

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2015-485-594
[2016] NZHC 2451**

BETWEEN TRACEY JANE CRIDGE AND MARK
ANTHONY UNWIN
Plaintiffs

AND STUDORP LIMITED
Defendant

CIV-2015-485-773

BETWEEN KATRINA MCKELLAR FOWLER
First Plaintiff

SCOTT WOODHEAD
Second Plaintiff

AND STUDORP LIMITED
First Defendant

JAMES HARDIE NEW ZEALAND
Second Defendant

CIV2015-404-3117

BETWEEN BODY CORPORATE 316651 AND ORS
Plaintiffs

AND STUDORP LIMITED
First Defendant

JAMES HARDIE NEW ZEALAND
Second Defendant

Hearing: 7-8 June 2016

Counsel: D J S Parker and E S K Dalzell for Plaintiffs
J E Hodder QC, J A McKay and A J Wicks for Defendants

Judgment: 14 October 2016

RESERVED JUDGMENT OF ELLIS J

*I direct that the delivery time of this judgment is
4.30 pm on the 14th day of October 2016*

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[1] All of the plaintiffs in these three proceedings own a home that leaks.¹ Each says that the leaks are attributable to defects in cladding systems known as “Harditex” and “Titan Board”.² The cladding systems were manufactured by the defendants, to whom I shall refer collectively as James Hardie.³ The plaintiffs also say that James Hardie made misleading statements about those products or systems. They now bring claims in negligence and under the Fair Trading Act 1986 (the FTA) seeking damages for the losses they have suffered.

[2] There are a number of others who are in a similar position to the plaintiffs. Following the release of an earlier decision of this Court,⁴ 55 of them have also filed claims and have the same lawyers acting for them. There are 10 others who have been identified but have not filed claims. As I understand it, there are also a number of parallel claims filed in the Auckland Registry.

[3] In any event, the plaintiffs seek to pursue their claims against James Hardie on behalf of those others, on a representative basis under r 4.24. The 64 identified owners of other Harditex properties have consented to be represented by the named plaintiffs in the Harditex claims. One owner has consented to be represented by the named plaintiffs in the Titan Board claim.

[4] The plaintiffs also seek orders under r 10.12 either for consolidation or joint trial of all three proceedings. They further contend that:

- (a) consent by those seeking representation is sufficient for representative action; and
- (b) an opt-in date is appropriate.

¹ The Body Corporate plaintiff in CIV 2015-404-3117 represents the individual unit holders.

² The home belonging to the plaintiffs in the first matter (*Cridge & Unwin v Studorp Limited* CIV-2015-485-594) was built in 1992 using Harditex cladding. They say that the cladding system contained inherent defects that have caused weathertightness failure. The plaintiffs in the second matter (*Fowler & Woodhead v Studorp Limited and James Hardie New Zealand* CIV-2015-485-773) make similar allegations in respect of their two-unit property built in 2000. The plaintiffs in the third matter (*Body Corporate 316651 and others v Studorp Limited and James Hardie New Zealand* CIV-2015-404-3117) allege inherent defects in the Titan Board cladding.

³ From 1994 to 2000 Studorp Ltd was known as James Hardie Building Products Ltd. James Hardie Building Products Ltd was known as James Hardie & Coy Pty Ltd from 1937 to 1994.

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

[5] The defendants oppose all orders sought. James Hardie says that:

- (a) the claimants do not have the “same interest”, as required by r 4.24 for representative proceedings;
- (b) a common issue is not readily identifiable;
- (c) a fact-specific assessment of each individual building is both necessary and unavoidable; and
- (d) it is not open to the plaintiffs to litigate the consent issue because that was determined against them by Thomas J last year.⁵

[6] More generally, James Hardie also says there is no utility in the proposed approach. Rather, it proposes that the plaintiffs should nominate one Harditex claim and one Titan claim as “test” cases. Those test cases could be case managed together but tried separately.

The issues

[7] At the outset I record my agreement with Mr Hodder QC for James Hardie that this Court has already determined that the plaintiffs have not validly commenced a representative action under r 4.24(a). Thomas J held that because the class of potential plaintiffs here was both broad and, as yet, indeterminate, it could not be said that the consent of all those with the same interest had been obtained and thus r 4.24(a) could not apply. That issue is clearly *res judicata* and further pursuit of it in the High Court is an abuse of process. The appropriate course is to pursue an appeal which, as I understand it, is what the plaintiffs have done.

[8] Accordingly the questions presently for determination are:

- (a) should leave be granted for representative proceedings under r 4.24?

⁵ *Cridge and Unwin v Studorp Ltd*, above n 4.

- (b) if leave is granted, are opt-in orders appropriate and if so, what period should be imposed?
- (c) should an order be made under r 10.12 to consolidate the proceedings or have them jointly tried?

[9] Before turning to consider those issues, however, it is necessary to set out the claims, in more detail.

THE NATURE OF THE CLAIMS

The pleadings

Cridge/Unwin

[10] Ms Cridge and Mr Unwin's amended statement of claim dated 22 October 2015 relates to their property at 2B Bay Lair Grove, Island Bay (Cridge pleading). The house was built between May and October 1992 with sign off by the Council on 21 October 1992. Ms Cridge and Mr Unwin purchased the property in December 2005. Their claim was initially filed on 19 August 2015.

[11] The claim is a monetary one for damage to the building (around \$250,000), as well as damages for anxiety (\$25,000) and also "stigma"/diminution in value (unquantified). There are three causes of action:

- (a) negligence;
- (b) section 9 of the FTA; and
- (c) section 10 of the FTA.

