. The Inland Revenue Department later sought copies of the interview notes, over which litigation

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13 *General Accident Fire & Life Assurance Corporation Ltd v Elite Apparel Ltd* [1987] 1 NZLR 129 at 133.

14 At 133.

15 *Dinsdale v Commissioner of Inland Revenue* (1997) 11 PRNZ 325 (CA).

privilege was claimed. Proceedings were later commenced seeking declarations as to the interview notes' privileged status.

[22] In considering the approach to litigation privilege, Blanchard J, writing for the Court, stated:[16]

> … the central feature of litigation privilege "is that it represents the fruits of the effort on the part of the litigants in preparing for the case". The evidence may have been gathered by the lawyer, the client or an agent for either of them, but the work must have been carried out with the dominant purpose of conducting or advising on reasonably anticipated litigation…
>
> If litigation is but one of two or more equally important purposes, it is not the dominant purpose. It is a question of fact what is the dominant purpose.

[23] That proceedings were reasonably apprehended by the bank was accepted. Applying the dominant purpose test, Blanchard J stated:[17]

> [The bank's solicitor] may have attended when the interviews took place with a view to seeing if there was any information to be gathered from the interviewees which might be helpful in the defence of the threatened prosecution or might be used to influence the department, but in our view that was at best an equal, not a dominant, purpose of the interviewing process.

[24] Finally, there is also no dispute that the fact that a document is ultimately used for the purposes of litigation does not itself mean that it was prepared for the dominant purpose of that litigation, where the original purpose behind the creation of the document was different.[18]

[25] Turning to the more recent decisions on litigation privilege of relevance to the issues arising in this case, in *Carter Holt Harvey Ltd v Genesis Power*, Randerson J commenced by noting that there was no reason to conclude that s 56 of the Act was intended to depart in any material respect from the Court of Appeal's decisions in *General Accident, Fire and Life Assurance Corporation Ltd v Elite Apparel Ltd* and *Guardian Royal Exchange*.[19] That point now appears to be well accepted. The reports in issue in *Carter Holt Harvey Ltd v Genesis Power* were expert reports prepared

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16 At 325.

17 At 331.

18 *Jupiter Air Ltd (in liq) v Australian Aviation Underwriting Pool Pty Ltd* HC Auckland, CP 71/01, 13 October 2003.

19 *Carter Holt Harvey Ltd v Genesis Power Ltd (No 7)* HC Auckland CIV-2001-404-1974, 6 May 2008, at [14].

shortly before the relevant proceedings had been issued, as well as some prepared after the proceedings had been commenced. The context for the reports' preparation was explained in evidence as follows:

> The No 8 primary boiler has never performed to its contract specifications. An improvement programme was initiated in November 2000. Experts from various companies including Thermal Energy Systems, Amec-Symons, Sanwell, and Kvaerner were retained to analyse the performance and reliability problems and propose solutions.
>
> As a result of work carried out according to the advice received, the boiler and plant performance have already substantially improved.

[26] On the challenge to litigation privilege, Randerson J stated the following:[20]

> Advice received in respect of remedial work on the allegedly non-performing plant is potentially relevant to the litigation in several ways. First, Carter Holt had a duty to take reasonable steps to mitigate its losses. Secondly, the cost of undertaking any remedial work is an essential part of Carter Holt's damages claim. Thirdly, to the extent that the study revealed the nature and cause of defects in the plant, it would be relevant to the issue of the liability of the defendants for those defects.
>
> Of course, as Mr Gault properly accepted, Carter Holt is obliged to disclose the documents relating to the remediation work actually carried out and the cost of that work. But in my view, Carter Holt is not obliged to disclose the advice it receives from its expert advisers as to the remedial steps proposed and their efficacy. This advice could include a range of options, reasons for or against the selection of an option, comparative costs and advice as to the anticipated outcomes. Advice of this kind is critical to the conduct of the litigation and **is obtained so the plaintiff is able properly to assess the options available and obtain advice from legal counsel as to the steps necessary to fulfil the plaintiff's duty to mitigate.** Advice of this nature cannot sensibly be differentiated between advice in connection with the litigation and advice on the remedial work required. The two are inextricably linked.
>
> [Emphasis added]

[27] I do not read the Judge's comments to endorse the suggestion of two equal purposes effectively becoming one dominant purpose. That would be contrary to the Court of Appeal's observations in *Guardian Royal Exchange* and *Dinsdale*. Rather, having endorsed the need for a single dominant purpose, Randerson J concluded that on the facts of that case, the reports' dominant purpose was to enable advice to be taken as to the steps necessary to fulfil the plaintiff's duty to mitigate in the context of apprehended (and then actual) proceedings. Had the (mixed) purposes of the reports

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[20] At [28]-[29].

have been to advise on remedial steps (outside the context of litigation) and to prepare for apprehended proceedings, then the latter could not have been said to be the dominant purpose.

[28] In *Minister of Education v H Construction North Island Ltd*, Associate Judge Bell considered claims to litigation privilege in circumstances not dissimilar to the present case.[21] He observed that "in some cases, the courts have found that purposes are inseparable and it is impossible to distinguish between dominant and secondary. An example is *Re Highgrade Traders Ltd*".[22] But in light of the above discussion, I do not consider that decision stands for the proposition that dominant and secondary purposes may "merge" to become one dominant purpose. Rather, Oliver LJ had found that the *only* reason the reports had been prepared in that case was to obtain advice from solicitors on apprehended litigation.[23] In effect, the suggested other purpose, to ascertain the cause of the fire, was not a free-standing purpose at all.

[29] In a later judgment involving the same parties, Associate Judge Bell referred again to reports potentially having an "inseparable duality of purpose – both settlement and litigation".[24] For the same reasons given in the preceding paragraph, I would again caution against the suggestion that "inseparable dual purposes" are sufficient to give rise to litigation privilege – unless it can be said that the dominant purpose is in fact preparation for apprehended proceedings.[25]

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21 *Minister of Education v H Construction North Island Ltd* [2017] NZHC 3147.

22 At [8].

23 See that extract of the decision in *Re Highgrade Traders*, above n 5, set out at [10] above.

24 *Minister of Education v H Construction North Island Ltd* [2018] NZHC 20 at [31].

