

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA25/2016  
[2017] NZCA 376**

BETWEEN	TRACEY JANE CRIDGE AND MARK ANTHONY UNWIN First Appellants
	KATRINA MCKELLAR FOWLER Second Appellant
	SCOTT WOODHEAD Third Appellant
AND	STUDORP LIMITED Respondent

**CA573/2016**

BETWEEN	STUDORP LIMITED First Appellant
	JAMES HARDIE NEW ZEALAND Second Appellant
AND	TRACEY JANE CRIDGE AND MARK ANTHONY UNWIN First Respondents
	KATRINA MCKELLAR FOWLER Second Respondent
	SCOTT WOODHEAD Third Respondent
	BODY CORPORATE 316651 AND ORS Fourth Respondents

Hearing:	18 May 2017 (further material received 30 May 2017)
Court:	French, Cooper and Asher JJ
Counsel:	J A Farmer QC, D J S Parker and E S K Dalzell for Appellants in CA25/2016 and Respondents in CA573/2016

Judgment: 30 August 2017 at 4.00 pm

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**JUDGMENT OF THE COURT**

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- A The appeal in CA573/2016 is dismissed. The representative order made in the High Court is upheld and the stay of proceedings lifted.**
- B The cross-appeal in CA573/2016 is allowed. The terms of the High Court's opt-in orders are amended by replacing the opt-in periods of 10 weeks and two weeks with an opt-in period of five calendar months applying to all representative proceedings and commencing from the date of this judgment.**
- C In CA573/2016 the appellants must pay one set of costs to the respondents for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.**
- D The appeal in CA25/2016 is allowed and the decision of the High Court set aside.**
- E In CA25/2016 the respondent must pay one set of costs to the appellants for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.**
- F Costs in the High Court for both judgments under appeal are to be determined in that Court in accordance with this judgment.**
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**REASONS OF THE COURT**

(Given by French J)

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## Introduction

[1] Rule 4.24(b) of the High Court Rules empowers the High Court to allow a plaintiff to bring representative proceedings on behalf of other persons having the same interest in the subject of the claim.

[2] This appeal concerns an order made under r 4.24(b) by Ellis J in the context of a claim brought by several owners of leaky homes.<sup>1</sup> The claim, described as a product liability claim, is against Studorp Ltd and James Hardie New Zealand in negligence and for breach of the Fair Trading Act 1986.<sup>2</sup> Throughout this judgment, we refer to both companies as James Hardie.

[3] The owners contend that the leaks in their respective homes are attributable to inherent defects in cladding systems manufactured by James Hardie. That is to say, they contend the products are bound to cause water ingress and are not capable of being installed in real world conditions so as to avoid that. They also claim James Hardie made misleading statements about its cladding systems in its technical literature.

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<sup>1</sup> *Cridge v Studorp Ltd* [2016] NZHC 2451 [Decision of Ellis J].

<sup>2</sup> Studorp Ltd was known as James Hardie Building Products Ltd from 1994 to 2000, and as James Hardie & Coy Pty Ltd from 1937 to 1994.

[4] It is alleged a large number of home owners may be affected. Accordingly, two sets of owners, Cridge/Unwin and Fowler/Woodhead (who had all already issued proceedings in their own names) and Body Corporate 316651 (the representative owners)<sup>3</sup> sought to be able to bring their proceedings in a representative capacity on behalf of a class. The class was defined as all owners or previous owners of properties using the relevant cladding system who had already consented to being represented, or who in future elected to opt in.

[5] In granting the application, Ellis J identified three issues raised in the proceedings that she considered were common to all members of the proposed class and which warranted the making of a representative order limited to those three common issues, namely:

- (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 effect of the order is that 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. Exactly how those individual issues will be subsequently processed awaits further case management.

[7] James Hardie now appeals the making of the representative order. For their part, the representative owners do not seek to argue that other issues (that is, other

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<sup>3</sup> Tracey Jane Cridge and Mark Anthony Unwin (the Cridge/Unwin proceedings) and Katrina McKellar Fowler and Scott Woodhead (the Fowler/Woodhead proceedings) in October 2015. Body Corporate 316651, and the 16 registered proprietors who comprise it, filed their claim later — in December 2015. The Cridge/Unwin and Fowler/Woodhead proceedings both relate to the Harditex cladding system, whereas the Body Corporate proceedings relate to the Titan Board cladding system. We make no distinction between the two systems for the purpose of this judgment.

than the three selected by Ellis J) should also be tried on a representative basis. However they do challenge, by way of a cross-appeal, the period of time allowed under the opt-in order for qualifying members to opt in.

[8] James Hardie's appeal and the cross-appeal relating to Ellis J's decision (CA573/2016) were heard at the same time as a related appeal (CA25/2016) brought by the representative owners against a decision of Thomas J.<sup>4</sup> In that decision, Thomas J had refused to make precautionary orders preserving the position of the members of the proposed class for limitation purposes should the then pending application for a representative order before Ellis J be unsuccessful.