[12] Each cause of action is focussed on the "Harditex cladding system" as at 1991, and therefore it is the 1987 and 1991 Harditex Technical Information Brochures that are relevant. The Harditex cladding system is pleaded as having the following components:

- (a) fibre cement sheets;
- (b) jointing systems;
- (c) architectural shapes;
- (d) coating systems;
- (e) the 1991 Brochure;
- (f) direct fixing of cement sheets to building framing;
- (g) accessories (some proprietary) for such fixing;
- (h) finishing in approved texture coat systems; and
- (i) installation as directed by the 1991 Brochure.

[13] The detail of the alleged “inherent defects” in the cladding system is set out in a schedule to the pleading. By way of summary they are that:

- (a) the Harditex sheets are inherently moisture absorbent;
- (b) the cladding system allows water ingress at various locations without appropriately managing it;
- (c) the cladding system does not adequately manage drainage and drying of water that has penetrated or accumulated within the system;
- (d) the cladding system fails adequately to accommodate normal building movement, which leads to cracking and water ingress;
- (e) the design and installation detailing of the horizontal control joint incorporating the “h mould” design is inherently flawed and allows water ingress;

- (f) the 1991 Technical Information:
 - (i) was “inadequate” and incapable of providing a cladding system which was fit for purpose;
 - (ii) failed to specify a method of installation which makes adequate allowance and tolerances for typical conditions, including climatic conditions and the skill and precision as a reasonable cladding installer; and
 - (iii) failed to provide specifications for important and commonly occurring details; and
- (g) the Harditex system is not durable and is prone to moisture damage, rotting and decay.

[14] Another schedule to the claim contains a list of contributing workmanship defects that are not attributable to James Hardie. They are summarised as:

- (a) defects in relation to the installation of the texture coated cement sheet cladding;
- (b) inadequate protection of the joinery/cladding junctions; and
- (c) defects in relation to the roof.

[15] In general terms, the alleged breach of duty is:

... failure to take reasonable care and skill in relation to the design, development, manufacture, testing and supply of the James Hardie building products, approved accessories and systems, the Harditex 1987 and 1991 Technical Information documents and the Harditex Cladding System ...

[16] Particulars of the breach are also pleaded.

[17] In terms of causation, the pleading is that:

As a result of the inherent defects and the workmanship defects the property has suffered from water ingress and damage as set out below ...

[18] The damage then set out includes elevated moisture content in timber framing, degradation of Harditex and decay of wood fibres in the Harditex sheets, degradation of particle board floor “in places”, mould and hyphae growth on various building elements and cracking to texture coating and sheet joints. The alleged contribution of each defect to the damage to the property is detailed further in the “defects” schedule. For example, in relation to the moisture absorbency allegation the schedule says:

This defect, being inherent within the Harditex sheets, has contributed to the majority of the damage at the property, particularly the damage identified at the base of elevations and at the base of sheets above the horizontal control joints.

...

This defect will likely be contributing to other damage in areas not yet inspected being the perimeter of the house at the base elevations and above the horizontal control joint on the north elevation.

[19] The remedial work alleged to be necessary is not pleaded in any detail but includes the removal, disposal and replacement of the existing cladding system, building underlay and joinery from the building. The estimated costs associated with the remedial work are set out in a third schedule.

[20] The two FTA causes of action focus on extracts from the 1987 and 1991 Brochures, and allege that these were (or were likely to be) misleading or deceptive or false. These causes of action assert (without pleading any causative links) that the plaintiffs suffered loss or damage as a result of the “inherent defects”.

Fowler/Woodhead

[21] The other Harditex-related (amended) statement of claim is that filed by Ms Fowler and Mr Woodhead, dated 2 December 2015 (the Fowler pleading). This relates to a duplex property comprising 80 and 80A Woodhouse Avenue, Karori. The duplex was built between October 1999 and May 2000. Number 80 was purchased by Ms Fowler from the developer just prior to completion. On 12 May 2000 the

Council issued a code compliance certificate. Mr Woodhead purchased number 80A on 11 September 2015 and proceedings were issued the following month.

[22] The Fowler pleading generally parallels the Cridge pleading, including the same three causes of action (negligence, FTA s 9 and FTA s 10). It alleges the same “inherent defects” in the Harditex cladding system but refers to, and makes somewhat different allegations in relation to, the July 1998 Technical Information Brochures.

[23] The Fowler pleading lists a somewhat wider range of “workmanship defects” than the Cridge pleading. The damage pleaded is largely the same but with one additional item: “degradation of inseal at base of elevations”.

[24] The monetary claim for damage to the building is approximately \$368,000, plus anxiety (\$25,000 per plaintiff) and “stigma”/diminution of value (unquantified).

The BC 316651 (“The Hub”)

[25] The claim made by Body Corporate 316651 is dated 22 December 2015 and concerns a 2001–2003 unit-titled development known as “the Hub” in Botany Downs, which is partly clad with Titan Board. The structure of the claim is similar to that in the Harditex pleadings. It includes acknowledgement of workmanship defects, but alleges multiple “inherent defects” which are set out in a schedule.

ISSUE 1: REPRESENTATIVE PROCEEDINGS

The plaintiffs’ stance

[26] The plaintiffs in all three statements of claim assert that they are “representative plaintiffs” for a class. The stated members of each class are:

- (a) owners of properties clad using the relevant cladding system; and also
- (b) previous owners of such properties; but only
- (c) those who have consented/opted in, or may in future opt in.

[27] The plaintiffs propose that:

- (a) there would be a full trial on all issues raised by the lead plaintiffs' claims;
- (b) the findings on the "common issues" in these three claims would be applied to the claims of all class members and would be binding in respect of each class member's claim; and
- (c) trial on the "individual issues" in each of the remaining claims would follow.

