IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 12/2019
[2019] NZSC 39

BETWEEN	JAMES HARDIE INDUSTRIES PLC First Applicant
	JAMES HARDIE NZ HOLDINGS Second Applicant
	RCI HOLDINGS PTY LIMITED Third Applicant
AND	KAREN LOUISE WHITE AND THE PERSONS LISTED IN SCHEDULE 1 First Respondents
	WAITAKERE GROUP LIMITED Second Respondent
	METLIFECARE PINESONG LIMITED Third Respondent
	FOREST LAKE GARDENS LIMITED Fourth Respondent
	VISION (DANNEMORA) LIMITED (NAME CHANGED TO METLIFECARE DANNEMORA GARDENS LIMITED) Fifth Respondent
	METLIFECARE COAST VILLAS LIMITED Sixth Respondent

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	J E Hodder QC, P G Watts QC, J A McKay and A J Wicks for Applicants B D Gray QC and J S Cooper QC for First Respondents J K Stewart and S M Sharma for Second to Sixth Respondents
Judgment:	16 April 2019

JUDGMENT OF THE COURT

A **The application for leave to appeal is dismissed.**

B **The applicants are to pay to the respondents costs of $2,500.**

REASONS

[1] The respondents (the claimants) are the past or present owners of buildings which were constructed using exterior cladding products produced and sold by the James Hardie group. They allege that the products were defective and seek damages over associated weathertightness problems against seven companies in the James Hardie group, those being: (a) four operating companies (Studorp Ltd, James Hardie New Zealand, James Hardie Australia Pty Ltd and James Hardie Research Pty Ltd); and (b) three holding companies – James Hardie Industries Plc (JHI) (the ultimate parent company of the group), RCI Holdings Pty Ltd (RCI) (the immediate parent company of Studorp), and James Hardie New Zealand Holdings (JHNZH) (the immediate parent company of James Hardie New Zealand).

[2] Currently in issue are the claims against the holding companies.

[3] The claimants allege that the development, manufacture, marketing and sale of the cladding products was, in effect, a joint effort in which all the James Hardie companies, including the holding companies, were engaged. The claimants say that this resulted in the holding companies incurring liability in the following respects:

(a) In negligence – pleaded separately as: (i) negligence in terms of the manufacture, marketing and sale of the defective profits; (ii) negligent misstatement in respect of the promotion of the products; and (iii) a breach of a duty to warn, inform and/or take reasonable steps to withdraw the products. The liability of the holding companies is said to arise because of their direct involvement in the development, manufacture, marketing and sale of the cladding products and their

superior knowledge (as compared to that of the operating companies) of the products.

(b) Under the Consumer Guarantees Act 1993, on the basis that all James Hardie companies, and thus the holding companies, are within the definition in that Act of "manufacturer".

(c) Under the Fair Trading Act 1986; this in terms of misleading and deceptive conduct in respect of the marketing of the cladding products which resulted in the respondents believing that the products were fit for purpose.

[4] JHI is an Irish company and was served in Ireland. It protested the jurisdiction of the High Court. Under the relevant High Court Rules 2016 (rr 5.49 and 6.29) it was entitled to be dismissed from the proceedings unless the claimants could show, inter alia, that there is a serious issue to be tried on the merits. RCI and JHNZH sought summary judgment in the High Court; this on the basis that it was clear, they argued, that they did not participate in, and were not responsible for, the actions of the operating companies.

[5] In issue in both the High Court and Court of Appeal was whether: (a) the claimants had shown that there was a serious case against JHI to be tried on the merits; and (b) RCI and JHNZH had shown that the claims against them would fail. Leaving aside the onus of proof, the central issue in respect of the protest to jurisdiction (in respect of JHI) and summary judgment (in respect of RCI and JHNZH) was broadly the same; that is whether the claimants had arguable claims against the three holding companies.

[6] The arguability of the claims turns on both the legal tests to be applied where holding companies are alleged to be liable in respect of actions apparently carried out by subsidiaries and an assessment of the facts. There is no assumption that the facts as pleaded are true (as is the case with strike-out applications). Instead, what is required is an assessment of the evidence adduced by affidavit. As against JHI at least,

the claimants are at something of a disadvantage because the facts bearing on its role in respect of the operating companies lie largely in its control.

[7] In the High Court, JHI was partially, but not completely, successful in its protest to jurisdiction and the summary judgment claims of RCI and JHNZH were dismissed.[1] All issues were revisited in the Court of Appeal which dismissed, in its entirety, JHI's protest to jurisdiction and upheld the dismissal of the summary judgment applications by RCI and JHNZH.[2] In its judgment, the Court of Appeal commented adversely on the limited nature of the evidence tendered by the holding companies.[3]

[8] The proceedings being interlocutory in character, the application for leave to appeal falls to be determined in accordance with s 13(4) of the Supreme Court Act 2003 which provides:

> The Supreme Court must not give leave to appeal to it against an order made by the Court of Appeal on an interlocutory application unless satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal before the proceeding concerned is concluded.

[9] We accept that the issue whether the holding companies are liable to the claimants gives rise to questions of law of considerable difficulty and importance. We accept too that there are arguable issues as to the cogency of the factual premises for the arguments advanced by the claimants, at least in relation to JHI (in respect of which the onus of proof was on the claimants). That said, there would be limited utility and some disadvantages if leave were granted:

(a) The operating companies are properly joined as defendants and there is no issue as to the arguability of the claims against them.

(b) In the summary judgment proceedings, the onus of proof was on RCI and JHNZH and, at least in respect of them, we see little scope for

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1 *White v James Hardie New Zealand* [2017] NZHC 2105 (Peters J).

2 *James Hardie Plc v White* [2018] NZCA 580, [2019] 2 NZLR 49 (French, Cooper and Winkelmann JJ).

3 At [90]–[91].

argument as to the significance placed by the Court of Appeal on the limited affidavit evidence they offered.

(c) Members of the James Hardie group of companies being necessarily parties to the proceedings, there is comparatively little disadvantage to JHI if it remains a party.

(d) Given the distinctly limited evidence, a decision by this Court as to the principles of law in issue would be somewhat artificial.

(e) The issues of fact and law which the holding companies wish to argue can, if necessary, be addressed in any later appeal.

(f) There is a distinct disadvantage to the claimants if the progress of their claims is further delayed.

(g) Elaborate and costly arguments on jurisdiction can be disproportionate to the interlocutory character of the challenge.[4]

[10] We are accordingly not satisfied that it is in the interests of justice for the proposed appeals to be heard before the determination of the substantive proceedings. The application for leave to appeal is dismissed. Costs of $2,500 are awarded to the respondents.

Solicitors:
Chapman Tripp, Wellington for Applicants
Adina Thorn Lawyers, Auckland for First Respondents
MinterEllisonRuddWatts, Auckland for Second to Sixth Respondents

[4] In *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337, Lord Neuberger observed at [82]: "It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost." This was cited with approval in *Vedanta Resources Ltd PLC v Lungowe* [2019] UKSC 20 at [7].