[9] It was common ground that if James Hardie failed in its appeal against the representative order, then the owners' appeal against Thomas J's decision would be rendered academic.

### **Appeal against the making of the representative order: CA573/2016**

#### *General principles governing applications under r 4.24*

[10] Rule 4.24 provides:

#### **4.24 Persons having 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.

[11] The rule derives from an equitable procedure designed to facilitate the disposition of cases where the parties were so numerous the proceedings would be unmanageable if all were named.<sup>5</sup> The rule has been considered in several cases including the leading decision of the Supreme Court in *Credit Suisse Private Equity*

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<sup>4</sup> *Cridge v Studorp Ltd* [2015] NZHC 3065 [Decision of Thomas J].

<sup>5</sup> *R J Flowers Ltd v Burns* [1987] 1 NZLR 260 (HC) at 264–265; citing *Duke of Bedford v Ellis* [1901] AC 1 (HL).

*LLC v Houghton (Credit Suisse)*.<sup>6</sup> The principles governing the application of the rule are well-established and can be conveniently summarised as follows:

- (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency.<sup>7</sup> A single determination of issues that are common to members of a class of claimants reduces costs, eliminates duplication of effort and avoids the risk of inconsistent findings.
- (b) Access to justice is also an important consideration.<sup>8</sup> Representative actions make affordable otherwise unaffordable claims that would be beyond the means of any individual claimant. Further, they deter potential wrongdoers by disabusing them of the assumption that minor but widespread harm will not result in litigation.
- (c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.<sup>9</sup>
- (d) The words “same interest” extend to a significant common interest in the resolution of any question of law or fact arising in the proceeding.<sup>10</sup>
- (e) A representative order can be made notwithstanding that it relates only to some of the issues in the claim. It is not necessary that the common question make a complete resolution of the case, or even liability, possible.<sup>11</sup>

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<sup>6</sup> *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] NZLR 541.

<sup>7</sup> *Credit Suisse*, above n 6, at [158]; and *R J Flowers Ltd v Burns*, above n 5, at 271.

<sup>8</sup> *Houghton v Saunders* (2008) 19 PRNZ 173 (HC) at [100(i)]; aff’d [2012] NZCA 545, [2013] 2 NZLR 652 [*Saunders v Houghton (No 2)*]; aff’d *Credit Suisse*, above n 6.

<sup>9</sup> High Court Rules, r 4.24.

<sup>10</sup> *Credit Suisse*, above n 6, at [51] per Elias CJ and Anderson J; and *Houghton v Saunders* (HC), above n 8, at [100(iii)].

<sup>11</sup> *Credit Suisse*, above n 6, at [55] per Elias CJ and Anderson J, see also [129]–[131] per the majority.

- (f) It must be for the benefit of the other members of the class that the plaintiff is able to sue in a representative capacity.<sup>12</sup>
- (g) The court should take a liberal and flexible approach in determining whether there is a common interest.<sup>13</sup>
- (h) The requisite commonality of interest is not a high threshold and the court should be wary of looking for impediments to the representative action rather than being facilitative of it.<sup>14</sup>
- (i) A representative action should not be allowed in circumstances that would deprive a defendant of a defence it could have relied on in a separate proceeding against one or more members of the class, or conversely allow a member of the class to succeed where they would not have succeeded had they brought an individual claim.<sup>15</sup>

[12] Mindful of those principles, we now turn to address James Hardie's grounds of appeal.

*James Hardie's arguments against the making of a representative order*

[13] James Hardie denies its cladding systems are defective and asserts that its systems work, provided they are installed correctly. It says the investigation of each property will show that any relevant damage was due solely to workmanship defects, and not due to inherent defects or a combination of inherent and workmanship defects as pleaded in the statements of claim.

[14] James Hardie further contends that the inherent defects pleaded in the statements of claim, such as the adequacy of water management, all involve issues of

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<sup>12</sup> *Credit Suisse*, above n 6, at [53(c)].

<sup>13</sup> *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331 at [10]–[12] [*Saunders v Houghton* (No 1)]; *Credit Suisse*, above n 6, at [53] per Elias CJ and Anderson J and [129] per the majority; and *Houghton v Saunders* (HC), above n 8, at [100(iv)].

<sup>14</sup> *Saunders v Houghton* (No 1), above n 13, at [12] and [38]; and *Houghton v Saunders* (HC), above n 8, at [100(v)].

<sup>15</sup> *R J Flowers Ltd v Burns*, above n 5, at 269; *Houghton v Saunders* (HC), above n 8, at [100(vi)]; and *Credit Suisse*, above n 6, at [131] per the majority.

degree and that in any building the performance of its cladding will always be dependent on a large number of different factors specific to that building.