[28] The "common issues" that the plaintiffs say can be determined on a representative basis include the issues of duty and breach which, in turn, include the factual question whether the pleaded "inherent defects" in the Harditex and Titan Board cladding systems exist. The plaintiffs also propose a partial determination of the causation inquiry. Mr Parker said that while "central" causation issues would be determined on a representative basis, questions of intervening or contributing causes, third party claims and affirmative defences would be dealt with as "individual" issues in subsequent separate trials.

Rule 4.24

[29] Rule 4.24 relevantly provides:

4.24 Persons having the same interest

One 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 —

- (a) with the consent of the other persons who have the same interest; or
- (b) as directed by the court on an application made by a party or intending party to the proceeding

[30] As noted earlier, there is no longer an issue of consent under (a) here. The present judgment turns on an application of (b). There are two matters to be decided. First, the Court must determine whether all relevant persons have "the same interest in the subject matter of a proceeding". Secondly, it must decide whether the order

sought is consistent with the objective of r 1.2, namely securing the just, speedy, and inexpensive determination of the proceeding.

[31] It has been held that the words “the same interest” mean a significant common interest in the resolution of any question of law or fact arising in the proceeding. Although there are dicta to the effect that the term should be applied liberally to meet modern requirements, Mr Hodder submitted, however, that such a generous approach is not applied without regard to litigation reality.⁶ He said it is salutary to begin by recalling that the effect of an order under r 4.24 is that the Court’s judgment on a single claim, or on the nominated common issues within the claim, will be binding (that is, giving rise to issue estoppels) between not only the plaintiff and the defendant, but between the defendant and all members of the represented class.

[32] Representative orders are thus properly regarded as exceptional in the sense that, ordinarily, judgments are binding only between the parties to them. For an order to be made the commonality between each member of the class and the representative plaintiff must be such that a judgment on that common issue in favour of the representative plaintiff can, as a matter of practicality and fairness, be binding on all parties and class members. Or, as the Canadian Supreme Court has put it, “success for one class member must mean success for all”.⁷

[33] Mr Hodder contended that statements that the threshold for granting a representative order is “low” must be seen in context.⁸ He said that the threshold is only “low” when compared to the earlier English approach, and in the sense that, if a plaintiff can identify a substantial and real common issue, a representative action may be available even though there may be other divergences between class members overall.

⁶ *R J Flowers v Burns* [1987] 1 NZLR 260 at 271 (HC) and *Taspac Oysetrs Ltd v James Hardie & Co Pty Ltd* [1990] 1 NZLR 442, (1988) 2 PRNZ 621 (HC) at 447, 626.

⁷ *Western Canadian Shopping Centre Inc v Bennett Jones Verchere* [2001] 2 SCR 534, (2001) 201 DLR (4th) 385 at [35].

⁸ See for example *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [9]-[10].

Rule 1.2

[34] Even where a substantial common issue can be identified, a representative action is not appropriate if a representative action would not achieve the overriding objective of the High Court Rules of securing the just, speedy and inexpensive determination of the proceedings.

[35] I agree with Mr Hodder that the need to consider the overriding objective of the Rules is particularly important in cases where what is proposed means that (formally or in fact) a claim is only partly representative. In other words, where the determination of identified common issues would be followed by individual determination of individual issues, it is much less obvious that permitting the matter to proceed on a (partly) representative basis will be expeditious. The Court should not ignore the well-known complications that can flow from attempting separately to determine discrete issues arising in a proceeding. These can include difficulties in demarcating between the (supposedly) separate issues, determining the extent of any estoppels, and the potential delay and expense of multiple appeals.

The relevant authorities

[36] The leading New Zealand decision is *Credit Suisse Private Equity LLC v Houghton*.⁹ That case involved what Mr Hodder termed “single event” or “single source” claims arising from specific statements in a prospectus on which the plaintiffs (purchasers of shares) said they had detrimentally relied.

[37] The Supreme Court was unanimous on the broad principles informing the use of r 4.24.¹⁰ Its discussion of the rule emphasised flexibility and the avoidance of injustice. It endorsed the evolutionary approach outlined in *RJ Flowers Ltd v Burns*.¹¹ The Court held that:

⁹ *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.

¹⁰ The Court was divided on the limitation and “relation back” issues, which are not presently relevant.

¹¹ *RJ Flowers Ltd*, above n 6, at 271 (*Flowers* also involved “single event” claims, following a fire which destroyed kiwifruit stored in a warehouse). See *Credit Suisse*, above n 9, at [61] and [130].

- (a) a representative order may not confer a right of action on the member of the class represented who could not have asserted such a right in separate proceedings, nor may it bar a defence which might have been available to the defendant in a separate proceeding;
- (b) there must be an interest shared in common by all members of the group; and
- (c) it must be for the benefit of other members of the class that the plaintiff is permitted to sue in a representative capacity.

[38] Other “single event” representative claims to which I was referred include:

- (a) *Boyd Knight v Purdue & Matthew* which involved a representative claim by investors in a failed company against its auditors. The claim ultimately failed because the representative plaintiffs had chosen not to prove individual reliance, which the appellate courts held was necessary.¹²
- (b) *Cooper v ANZ*, involving claims brought on behalf of thousands of past or present ANZ customers who were allegedly charged fees in breach of the common terms of their savings or credit card accounts.¹³
- (c) The Supreme Court of Canada’s decision in *Western Canadian Shopping Centres Inc v Bennett Jones Verchere* where, the plaintiff investors each had a proportional investment in the same underlying security (debentures).¹⁴ The claim alleged conduct by the defendant which breached fiduciary duties. The plaintiffs had abandoned their earlier negligence and misrepresentation claims.

¹² *Boyd Knight v Purdue and Matthew* [1999] 2 NZLR 278.

¹³ *Cooper v ANZ* [2013] NZHC 2827.

¹⁴ *Western Canadian Shopping Centres Inc v Bennett Jones Verchere*, above n 7.

