

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 81/2023
[2023] NZSC 138

BETWEEN RED STAG TIMBER LIMITED
Applicant
AND JUKEN NEW ZEALAND LIMITED
Respondent

Court: Glazebrook, O'Regan and Ellen France JJ
Counsel: N F Flanagan and E M Watt for the Applicant
A R Galbraith KC, C L Bryant and G J Luen for Respondent
Judgment: 25 October 2023

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
B The applicant must pay the respondent costs of \$2,500.
-

REASONS

Background

[1] Red Stag Timber Ltd (Red Stag) and Juken New Zealand Ltd (JNL) are competitors in the production and supply of timber for construction. JNL manufactures, promotes and supplies a product called "J-Frame".

[2] In 2017 Red Stag commenced proceedings alleging that, since 2007, JNL had made misrepresentations about J-Frame in breach of the Fair Trading Act 1986 (FTA). The statement of claim divided JNL's alleged conduct into different time periods. One of these periods was from 2008 to December 2012. In 2018, the cause of action

relating to conduct before December 2012 was struck out for lack of particulars.¹ There was no appeal against that decision.²

[3] In October 2020 Red Stag filed an amended statement of claim, dividing the causes of action by section of the FTA rather than by time period. The various causes of action all encompassed conduct that occurred before December 2012.

[4] JNL applied to strike out the claim, insofar as it related to conduct before December 2012. This was on the basis of it being outside the limitation period contained in s 43A of the FTA.

[5] The application was dismissed in the High Court.³ An appeal against that decision was allowed by the Court of Appeal.⁴

[6] Red Stag applies for leave to appeal against the Court of Appeal's decision.

High Court decision

[7] The High Court accepted Red Stag's argument that the claim for the conduct before December 2012 was not a new cause of action as it was not essentially different to the claim in relation to the later periods.⁵ As a result of this, the High Court held that it could not say that there was "no reasonable possibility that the case was brought within time".⁶

Court of Appeal decision

[8] In the Court of Appeal Red Stag's principal argument rested on r 7.77 of the High Court Rules 2016 and the ability it gives to amend pleadings as of right, including by introducing relief in respect of a fresh cause of action which is not statute-barred. Red Stag argued that the issue was whether Red Stag introduced a fresh cause of action

¹ *Red Stag Timber Ltd v Juken New Zealand Ltd* [2018] NZHC 2459.

² There were also separate proceedings issued in 2019 but they are no longer extant.

³ *Red Stag Timber Ltd v Juken New Zealand Ltd* [2021] NZHC 2662 (Gault J) [HC decision].

⁴ *Juken New Zealand Ltd v Red Stag Timber Ltd* [2023] NZCA 242 (Cooper P, Mander and Fitzgerald JJ) [CA decision].

⁵ HC decision, above n 3, at [73].

⁶ At [74].

when it amended its claim to include allegations about JNL's conduct before December 2012.⁷

[9] The Court of Appeal considered that the starting point must be s 43A of the FTA. A claim for relief which relates to a period more than three years after the date on which the loss or damage was discovered, or ought to have been discovered, would be contrary to that provision.⁸ The question was whether r 7.77 changes that conclusion.⁹ The Court held that it did not.¹⁰ It said that a claim which seeks relief in relation to a period earlier than that covered by the existing claim and in breach of a statutory bar is not authorised by r 7.77(2)(a). The fact that the claim might be seen as not essentially different in nature from that raised by the claim does not mean that the statutory bar can be ignored.¹¹

The application for leave

[10] Red Stag submits that the case law before the Court of Appeal decision framed the application of r 7.77 as centring on whether a cause of action was fresh or not. If it were fresh, then limitation restrictions might apply to prevent it and, if it were not (and merely modified the causes of action that existed), then the claim was to be taken as unchanged for limitation purposes. Red Stag argues that the Court of Appeal added a new test to this, holding that no amendment may extend the statement of claim to an earlier point than the time the original claim was filed.

Our assessment

[11] We accept that the application raises a question of law. Because of the rather unusual procedural background, we are not, however, convinced that it is of commercial importance.¹² In any event, we do not consider that the arguments

⁷ CA decision, above n 4, at [35].

⁸ At [57].

⁹ At [58].

¹⁰ At [61].

¹¹ At [68].

¹² Senior Courts Act 2016, s 74(2)(c).

Red Stag wishes to run have sufficient prospects of success for it to be in the interests of justice to grant the application for leave to appeal.¹³

Result

[12] The application for leave to appeal is dismissed.

[13] The applicant must pay the respondent costs of \$2,500.

Solicitors:
Meredith Connell, Auckland for Applicant
Hesketh Henry, Auckland for Respondent

¹³ *Prime Commercial Ltd v Wool Board Disestablishment Company Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2]; *Hookway v R* [2008] NZSC 21 at [4]; *B (SC 18/2020) v R* [2020] NZSC 52 at [12]; and *Foster v R* [2021] NZSC 130 at [4].