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Defective cladding

Supreme Court gives green light to claim against CHH.

Carter Holt Harvey (CHH) has lost another battle in its war with the Ministry of Education over "leaky schools". The decision paves the way for the claim to proceed to trial and clarifies what claims may be brought against cladding manufacturers by other affected building owners.

CHH manufactures a cladding product called "Shadowclad".

The Ministry alleges that 900 school buildings are leaking because the cladding system is defective. It is suing CHH.

On 29 July 2016 our highest appellant court, the Supreme Court, dismissed an appeal brought by CHH and allowed a cross appeal brought by the Ministry.[1] CHH's latest, entirely unsuccessful skirmish came after a loss in the High Court and a small success in the Court of Appeal.

THE HIGH COURT CONCLUDED THAT THE "LONG STOP" LIMITATION PROVISION IN THE BUILDING ACT 2004 DID NOT APPLY TO PRODUCT MANUFACTURERS AS IT WAS NOT "BUILDING WORK".

WHAT HAS HAPPENED SO FAR?

Despite the large number of judgments this case has produced, the proceeding is still at a relatively early stage. CHH challenged the ability of the Ministry to bring some of the claims against it.

It applied to the court to "strike out" those claims.

There are five claims against CHH:

- A claim in negligence in relation to the design, manufacture and supply of defective cladding;
- Breach of the Consumer Guarantees Act 1993;
- Negligent misstatement in promotional material relating to the cladding;
- Negligent failure to warn about the characteristics of the cladding;
- Breach of the Fair Trading Act 1986.

At first instance the High Court dismissed the application to strike out the claims and ruled that all the claims should go to trial. In doing so, the High Court concluded that the "long stop" limitation provision in the Building Act 2004 did not apply to product manufacturers as it was not "building work".

CHH appealed to the Court of Appeal. The appeal failed, except in relation to the negligent misstatement claim which the Court of Appeal struck out. The Court of Appeal agreed with the High Court that the "long stop" did not apply.

The case then went to the Supreme Court. It was tasked with deciding whether the Court of Appeal was correct to decide:

- The claims in negligence were arguable;
- The claim for negligent misstatement was not arguable; and
- The "long stop" did not apply.

The five Supreme Court Justices unanimously decided that the claims in negligence and negligent misstatement were arguable and should be allowed to go to trial rather than be struck out. In relation to the "long stop" the Justices unanimously found that it did not apply to claims relating to defective building products and materials, which are not claims about "building work".

Interestingly CHH finds itself back in the same position it was in after the High Court judgment but somewhat lighter of pocket.

AND WHAT WILL HAPPEN NEXT?

The claim against CHH will now continue. Given the reality of the significant costs involved in this type of litigation it will probably settle before it gets to trial.

Also waiting in the wings are two class actions by home and commercial owners against the cladding manufacturer James Hardie. Those owners were waiting to see what the Supreme Court decided about the viability of the various claims and limitation before proceeding further.

James Hardie's accounts show provision for US$32.4 million for weathertightness claims. The claims against James Hardie will also proceed now. Those claims are also likely to settle before trial due to the costs and risks associated with large scale multiple party litigation. **LG**

1. Carter Holt Harvey Ltd v Minister of Education & Ors [2016] NZSC 95