- (d) *LDC Finance Ltd (in rec and in liq) v Miller* which involved claims by groups of investors in a failed finance company.¹⁵
- (e) *Strathboss Kiwifruit Ltd v Attorney-General* which involves claims by Kiwifruit growers and post-harvest operators in relation to losses suffered as a result of the introduction into New Zealand of a pathogenic bacterium known as Psa-V.¹⁶

[39] Mr Hodder submitted that these authorities can usefully be contrasted with cases of the kind discussed next, in which the damage caused to the plaintiffs in the relevant group was caused by a combination of factors, rather than a single event such as the issuing of a prospectus or a warehouse fire.

[40] First, there is an earlier decision of the Supreme Court of Canada in *General Motors Canada v Naken*.¹⁷ The Court referred to *Naken* in the course of its judgment in *Western Canadian Shopping Centres* as an example of a case involving facts which “invited caution” about the utility of a class procedure.¹⁸ *Naken* involved a claim concerning some 46,000 sales in Ontario of Vauxhall Firenza cars during 1971 and 1972. The claim alleged a number of mechanical defects and sought global damages in the sum of \$5 million. The claim was struck out.

[41] Importantly, however, the action was for breach of warranty and breach of representation: the warranties were allegedly made in partly oral and partly written contracts, General Motors’ published materials, or newspaper advertisements.

[42] The Supreme Court contrasted the case before it with a “simple shareholder type proceeding” on the grounds that each individual claimant would need to establish the basis for their own cause of action, including (for example) individual reliance on advertisements. The Court said that while the relevant common interest need not relate to the same physical object, it was not enough that the group share a “similar interest” in the sense that they had varying contractual arrangements with

¹⁵ *LDC Finance Ltd (in rec and in liq) v Miller* [2013] NZHC 2993.

¹⁶ *Strathboss Kiwifruit Ltd*, above n 8.

¹⁷ *General Motors Canada v Naken* [1983] 1 SCR 72.

¹⁸ *Western Canadian Shopping Centres Inc v Bennett Jones Verchere*, above n 7, at [46].

appellants giving rise to different but similar claims in contract relating to the same model of car. The Court identified a range of practical factors which might materially distinguish between the claimants. It also emphasised the detailed and extensive hearings which would be required on the assessment of damages in each case. The Court concluded that there was real doubt about the asserted economy of the class procedure as compared to individual trials. As the Court later said (in *Western Canadian Shopping Centres*):¹⁹

Far from avoiding needless duplication, a class action [in *Naken*] would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

[43] The decision in *Naken* has similarities to the recent decision of this Court in *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd.*²⁰ There, Mander J declined to make a representative order in relation to claims by individuals against the same insurance company involving the same type of insurance policy. The order was declined because the representative group had been unable to identify any relevant common interest beyond the policies themselves. The group had acknowledged that each claimant's insurance claim would ultimately depend on the damage caused to each of their homes, and on specific factual issues in relation to the assessment of the damage and valuation of the cost to repair, replace or rebuild. In that respect, therefore, each of the insurance claims was factually different.

[44] Mr Hodder also referred me to another Canadian case, *Spencer v Regina*, which involved a claim about the alleged negligent design and construction of a proprietary type of house known as "Norlawn".²¹ In declining to certify that the purchasers of such houses constituted an appropriate class, Zarzeczny J was satisfied that the variable circumstances were such that a "house by house" analysis was necessary. The Judge said:

[37] Since the claim is framed in negligence it is clear that principles such as the degree or extent to which, if any, the negligent design or construction of the Norlawn homes contributed to any damages (in this case

¹⁹ At [47].

²⁰ *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245.

²¹ *Spencer v Regina* 2003 SKQB 109.

to the foundations or other structural elements of the homes), will have to be examined not only on a home by home basis but as well the extent to which such damage occurred and/or existed at any particular point in time in its ownership. None of these factual issues are held in common by any particular owner plaintiff with any other members of the class.

[38] Both defendants raise limitation defences and this in turn will bring into play the "discoverability" principle as it applies to a claim of negligence. Once again this will require an inquiry of each individual member of the class based upon facts and circumstances uniquely applicable to them and not applicable in common with any or all other members of the class.

[39] The defences with respect to contributory negligence will depend very much on facts as they exist with respect to each individual Norlawn home and its class member owner at various periods of time corresponding to the ownership of the home. Whether or not the original purchaser or any subsequent owners of the Norlawn homes failed to maintain and repair with what consequences in terms of damage to their Norlawn home and any contributions that their actions or inactions (failure for example to have proper or any eavestroughing, down spouts, runouts etc.) contributed to the damage, if any, to the foundation or structure of each home will have to be examined in separate and distinct proceedings. Additionally, causation issues with respect to liability and contribution to damages based upon the actions or inactions of each member of the class as owners will have to be examined on a case by case basis. None of these elements are common to all owners or properties.

[45] Lastly, Mr Hodder referred to *Cholakyan v Mercedes-Benz*, another case involving faulty cars.²² There, the Judge identified the crucial question as: "Why each class member's vehicle experienced water leaks?" She concluded that this question was incapable of a common answer, not least because the alleged faults related to a range of components or sub-systems pleaded to be part of a "water management system" but not necessarily connected. The Judge said each alleged fault would require individual consideration.

[46] Further, the Judge noted that there were design variations between different models over the relevant six year period, and that the numerous conceptual sub-classes included former owners as well as current owners. In the result, there was no single source of the injuries alleged to have been suffered by the proposed class membership. Class certification was revoked.

²² *Cholakyan v Mercedes-Benz USA LLC* 281 FRD 534 (2012).

