IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA626/2022
[2023] NZCA 648

BETWEEN	BODY CORPORATE NUMBER DPS 91535 First Appellant	
	ARGOSY PROPERTY NO. 1 LIMITED Second Appellant	
AND	3A COMPOSITES GMBH First Respondent	
	TERMINUS 2 LIMITED Second Respondent	
	SKELLERUP INDUSTRIES LIMITED Third Respondent	

Hearing:	7–8 June 2023
Court:	Gilbert, Goddard and Mallon JJ
Counsel:	J A Farmer KC, J L W Wass, S C I Jeffs and A L Robertson for Appellants A R Galbraith KC, J Q Wilson, A M Boberg and S L Cahill for First Respondent M C Harris and Z A Brentnall for Second Respondent M D O'Brien KC, R M Irvine-Shanks and L C Bercovitch for Third Respondent
Judgment:	15 December 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay each respondent costs for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel for each respondent.

REASONS OF THE COURT

(Given by Goddard J)

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Introduction and summary

[1] The appellants own buildings which are, to varying extents, clad in building products branded as "Alucobond" manufactured by the first respondent, 3A Composites GmbH (3AC). The second and third respondents were, at various times, importers, distributors and suppliers in New Zealand of Alucobond products. The appellants say that two Alucobond products used as cladding on their buildings — Alucobond PE and Alucobond Plus — are combustible, and give rise to an unacceptable risk of spread of fire.[1] Their proceedings allege that the Alucobond

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[1] We refer to these two products together as "the Alucobond products". There are other cladding products branded as "Alucobond" that are outside the scope of these proceedings.

products are inherently unsuitable for use as an external building cladding material, and do not comply with relevant New Zealand Building Code requirements.

[2] In a separate judgment, delivered today, we have determined an appeal in relation to 3AC's protest to the jurisdiction of the New Zealand Courts.[2] The appellants are entitled to pursue their claims before the New Zealand Courts against 3AC in negligence, negligent misstatement, negligent failure to warn and for breach of the Fair Trading Act 1986. We have held that their claim against 3AC under the Consumer Guarantees Act 1993 is not seriously arguable, and cannot proceed in New Zealand. (The other respondents are New Zealand companies, in relation to which no question of jurisdiction arises.)

[3] The appellants wish to bring their claims as representative proceedings, on an opt out basis. The group of plaintiffs they seek to represent is all current and former owners and leaseholders of buildings or parts of buildings with the Alucobond products as exterior cladding. Their application for orders authorising them to sue as representative plaintiffs under r 4.24 of the High Court Rules 2016 was unsuccessful in the High Court.[3] They appeal against that decision.

[4] We agree with Jagose J that this is not a suitable case for representative proceedings brought on an opt out basis. We are not persuaded that the appellants are sufficiently representative of the full range of plaintiffs on whose behalf they seek to claim. Although common issues across such a class can be framed at a high level of generality, we do not consider that it would be just or efficient for the wide-ranging claims advanced by the appellants, many of which do not relate directly to their own circumstances, to be litigated before the High Court in the manner they propose.

[5] For example, the appellants seek to litigate claims in relation to Alucobond Plus even though that product does not appear to have been used on any of their buildings. They seek to have the court determine the suitability of the Alucobond products as exterior cladding products, and their compliance with the Building Code,

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2 *Body Corporate Number DP 91535 v 3A Composites GmbH* [2023] NZCA 647.

3 *Body Corporate Number DP 91535 v 3A Composites GmbH* [2022] NZHC 2355 [High Court judgment].

in buildings that have very different characteristics from their own buildings, and that use Alucobond to very different extents ranging from minor decorative features of a building through to complete exterior cladding. Some — perhaps, many — of the issues that they ask the court to determine at Stage 1 of their proposed representative proceeding may not in fact be relevant to any building in respect of which a specific claim is advanced at Stage 2. A trial of these issues, some of which may prove hypothetical, would not be an efficient use of the court's resources and would be disproportionately burdensome and unjust for the respondents.

[6] The appeal must therefore be dismissed.