[15] In circumstances where the issues between the parties are matters of degree dependent on a wide variety of factors, counsel for James Hardie, Mr Hodder QC, argued that none of the three selected issues was appropriate for representative determination. The three issues could not, he argued, be clearly separated from other issues and there was insufficient commonality of interest. He said the Judge wrongly assumed the selected issues are capable of clear determination. They are not and, instead of promoting efficiency, the order will do the opposite. It is likely to unnecessarily and unjustly complicate the resolution of what, correctly analysed, amount to distinctly individual claims. In Mr Hodder's submission, a house by house investigation is the only proper and fair way of resolving the claims and that is so whether the claims are characterised as product liability/inherent defect claims or leaky building claims. The label cannot change the fundamental nature of the issues requiring resolution.

[16] Developing those central themes, Mr Hodder pointed out that determining the cause of water ingress in an individual building requires consideration of a wide range of variables such as:

- (a) geographical location of the building including climate conditions;
- (b) building design;
- (c) installation methods and workmanship;
- (d) maintenance practices;
- (e) scope of remedial works; and
- (f) the date the building was constructed.

[17] As regards the last mentioned variable, Mr Hodder noted that the various claims span a period of 16 years during which time there have been changes to the



James Hardie products, 10 different versions of its technical brochures, changes to the relevant regulatory regimes and changes to the state of industry knowledge about water management.

[18] Mr Hodder also pointed out that the cladding system alleged to be defective is pleaded in the statements of claim as involving numerous components including fibre cement sheets, jointing systems, and brochures. Identifying which, if any, of those components was responsible for any damage and in what combinations is likely to be highly problematic and a quintessentially individual exercise.

[19] Mr Hodder acknowledged the Judge had excluded causation from the representative order but submitted it was artificial and wrong in principle to divorce duty and breach from causation and loss.<sup>16</sup> He submitted that duty and breach must of necessity be shaped by the specific buildings. So too, the cause of action under the Fair Trading Act. The basis on which the statements in the technical literature are said to be misleading is that the products were inherently defective. Whether they were or not requires individual assessment.

[20] According to Mr Hodder, given the interacting variables and matters of degree involved, delineating the scope of issue estoppels on the selected issues is also likely to be fraught. He predicts considerable uncertainty and a serious risk of injustice stemming from the possibility of inconsistent factual findings and inappropriate issue estoppels arising on the selected issues. Representative determination of the selected issues in the first trials may also, he said, increase the risks of evidence being called which may be irrelevant to the representative owners' claims or, if relevant to those claims, may be irrelevant to the other claims against James Hardie.

[21] Mr Hodder further contended that the order made by Ellis J was contrary to the weight of authority. He submitted that in New Zealand and international case law representative orders have generally been granted only in single event or single source claims where a common issue can be readily identified. In contrast,

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<sup>16</sup> Relying on: *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [34]; *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) at 1052; and *Dovuro Pty Ltd v Wilkins* [2003] HCA 51, (2003) 215 CLR 317 at [142].

orders have been declined in complex claims like the present case where liability depends on a large number of individualised variables. In support of that contention, Mr Hodder referred us to a number of decisions from North America and Australia.<sup>17</sup>

[22] Although Mr Hodder strongly opposed a representative order, he accepted that “sensible case management arrangements” are required to deal with the multiple claims which the owners’ group seeks to advance. Instead of a representative order with all its difficulties, he advocated a test case procedure. He suggested a number of appropriate properties within the group could be selected reflecting “a range of credible scenarios”. There could then be test cases tried on all issues in relation to those properties. The claims related to other properties would be stayed but would be greatly informed by the test case outcomes.

[23] In Mr Hodder’s submission, the test case procedure afforded a more orderly and just approach than a representative order with all its pitfalls.

#### *Analysis*

[24] In our view, Mr Hodder’s submissions overstate the difficulties of the representative order made by the Judge and overstate the differences between the claims. For example, while there may have been 10 versions of the technical literature, the Harditex cladding system has itself remained substantially similar throughout the entire period.

[25] We also consider that Mr Hodder’s submissions underestimate the Court’s powers of case management and its ability to be creative. Time-dependent variables could for example be accommodated by the creation of sub-classes.

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<sup>17</sup> *Western Canadian Shopping Centres Inc v Bennett Jones Verchere* 2001 SCC 46, [2001] 2 SCR 534; *General Motors of Canada Ltd v Naken* [1983] 1 SCR 72; *Rumley v British Columbia* 2001 SCC 69, [2001] 3 SCR 184 at [29]; *Spencer v City of Regina* 2003 SKQB 109; *Wal-Mart Stores Inc v Dukes* 564 US 338 (2011); *Cholakyan v Mercedes-Benz USA LLC* 281 FRD 534 (CD Cal 2012); *Marcus v BMW of North America LLC* 687 F 3d 583 (3d Cir 2012); *Re American Medical Systems Inc* 75 F 3d 1069 (6th Cir 1996); *Re Whirlpool Corp Front-Loading Washer Products Liability Litigation* 678 F 3d 409 (6th Cir 2012); *Re Whirlpool Corp Front-Loading Washer Products Liability Litigation* 722 F 3d 838 (6th Cir 2012); *Butler v Sears* 702 F 3d 359 (7th Cir 2012); *Butler v Sears* 727 F 3d 796 (7th Cir 2012); *Vaugeois v Budget Rent-A-Car of BC Ltd* 2017 BCCA 111; and *AS v Minister of Immigration and Border Protection* [2017] VSC 137. Mr Hodder said *Southern Response Unresolved Claims Group v Southern Response Earthquake Services Ltd* [2016] NZHC 245 reflects this jurisprudence, despite not expressly referring to it.