Discussion

[47] The plaintiffs submitted that the present proceedings are ideally suited to representative actions. The issues of law and fact said to be common to all claims can be summarised as follows:

- (a) the factors relevant to determining whether a duty of care exists;
- (b) the existence of inherent defects in both kinds of cladding;
- (c) the relevant acts of negligence; and
- (d) the causal relationship between the inherent defects and damage.

[48] On James Hardie's behalf, however, Mr Hodder submitted that liability in negligence, especially when considering a claim that pleads a novel duty of care, ultimately depends on a value judgment in light of specific, proven facts.²³ Although, for analytical purposes, negligence claims are broken down into questions of duty, breach, causation and loss, these inquiries overlap and cannot be neatly separated; all are intimately related. He referred (inter alia) to *Dorset Yacht Co Ltd v Home Office*, where Lord Pearson spoke of "the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that duty and the resulting damage", but said:²⁴

The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole. It may be artificial and unhelpful to consider the question as to the existence of a duty of care in isolation from the elements of breach of duty and damage. The actual damage alleged to have been suffered by the plaintiffs may be an example of a kind or range of potential damage which was foreseeable, and if the act or omission by which the damage was caused is identifiable it may put one on the trail of a possible duty of care of which the act or omission would be a breach. In short, it may be illuminating to start with the damage and work back through the cause of it to the possible duty which may have been broken.

²³ Notwithstanding the significant number of leaky building claims to date there has not yet been a concluded claim against a cladding manufacturer. After the hearing of the present applications before me the Supreme Court confirmed the decisions in the Courts below that such a claim was not so untenable that it should be struck out: *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95.

²⁴ *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (HL) at 1052.

[49] Mr Hodder said that, in a duty context, the fact-specific nature of the inquiry has been recognised on numerous occasions by the appellate courts. He gave the following examples:

- (a) in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* Cooke P said:²⁵

when a duty of care issue arises in a situation not clearly covered by existing authority the proper approach is to look at all the material facts in combination, in order to decide as a question of mixed law and fact whether or not liability should be imposed.

- (b) in *Rolls Royce New Zealand Ltd v Carter Holt Harvey*, Glazebrook J said:²⁶

the ultimate question when deciding whether a duty of care should be recognized in New Zealand is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed

- (c) in *North Shore City Council v Attorney-General* Elias CJ said that the duty inquiry “requires close consideration of all material facts” and Blanchard J observed that the duty inquiry is concerned with “everything bearing upon the relationship between the parties”.²⁷

[50] The inquiry into breach is similarly fact-specific: the degree of care required is “infinitely variable” and “must be determined ultimately in the light of what is being done and in what particular circumstances it is being done”. And similarly, the inherently factual questions of causation and damage will permeate all stages of the negligence inquiry and evidence relating to these matters will be relevant to all those stages.

[51] As far as the FTA claims are concerned, Mr Hodder said that there are two essential questions. First, whether the conduct was misleading or deceptive.

²⁵ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 293.

²⁶ *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].

²⁷ *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [26], [156].

Secondly, whether loss has been caused (or is likely to be caused) “by” the impugned conduct, that is, whether the conduct is an “operative cause” of the loss. Both are circumstantial, fact-specific, inquiries. Thus:

- (a) in *Goldsbro v Walker* Richardson J said in relation to the s 9 inquiry that:²⁸

the test of whether conduct is misleading is objective and requires assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. In considering whether conduct is to be characterised as misleading it is necessary to apply the ordinary words of the section to the particular facts. Problems arising tend to be problems of fact and degree.

- (b) in *Red Eagle Corporation Ltd v Ellis* the Supreme Court said that s 9 is:²⁹

directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected.

[52] Mr Hodder accepted that resolving the key facts of, and legal responsibility for, single events may well be relatively straightforward and that r 4.24 has a clear role to play in such cases even if there is a need for subsequent individual assessments of damage.³⁰ And he said that the quantification of damages often may not be overly complicated (a multiple of shares bought, or kiwifruit cartons stored).

[53] In order to determine whether a representative order should be made in the present case it is important to be clear about the nature of the claim as pleaded. Mr Hodder’s submissions were, in large part, predicated on the undoubted complexity of a “normal” leaky building claim. The present case has been pleaded differently. As Mr Parker said, it is styled a “product liability” claim of a similar kind to that which has been mounted by the plaintiffs in the *Carter Holt* litigation.

²⁸ *Goldsbro v Walker* [1993] 1 NZLR 394 at 401.

²⁹ *Red Eagle Corporation v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].

³⁰ The Supreme Court (at [131] and [133]) recognised that some issues (such as actual reliance) might require individual assessment, but suggested that such might be achieved through case management directions.

The distinction sought to be made was noted by the Court of Appeal in the following passage from its recent decision in *Carter Holt Harvey v Ministry of Education*.³¹

[22] The respondents allege Carter Holt owed them a duty of care in designing, manufacturing and supplying the cladding sheets and cladding systems, which were then used in and on school buildings. Carter Holt denies it owed any such duty. As noted above, Carter Holt seeks to characterise the claim as a defective building claim. It is about school buildings that have failed or will fail to achieve compliance with the Building Code due to alleged defects in shadowclad and its suitability for use as directly fixed cladding in the construction of those buildings. The respondents say, however, this is a product liability claim. The cladding sheeting and systems are inherently defective; using shadowclad as intended by the manufacturer causes damage to the respondents' property and risks the health of the users of those buildings. While the respondents accept there may also be other causes of the defects in some cases, such as failures by building professionals (builders, designers, architects), the defects in shadowclad exist independently of that building work. They contend the design or construction of the building is irrelevant to the presence of inherent defects in the cladding and the damage it causes.