Background

[7] As already mentioned, the proceedings relate to two Alucobond products manufactured by 3AC: Alucobond PE and Alucobond Plus. Each product consists of two aluminium cover sheets with a core containing polyethylene (PE) and other materials laminated and bonded together. The core of Alucobond PE cladding is approximately 100 per cent PE. The core of Alucobond Plus is approximately 30 per cent PE and another ethylene compound, and 70 per cent mineral compounds.

[8] Alucobond is one of a number of aluminium composite panel (ACP) cladding products used in New Zealand. The appellants say there has been growing recognition of fire risks associated with the use of ACP cladding in recent years, in particular following the fire at Grenfell Tower in London. They say that ACP panels, including Alucobond panels, are combustible and are not fit for use in external cladding in many buildings due to the risk that they will fuel the rapid spread of fire. The appellants say that they are concerned about the risks posed by the Alucobond cladding used on their buildings, and that addressing those risks by removing and replacing the panels will cause them loss and expense. They wish to bring representative proceedings against 3AC and two New Zealand distributors of Alucobond products in relation to the Alucobond products used on their buildings.

[9] The distributors against whom the claim is brought are the third respondent, Skellerup Industries Ltd (Skellerup) and the second respondent, which at the relevant time was called Kaneba Ltd (Kaneba).

[10] Skellerup imported and distributed Alucobond in New Zealand between 2005 and 2009.

[11] Kaneba carried on business importing and supplying Alucobond products in New Zealand from 2009, when it acquired Skellerup's Alucobond business, until September 2014 when it sold the business to another company. From September 2014 until 2020 Kaneba continued to import Alucobond products for on-sale to other fabricators.

Cutterscove Building

[12] The first appellant (Cutterscove) is the body corporate for a three-storey apartment building in Mt Maunganui known as the Cutterscove Resort Apartments (Cutterscove Building). Cutterscove says that Alucobond PE was supplied to it and affixed to the exterior of the Cutterscove Building in 2006 to 2008 pursuant to a construction contract that Cutterscove entered into with Moyle Construction Ltd. Moyle Construction Ltd was supplied with the Alucobond by Skellerup.

Argosy Buildings

[13] The second appellant (Argosy) owns an extensive property portfolio including:

(a) A property at 140 Don McKinnon Drive, Albany, Auckland (Don McKinnon Drive). Don McKinnon Drive is a Burger King restaurant. It has two strips of Alucobond PE totalling approximately 39 m² affixed to its exterior.

(b) A property at 80 Favona Road, Māngere, Auckland (Favona Road). A substantial part of the cladding of Favona Road is Alucobond. Most of that cladding was fitted in 2003. In 2011 Kaneba was engaged to fabricate and fit approximately 26 m² of Alucobond PE to a new pedestrian link bridge connecting two office buildings.

The proceedings

[14] The appellants plead six causes of action against 3AC, Kaneba and Skellerup:

(a) First cause of action: Breach of the guarantee of acceptable quality in s 6 of the Consumer Guarantees Act.

(b) Second cause of action: Negligence.

(c) Third cause of action: Negligent misstatement.

(d) Fourth cause of action: Negligent failure to warn.

(e) Fifth cause of action: Breach of s 9 of the Fair Trading Act (misleading or deceptive conduct).

(f) Sixth cause of action: Breach of s 13 of the Fair Trading Act (false or misleading representations).

[15] The appellants' pleading is lengthy (some 53 pages) and complex. But in essence they plead that there is a material risk that Alucobond PE and Alucobond Plus, when used as cladding, will cause or contribute to the rapid spread and severity of a fire, including the rapid vertical spread and/or horizontal spread of a fire in a building. They allege that these Alucobond products are inherently unsuitable for use as external cladding due to their combustibility, and did not and do not comply with the Building Code, which sets performance standards for buildings including (in cl C) standards relating to protection from fire. They say that the products have been negligently designed, that the respondents have made misleading claims about the suitability of the products for use as external cladding, and that the respondents have failed to give appropriate warnings about the risks inherent in use of the products as external cladding.

