

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 9/2024
[2024] NZSC 53

BETWEEN	BODY CORPORATE NUMBER DPS 91535 First Applicant
AND	ARGOSY PROPERTY NO.1 LIMITED Second Applicant
AND	3A COMPOSITES GMBH Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: D M Salmon KC, S C I Jeffs and M J F Taylor for Applicants
A R Galbraith KC, J Q Wilson and S L Cahill for Respondent

Judgment: 9 May 2024

JUDGMENT OF THE COURT

- A The applications for leave to appeal and cross-appeal are dismissed.**
- B There is no order as to costs.**
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REASONS

[1] This judgment deals with applications for leave to appeal and cross-appeal in a dispute relating to a cladding product (Alucobond PE) installed on buildings. It is alleged that there is a material risk that, in the event of fire, the flammable core of the cladding will cause or contribute to the rapid spread and severity of any fire.

[2] Alucobond PE is manufactured by the respondent, 3A Composites GmbH, a German corporation. It filed a protest to jurisdiction regarding High Court proceedings filed by the applicants.

[3] The High Court set aside the protest to jurisdiction in relation to three tort causes of action but upheld it in relation to one cause of action under the Consumer Guarantees Act 1993 and two brought under the Fair Trading Act 1986.¹

[4] The Court of Appeal upheld the findings of the High Court on the Consumer Guarantees Act, although the reasoning differed in some respects from that in the High Court.² The Court said:

[3] ... We consider that the Consumer Guarantees Act applies to overseas manufacturers of goods that are supplied to consumers in New Zealand, contrary to the view expressed by Davison J. However we agree with the Judge that it is not seriously arguable that Alucobond is a product of a kind ordinarily acquired for personal, domestic, or household use or consumption (which by way of shorthand we refer to as “personal use”). Alucobond is almost invariably acquired by building professionals for incorporation into buildings, rather than being purchased by building owners for their own personal use. We also agree with the Judge that it is not seriously arguable that Alucobond qualifies as “goods” for the purposes of the Consumer Guarantees Act: the term “goods” is defined to exclude a whole building, or part of a whole building, attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation. The cladding that has been installed as part of the buildings owned by the appellants falls within that exclusion, so does not qualify as “goods” for the purposes of the Consumer Guarantees Act.

[5] The Court of Appeal allowed the appeal with regard to the Fair Trading causes of action saying:

[4] We have concluded, by a fine margin, that the appellants have shown that there is a serious issue to be tried in relation to their Fair Trading Act claims. The appellants have identified conduct engaged in by [3A Composites GmbH] in New Zealand which is arguably misleading or deceptive in relation to the suitability of Alucobond cladding for certain cladding uses and in relation to its regulatory compliance. They have not established that it is seriously arguable that either appellant relied directly on such conduct. Such evidence as there is suggests they did not. But it is arguable that conduct in New Zealand by or on behalf of [3A Composites GmbH] created a misleading impression in the market about the suitability of Alucobond products for certain uses, and about its regulatory compliance, and that this impression influenced designers and others to recommend use of Alucobond products as a cladding material for the appellants’ buildings.

¹ *Body Corporate Number DP 91535 v 3A Composites GmbH* [2022] NZHC 985, [2022] NZCCLR 4 (Paul Davison J) at [130].

² *Body Corporate Number DP 91535 v 3A Composites GmbH* [2023] NZCA 647 (Gilbert, Goddard and Mallon JJ) [CA judgment].

[5] There is also real force in the appellants' argument that it would be illogical to permit their negligent misstatement cause of action to proceed before the New Zealand courts, but not the Fair Trading Act causes of action founded on essentially the same allegations.

[6] The applicants seek leave to appeal against the Consumer Guarantees Act finding. The respondent seeks leave to cross-appeal with regard to the Court of Appeal's decision on the Fair Trading Act causes of action.

Our assessment

[7] The proposed appeal and cross-appeal relate to an interlocutory decision, meaning s 74(4) of the Senior Courts Act 2016 applies. With regard to the cross-appeal, we do not consider that it is necessary to hear the proposed appeal on the Fair Trading Act causes of action before trial, particularly in light of the fact that the tort claims are proceeding to trial.

[8] With regard to the application for leave to appeal the Court of Appeal's finding on the Consumer Guarantees Act cause of action, we do not consider the prospects of success sufficient to mean that it is in the interests of justice to grant the application.³

Result

[9] The applications for leave to appeal and cross-appeal are dismissed.

[10] As neither party succeeded in its leave application there is no order as to costs.

Solicitors:
Russell McVeagh, Auckland for Applicants
Bell Gully, Auckland for Respondent

³ *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]; and *B (SC 18/2020) v R* [2020] NZSC 52 at [12].