25 A similar cautionary note applies to comments made in *Miah v AMP Life Ltd* [2018] NZHC 1964, in which Associate Judge Bell states at [33] that "to claim privilege National Mutual needs to show **either** that the preparation for litigation was inextricably connected with that purpose (so that there was a single purpose) **or** that preparation for litigation was the dominant purpose" (emphasis added). For the reasons already elaborated on, the latter inquiry is the only proper inquiry. Researches have not disclosed further authorities addressing a "duality of purpose" approach, other than it being referred to as "the troublesome issue of possible duality of purpose" in *Kupe Group Ltd v Ariadne Australia Ltd* (1991) 4 PRNZ 135 (HC) at 138; and in *Mudgway v New Zealand Insurance Co Ltd* [1988] 2 NZLR 283 (HC), Chilwell J referring to the "inseparable" purposes of advising on a claim and the conduct of apprehended litigation, thus the dominant purpose test being satisfied. I note that in *Carlton Cranes Ltd v Consolidated Hotels Ltd* [1988] 2 NZLR 555 at 560-561, Tompkins J disagreed with observations by Chilwell J in *Mudgway* that the Court of Appeal in *General Accident, Fire and Life Assurance Corporation Ltd v Elite Apparel Ltd*, above n 13, adopting *Highgrade Traders*, had taken a different approach to the Court in *Guardian Royal Exchange*, above n 2, on the test for litigation privilege. I respectfully agree with Tompkins J.

[30] With these principles in mind, I now turn to the applications.

Ministry's challenge to Carter Holt's privilege claims

Introduction

[31] The Ministry applies for an order setting aside Carter Holt's claim of litigation privilege in relation to some 25 documents relating to Carter Holt's process for dealing with complaints about Shadowclad. Those 25 documents were inadvertently disclosed by Carter Holt on inspection.[26] As discussed at the hearing, were I to set aside the privilege claims in relation to the 25 documents, this may require Carter Holt to conduct a document-by-document review of other similar documents over which it has claimed privilege.

The Carter Holt complaints process

[32] A Carter Holt "Shadowclad inquiry process summary" document dated October 2017 was produced in evidence. It notes that Carter Holt can receive inquiries in relation to cladding from multiple avenues, being:

(a) an 0800 inquiry;

(b) a website inquiry; and

(c) a merchant inquiry.

[33] The process summary document states:

> Typically we contact the person who has made the inquiry within 24 hours to acknowledge their inquiry and to gather further information. This acknowledgement is generally by way of a phone call if they have provided a phone number and then by a follow-up email as below.

[34] The template draft email inquiry sets out various questions to be asked of the user, being relevant information required prior to a site visit. The document states:

> It tells us what to be looking for based on the specification of the day,

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[26] The Ministry is responsibly treating those documents as confidential pending resolution of the privilege issue; the documents have not yet been disclosed to the Ministry by its solicitors.

> It provides us some understanding of what we may need to look closer at when onsite also allows us to load into the OMS System accurately what we know at this point in time
>
> Prepares us for what we may be about to view and whether a CHH Rep can assist in gathering information or whether we need to send someone more senior to investigate in the first instance

[35] The document goes on to explain that the next step would be a site visit. Under the heading "Technical Team Engagement", it says:

> Where a site inspection identifies a complex site, scenario or issue this is then referred to our technical team to take over the investigation and resolve the enquiry.
>
> The Technical Team investigation further — investigation that is required is dependent on the specific nature of the enquiry, the complexity of the build, the installation methods used and a number of other factors. In some instances the technical team will do a second site visit or seek third party assistance to better understand the nature of the enquiry or issue at hand. This can take some time to work through.
>
> The Technical Team review each enquiry on its merits and post the review will identify an appropriate outcome to complete the enquiry.
>
> Every enquiry in relation to claims is judged on its own merits and facts, there is no text book response that can be used as each enquiry is different in some form.
>
> The methods the CHHWP Technical Team use for making decisions are
>
> - What did the building code require?
> - What did the specification of the day require?
> - Is this a manufacturing fault?
> - Is this an installation error?
> - Is this fair and reasonable from the business and clients perspective?
> - Are we acting as a responsible company?

[36] Ms Lang-Siu, legal counsel employed by Carter Holt, swore an affidavit in support of Carter Holt's opposition to the application, and also addressed the complaints process. It is appropriate to set out the key aspects of her evidence in full:

> [27] I confirm that the process document annexed to Mr O'Sullivan's affidavit reflects the general enquiry process adopted by CHH when queries are received. The process is straightforward, and involves

taking steps to gather information as needed to take steps in relation to complaints.

[28] The process document does **not determine whether or not litigation is contemplated. That depends on a number of factors**, including the nature and circumstances of the complaint; how serious the subject matter is perceived to be; and whether litigation is expressly threatened or on foot.

[29] I note that:

(a) Most complaints received by CHH originated from building supply merchants or from its website, where it maintains an online enquiry form.

(b) In the majority of cases, complaints are not major and are readily resolved. Common complaints include late delivery; incorrect stock, and damage to product during freight, one-off manufacturing flaws and minor appearance defects with product sold. CHH has authorised its sales representatives to address such issues using their discretion up to a cost of $5,000, and most issues are readily resolved by a refund, store credit or replacement in this way. The threshold was previously $1,500, up until October 2018. Despite this, the most common, routine and ordinary complaints have almost been excluded from discovery because they are not relevant to the pleaded defects and therefore not discoverable.

(c) Where complaints are more serious, likely to involve litigation, or involve claims or costs of more than the above threshold, sales representatives are instructed to escalate them to CHH's senior complaints team. CHH carries out regular training at least once a year with its sales representatives to ensure this occurs. The training is currently led by CHH's legal counsel and senior complaints team. Non-routine complaints and any particularly significant complaints relating to Shadowclad and weathertightness issues which are relevant to this proceeding are almost invariably escalated in this way.