[54] In the context of an application for further particulars made by Carter Holt earlier in that litigation, Fogarty J suggested that counsel were "talking past each other" in their respective descriptions of the claims. He also said:³²

[42] The characterisation of this case by the plaintiffs as a product liability case, as distinct from a leaky building case, is a distinction not yet established by the authorities. Nor am I aware of the distinction in any of the common law jurisdictions against which we benchmark the New Zealand common law. For this reason, not surprisingly, Mr Flanagan was not able to proffer any authority in any Commonwealth jurisdiction, and indeed no authority from any common law jurisdiction, upholding the statement of claim which seeks a judgment of liability in negligence without proving the loss or damage with particularity, building by building; but rather, as here, seeks only an indeterminate finding of some loss and then an order for enquiry.

[43] In the course of argument, I had queried the description of this case as a product liability case, as distinct from a leaky building case. After the hearing, Mr Flanagan filed a minute exhibiting the statement of claim in the United States District Court of Minnesota pleading *Picht v James Hardie Building Products*. Mr Flanagan advised that when the plaintiffs drafted its own pleadings, it had regard to the *Picht* pleadings.

[55] The Judge went on to note that *Picht* was a class action claim relating to alleged systemic failures of a cladding product sold (as it happens) by James Hardie. He said that while the claim was pleaded so as to form the basis for a class action, it

³¹ *Carter Hold Harvey v Ministry of Education* [2015] NZCA 321.

³² *Minister of Education v James Hardie New Zealand* [2014] NZHC 2432.

contained particulars relating to one person, the plaintiff, Heidi Picht. After setting out the various causes of action pleaded by Ms Picht, Fogarty J said:

[46] The pleading pleads specifically the defects and damage present in the James Hardie product, cladding the plaintiff's home:

[40] In the spring of 2007, the plaintiff began to notice problems with the siding. A stain or surface of the siding appeared to be flaking off. The flaking not only left white spots on the siding, it also exposed the underlying siding material, which began to deteriorate. Over time, the siding began to shrink, causing gaps and some pieces to pull from fasteners. Warping and delamination occurred as well, which resulted in water penetration into the home itself. The siding also became severely discoloured in places.

[50] In the spring of 2008, at BPI's recommendation, the plaintiff's contract was told some of the boards may need to be replaced and the plaintiff ordered it installed approximately 20 replacement boards. BPI directed the plaintiff to find installation instructions on James Hardie's website – instructions recalled for areas around flashings and roof lines to be cut back.

[47] Under the negligence pleading:

[122] As a direct and proximate cause of the defendant's negligence, plaintiff has suffered actual damages in that she purchased and installed on her building an exterior siding product that is defective and unsafe and that it fails prematurely due to water absorption, porosity problems, moisture penetration and other inherent defects. The defect causes damage to the plaintiff's building, in addition to damage to the siding itself, by allowing moisture to enter through the siding. These failures have caused and will continue to cause the plaintiff to incur expensive repairing or replacing the siding as well as the result of progressive property damage.

[56] Then, the Judge said:

[48] I recognise these as traditional pleadings of damage or loss as a necessary prerequisite of entitlement to a remedy in a negligence claim.

[57] Fogarty J concluded that the pleadings in the *Carter Holt* proceedings had insufficiently pleaded the specific damage and loss suffered by the individual plaintiffs and ordered that further particulars be provided.

[58] What Fogarty J's decision, in my view, makes clear is the importance of specific, individualised, pleadings of causation and loss in a case such as the present.

As he notes elsewhere in the decision, without a causative link between specific damage and the alleged breach of duty, there is no cause of action at all.³³

[59] Here, the relevant pleading of damage and loss has been noted at [18] and [19] above. It is arguably less specific than the pleading in *Picht* but more particular than the claim dealt with by Fogarty J. But the adequacy of the pleading per se is not, of course, the matter with which I am presently concerned. The single point is, rather, that to the extent the plaintiffs say (as I think they do) that the causal relationship between the inherent defects and damage is capable of determination on a representative basis I do not agree. In my view those matters, at least, must be specifically pleaded and proved by each individual claimant or plaintiff.

[60] So the critical questions here are whether the issues of duty and breach have sufficient commonality to meet the threshold for determination on a representative basis and, if so, whether such a determination is likely to be the most expedient and just way forward from a case management perspective.

[61] In my view the claims as pleaded do raise issues of duty and breach which might fairly be said to be “the same” or sufficiently common for representative purposes. And the question of “breach” relevantly includes further common sub-issues, namely:

- (a) whether the alleged inherent defects exist; and if so
- (b) whether they were the result of the pleaded failures of design, manufacturing and testing; and
- (c) whether those failures were negligent by reference to the applicable industry standards and knowledge at the time.

[62] While I accept that the existence and scope of a duty will often be linked to questions of causation and damage (which, as I have said, are necessarily individual) I do not consider that any variations that might exist between claimants here would

³³ At [52]-[54].

be at all likely to lead to different conclusions about duty. On the contrary, I would expect that the matters of proximity and policy identified by the Supreme Court (and the Court below) in *Carter Holt* as being relevant to the existence of such a duty will be materially the same or similar as between the claimants in the proposed class.³⁴

[63] As far as the standard of care and breach are concerned, I accept that there are arguments to be made that the whole notion of “inherent defects” is conceptually problematic in a context such as the present. As Fogarty J noted a claim based on such alleged defects is novel. A relatively complex building “system” that is made up of a number of linked components seems very different from many product liability cases involving a single product, such as surgical mesh. But any such difficulty is likely ultimately to favour James Hardie. Indeed if the Court hearing any representative action rejects the “inherent defects” theory then all the claims might well fall away.