[16] When the proceeding was first filed in December 2020, the sole plaintiff was Cutterscove. Cutterscove pleaded that it had commenced the proceeding on its own behalf and in a representative capacity on behalf of all persons with the same interest in the subject matter of this proceeding, which it identified as persons who:

(a) either:

(i) own or have previously owned a building situated in New Zealand ("**Relevant Building**"), or have previously had an ownership interest in a part of a building situated in New Zealand ("**Relevant Building Part**"); or

(ii) have or have previously had a leasehold interest in a Relevant Building and/or a Relevant Building Part;

(b) where the Relevant Building and/or the Relevant Building Part is or was fitted with Alucobond PE Core Cladding; and

(c) have suffered or will suffer loss or damage for which compensation is claimed in this proceeding;

(together, "**Group Members**").

[17] Kaneba pointed out to the appellants that it had nothing to do with the supply of Alucobond at the time that Cutterscove was reclad with Alucobond PE, so Cutterscove could have no claim against it. Kaneba applied to strike out the proceedings against it. In December 2021, in response to that strike out application, the appellants filed an amended statement of claim (ASC) which added Argosy as second plaintiff. The ASC pleads that Cutterscove brings the claim on behalf of the "Group Members" as defined above. It adds that Argosy brings its claims on behalf of all Group Members whose Relevant Building and/or Relevant Building Part is or was fitted with Alucobond cladding that was directly or indirectly supplied by Kaneba.

[18] The appellants claim damages for themselves and on behalf of each of the Group Members. Those damages are primarily assessed as the cost of removing and replacing the Alucobond cladding used on the relevant buildings.

Representative actions: relevant principles

[19] Representative actions are provided for in r 4.24 of the High Court Rules:

> **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.

[20] The appellants seek to bring proceedings on behalf of all relevant "Group Members", as defined in the ASC. They have not obtained the consent of all such persons to sue on their behalf: to do so would be impractical. So they seek directions under r 4.24(b).

[21] In *Southern Response Earthquake Services Ltd v Ross* the Supreme Court confirmed that representative actions may be brought on an opt out basis, and provided guidance on when an opt out claim may be appropriate.[4] As the Supreme Court noted, in construing r 4.24 the objective of the High Court Rules is also relevant. Rule 1.2 provides that the objective is to ensure the just, speedy and inexpensive determination of any proceeding or interlocutory application.[5]

[22] The objectives of a representative action are to improve access to justice, facilitate the efficient use of judicial resources, and strengthen incentives for compliance with the law.[6] In particular, an opt out approach has advantages in improving access to justice.

[23] As this Court explained in *Cridge v Studorp Ltd*, r 4.24 derived 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.[7] The principles governing the application of the rule are well established, and were summarised by this Court as follows:[8]

> (a) The rule should be applied to serve the interests of expedition and judicial economy, a key underlying reason for its existence being efficiency. 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.
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> (b) Access to justice is also an important consideration. 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.

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4 *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117.
5 At [26].
6 At [37] and [40].
7 *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582 at [11].
8 At [11] (footnotes omitted).

(c) Under the rule, the test is whether the parties to be represented have the same interest in the proceeding as the named parties.

(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.

(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.

(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.

(g) The court should take a liberal and flexible approach in determining whether there is a common interest.

(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.

(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.

[24] As the Supreme Court noted in *Southern Response Earthquake Services Ltd v Ross*, the concern not to work injustice on a defendant is met at least in part by the requirement that applicants under r 4.24 have to satisfy the court as to the requisite common interest.[9] The Supreme Court also noted that the question of proportionality of cost to the size of the claim and burden on the defendant will be relevant in terms of the objective of the High Court Rules.[10]

[25] The Supreme Court made a number of comments intended to assist in the exercise of the discretion under r 4.24, where an applicant proposes to bring representative proceedings on an opt out basis:[11]

> [95] First, generally, the court should adopt the procedure sought by the applicant unless there is good reason to do otherwise. We see no basis in policy or practical terms for not adopting that course so long as the court turns its mind to all of the relevant factors. But it is not necessary to characterise the situations in which the court may depart from an opt out order as rare, as Mr and Mrs Ross submit. Rather, it is a question of considering the relevant factors in light of what will best meet the permissible objectives of the

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9 *Southern Response Earthquake Services Ltd v Ross*, above n 4, at [41].
10 At [89].
11 Footnotes omitted.