[30] Where complaints concerning weathertightness or durability issues are received, CHH perceives that **unless the complaint is able to be resolved amicably litigation is a likely outcome**. In general it is expected that homeowners with issues on their buildings will be sufficiently motivated to pursue claims. **CHH treats all weathertightness related complaints as serious and as though litigation is likely to occur.**

[31] When such complaints are received:

(a) CHH typically carries out an on-site investigation of the property. At this investigation, a senior technical team member, or externally engaged building surveyor will discuss the complaint with the homeowner, and review the property, Shadowclad, and any damage and take photographs and notes

of the general condition of the property and issue. This involves gathering information for defending potential litigation claims. That information .is also used for advancing negotiations.

(b) In many cases, CHH may engage with without prejudice correspondence with the complainant in an attempt to resolve the dispute and avoid litigation, but a settlement is not a guaranteed outcome. Such discussions and settlement negotiations with homeowners are conducted on a confidential and without prejudice basis.

(c) If a settlement is reached, that is documented in writing. CHH has discovered settlement agreements and correspondence about implementing settlement on relevant complaints as open.

(d) If CHH does not consider itself responsible, CHH may write to the homeowner explaining why it does not consider itself at fault. Such correspondence has been discovered as open where it does not form part of ongoing settlement negotiations.

[32] As the above occurs, the relevant information gathered from any site investigation and key correspondence about the complaint is usually saved to the complaints system and a folder relating to the complaint.

[Emphasis added]

The nature of the documents

[37] Turning to the documents themselves, they broadly fall into the following categories:

(a) a standard form email inquiry form recording a user's complaint or query, which appears to be automatically forwarded to a shared mail box (titled "Wood Products");[27]

(b) a similar SAP system generated document, being a standard form email summarising the complaint or query;[28]

[27] For example document CAR.002.00002642.
[28] As in document CAR.002.00003423.

(c) internal emails between members of the technical team forwarding a complaint and engaging in some initial discussion of it (i.e. pre-site visit);

(d) further internal emails between the technical team, post-visit, often attaching photographs of the cladding concerned;

(e) documents which further discuss the complaint and set out a basis for resolution, or enclose a draft letter to the user or merchant concerned.[29]

[38] The email correspondence referred to at (c) and (d) above, and in particular (d), discusses the possible cause(s) of the issue that has been raised by a Shadowclad user.

Discussion

[39] Having reviewed the documents themselves, and dealing with them generally at this stage, I not persuaded that litigation privilege applies. First, Ms Lang-Siu states that "CHH treats all weathertightness related complaints as serious as though litigation is likely to occur". But that does not mean litigation in relation to each complaint is reasonably apprehended. At the time a complaint or query is first received, it cannot be said that litigation is reasonably apprehended, as nothing is known about the complaint or what Carter Holt's response might be to it. That continues to be the position prior to any investigation of the matter, given those discussing the complaint in the internal emails have no basis upon which to assess the complaint, other than as noted in the complainant's original communication.

[40] Even after a site visit, I doubt it can be said that litigation would be reasonably apprehended. From the documents reviewed, the technical team are clearly still at an investigatory phase as to the nature of the complaint and the possible causes of the issue that has been raised. So while Ms Lang-Sui states that "CHH perceives that unless the complaint is able to be resolved amicably, litigation is a likely outcome", the documents do not disclose a view being reached that the matter will be unable to

[29] As in documents CAR.002.00001714 and CAR.002.00001964.

be resolved amicably. This is analogous with cases such as *Guardian Royal Exchange,* where preliminary investigations are being carried out as to the cause of the event in question, without a view having been taken on acceptance or declinature of the claim (and thus the likelihood of litigation ensuing).

[41] Further, Carter Holt cannot effectively "pull itself up by its boot straps" by treating all weathertightness-related complaints as serious and *as though* litigation is likely to occur. This is inconsistent with Ms Lang-Siu's own observations that whether or not litigation is contemplated will depend on a number of factors, including the nature and circumstances of the complaint; how serious the subject-matter is perceived to be; and whether litigation is expressly threatened or on foot. Treating all weathertightness complaints "as though" litigation is likely to occur is also inconsistent with the 2017 inquiry process summary, which emphasises that "every inquiry in relation to claims is judged on its own merits and facts, there is no textbook response that can be used as each inquiry is different in some form".

[42] Carter Holt points to the fact that it was subject to a claim in the Weathertight Homes Resolution Service in 2006, and that all the documents in question post-date that time. I do not consider that alters the position. That certainly demonstrates that litigation, or at least proceedings in that forum, are a possibility. But in *any* complaint resolution system, some form of litigation or involvement in external processes to resolve the complaint will always be a *possibility*. It cannot be right that, simply on the basis of one matter progressing to a formal process, proceedings were reasonably apprehended at the time of preparing all later documents concerning the investigation and response to complaints, including at *all* stages of dealing with those complaints.

[43] But even putting aside whether proceedings were reasonably apprehended, I do not consider the documents I have reviewed were prepared for the dominant purpose of preparing for apprehended proceedings in any event. Rather, the dominant purpose is clearly to carry out investigations in order to assess the complaint or query, and ascertain what Carter Holt's response to it might be. In this context, I note that Carter Holt states in its own submissions that the documents in question "have all been created for the *sole purpose* of investigating and responding to those claims" (emphasis added). The fact that the information gathered might, later down the track,

be used in connection with any proceedings which might ensue does not elevate that purpose to a dominant purpose.

[44] Attached to Ms Lang-Siu's affidavit is a schedule in which she says she explains the basis for litigation privilege on a document-by-document basis. However, the comments in relation to individual documents do not address or deal with the points I have referred to above. Rather, the "comments" column instead makes conclusory-type statements in relation to the general description of each document and that it was prepared when litigation was anticipated. A selection of these comments illustrates the point:

> The top document in this email is privileged as it relates to steps taken to investigate a complaint where litigation was anticipated.
>
> …
>
> This email includes an internal report of on-site investigations and evidence gathered by CHH in respect of a complaint where litigation was anticipated.
>
> …
>
> This is a report of on-site investigations and evidence gathered by CHH in respect of a complaint about Shadowclad where litigation was anticipated.
>
> …
>
> This email is between CHH staff only and relates to steps being taken to investigate a complaint where litigation was anticipated.

[45] None of the statements explains why or what litigation was reasonably apprehended at the time of each of the individual documents was prepared, nor why the dominant purpose of each individual document was for the preparation of those proceedings or apprehended proceedings.