[26] The duty of care pleaded is a “duty to exercise reasonable care and skill in relation to the design, development, manufacture, testing and supply of its Harditex building products, approved accessories and technical information documents... and the Harditex Cladding System”.

[27] Although manufacturers have been held to owe a duty of care to consumers ever since *Donoghue v Stevenson*,<sup>18</sup> there has never been a concluded claim in New Zealand for pure economic loss against a cladding manufacturer. To that extent, but to that extent only, the duty pleaded is a novel one.

[28] Like Ellis J, we accept that the existence and scope of a novel duty is generally a fact-intensive inquiry and often linked to questions of causation and damage which in this case are individual issues. However, like Ellis J we also consider it most unlikely that any variations that might exist as between the claimants in this case would lead to different conclusions about duty.

[29] We are fortified in that conclusion by the recent Supreme Court decision of *Carter Holt Harvey Ltd v Minister of Education*.<sup>19</sup> It too concerned a negligence claim by a building owner against the manufacturer of building systems for loss due to water ingress. The manufacturer sought to strike out the claim on the grounds it was not arguable it owed a duty of care to the owner. The Court rejected that submission and in doing so made it clear that the key proximity and policy considerations that should inform the duty question at trial are of a general nature and not peculiar to the individual parties.

[30] Those key considerations were the parties’ relationship described in a generic way as that between ultimate consumer and manufacturer; the contractual matrix (which in the case of the construction of residential properties will be reasonably standard); the statutory framework which will only vary on a time basis; and the vulnerability of the plaintiff, in relation to which the Supreme Court significantly

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<sup>18</sup> *Donoghue v Stevenson* [1932] AC 562 (HL).

<sup>19</sup> *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78.

said it “must be looked at not in relation to the plaintiff in the case at hand but in relation to likely plaintiffs as a class”.<sup>20</sup>

[31] We are satisfied the sorts of considerations identified by the Supreme Court will be materially the same or similar for all claims in this case and accordingly the duty issue is well suited to a representative hearing.

[32] In relation to breach, the question will be whether James Hardie met the standard of care reasonably expected in the circumstances of a manufacturer of the relevant products. As Ellis J noted, this will involve sub-issues as to the existence of alleged inherent defects, whether they were the result of pleaded failures of design, manufacturing and testing as alleged and whether those failures were negligent by the applicable standards and knowledge of the time.<sup>21</sup> All of those issues are common issues and will involve the examination of a common factual matrix — namely what James Hardie knew, did, or omitted to do leading up to and following the release of the relevant products into the market place. To require the same evidence to be given in respect of each claim would clearly be a wasteful duplication. A finding that the product and system have inherent defects must by its very nature be of general application.

[33] Mr Hodder argued that such an analysis was flawed because it wrongly assumed the inherent effectiveness or otherwise of the products can somehow be determined by laboratory testing. Mr Hodder said that is impossible. He claimed the only way of proving the effectiveness of these products is to adduce evidence about their performance after installation, and once you go down that track then you are in causation territory and all the variables arise.

[34] It is of course the representative owners who will bear the onus of proof and if Mr Hodder is correct (and that is not accepted by the owners) that may mean they have difficulty discharging that onus. But it is not in our view a reason to withhold a representative order.

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<sup>20</sup> At [54].

<sup>21</sup> Decision of Ellis J, above n 1, at [61].

[35] Similarly we agree with Ellis J that whether or not particular statements made in the technical brochures were misleading or deceptive is a common issue. As the Judge noted, it sits neatly alongside the question of inherent defects.<sup>22</sup>

[36] We are also not persuaded the Judge's decision is contrary to authority. There is no rule that a representative order is limited to cases involving a single event or single source. Each case must turn on an assessment of the particular claim and the issues arising from that claim in light of the wording of r 4.24 and its underlying purposes. Significantly, some of the North American decisions relied on by Mr Hodder are based on a federal rule that is more restrictive than r 4.24.<sup>23</sup> The federal rule in question requires that before a claim will be allowed to proceed as a class action, the common issue(s) must predominate over any questions affecting only individual members. There is no predominance requirement under r 4.24.

[37] We acknowledge that many of the overseas product liability cases where a representative order has been made involve a single product, whereas this case involves a system comprised of linked components. However, as Ellis J pointed out, that fact is likely ultimately to favour James Hardie.<sup>24</sup>

[38] We are satisfied the three issues selected for determination on a representative basis are sufficiently common to justify the order made by Ellis J.