> representative action in the particular case. We consider that approach meets the Law Society's concern that requiring claims to proceed on an opt out basis may have the unintended result of creating a barrier to justice because some litigation funders may be less willing to fund open class claims absent a legislative framework that deals with funding equalisation or common fund orders.
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> …
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> [97] Second, in terms of departures from this starting point, where there is a real prospect some class members may end up worse off or adversely affected by the proceeding, that favours an opt in approach. Cases where there is a counterclaim or the potential for one to emerge would fall into this category.
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> [98] Given the objectives of a representative proceeding, class size will have some relevance. In particular, an opt in approach may be the preferable option where the class is small. By that we mean where the number of members in the class is small relative to other claims and there is a natural community of interest, or, as the Court of Appeal put it, a "pre-existing connection". … That said, class size will not necessarily be determinative.
>
> [99] We agree … that participation at stage two may be a relevant consideration warranting a departure from an opt out approach if persisting with an opt out approach at that point lessens the benefits of the representative proceeding, or increases any unfairness or prejudice.
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> [100] Third … a universal approach may be appropriate where the only relief sought is declaratory or injunctive and where the outcome will affect all class members identically. That is because in those cases it may be impractical, and indeed sometimes almost impossible, to provide the necessary notice for either an opt in or opt out approach. … In these types of claims, opt in or opt out orders will be neither necessary nor conducive to a speedy and inexpensive determination.
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> [101] Finally, applications under r 4.24 should include proposed conditions as to the court's supervision of settlement and discontinuance. We agree with the Law Society that settlement or discontinuance may operate unfairly to either absent plaintiffs in an opt out claim or to a subset of plaintiffs under either option. As we have noted, the Court of Appeal in this case added a requirement that the plaintiffs seek the court's leave to settle the claim or to discontinue it. As we have indicated, we endorse that approach.

[26] The parties did not differ on the principles that govern the making of orders under r 4.24. Rather, the focus of the argument we heard was on the application of the rule, and the principles set out above, to the particular facts of this claim.

The representation order sought in this case

[27] The appellants applied to the High Court for directions authorising them to bring the proceedings on behalf of the pleaded "Group Members", as defined in the

ASC. They say that there are many buildings in New Zealand that were fitted with Alucobond cladding. They refer to lists published by the Auckland, Wellington and Christchurch local authorities of buildings in their territories that are clad with ACPs. Those lists identify some 271 buildings with ACP cladding. In many cases the type of cladding is not known. In others, it is ACP manufactured by a company other than 3AC. But there are a significant number of buildings on the lists identified as having Alucobond cladding. The estimated percentage of total cladding that is ACP varies significantly: for many buildings use of ACP appears to be confined to signage, or architectural features such as street canopies or entrance areas.

[28] The public statement issued by Te Kaunihera o Tāmaki Makaurau | Auckland Council to accompany its list recorded that over the past 12 months the Council had carried out an investigation into buildings with ACP cladding. The Council expressed the view that none of the buildings assessed by it so far qualify as unsafe or dangerous. It noted that some ACPs, whether PE or plastic core, had been linked to fire risks in tall buildings. The Council also noted that ACP is a common material used for many purposes, including building signage, architectural features and full building facades. The Council went on to say:

> Building owners have the option to replace all or any of the cladding.
>
> For many buildings with ACP, coverage is limited and the likelihood of it being involved in a fire will be very small. For buildings with a large amount of ACP, full removal of the cladding may be an option.
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> However, there are typically many safety features present within the buildings and whilst full or partial removal of any cladding will reduce any potential risk, there are many options available that could mitigate the risk.
>
> We advise seeking advice from your insurers and ensuring all fire safety features are in good working order.