[46] Carter Holt bears the burden of satisfying me that the privilege claim is made out. It has not done so. Accordingly, the privilege claims by Carter Holt in relation to the following documents (by reference to the last four digits of the document identification number) are set aside – 2642; 3423; 0571; 1797; 2266; 2502; 2516; 0216; 0220; 0543; 0921; 1639; 2272; 2381; 2416; 2436; 2880; 3012; 3434; 0218; 0903; and 4639.

[47] Given the above and/or to the extent a blanket type approach has been taken to documents of this nature, Carter Holt will need to re-review the complaint related documents and its associated privilege claims.

Without prejudice privilege

[48] Carter Holt claims privilege for settlement negotiations (without prejudice privilege)[30] in relation to four of the documents provided to me for review.

[49] Section 57 of the Act provides as follows:

> **57 Privilege for settlement negotiations, mediation, or plea discussions**
>
> (1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—
>
> (a) was intended to be confidential; and
>
> (b) was made in connection with an attempt to settle or mediate the dispute between the persons.
>
> (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

[50] In this case, the challenge to Carter Holt's privilege claim turns largely on whether the Shadowclad user and Carter Holt could be said to be in a "dispute".

[51] The term "dispute" is not defined in the Act. The Court of Appeal considered its meaning in *Morgan v Whanganui College Board of Trustees* and said the following:[31]

> The word "dispute" is not a term of art; its use was not meant to be exclusive. And, as noted, "negotiations" or the broader term "difference" will suffice. None of these phrases warrant a narrow construction where something has arisen between the parties which must be resolved and they have expressly agreed their communications should be protected for that purpose.

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30 Evidence Act 2006, s 57.

31 *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713, at [17].

[52] The Court said that whether the parties are in dispute or a state of negotiations is a fact-specific question.[32]

[53] Adopting these principles, I make the following findings in relation to the documents over which Carter Holt claims without prejudice privilege:

(a) Document CAR.002.00003012 – I am not satisfied the claim to without prejudice privilege is made out. This is an automatically generated email from a SAP system, which appears to record actions taken in relation to a query or complaint. Ms Lang-Sui's schedule states it includes reference to ongoing steps to reach settlement of a complaint. But the document itself simply records that there has been site replacement for rotting Shadowclad. There is no suggestion of a "dispute" between any relevant parties in connection with the contents of the email.

(b) Document CAR.002.00001964 – I am satisfied the two emails in this document email chain are privileged on a without prejudice basis. In raising an issue regarding Shadowclad, the relevant user has not raised that issue simply for Carter Holt's information or edification; rather, the user wants something to be done about it. The two internal emails which make up this chain discuss the issue raised and propose a potential resolution. I am satisfied that as between the user and Carter Holt, there is a dispute (in the sense of a "difference" or "negotiations"), and that the internal emails were prepared in connection with an attempt to settle that "dispute". I am also satisfied the emails were intended to be confidential; in other words, the authors of the emails would not have anticipated the contents of those emails being disclosed more broadly, including to the end-user concerned.

(c) Documents CAR.002.00001713 and 1714 – For the same reasons set out at (b) above, I am satisfied these documents are subject to without prejudice privilege. The first is an email circulating a draft letter to a

[32] At [19].

> wholesaler in which a proposal to resolve a complaint is set out. The second document is a draft of the letter concerned. As between Carter Holt and the underlying end-user, there is "dispute" for the reasons noted above. Further, both the email and the draft letter were made in connection with an attempt to settle that dispute. The Ministry queried whether the privilege could attach given the draft correspondence was to an intermediary party, namely the relevant wholesaler. I do not consider that alters the analysis. It does not alter the fact that there is a "dispute" between Carter Holt and the end-user (and potentially the wholesaler also). I am also satisfied the communications were intended to be confidential, despite the involvement of the wholesaler. Ultimately, the presence of the wholesaler is simply the "conduit" through which the complaint is being made. Had Carter Holt's offer to resolve the issue not been accepted, it would still have been reasonable for Carter Holt to expect that its offer would not be disclosed in any proceedings concern the issue, despite its offer being made "via" the wholesaler.

[54] The Ministry says that if the claims to without prejudice privilege were made out, it would be in the interests of justice to set aside the privilege on the basis that the need for the communication or document to be disclosed outweighs the need for the privilege.[33]

[55] I cannot see any reason why the interests of justice would require setting aside the without prejudice privilege in this case. There is nothing particular or special about these proceedings, other than, of course, their sheer size, which would warrant that. Without prejudice privilege carries with it significant benefits, as recognised in s 57(3)(d) itself, which requires the Court to consider whether setting aside the privilege would be in the interests of justice "taking into account the particular nature and benefit of the settlement negotiations or mediation". To set aside privilege in this case, where no particular or special circumstances exist, would in my view

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[33] Evidence Act 2006, s 57(3)(d).

significantly undermine the benefits and very purpose of without prejudice negotiations.

[56] For these reasons the Ministry's application to set aside privilege in relation to the above four documents is declined.

Carter Holt's challenge to Ministry's privilege claims

Introduction

[57] Carter Holt seeks orders setting aside the Ministry's claim of privilege over a number of destructive testing and visual inspection reports relating to school buildings clad in Shadowclad. More specifically, the challenge relates to 1,472 such reports dating from 24 September 2008.

[58] As a preliminary point, given the sheer number of documents involved, I have not requested to review each of the reports, which would be a very significant task in its own right. Rather, I have considered the principled basis upon which the Ministry has claimed privilege over the reports. I have set out at [92]-[96] below my conclusions as to whether certain reports prepared in certain circumstances would or could attract litigation privilege. As noted at the outset of this judgment, and as discussed with the parties at the hearing, rather than being in a position to give document-by-document rulings (which is presently impossible), the broad findings made in this part of my judgment may require the Ministry to re-review some documents and privilege claims, to ensure that privilege is only claimed in accordance with those findings.

[59] In order to understand the basis of the privilege claimed by the Ministry and my findings in relation to it, it is necessary to set out in some detail the background to and context in which the various reports have been prepared. The discussion in the following section of this judgment is largely drawn from internal, contemporaneous Ministry documents produced in evidence on Carter Holt's application, as well as the contents of affidavits sworn in support of the Ministry's opposition.