[39] We are satisfied too that the representative order will better achieve the just, speedy and inexpensive determination of the proceedings than the test case procedure advocated by James Hardie. A test case would involve the same work and judicial resources as a lead representative case, but without the tangible benefit of generating findings that are binding on all.

[40] We uphold the representative order made by Ellis J.

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<sup>22</sup> At [66].

<sup>23</sup> Rule 23(b)(3) of the United States' Federal Rules of Civil Procedure. See similarly for the British Columbian cases above n 17, c 50 s 4 of the Class Proceedings Act RSBC 1996.

<sup>24</sup> At [63].

## **Appeal and cross-appeal against the terms of the opt-in order**

### *Background*

[41] When granting a representative order in New Zealand, it is standard practice to impose a final opt-in date for qualifying members of the relevant class. If qualifying members of the class want to be part of the proceedings, they must formally opt in. Otherwise, once that date has passed, it is too late.

[42] In order to explain the opt-in order made in this case and the criticisms levied against it by both parties, it is necessary to provide further detail about the history of the claim.

[43] The representative proceedings comprise three separate proceedings. Statements of claim purporting to be in representative form were filed on the following dates:

- (a) the Cridge/Unwin proceeding filed on 22 October 2015;
- (b) the Fowler/Woodhead proceeding filed on 22 October 2015; and
- (c) the Body Corporate 316651 proceeding filed 22 December 2015.

[44] As noted by Ellis J, there is no dispute that the negligence claim in all three proceedings is subject to the long stop limitation period created by s 23B of the Limitation Act 1950. According to James Hardie, this means the limitation period in respect of all three proceedings expired on 31 December 2015. It is unclear to us whether that is in fact correct. However, the High Court appears to have proceeded on the basis that it was correct. And for the purposes of the appeal, no issue was taken on the point by the representative owners. This judgment therefore proceeds on the basis the limitation period expired on 31 December 2015 but without making any formal finding to that effect.

[45] It was held by a majority of the Supreme Court in *Credit Suisse* that time stops running under the Limitation Act not only for the named plaintiff but also for

all qualifying members of the class when the representative proceedings are first filed.<sup>25</sup> However, that ruling was in the context of a case where a representative order had been made before the expiry of the limitation period. In this case, as at 31 December 2015, Ellis J had not yet delivered her decision. It was therefore uncertain whether representative orders would be made.

[46] That uncertainty prompted an application for what was called a precautionary order preserving the position of members of the class for limitation purposes should a representative order not be made. The application for a precautionary order was declined by Thomas J on 4 December 2015, prompting the immediate filing of a large number of individual proceedings by home owners who came within the scope of the proposed represented class.

[47] Justice Ellis granted the final representative orders a year later on 19 December 2016.<sup>26</sup> She held that those claimants who had filed separate proceedings meantime out of an abundance of caution should be regarded as forming part of the class to whom the representative orders extended. The Judge also held that other qualifying owners who had not filed proceedings should also be given the opportunity to opt in.<sup>27</sup>

[48] However, the Judge went on to say that the opt-in periods were to be short and calculated by reference to the periods of days or weeks between the filing of the representative claims and the date the limitation period expired, that is 31 December 2015.<sup>28</sup> That meant in the case of the Cridge/Unwin and Fowler/Woodhead proceedings, the opt-in period was 10 weeks after the making of the representative order (10 weeks being the period of time between 22 October and 31 December 2015) and two weeks in the case of the Body Corporate proceeding (two weeks being the period of time between 21 December and 31 December 2015).

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<sup>25</sup> *Credit Suisse*, above n 6, at [127].

<sup>26</sup> A minute on 19 December 2016 finalised the orders in the decision of Ellis J, above n 1. In that minute the opt-in period for the Fowler/Woodhead proceedings was amended by consent to 10 weeks, matching the Cridge/Unwin proceedings. The four week period in the decision of Ellis J was based on the date of the second amended statement of claim, rather than the first.

<sup>27</sup> Decision of Ellis J, above n 1, at [81].

<sup>28</sup> At [82].

[49] In so limiting the opt-in periods, the Judge said she was influenced by three factors:

- (a) the extensive publicity that had already taken place about the claim, which had been effective as evidenced by the fact approximately 350 plaintiffs had filed individual proceedings;
- (b) “the likely age of any future unidentified claims; and
- (c) the associated prejudice to James Hardie”.<sup>29</sup>

[50] After the representative orders were granted, James Hardie successfully applied to Ellis J for a stay of execution pending the outcome of its appeal to this Court.<sup>30</sup> As a result of the stay, there has been no formal public notice of the final opt-in date.

#### *Challenges to the opt-in order*

[51] Mr Hodder submitted that logically the same reasoning that persuaded the Judge to limit the opt-in periods should also have resulted in her limiting the category of owners who would otherwise come within the defined class being allowed to opt in. In his submission, the interests of justice and the policy of the Limitation Act required that the opt-in order should have been limited to claimants who had, before the expiry of the limitation period, specifically identified themselves to the lawyers acting for the representative owners as wanting to join the action. Mr Hodder contended there was no justification for potential class members being able to effectively sidestep the limitation period when they had had ample opportunity to join the claims. It was unfair, he said, to require James Hardie to face additional stale claims.