[29] The Council stated that it takes building safety "extremely seriously and will issue a formal warning for buildings that pose a significant risk". There was no evidence before us of any such formal warnings by the Auckland Council or any other council.

[30] The appellants say that they believe that the class of Group Members is large, based on these lists, which are not exhaustive and relate only to three cities. They note

that Kaneba says that since November 2008, it has supplied or installed the Alucobond products on "hundreds of properties". They also note that on 10 May 2005, Skellerup wrote a letter stating that since 1985 Alucobond had been installed to "approximately 2,000 buildings through New Zealand and the South Pacific". The appellants say that it is not possible to say definitively how many Group Members there will be without discovery from the respondents. However they are expected to be numerous.

[31] A representative of Cutterscove says that he understands that High Court litigation is expensive, and that would be the case for their claim. If Cutterscove were to commence unfunded and non-representative proceedings, it would need to levy each of the unit owners. That would be a significant burden on each of them. They therefore decided to bring the proceeding on a representative and funded basis.

[32] When Argosy was added as a plaintiff, in December 2021, the appellants filed an amended application for an order under r 4.24(b) of the High Court Rules, reflecting the addition of Argosy as a proposed representative of a subset of claimants.

[33] The appellants have entered into a litigation funding agreement with an Australian funder, Omni Bridgeway (Fund 5) Cayman Invt. Ltd, an investment vehicle wholly owned by Omni Bridgeway (Fund 5) LP, a limited partnership incorporated in the Cayman Islands, which is advised by Omni Bridgeway Ltd, an Australian public company listed on the Australian Securities Exchange. A redacted copy of the funding agreement was provided to the Court.

[34] Cutterscove subsequently advised that there are 14 claimants who collectively own 30 buildings who have signed litigation funding agreements. Those claimants own buildings across New Zealand including in Auckland, Christchurch, Wellington, Mt Maunganui and Whangārei and include buildings supplied with Alucobond as recently as 2016. The material before the Court does not include the names of those 14 claimants, or any information about the buildings they own or the extent of ACP cladding on those buildings.

[35] In addition to evidence from representatives of Cutterscove and Argosy, the appellants filed expert evidence setting out the basis for their claim. Mr Weaver, a

chartered professional engineer with particular experience in fire engineering, was asked to provide opinion evidence about whether Alucobond PE and Alucobond Plus are combustible, and about relevant requirements of the Building Code when the Cutterscove Building was reclad in 2006–2008. He was also instructed that the plaintiffs were seeking leave to bring their claims as a representative claim, and he was therefore asked to provide his opinion as to whether, where there are combustibility requirements in compliance documents for the Building Code, those requirements are met for the Alucobond products.

[36] Mr Weaver referred in his first affidavit to "growing recognition that combustible ACP panels are not fit for use in external cladding in many buildings due to the risk that they fuel the rapid spread of fire". He expressed the view that Alucobond Plus and Alucobond PE are both combustible as determined by the relevant acceptable standard under the Building Code, and are "combustible building material" within the meaning of that term under the Building Code. He summarised his conclusions as follows:

> 58. In summary, in my opinion, based on the facts, assumptions, reasons and literature referred to above:
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> (a) Alucobond PE and Alucobond Plus are combustible; and
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> (b) when the Cutterscove complex was reclad in 2006–2008, the New Zealand Building Code relevantly required external walls and roofs to have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of other household units and other property. In my opinion the presence of Alucobond PE cladding is inconsistent with these requirements; and
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> (c) where there are combustibility requirements in the compliance documents of the New Zealand Building Code, there is no evidence that those requirements have been met for Alucobond PE and Plus.

[37] The respondents contest various aspects of Mr Weaver's evidence. Skellerup filed expert evidence in response from Gillian Stopford, a chartered professional fire engineer with extensive experience as a fire engineering consultant. Ms Stopford emphasised that different requirements in relation to protection from fire apply to different buildings. A large number of variables may be relevant. The term "combustible" does not necessarily signal a problem or defect with cladding.