Background/context to reports

[60] Ms Halpin, for the Ministry, says in her affidavit that prior to 2008, weathertightness was not considered to be a significant issue for school buildings. This is consistent with internal documents explaining the history of how the Ministry has responded to and managed "leaky" schools. Ms Halpin goes on to say that prior to about 2010, the Ministry gave relatively little consideration to weathertightness issues and the causes and extent of such issues or cladding.

[61] The contemporaneous documents explain that prior to 2008, schools tended to address weathertightness issues themselves in an ad hoc manner. An internal email of July 2008 identified the need for a more coordinated approach, "to drive resolution of these issues with urgency". It noted that the deliverables of the intended project would be:

- Compilation of a current schedule of schools with leaky buildings.
- Procurement process for sourcing people to undertake both the investigations and remedial works required, i.e. should we set up national any national [sic] contracts?
- Funding requirements to complete the required investigation work.
- Finding requirements to address the leaky building issues in the current schedule of schools.
- Confirmation of the ongoing process for managing leaky building issues in schools.

[62] This led to the development of what became known as the "Building Improvement Programme" (BIP). Various internal documents record the BIP as having three "work streams":

(a) Remediation – identification and repair of the defective buildings;

(b) Prevention – specification of guidelines and policy that determines how school buildings should be designed and repaired or built; and

(c) Recovery – recovery of costs from contractors responsible for defective works.

[63] A "Project Mandate" document dated February 2009 for the "Defective/Leaky School Buildings Project"[34] noted health and safety issues for the occupants of leaky school buildings, and that "structural frame decay ultimately poses a real and present danger to occupants of the buildings for which the Ministry of Education would be held liable". The document noted that to that point in time, 60 schools had been identified as requiring investigation for possible defects, but that until a national survey was carried out, the "Ministry was reliant on the vigilance of schools to report cases of defective buildings".

[64] The document went on to state that objectives of the Defective/Leaky School Buildings project were to:

> ..identify defective school buildings that are owned by the Ministry of Education and have them repaired to a high quality standard so that their life is extended and they require the minimum maintenance in the future. The Ministry will collect evidence against the three main causal effects and where possible the Ministry will take a civil claim to court against the project manager, architect or designer and builders and contractors responsible and recover the costs of remediation of the buildings.

[65] In a similar vein, the deliverables of the project were stated to be:

> …to identify the schools that have defective buildings, ensure that the buildings are repaired to a high quality standard which will ensure future maintenance and repairs will be held to a minimum. And to prepare a claim of civil action through the courts to recover as much of the remediation costs as possible.

[66] As can be seen, these statement of the project objectives and deliverables has shades of the three work streams of the BIP as referenced in a number of other documents, namely remediation, prevention and recovery.

[67] The mandate document further stated:

> If the initial survey finds issues with the design or construction of the building the surveyor will indicate that a full destructive test should be carried out.
>
> …
>
> The Ministry, school Board representatives and surveyor will discuss the result of the survey once complete. This discussion will inform the board of

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[34] Prepared by a Mr David Bos (who was appointed at the BIP Programme Manager in November 2009).

> the likely remediation process required to fix the building. In some cases, the repairs will be minor and may not require the further involvement of the surveyor.

[68] The document also noted that it would be extremely important at that stage of the process for the surveyor to advise if there were any issues that required urgent attention, and in particular, that the Ministry would need advice on health and safety risk.[35]

[69] The Ministry's approval was accordingly sought for:

(a) The proposed process for fixing school buildings;

(b) Funding to fix the affected buildings;

(c) Making available the necessary resources to manage the process of fixing affected buildings; and

(d) Making available the funding and resources necessary to initiate legal action where it was viable to recover the expenses of fixing school buildings that have failed.

[70] A report of 20 April 2009 to the Minister of Education summarised the work then being undertaken to manage the "nation-wide problem" of leaking schools. The report:

(a) Highlighted the health and safety risk to occupants of the affected buildings from mould and fungi spores, as well as structural damage which leaves buildings unsafe (and that the Ministry, as building owner, could be held liable for any serious injury or death due to structural failure);

(b) Advised that a national project manager has been appointed to:

> … organise the remedial work on school buildings that have weather tightness issues. The priority in each case is to assess the

[35] I note that surrounding paragraphs of this aspect of the document are redacted for privilege.

> potential health and safety risks and put measures in place to remove any urgent risk to the occupants of the school. The focus is then to have the buildings repaired to a high quality standard so their life is extended and they require the minimum maintenance in the future.
>
> The Ministry gathers evidence from the three main causal effects and where possible takes civil action … to recover the costs of the repairs.

(c) Advised that a national survey is planned for 2010 to inform the development of "a national remediation programme".

[71] Internal documents describe the early life of the BIP as somewhat "reactive". Four firms of surveyors were engaged in April 2009 to assist the BIP. Individual schools would identify potential issues with leaking buildings; they were advised of the contact details for the four surveyors; the school chose which surveyor was to be used; and engaged them to provide an "initial test". As noted in the extracts set out from the mandate document above, if the initial test showed the building had issues:[36]

> …the Ministry reimbursed the school and engaged the same surveying company to undertake further testing (Destructive Testing) and if required, to undertake the remediation design and manage the physical works.

[72] Subsequently, the BIP developed a "proactive remediation programme". This commenced by the commissioning of the "Auckland Survey", which comprised a visual survey of 1,074 school buildings randomly selected from 199 Auckland Schools. This was completed on 14 April 2010.

[73] This in turn led to what was known as the National Survey, which was ultimately to survey 6,130 school buildings at 1,592 schools nationwide. It appears, however, that this survey took some further time to plan and procure. In the interim, initial and then destructive testing (and the resulting reports) continued to be carried out at schools around the country. For example, a 2 February 2010 "Project Highlight Report" stated that over the following two months, assessments would be made of any initial reports received, and once destructive reports had been received, "a plan formulated for remedial works". The report also noted that "civil cases in place will be progressed. Further work will be done to assess other potential viable cases."

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[36] Internal Ministry email dated 8 May 2013 summarising the history of the BIP.