[52] As a backup argument, Mr Hodder submitted that if we were not minded to limit the category of claimants allowed to opt in, then we should reduce the opt-in period to five weeks for all claims.

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<sup>29</sup> At [81].

<sup>30</sup> *Cridge v Studorp Ltd* [2017] NZHC 528.



[53] In contrast, by way of cross-appeal, counsel for the representative owners Mr Farmer QC argued the Judge’s opt-in periods were far too short.

### *Analysis*

[54] In our view, the reliance placed by Mr Hodder and indeed the Judge on the Limitation Act when considering the terms of an opt-in order is misconceived. The purpose of an opt-in period is not to enforce the limitation period but rather to reduce the original class to those who take the positive step of opting in. The 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 of time is reasonable in all the circumstances to allow potential class members to be made aware of the proceeding and consider their options after making any necessary investigations and taking advice.

[55] Allowing qualifying owners to opt in after the expiry of the limitation period does not bypass the Limitation Act or undermine its policy. When these representative proceedings were filed, they were expressly brought on behalf of all members of a class defined in the statement of claim. James Hardie was thus put on notice prior to the expiry of the limitation period of the nature and potential scope of the claims against them. Contrary to a submission made by Mr Hodder, it is not a case of James Hardie facing “*additional* stale claims, brought after the time by which it could reasonably expect that new claims relating to the use of [its products] would be raised”.<sup>31</sup> In so far as the Judge appears to have accepted James Hardie would be prejudiced if a longer opt-in period were allowed because of limitation issues, that was an error and contrary to the reasoning in *Credit Suisse*.

[56] It follows we do not agree the category of claimant should be limited under the opt-in orders or that the opt-in period should be reduced. On the contrary, applying the correct principles as detailed in [54] above, we consider the period imposed by the Judge was too short and takes insufficient account of access to justice considerations. Ten and two week periods are likely to deprive many

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<sup>31</sup> Emphasis added.

potentially eligible class members of the ability to opt in and seek recovery of their alleged losses.

[57] We note in particular that many of these claims are likely to involve latent defects, and there is no ready means of ensuring that the proceedings and the opt-in orders are drawn to the attention of all potential claimants. In that respect the case can be contrasted with the Feltex litigation where the lawyers acting for the representative plaintiffs had access to a shareholder list.<sup>32</sup> It appears there has been some publicity about this case, but the extent of it is unclear and according to Mr Farmer some of the publicity has been confusing. Certainly due to the stay there has been not yet been any formal public notice of the final opt-in orders.

[58] We accept too that, given the nature of the claim, many lay homeowners are likely to need to take appropriate legal and other expert advice in order to be satisfied of their eligibility to join the proceeding.

[59] Taking all those considerations into account we would therefore amend the opt-in order to allow an opt-in period of five calendar months commencing from the date of this decision.

### **Outcome of appeal in CA573/2016**

[60] The appeal is dismissed. The representative order made in the High Court is upheld and the stay of proceedings lifted.

[61] The cross-appeal is allowed. The terms of the High Court's opt-in orders are amended by replacing the opt-in periods of 10 weeks and two weeks with an opt-in period of five calendar months applying to all representative proceedings and commencing from the date of this judgment.

[62] As regards costs, there is no reason why costs should not follow the event. We therefore order that the appellants pay one set of costs to the respondents for a standard appeal on a band A basis together with usual disbursements. We certify for second counsel.

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<sup>32</sup> See *Saunders v Houghton (No 1)*, above n 13; and the cases above at n 8.

## **Appeal against the making of the precautionary orders: CA25/2016**

[63] Our upholding of the representative order means the outcome of the appeal against Thomas J's decision is academic as far as the parties to this case are concerned. It does however raise a novel issue of general importance and it is therefore appropriate that we address it rather than let it stand without analysis.

[64] Before doing so, it is necessary to explain a further aspect of r 4.24. For convenience we again set out the text of the rule:

### **4.24 Persons having 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.

[65] As the wording makes clear, there are two ways in which a person may bring a claim on behalf of others with the same interest in the subject matter of the proceeding. The two ways are either with the consent of those with the same interest or as directed by the Court on application.

[66] If consent has been given, the plaintiff may file a representative proceeding as of right. No other authority for a representative claim than that it is brought with the consent of those represented is necessary. Without consent however, a representative claim requires a court direction.

[67] Even where a representative proceeding has been filed as of right, it may however not be allowed to proceed on a representative basis if the court later considers those consenting do not have the necessary common interest. To put it another way, the provision of consent does not of itself mean the interest in the subject matter of the proceeding is the same.

[68] As previously mentioned, in this case it became apparent to those advising the representative owners that the application for the representative order would not be determined by Ellis J before the limitation period expired. Accordingly, in order to preserve the position of the members of the class for limitation purposes, they sought a declaration of the legal position that would apply in the event Ellis J declined to make a representative order.