[64] Nor do I regard the cases to which Mr Hodder referred me as pointing the other way. They were not “inherent defect” claims of the kind presently pleaded. They involved no relevant factual commonality and no meaningful legal one. While there are, or can be expected to be, differences between the plaintiffs here in terms of causation and damage, if it is possible to determine those issues on an individual basis many of the potential complexities fall away. In my view the issues of duty and breach as pleaded are *prima facie*, subject to any r 1.2 assessment, suitable for determination on a representative basis.

[65] But beyond that, however, I would not be prepared to go. As I have said questions of causation and loss will plainly vary between cases. I am not prepared to accept at this early point that there is necessarily a line which is either straight or unbroken between proof of “inherent defects” and the damage alleged by the plaintiffs here, which is by no means limited to the loss from paying too much for a cladding system which turns out to be faulty. In a causation context I entirely accept Mr Hodder’s submission that, in any given case, there is likely to be a complex interplay of factors, including:

³⁴ Those matters were: the parties’ relationship, the contractual matrix, the statutory framework and plaintiff vulnerability.

- (a) geography and climate;
- (b) design;
- (c) other material used (for example on the roof);
- (d) whether the James Hardie cladding is used by itself or in combination with other cladding;³⁵
- (e) installation and workmanship; and
- (f) post-construction maintenance.

[66] As regards the FTA claims, I consider that whether or not particular statements made in the James Hardie technical brochures were misleading or deceptive could also be determined on a representative basis. The test is an objective one.³⁶ It seems to me that the issue sits neatly alongside the question of inherent defects. Again, however, issues of causation and loss to a specific plaintiff can only meaningfully be determined in their own particular context.³⁷

[67] The question therefore is whether r 1.2 might alter these conclusions.

Rule 1.2

[68] It does not follow from my conclusion that there are *some* common issues raised by the proposed representative proceedings that representative orders should be made. The interests of expedience, justice and cost to the parties must also be considered.

[69] First, any representative orders made would determine only part of the claims made by the other plaintiffs. While cases such as *Strathboss* make it clear that that is far from fatal, it is necessarily a factor. One relevant question that arises is how

³⁵ For example the building in the *Hub* claim is only partially clad in Titan Board, while the buildings in the *Cridge* and *Fowler* claims are clad fully in Harditex.

³⁶ *Marcol Manufacturers Ltd v Commerce Commission* [1991] 2 NZLR 502 at 506.

³⁷ I acknowledge that causation under the FTA may be a somewhat more straightforward matter.

straightforward or complex the remaining individual issues are likely to be to determine.

[70] Although I have rejected the proposition that a finding of duty and breach on a “product liability” basis would then entitle the plaintiffs to proceed on the basis of some kind of presumptive damage, I am inclined to accept that a finding of inherent defects in the cladding system would render the issues of causation and damage more straightforward. While I acknowledge that the position might be complicated by issues of contribution and intervening causes, that complexity exists in claims like these in any event. I do not think they can fairly be regarded as counting against a representative action here.

[71] Another matter I regard as relevant is a comparison of the relative advantages or disadvantages of a (partial) representative process and the “test case” alternative favoured by James Hardie. What would be lost under that alternative approach is the benefit of formal estoppels on the issues of duty and breach. It seems to me that that benefit has two principal components. First, and most simplistically, a finding on an issue that founds an estoppel is of obvious benefit to whichever party in whose favour that finding is made. In that sense it is a neutral factor. Secondly, there is the practical point that if (for example) an estoppel is created on the breach issues (inherent defects and the applicable standards of care) then the obvious benefit is that the parties will not need to call their respective experts on those issues in any individual proceedings which follow. Thus the creation of estoppels is potentially of real benefit to both sides in terms of the r 1.2 touchstones of expedience and expense, provided that the issues that have been finally determined are capable of clear definition. If they cannot, however, then the hoped for cost-savings and efficiency go out the window.

[72] If the matter proceeds on the basis, that that only questions of duty and breach will be determined on a common basis, and that only findings on those issues will give rise to estoppels I consider that there is likely to be sufficient clarity on those issues to render a representative action worthwhile. However novel the alleged duty may be, a finding should be able to be applied in a fairly straightforward way in the other cases involving, as they do, very similar relationships. And regardless of

whether the plaintiffs' "inherent defects" theory is conceptually sound or ultimately succeeds it, too, seems to have a sufficiently broad base to enable meaningful extrapolation in all cases.

[73] On the other hand, I acknowledge that, as Mr Hodder said, it is unlikely (for example) that James Hardie would seek to relitigate the duty issue in another proceeding, were that to be determined against it in a test case. Similarly, the scope for relitigating a finding in an individual test case that a James Hardie cladding system was inherently defective would be limited. But there would, nonetheless, be inevitable contingencies involved and room to manoeuvre. The plaintiffs here are individuals who are living in homes that are not fit for purpose and, in all likelihood, unhealthy. If there is a tenable way of facilitating their access to the Court or of avoiding some, or any, of the costs (both financial and other) of litigation then the Court should be slow to close that down.

[74] And lest it be thought that making a representative order casts the parties' position in stone with no prospect of relief if matters do not go as planned, I simply endorse what Mander J said in *Southern Response*:³⁸

The making of a representative order does not therefore preclude the Court from, at some later stage in the proceeding, varying or rescinding such an order if the point is reached in the proceeding where the continuation of the litigation in the form of a representative action is no longer necessary or desirable.

The Supreme Court has similarly recognised that the Court retains the power to review whether a claim should be allowed to continue in a representative form, being part of the flexibility of approach to be taken to the representative procedure and the need to deal with individual claims at some later stage. The efficiency or effectiveness of the representative procedure can therefore always be reviewed at some later stage in the proceeding, no doubt depending upon whether there are other processes which can accommodate the individuality of each member's claim or identified sub-groupings; and which will allow refined issues common to that set of claims to proceed to determination in that form.

[75] In my view r 1.2 does not alter the position arrived at earlier.