[74] Ms Haplin also confirms in her affidavit that destructive testing (and resulting reports) was carried out pursuant to the BIP and prior to the National Survey. She says that in relation to such destructive testing reports:

> Because the BIP programme was always concerned with legal recovery, testing reports were prepared for both the purpose of identifying any issues with the building and remediation requirements and for the purpose of a legal claim.
>
> …
>
> Once completed, a report would be reviewed by the Ministry and its legal team to determine whether a legal claim was viable.

[75] Where a claim was considered viable, Ms Halpin explains that the Ministry would then seek to engage with the parties involved with the building concerned and seek a resolution and if that was not possible (or limitation periods were looming), proceedings would be commenced. Ms Halpin notes that by 2010, the Ministry had approximately six court proceedings on foot for weathertightness claims. She also explains that the destructive testing reports captured:

> Details [which] were required in order for the Ministry and its legal advisers to consider and, if appropriate, issue, legal proceedings or negotiate settlements with relevant parties. The reports contain more detail than is required for remediation purposes and were prepared with sufficient detail to prepare legal proceedings.
>
> There were some exceptions to that, such as if a building was very clearly out of time for a legal claim or the remediation made any legal claim uneconomical. In those cases, the relevant surveying company would notify the Ministry and, subject to the Ministry's approval, would prepare a much less detailed report that focussed solely on identifying any issues and necessary repairs. This practice of providing less detailed reports (or "condensed reports") started well after 2010. Any such reports are not privileged and, if relevant, have been provided.

[76] I interpolate to note that Ms Halpin's acceptance that the condensed reports are not subject to litigation privilege must be correct, given that proceedings in respect of buildings then considered to be outside the relevant limitation period could not have been actually (or reasonably) apprehended by the Ministry.

[77] A (draft) January 2011 report to the Ministers of Finance and Education noted two issues then identified with the "defective buildings remediation programme". The first was the distraction the project was causing for school principals, and therefore a

proposal that the Ministry, rather than school boards, be party to the remediation contracts. The second issue was a future funding risk, given the anticipated identification of significantly more priority buildings through the forthcoming National Survey. A more detailed (draft) paper attached to the report discussed those issues in more detail. A section headed "Legal Redress" has been fully redacted for privilege.

[78] Planning for the National Survey continued in 2011. A project brief of February 2011 seeking approval for the National Survey stated:

> The primary objective of the survey is to ascertain the extent of weather-tightness issues in schools. This will assist with the Ministry's budget planning and enable a proactive prioritised remediation programme of defective buildings to be developed.

[79] The brief went on to note that the project would be completed by June 2012, which would "enable a prioritised remediation programme to be developed."

[80] The National Survey was completed in May 2012. It identified 1,233 buildings as a priority for further testing.

[81] Ms Halpin also addresses destructive testing reports prepared as a result of the National Survey. Rather than the report being prepared and then assessed to determine if a legal claim were viable, Ms Halpin states that legal recovery was considered in advance. She explains that following the National Survey, a triage process was conducted to identify those buildings likely to be the subject of a legal claim. This involved an assessment of the limitation period, the relevant parties and the likely extent of damage.

[82] A "Scope of Services" document issued to the four contracted surveyors dated 13 November 2012 addressed the nature of the further destructive testing to be carried out following the National Survey results. The document stated that:

> The Ministry wishes to appoint building surveyors to undertake destructive testing (DT) on the first tranche of these priority buildings in order to identify any weather-tightness issues and required remediation.
>
> …

> The purpose of the DTs is to provide the Ministry with technical advice on the diagnoses of weather-tight defects, recommendation on remediation and the scope and cost estimate of remediation work.

[83] In a breakdown of the scope of services to be provided, the document stated:

> 6.8 Comprehensive reports should be provided for any block identified by the Ministry to be in time for a legal claim. A reduced report should be provided for any block identified by the Ministry to be out of time for a legal claim.

[84] By 21 December 2012, the four survey firms had been formally engaged by the BIP Programme Manager, for and on behalf of the Ministry, for the purpose of carrying out destructive testing. Mr Salmon for Carter Holt notes that there is no reference in the engagement letters to the purpose of the engagement being to prepare for apprehended proceedings.

Reports prepared after 2012

[85] These proceedings against Carter Holt (and others) were commenced on 12 April 2013.[37] Ms Haplin explains that once the litigation was apprehended (she does not actually state when this occurred), the Ministry worked with its external solicitors, Meredith Connell to create what is known as the "PLC Handbook". The PLC Handbook (over which the Ministry claims privilege) provides a template of the issues to be identified by the surveyors when carrying out testing. She explains that the Ministry worked with the surveyors and Meredith Connell to determine the priority for carrying out the further testing of buildings. Ms Halpin states that the claim was a "critical part of the prioritisation process," with buildings in the claim being prioritised over those that were not relevant to the claim. Ms Halpin says that other factors considered in assessing priority "included the building's initial risk assessment from the National Survey and whether the building was affected by limitation issues."

[86] Ms Halpin notes that following that process, the surveyors tested those priority buildings in accordance with the PLC Handbook. She states that "reports produced using the PLC Handbook template were for the purpose of obtaining and collating information relevant to this claim". Ms Halpin goes on to state that:

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[37] The Ministry has resolved the proceedings against other defendants. It now proceeds against Carter Holt only.

> All testing reports created after 2012 were created in this way and were created for the purposes of this claim. Copies of the reports were provided to Meredith Connell and the Ministry and were included in the KPMG database that was created for the purposes of this claim. Because the basis for the privilege claimed is the same for all these reports, I have not separately listed or provided further detail of those reports in this affidavit.

The basis for the Ministry's claim of privilege

[87] The Ministry says that for destructive testing reports prepared after 2012 (so from 2013 onwards), the position is straightforward, given the context in which the reports were prepared and outlined at [83] and [85] above. In relation to reports prepared before 2013, the Ministry says that it was clear that the BIP was always concerned with legal recovery. Destructive testing reports prepared during this time period were therefore prepared for "*both* the purpose of identifying building issues and remediation, *and* for the purposes of a legal claim" (emphasis in the Ministry's submissions). Relying on Associate Judge Bell's approach in *Ministry of Education v H Construction North Island Ltd*, the Ministry says that the destructive testing reports in this case therefore have the same "inseparable duality of purpose", which satisfies the dominant purpose test.[38]

Discussion

[88] For the reasons set out in the legal principles section of this judgment, I do not consider that if a document has "inseparable dual purposes" it can be concluded that litigation privilege applies. That is not, after all, the test set out in the string of Court of Appeal decisions referred to earlier, nor that carried into s 57 of the Act itself. Rather, the inquiry must always be, is the *dominant* purpose of the document to prepare for apprehended proceedings?