[69] The application was in the following terms:

... to address the situation that would arise if the defendant is successful in its opposition to a representative proceeding. Specifically, should the defendant successfully oppose this proceeding being brought as a representative proceeding, the plaintiffs seek an order that would deem those who have consented to join the representative proceeding (and those whose [sic] decide to consent within a reasonable period following the Court ruling on the representative proceeding application) as having commenced their own individual proceedings at the same time as the representative statement of claim was filed on 22 October 2015 and/or being added as additional plaintiffs to the proceeding (but with particulars of their individual claims to be filed in either an orthodox statement of claim or as otherwise as directed by the Court at a later point).

[70] In making the application for precautionary orders, the representative owners relied on the decision of the Supreme Court in *Credit Suisse*. Under the Limitation Act, time stops running when a proceeding is “brought”. And in *Credit Suisse* a majority of the Court held that a representative action is brought not only by the named plaintiff, but also by those he or she represents when the named plaintiff’s statement of claim is first filed.<sup>33</sup> The majority further held that if the representative order is not made at the time the statement of claim is filed and if in the intervening period the limitation period has expired, then the representative order should be backdated to the date the statement of claim was filed.<sup>34</sup> To put it another way, when the limitation clock stops for the named plaintiff, it stops for everyone else on whose behalf he or she sues.

[71] Justice Thomas however held that *Credit Suisse* was distinguishable. Unlike the scenario put to her, it was dealing with the situation where a representative order had been made, and not the situation where one had been applied for but not yet

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<sup>33</sup> *Credit Suisse*, above n 6, at [127].

<sup>34</sup> At [128].

obtained.<sup>35</sup> In the Judge's view, unless and until a representative order is obtained, qualifying members in the proposed class have no representative status.<sup>36</sup> It followed that if a representative order was never obtained and the limitation period has expired in the meantime, then the ordinary rule precluding joinder of additional plaintiffs when their claim would be time-barred must apply. Amendment to pleadings to add a party or a cause of action is not generally permitted if it would defeat a limitation defence.<sup>37</sup>

[72] The Judge considered this reasoning was equally applicable where a representative proceeding had been commenced as of right under r 4.24(a), but then disallowed because of insufficient common interest.<sup>38</sup> She concluded the Court had no jurisdiction to make any of the precautionary orders sought.<sup>39</sup>

#### *Analysis*

[73] The approach adopted by Thomas J is consistent with Canadian authority where a distinction has been drawn between actions "allowed to continue as representative actions and those that are disallowed. The suspension of limitation periods only applies to the former".<sup>40</sup> It is also consistent with the views expressed by Mason P in *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*, a decision of the New South Wales Court of Appeal, that only those proceedings that are judicially regarded as being properly brought under the representative action procedure will stop the limitation clock for the class members.<sup>41</sup>

[74] A contrary approach has however been taken by the Supreme Court of Queensland and by the Supreme Court of the United States.

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<sup>35</sup> Decision of Thomas J, above n 4, at [52].

<sup>36</sup> At [63].

<sup>37</sup> At [81]. See High Court Rules, r 4.56; *Mabro v Eagle, Star and British Dominions Insurance Co Ltd* [1932] 1 KB 485 (CA); *McCoomb v Fleetwood Motors Ltd* [1967] NZLR 945 (SC) at 949; *NZI Insurance Ltd v Hinton Hill & Coles Ltd [Joinder]* (1996) 9 PRNZ 615 (HC); and *Outfox Total Security (NZ) Ltd v NZ Security Industry Assn Inc [Review]* (1995) 8 PRNZ 477 (HC).

<sup>38</sup> At [66].

<sup>39</sup> At [79].

<sup>40</sup> Vince Morabito "Statutory Limitation Periods and the Traditional Representative Action Procedure" (2005) OUC LJ 113 at 136; citing *Shiels v TELUS Communications Inc* 2004 ABQB 76 at [13].

<sup>41</sup> *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, (2005) 63 NSWLR 203 at [44].

[75] The United States Supreme Court has held in relation to class actions that the commencement of a class action “has the effect of suspending applicable limitation statutes with respect to the claims of the class members”.<sup>42</sup> If the court subsequently rules the action should not have been brought as a class action, the suspension is lifted and time starts to run again. The effect of this is that the members of the now disallowed class action who want to issue their own proceedings will still have the opportunity to do so before the limitation period expires.

[76] This principle is known as the American Pipe doctrine.

[77] Closer to home and in a case which concerned a disallowed representative proceeding is the decision of the Queensland Supreme Court in *Cameron v National Mutal Life Association of Australasia Ltd (No 2)*.<sup>43</sup> In *Cameron*, a Master of the Supreme Court ruled that a proceeding which had been commenced as a representative proceeding could not continue on a representative basis because it did not comply with the relevant rule relating to representative proceedings. On appeal the Master’s decision was upheld but the appeal Judge also granted leave to the class members to elect to be joined as plaintiffs to the action by filing a written consent in the registry. The defendants then appealed to the Full Court of the Supreme Court on the grounds that joinder should not be allowed because the claims of those seeking to be joined were now statute-barred.