³⁸ *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd*, above n 20, at [87] and [88], footnotes omitted.

ISSUE 2: OPT-IN PERIOD

[76] The Court of Appeal in *Saunders v Houghton* said:³⁹

[75] In our judgment the text, policy and practicalities of the relevant legislative instruments confirm that the statutory limitation period stops running for all represented persons when a representative order is made. *A Judge granting a representative order should impose a final opt-in or opt-out date as part of normal case management procedures.* By this means the purposes of the Limitation Act will continue to be met in the representative context. A represented person who opts-out or fails to opt-in by the stipulated date will then be subject to the limitation provisions in the normal way.

(Emphasis added)

[77] And the majority in the Supreme Court confirmed that time stops running for limitation purposes on the date when the proceeding is filed and when the representative order is made.⁴⁰ In cases such as the present, where those two dates do not coincide, the judges held that backdated representative orders may be required.

[78] As I understand it, there is no dispute that the statutory long-stop limitation period under s 23B of the Limitation Act 1950 expired on 31 December last year. On any analysis, the claims are historic. The house in the *Cridge* claim was built nearly a quarter of a century ago. The effluxion of time necessarily creates difficulties and potential unfairness in terms of James Hardie's ability to defend the claims.

[79] As Mr Hodder also emphasised, the impending 15 year long-stop received extensive publicity from the promoters of the current action and from those promoting similar proceedings filed in Auckland late last year. The publicity took the form of both advertisements by law firms, and media coverage. Thomas J in her decision on r 4.24(a) emphasised that those who wished to make a claim should do so, in case the r 4.24(b) application was unsuccessful.

³⁹ *Saunders v Houghton* [2012] NZCA 545, [2013] 2 NZLR 652.

⁴⁰ *Credit Suisse Private Equity LLC v Houghton*, above n 9.

[80] Moreover, the fact that approximately 350 plaintiffs (including those in Auckland) did file proceedings in time suggests that this publicity was effective and that those who have not filed but wish to participate in a representative action have had the opportunity to signal that wish. I do not think that the fact that the appeal in the *Carter Holt* appeal had (at the time the longstop expired) yet to be determined makes a difference to that position.

[81] In my view those claimants who have filed separate proceedings out of an abundance of caution should be regarded as forming part of the class to whom the representative orders extend. In addition, those others who have been specifically identified as falling within the class as defined should be given the opportunity to opt in. But in light of:

- (a) the extensive publicity that has already taken place;
- (b) the likely age of any future unidentified claims; and
- (c) the associated prejudice to James Hardie;

I do not propose to make significantly more liberal opt-in orders than that.

[82] The opt-in period will therefore essentially be limited to the period of days or weeks between the filing of the relevant representative claims and 31 December 2015. Thus:

- (a) in relation to the *Cridge* proceedings there will be an opt-in period of 10 weeks from the date the final representative orders are made;
- (b) in relation to the *Fowler* proceedings there will be an opt-in period of four weeks from the date the final representative orders are made; and
- (c) in relation to the *Hub* proceedings there will be an opt-in period of two weeks from the date the final representative orders are made.

ISSUE 3: CONSOLIDATION/JOINT TRIAL

[83] At this stage I am not inclined to order formal consolidation or a joint trial of the three representative proceedings. While it may well be sensible to manage and progress the claims together, joining them in some more formal sense under r 10.12 (which threshold test is worded similarly to r 4.24) would run the risk of a number of the perils identified above. As McGechan J said in *Amalgamated Finance v Wyness*:⁴¹

...as with all short cuts, the Court must take care to see that consolidation ... will not in the end result in confusion through multiplicity of parties and issues, and will not in the end cause injustice by comparison with separate hearings.

[84] It is well-established that consolidation is not appropriate where it will result in the admission of inadmissible evidence to one or more of the consolidated proceedings. That consideration is particularly pertinent to the present application for joint trial, as joint trial would necessarily involve the admission of irrelevant, and therefore inadmissible evidence into each proceeding (for example, much evidence relating to events after 1991 will not be admissible in relation to the *Cridge* claim).

[85] But like the terms of the representation order itself, that is an issue which can be kept under review.

RESULT

[86] For the reasons I have given I consider that representative orders should be made in relation to the common issues raised in the three statements of claim, namely:

- (a) whether a duty of care is owed by James Hardie to plaintiffs in the relevant classes; and
- (b) if so, whether that duty was breached as alleged; and

⁴¹ *Amalgamated Finance v Wyness* HC Wellington CP156/86, at 12.

- (c) whether the statements made in the pleaded technical literature were misleading and deceptive.

[87] The determination of the remainder of the representative plaintiffs' claims will have no binding effect on other class members.

[88] The representative orders are to be backdated to the date of filing of the latest iterations of the relevant statements of claim.

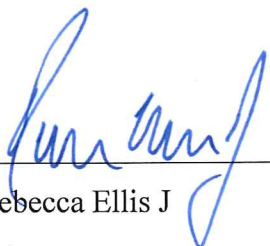
[89] I also propose to make opt-in orders on the lines I have set out at [82] above.

[90] The application for consolidation or joint trials is dismissed.

[91] I do not, however, make any of these orders formally in this judgment. Counsel are to confer and agree the appropriate wording which I will then endorse. If agreement cannot be reached or there are other matters arising, counsel may seek a teleconference with me.

[92] If there are any reasons why James Hardie says 2B costs should not follow the event a memorandum is to be filed within 10 working days.

[93] Once the above matters have been resolved the proceedings should be listed for a further case management conference.


Rebecca Ellis J

Solicitors: Parker & Associates, Wellington, for Plaintiffs
Chapman Tripp, Auckland, for Defendants
Counsel Acting: J E H Hodder QC.