[89] In this case, and given the factual basis upon which the various reports were prepared, the following conclusions can be drawn.

[90] I am prepared to accept that from the point at which destructive testing reports were being prepared as part of the BIP, legal proceedings, at least in a general sense, were reasonably apprehended. It seems clear from the documentary record examined,

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[38] *Minister of Education v H Construction North Island Ltd*, above n 24.

and Ms Halpin's evidence, that in all cases considered appropriate, legal proceedings to recover the costs of remediation *would* be pursued. As such, it was not a case of such proceedings being a mere possibility or a "vague" apprehension.

[91] In my view, the key issue in relation to the reports is whether it can be said they were prepared for the *dominant* purpose of apprehended proceedings. While this can only be considered on a report-by-report basis, the following principles can be drawn (subject of course, to any factors pointing otherwise from the circumstances pertaining to a particular report).

[92] First, any "initial reports" prepared pursuant to the BIP could not properly be subject to litigation privilege. It seems plain that the dominant purpose of such reports was not to prepare for apprehended proceedings, but rather to ascertain what buildings should be prioritised for further destructive testing.

[93] Second, any condensed or reduced report prepared prior to the process put in place after the National Survey is not, without more, subject to litigation privilege. As well as proceedings actively *not* apprehended in relation to the relevant buildings, those reports cannot have been prepared for the dominant purpose of proceedings.

[94] Third, I do not consider that comprehensive reports (i.e. not being "reduced" or "condensed" reports) prepared before the process put in place following the National Survey (and explained at [85] above) would, without more, attract litigation privilege. I say this for the following reasons:

(a) It is correct the BIP was always concerned with legal recovery. That is clear from the documents reviewed. But that does not mean reports were thereby prepared for that dominant purpose. Rather, the clear and indeed prevailing purpose was remediation of buildings. This reflected the Ministry's real concern at the health and safety issues arising from leaking buildings. To put the point another way, *irrespective* of whether legal proceedings might follow, a priority building would be subject to destructive testing to inform remediation and the costs of doing so. In that way, and unlike in *Re Highgrade Traders*, the reports had an

independent "life" other than for the purposes of preparing apprehended litigation.

(b) Nor do I consider the fact a comprehensive rather than condensed or reduced report was prepared alters the position. That is because at that time, and prior to any assessment of legal recovery, the only point which can be drawn from the distinction between comprehensive and reduced reports is that buildings the subject of reduced reports were "out" so far as legal proceedings were concerned. In the case of comprehensive reports, the position remained unknown until after the report had been prepared and reviewed to establish whether a legal claim was viable. As such, the *dominant* purpose of these reports cannot have been to prepare for apprehended legal proceedings. Rather, that remained to inform a remediation process; or at best, with *equal* purposes of remediation and putting information before a lawyer to assess the viability of legal proceedings. In that case, the latter could not be the dominant purpose.

[95] Fourth, I am satisfied, however, the position changed as a result of the process put in place after the National Survey. From that point, the question of legal recovery was considered in advance. Importantly, that "up front" consideration drove the decision whether a comprehensive or reduced report would be prepared. Unlike in the earlier stages of the BIP, therefore, the *very fact* a comprehensive report was prepared, rather than a reduced report, was because that *form* of document was being produced to prepare for apprehended proceedings. To put the point another way, a document in the form of a comprehensive report would not have come into existence unless to prepare for apprehended proceedings. As such, and of course subject to the position being considered on a document-by-document basis, comprehensive reports prepared as a result of the December 2012 engagements of the four survey companies are capable of attracting litigation privilege.

[96] Finally, condensed or reduced reports prepared after the National Survey would also not attract litigation privilege (absent particular circumstances applying to any given report).

Next steps

[97] Given the manner in which Carter Holt's application proceeded, i.e. not tied to any particular documents, it is not possible to make orders setting aside or confirming claims to privilege made by the Ministry. As discussed with counsel at the hearing, the outcome is instead a set of findings as to the ability to claim litigation privilege as a matter of principle, subject to individual circumstances pertaining to particular documents.

[98] I anticipate the findings made in this section of my judgment will require the Ministry to review a number of claims to litigation privilege over destructive testing reports which pre-date 2013. It is not possible to determine this on the basis of the information set out in Schedule 6 to Ms Haplin's affidavit which, like the Schedule attached to Ms Lang-Sui's affidavit, largely consists of conclusory statements as to the nature of a particular document, and a statement that it is privileged. Clearly, the fact that a document is addressed to a legal adviser, Ms Halpin, or said to be for the purpose of legal advisers, is not determinative, or in many cases, likely to be particularly relevant. That is clear from the discussion in authorities concerning insurance reports, where reports are often addressed to the insurer's solicitors. In addition, the fact the report gathers information relevant to legal proceedings (such as a building's compliance with aspects of the Building Code) is not determinative of the dominant purpose of the report's preparation. Further, it seems that there remains a number of condensed or reduced reports in Schedule 6 for which litigation privilege is claimed. It may be, although it is unclear from the commentary to such documents, that there are particular facts pertaining to the report in question which cloak it in privilege, despite Ms Halpin's acceptance that such documents do not attract litigation privilege.

[99] It strikes me that, subject to any contrary approach suggested by the parties, the Ministry ought to re-review those reports making up Schedule 6 in light of the findings made in this judgment, to assess whether any privilege claims should be removed. The document pool is relatively small, so I would be confident this can be attended to fairly swiftly in the New Year. If, having undertaken that exercise, there remains issues as to the basis upon which claims to litigation privilege have been

made, I will need to review the particular documents involved in order to make formal orders.

Residual privilege issues arising on the applications

[100] Given the findings I have made on both applications, it is not necessary to determine alternative bases that were advanced (particularly on the Ministry's application) for orders setting aside privilege, namely waiver of privilege and that litigation privilege has come to an end. I accordingly make some brief observations only.

