

IN THE SUPREME COURT OF NEW ZEALAND

SC 104/2017
[2017] NZSC 178

BETWEEN

STUDORP LIMITED
First Applicant

JAMES HARDIE NEW ZEALAND
Second Applicant

AND

TRACEY JANE CRIDGE AND MARK
ANTHONY UNWIN
First Respondents

KATRINA McKELLAR FOWLER AND
SCOTT WOODHEAD
Second Respondents

BODY CORPORATE 316651
Third Respondent

Court: Elias CJ, Glazebrook and Ellen France JJ

Counsel: J E Hodder QC, J A McKay and A J Wicks for Applicants
J A Farmer QC, D J S Parker and E S K Dalzell for
Respondents

Judgment: 27 November 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicants must pay costs of \$2,500 to the respondents.

REASONS

Introduction

[1] The applicants, Studorp Limited and James Hardie New Zealand (James Hardie) manufacture cladding systems. The respondents are home owners who have brought proceedings in which they allege the leaks in their homes are attributable to

inherent defects in cladding systems manufactured by James Hardie.¹ The respondents also claim that James Hardie made misleading statements about the cladding systems in its technical literature. The claims are brought in negligence and under the Fair Trading Act 1986.

[2] It is alleged that a large number of home owners may be affected. Accordingly, the respondents sought orders to be able to bring their proceedings in a representative capacity on behalf of a class under r 4.24 of the High Court Rules.² The class was defined as all owners or previous owners of properties using the relevant cladding systems who had already consented to being represented, or who in future elected to opt in.

[3] Representative orders were granted by Ellis J.³ The Judge also imposed opt in dates. While that judgment was pending, the respondents also sought precautionary orders preserving the position of the members of the proposed class for limitation purposes should the then pending application for representative orders be unsuccessful. This application was refused by Thomas J.⁴

[4] James Hardie's appeal against the making of representative orders was dismissed by the Court of Appeal.⁵ The respondents successfully cross-appealed the period of time allowed under the opt in order for qualifying members to opt in. The Court of Appeal also allowed the respondents' appeal of Thomas J's refusal to grant precautionary orders, though this outcome was "academic" for the parties given that James Hardie's appeal had been dismissed.⁶

[5] In dismissing James Hardie's appeal, the Court of Appeal upheld the finding of Ellis J that there were three common issues which warranted making a representative order confined to those issues, namely:⁷

¹ The systems are known as "Harditex" and "Titan Board".

² Rule 4.24 relevantly provides that "[o]ne or more persons may sue or be sued on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding— ... (b) as directed by the court on an application made by a party or intending party to the proceeding".

³ *Cridge v Studorp Ltd* [2016] NZHC 2451, (2016) 23 PRNZ 281.

⁴ *Cridge v Studorp Ltd* [2015] NZHC 3065.

⁵ *Cridge v Studorp Ltd* [2017] NZCA 376 (French, Cooper and Asher JJ).

⁶ At [63].

⁷ At [5]. See also at [28], [31]–[32], [35] and [38].

- (a) whether James Hardie owed the owners a duty of care in tort;
- (b) whether James Hardie had breached that duty; and
- (c) whether the statements made in James Hardie’s technical literature were misleading and deceptive for the purposes of the Fair Trading Act.

[6] The Court considered that on the issue of duty of care, the considerations will be “materially the same or similar” for all claims.⁸ The Court acknowledged that in relation to breach there were various sub-issues but they were nonetheless common and will involve consideration of a common factual matrix.⁹ Further, whether particular statements in James Hardie’s technical literature were misleading or deceptive was a common issue.¹⁰

[7] The effect of the representative orders is, as the Court described, that:¹¹

... when the claims of the representative owners are tried in full, determination of the three common issues will result in findings that are binding on James Hardie and all members of the class. Determination of other aspects of the claims such as causation and loss will be determined on an individual owner basis.

[8] The Court of Appeal was also satisfied that the representative order would “better achieve the just, speedy and inexpensive determination of the proceedings than the test case procedure” for which James Hardie contended.¹²

[9] In allowing the respondents’ appeal in relation to the making of precautionary orders, the Court of Appeal adopted an approach under which the clock stops in terms of limitation periods when representative proceedings are filed for everyone on whose behalf they are brought, regardless of whether a representative order is later made or not.¹³

⁸ At [31].

⁹ At [32].

¹⁰ At [35].

¹¹ At [6].

¹² At [39].

¹³ At [86].

The proposed appeal

[10] The grounds of the proposed appeal are, first, that the Court of Appeal erred in finding that the respondents had the “same interest” in the subject matter of the proceeding as the class members it is proposed they represent, as required by r 4.24. The second ground is that the Court of Appeal was wrong to find that determination of the issues in the two-stage manner envisaged was “just, speedy or inexpensive”.

[11] In developing the submissions on these grounds the applicants emphasise that this case is not one where the damage results from a “single event” or “single source”. The applicants say the “single event” or “single source” cases reflect the paradigm situation in which representative actions have been adopted. The applicants wish to argue that the problems of expanding the representative action to a case like the present are even more acute where the alleged failure relates to what Mr Hodder QC describes as “a complex and evolving system” of cladding comprised both of James Hardie components and components manufactured or supplied by others.

[12] In addition, in terms of both of these two proposed grounds, it is submitted there are difficulties in distinguishing the issues selected for trial in the first stage from the issues the Court acknowledged will be dealt with separately, particularly the causation question.

[13] In the event the representative orders appeal succeeds, James Hardie also seeks leave to appeal the Court of Appeal’s judgment overturning Thomas J’s refusal to grant precautionary orders.

Our assessment

[14] The principles applicable to representative orders have been examined recently by this Court in *Credit Suisse Private Equity LLC v Houghton*.¹⁴ This case, given its particular facts and the inevitable focus on those facts, does not appear to be a suitable vehicle for any further elaboration of those principles.

¹⁴ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.

[15] In any event, as the proposed appeal relates to an interlocutory application, the Court needs to be satisfied that “it is in the interests of justice” to hear and determine the appeal before trial.¹⁵ James Hardie can raise at trial the issues identified in relation to, for example, the evolving nature of the cladding systems and the other variables referred to. Further, causation will have to be established at trial and the High Court Rules provide various options in terms of case management of the procedural issues which may arise as the proceedings continue. In other words, there are other avenues through which James Hardie can pursue matters which mean it is not necessary in the interests of justice to hear and decide the proposed appeal prior to trial.

[16] The other proposed question relating to the precautionary orders accordingly falls away. We are not therefore satisfied the criteria for leave are met.

[17] The application for leave is dismissed. The applicants must pay costs of \$2,500 to the respondents.

Solicitors:
Chapman Tripp, Wellington for Applicants
Parker & Associates, Wellington for Respondents

¹⁵ Senior Courts Act 2016, s 74(4); and Supreme Court Act 2003, s 13(4).