[78] Although all three judges of the Full Court agreed the defendants’ appeal should be dismissed, there are some differences in the reasoning. However, significant for present purposes are the views of the majority, McPherson SPJ and Moynihan J.<sup>44</sup> In their view, the crucial question was not whether the unnamed class members could be regarded as parties to the representative proceeding when it was initiated, but whether they could be said to have brought the action for the purposes

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<sup>42</sup> Morabito, above n 40, at 130; citing *American Pipe & Construction Co v Utah* 414 US 538 (1974) at 766; and *Crown, Cork & Seal Co, Inc v Parker* 462 US 345 (1983).

<sup>43</sup> *Cameron v National Mutal Life Association of Australasia Ltd (No 2)* [1992] 1 Qd R 133 (SC).

<sup>44</sup> The third member of the Court, Ryan J, considered the commencement of the representative action had no effect on the running of the statutory limitation period in relation to the causes of action of the class members. He decided the case on the basis of a special circumstances exception to the usual rule prohibiting joinder of a statute-barred claim.

of the Limitation Act at the time the writ was first filed.<sup>45</sup> The majority concluded a representative action is brought not only by or on behalf of the named plaintiffs but also by or on behalf of the class members at the time the writ was filed.

[79] As the majority noted, the fact the proceeding had been wrongly brought in representative form did not render it a nullity. At most it was a procedural irregularity that was capable of being cured and was cured by an order giving the unnamed plaintiffs leave to be joined as named plaintiffs. “The fact that under the rules the action ought not to have been brought on their behalf does not mean that it was not so brought.”<sup>46</sup>

[80] Under this approach, limitation periods are not “suspended” as they are under the American Pipe doctrine. The clock stops permanently. And for the purposes of the joinder rules, the situation is seen as analogous to the situation where a party wrongly joined in one capacity (for example as trustee) is struck out in that capacity but allowed to remain in some other capacity.

[81] We find this analysis compelling and in our view there is no impediment to applying it in New Zealand.

[82] Justice Thomas considered the *Cameron* decision was distinguishable because the relevant rule was different to our r 4.24.<sup>47</sup> That was certainly the view taken by the minority in *Credit Suisse*.<sup>48</sup> But it was not the view of the majority. Significantly, the majority considered the Queensland rule was broadly similar to ours,<sup>49</sup> and drew on the analysis in *Cameron* to support their conclusion that in New Zealand the proceeding is brought for limitation purposes when the statement of claim is filed.

[83] We consider this must logically apply whenever a proceeding is commenced as a representative proceeding, regardless of whether it is judicially allowed to

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<sup>45</sup> At 137.

<sup>46</sup> At 138.

<sup>47</sup> Decision of Thomas J, above n 4, at [59]–[63].

<sup>48</sup> *Credit Suisse*, above n 6, at [74]–[75].

<sup>49</sup> At [136] and [146]

continue on that basis or not. That this is the logical effect of the majority reasoning was indeed expressly recognised by the minority in *Credit Suisse*.<sup>50</sup>

[84] We are fortified in that conclusion by consideration of the relevant policy factors. Having the clock stop when representative proceedings are filed removes uncertainty and so avoids the filing of what may well turn out to be needless individual joinder applications or separate individual proceedings. In claims involving large numbers, such as the Feltex litigation, these individual filings could number over a thousand.

[85] Contrary to a submission made by Mr Hodder, the *Cameron* approach is not, in our view, unjust to defendants nor does it undermine the policies of the Limitation Act. The underlying purpose of limitation periods is to protect defendants against the injustice of stale claims being fought many years after the events when records have been lost and memories dimmed. We repeat, the filing of the representative proceeding clearly put James Hardie on notice as to the nature and potential scope of the claim and did so within the limitation period. Difficulties arising from the staleness of any individual claims are unlikely to favour the plaintiffs, who have the burden of proof.

[86] We therefore conclude that Thomas J was wrong to decline to grant the orders sought. We hold that when time stopped running under the Limitation Act for the representative owners, it stopped for everyone else on whose behalf they purported to sue and that remained the case regardless of whether a representative order was later made or not. Had Ellis J declined to make a representative order, those homeowners who had already consented, or who were within the definition of the class, would therefore have been able to join the proceedings as named plaintiffs after 31 December 2015.

### **Outcome of appeal in CA25/2016**

[87] The appeal is allowed and the decision of the High Court set aside.

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<sup>50</sup> At [79].



[88] It is unnecessary for us to make any other orders, except those relating to costs.

[89] The respondent is ordered to pay the appellants one set of costs on a standard appeal on a band A basis together with usual disbursements. We certify for second counsel. Costs in the High Court for both judgments under appeal are to be determined in that Court in accordance with this judgment.

Solicitors:

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