Waiver

[101] The Ministry suggested that Carter Holt had waived privilege over all documents concerning the complaints process given a (very brief) comment in an affidavit sworn by Carter Holt's general counsel in an earlier interlocutory hearing in this proceeding, in which he said that "where weathertightness has been at issue, it has been apparent from CHH's investigations that the failures have been attributable to installation, or design defects or maintenance." The Ministry said this is inconsistent with what it has seen in some of the complaints documents to date. It says that by putting in issue the findings made when dealing with complaints, Carter Holt waived privilege over documents setting out those findings.

[102] I simply record that, had it been necessary to determine the question of waiver, I have considerable doubt that the relatively brief reference in Mr Simpson's affidavit relied on by the Ministry has the effect of waiving privilege over a very large number of privileged documents. It is unlikely that Mr Simpson has acted to put "the" privileged communications or information in issue for the purposes of s 65(3)(a) of the Act. I do not consider that stating something that is merely inconsistent with a privileged document constitutes waiver. That could often arise, for example, in relation to information contained in without prejudice communications. Nor is "inconsistency" the test under s 65 in any event.

Litigation privilege ceasing on conclusion of the proceedings

[103] Nor do the findings I have made require me to determine what the Court of Appeal has described as the "interesting question" of whether courts in this jurisdiction should follow the approach adopted in the Supreme Court of Canada's decision in *Blank v Canada (the Minister of Justice)*.[39] In *Blank*, the Supreme Court of Canada found that, unlike privilege for communications with legal advisers,[40] which are "once privileged always privileged", litigation privilege ceases at the conclusion of the proceedings in connection with which the documents were prepared.

[104] The Court's reasoning in *Blank* was that litigation privilege is designed to give a "zone of privacy" around legal proceedings, and the rational for that "zone of privacy" ceases with the proceedings.[41] An exception to this is that the privilege retains its purpose and therefore its effect where "related litigation" remains pending or may reasonably be apprehended, or in connection with proceedings that "raise issues common to the initial action and share its essential purpose". (I will refer to these sorts of proceedings collectively as "related proceedings".)

[105] There is some conflict in High Court decisions in this jurisdiction as to whether *Blank* should be adopted here, and the point has not yet arisen for consideration by the Court of Appeal or Supreme Court.[42] While not having had the matter fully argued before me, I nevertheless have some sympathy with the views expressed by Peters J in *NZH Ltd v Ramspecs Ltd*, in which her Honour queried whether the conclusion reached in *Blank* is available in the context of the Act.[43] Her Honour noted that most sections conferring privilege on certain communications or information (ss 54, 55, 57, 58, 59 and 60) provide that a party "has" a privilege in relation to the communication or information, and that s 53 of the Act, which provides for enforcement of privilege, does not suggest that litigation privilege ceases earlier than the other privileges.

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39 *A v Attorney-General* [2009] NZCA 490 at [27], referring to *Blank v Canada (Minister of Justice)* [2006] 2 SCR 319.

40 In this jurisdiction, Evidence Act 2006, s 54.

41 *Blank v Canada (Minister of Justice)*, above n 39, at [32]-[34].

42 *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 504; *A v Attorney-General*, above n 39; *Reid v New Zealand Fire Service Commission* [2010] NZCA 133, (2010) 19 PRNZ 923 at [21]; *Houghton v Saunders* [2013] NZHC 1824; *Osborne v Worksafe New Zealand* [2015] NZHC 264, [2015] NZAR 293 at [21]-[23]; *NZH Ltd v Ramspecs Ltd* [2015] NZHC 2396; *Hoyle v Hoyle* [2015] NZHC 3001 at [39]-[40]; *Williams v Craig* [2016] NZHC 1453.

43 *NZH Ltd v Ramspecs Ltd*, above n 42, at [32].

[106] In my view, the proper interpretation and application of s 53 to this issue is likely to be key. That section does not appear to contemplate litigation privilege ceasing at the conclusion of the proceedings in relation which the relevant documents had been prepared. Rather, s 53(1) expressly provides that a person who has a privilege conferred by *any* of ss 54 to 59 "*has* the right to refuse" to disclose the document or communication "*in a proceeding* …" (emphasis added). Accordingly, s 53(1) does not distinguish between any of the different forms of privilege for the purposes of the duration of that privilege. Nor is the type of proceeding in which a privilege-holder has the "right" to refuse to disclose a privileged document limited, at least in the case of litigation privilege, to the related proceedings contemplated in *Blank.*

[107] I also have some concern as to how the *Blank* approach might operate in practice. What if the original proceedings had ended, no further or related litigation was either pending or reasonably apprehended at that time (such that the privilege ceases), but some years later, a proceeding meeting the definition of *Blank's* related proceeding was commenced? Would the privilege "re-attach" to the documents concerned? And what if in the intervening period, other proceedings had been commenced which did not meet the definition of *Blank's* "related proceedings", in which the documents, having lost their privileged status, had been disclosed? Having been so disclosed, the documents would have lost their confidentiality (despite the restraints on what use might be made of documents discovered in proceedings; they might, after all, be referred to in open court). Losing confidentiality would then be inconsistent with "regaining" their privileged status for later related proceedings. At least at first blush, it strikes me that difficulties could arise if documents moved "in and out" of a privileged state.

[108] There may be simple and principled answers to issues such as this when the "interesting question" arising from *Blank* is fully considered in a case in which it arises for determination. I merely offer these thoughts as matters for consideration in such a case.

Result

The Ministry's application

[109] The Ministry's application to set aside Carter Holt's claims of litigation privilege is successful in respect of those documents listed at [46] above. It is unsuccessful in setting aside claims to without prejudice privilege in relation to those documents set out at [53](b)-(c) above.

Carter Holt's application

[110] Carter Holt's claim to set aside the Ministry's claims of litigation privilege in relation to destructive testing reports is successful, insofar as those findings made at [92] to [96] are likely to require certain privilege claims made to date by the Ministry to be reviewed. It is not possible on the material presently before the Court to deal with the Ministry's claims to litigation privilege on a document-by-document basis. But if, despite the Ministry having completed any re-review process, disputes remain in relation to particular documents, I will inspect the documents concerned and make rulings on a document-by-document basis.

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Fitzgerald J