

Access to justice and efficiency key to representative (class action) orders: *Cridge v Studorp Limited* [2017] NZCA 376

Leaky building owners can now join the class action against James Hardie under a five month “opt-in period” granted by the Court of Appeal in *Cridge v Studorp Limited* [2017] NZCA 376. The Court of Appeal found that issues of duty, breach of duty and Fair Trading Act breach were sufficiently common to all owners to justify a representative or class action.

Therefore, the claim had been properly brought as a representative case, stopping time “permanently” for limitation purposes for both the named plaintiffs and represented class members. The later coming into force of the 15-year limitation period under the Limitation Act was not a reason to limit the opt in period. Parker & Associates acted for the successful owners. **Stuart Dalzell, Partner, discusses the decision*

Background and High Court

The case involved a claim by owners of three properties, who alleged that the leaks in their respective homes and buildings are attributable to inherent defects in cladding systems manufactured by James Hardie, known as “Harditex” and “Titan Board”. The High Court judge, Justice Ellis, had found that determination of three issues, i.e. –

- whether James Hardie owed a duty of care;
- whether it had breached that duty (including sub-issues of inherent defects, failures in design and industry standards and knowledge); and
- whether statements made in James Hardie’s technical literature were misleading and deceptive for the

purposes of the Fair Trading Act –

- (a) were issues common to all members of the proposed class — and
- (b) that they warranted the making of a representative order limited to those common issues.

The judge had also found that there should be two and 10-week periods for more leaky-building owners to “opt in” to join the claim, on the basis that the opt in periods should be limited to the period of days or weeks between the filing of the relevant representative claims and the “expiry” of the 15-year limitation longstop period. James Hardie appealed the representative orders and the plaintiffs cross-appealed seeking a longer opt in period.

A further appeal was brought by the plaintiffs against a judgment of Justice Susan Thomas in December 2015. That judgment concerned an issue which it was common ground was academic if James Hardie’s appeal failed but of some general importance: what was the status of represented class members in the period after the representative claim was filed but before the application for representative orders was heard and determined? Thomas J had held represented class members had *no* status pending representative orders being made and would need to file individual proceedings to protect against the

“expiry” of limitation periods during this period.

Access to justice, economy and efficiency

The Court of Appeal upheld the representative orders, finding that the duty issue was “well suited” to a representative hearing; that issues of breach involved the examination of a “common factual matrix – namely what James Haride knew, did, or omitted to do leading up to and following release of the relevant products in o the market place”; and that the issue of misleading and deceptive conduct “sits neatly alongside the question of inherent defects.”

Justice French (for an unanimous Court of Appeal) emphasized the fundamental policies that representative proceedings are meant to uphold, namely:

- access to justice
- judicial economy, and
- efficiency.

She went on to explain how a proper interpretation of the representative procedure rule 4.24 is one in which the provisions are construed liberally and flexibly to further those purposes.

Justice French said the principles governing the application of the rule are well-established, including:

1. The test is whether the parties to be represented (the class members) have the “same interest” in the proceeding as the named parties;
2. “Same interest” extends to a **significant common interest in the resolution of any question of law or fact** in the proceeding;
3. It is not necessary that the common question make a complete resolution of the case, or even *liability*, possible;

4. The requisite commonality of interest is **not a high threshold: requiring a liberal and flexible approach** to determining whether there is a common interest;
5. The Court should be wary of looking for impediments to the representative action and rather should be *facilitative* of it –

Provided always a representative action should not work injustice by depriving a defendant of a defence or allowing a class member to succeed where they would not have succeeded in an individual claim.

Justice French found those requirements were satisfied here, saying James Hardie's arguments "overstate[d] the difficulties" of the representative order, "overstate[d] the differences" between the claims and "underestimate[d] the Court's powers of case management". "Time dependent variables could for example be accommodated by the creation of subclasses," she said.

Based on these principles, Justice French rejected all James Hardie's arguments against the making of the representative order, including:

Similarities over differences

1. That the judge wrongly assumed the selected issues are capable of clear determination when a "house by house investigation" was required to resolve the claims. In Justice French's view, the cladding systems in issue had remained "substantially similar throughout the entire period [that they were on the market]".

Duty, proximity and policy common issues

2. That duty of care is a fact-intensive inquiry linked to questions of causation and damage. Justice French considered that the duty of a cladding manufacturer stemmed from *Donoghue v Stevenson* and it was "most unlikely" that any variations that might exist between the claimants in this case would lead to different conclusions about duty. Key issues of "proximity and

policy" could be determined on a class-wide basis.

No predominance requirement

3. Justice French also rejected James Hardie's arguments, based mainly on US Federal Rules and case law, that representative orders are appropriate only in so-called "single event" or "single source" cases. No such rule or limitation existed — and nor was there any requirement that the common issues "predominate" individual issues, as in *America*, she said.

Opt-in periods

The Court of Appeal allowed the owners' cross appeal, accepting their argument that the opt in periods were far too short. On this issue, James Hardie had argued, and the judge had accepted, that the opt-in periods should be limited to the period between the filing of the representative claims and the expiry of the 15-year time-bar under the Limitation Act — here, a matter of weeks.

However, as Justice French pointed out, the Supreme Court had held in its 2014 *Credit Suisse* decision that time stops running for limitation purposes when the representative claim is brought, not when representative orders are made, and furthermore that time is stopped for the named plaintiffs *and* those they seek to represent.

The purpose of an opt in period, Justice French said, "is not to enforce the limitation period but rather to reduce the original class to those who take the positive step of opting in." As such, "[t]he length of the opt in period should be determined not by reference to the limitation period — as it was by Ellis J — but by considering what period is reasonable in all the circumstances...". Justice French concluded five months was reasonable given "latent defects", the need for formal public notice and receipt of legal and expert advice.

Thomas J appeal

The Court of Appeal also allowed the owners' appeal against the judgment of Susan Thomas J. Applying the 1992

decision of the Full Court of the Queensland Supreme Court in *Cameron v National Mutual Life Assn of Australasia (No.2)*, Justice French held that the representative claim was brought not only by the named plaintiffs but also by or on behalf of the class members at the time the claim was filed. The limitation clock is not suspended, it "stops permanently", she said. Therefore, the fact that claims may have been wrongly brought in representative form did not render them a *nullity*. At most it was a procedural irregularity capable of cure by giving unnamed class members leave to be joined as named plaintiffs.

Comment

The emphasis in the modern case law on class actions or representative actions is access to justice and efficiency. In moving away from the past these cases suggest a focus on common issues rather than differences. In *Cridge v Studorp Limited* [2017] NZCA 376, the Court of Appeal applied this approach to product liability and/or mass-tort claims, rejecting an unduly narrow approach as inconsistent with the with emphasis on a "broad and liberal approach" and procedural flexibility as seen in cases such as *RJ Flowers v Burns* (1987), *Credit Suisse v Houghton* (2014) and *Strathboss Kiwifruit* (2015), another case in which Parker & Associates acted for the successful growers.

The Court's decision to overturn the decision of Susan Thomas J, it is submitted, provides much needed clarification of the status of represented class members where a limitation deadline intervenes between the time an application for representative orders is filed and when it is determined. In practical terms the decision avoids the need to file unnecessary and costly proceedings on behalf of individual class members pending the making of representative orders. In this respect, however, the decision does underscore the need for clear class action rules in New Zealand.