Combustible cladding may be used as part of an external wall cladding system on tall buildings provided it has passed relevant full scale fire tests. There are no combustibility requirements for certain categories of building. The factors that Ms Stopford would need to consider, in order to determine whether a particular building complies with the Building Code in relation to external wall cladding, would include the:

> 26.1 date of issue of building consent, date of construction, date of issue of certificate of code compliance (and accordingly what Building Code requirements, Acceptable solutions, Verification Method, MBIE guidelines and sprinkler standard were in place at that time);
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> 26.2 building height;
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> 26.3 use of the building (Purpose Group or Risk Group), such as whether it is residential, industrial, office, aged care, mixed use
>
> 26.4 nature and extent and location of cladding used in the building; and
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> 26.5 fire safety design for the building, including whether the building is sprinklered, and
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> 26.6 external wall construction, fire rating requirements, proximity to boundary, title boundaries, presence of spandrel panels or aprons, and
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> 26. 7 any 'alternative solutions' or engineering judgements that may have been accepted by the building consent authority at the time and hence deemed to meet Building Code requirements.

[38] Ms Stopford commented on the lists of buildings prepared by the three city councils. She expressed the view that a detailed review of each building listed would be required to determine the location of the ACP cladding on the building and whether it would present a material fire risk in terms of horizontal or vertical fire spread. She gave examples of buildings on the lists with very limited areas of ACP.

[39] Each of the experts filed a number of further affidavits. However these are of limited assistance, in circumstances where it is not the role of the Court to resolve disputes between expert witnesses. In particular, Mr Weaver and Ms Stopford disagree about whether any combustibility requirements under the Building Code applied to the Cutterscove Building when it was constructed. That is not an issue we need to resolve for present purposes: we proceed on the basis that it is seriously arguable that such requirements did apply.

High Court Judgment

[40] The Judge began by summarising the proceedings, and setting out the principles that govern representative proceedings. He then set out the issues identified by the appellants as common issues appropriate for resolution in a representative claim. The Judge said these were essentially the denied allegations in the proceeding, including disputed factual issues relating to PE's flammability and aluminium and ACP combustibility as latent defects, materially risking spread and severity of fire and consequent loss of life and property damage.[12] He identified as the proposed common legal issues the respondents' alleged duty of care to ensure that Alucobond cladding:[13]

> (a) complied with the Building Act 2004 and with the Building Code;
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> (b) was not subject to the Material Fire Risk Properties (or any of them);
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> (c) was not subject to the Building Code Non-compliance Properties (or any of them);
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> (d) was not subject to the Building Code Non-compliance Risk Properties (or any of them); and
>
> (e) was fit for all the purposes for which good of its type are commonly supplied and/or the Purposes …

[41] The Judge recorded his understanding that the appellants argued that "fitness for purpose" was not to be understood as constrained by the state of the Building Code at any time. That, he said, involved acceptance that any particular failure to comply with the Building Code is more for building-by-building assessment by reference at least to the building's height, distance from a relevant boundary, fire suppression means, and use. These factors, the Judge said, were less susceptible to "common issue" analysis.[14]

[42] The Judge considered that the negligence causes of action could not be read without reference to the Building Code.[15] He did not think that either appellant, or any other individual member of the intended group, would seek to argue in their own interests that the Alucobond products were inherently incapable of meeting Building

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12 High Court judgment, above n 3, at [16].
13 At [16] (footnotes omitted).
14 At [17].
15 At [21].

Code requirements. Left to their own devices, he said, each would be more likely to argue for their particular cladding's failure to meet the Building Code requirements applicable to their buildings. However, he said, a legitimate reason for alleging the cladding's inherent capability may be to incorporate all possible Building Code requirements that may apply across the intended representative group, enabling the representative plaintiffs to escape the prohibition against advancing claims other than those which their own claim represents.[16]

[43] The Judge considered that he needed to be satisfied the intended represented group's claims would engage a broader range, if not the whole, of Building Code fire spread requirements than may apply in the Cutterscove and Argosy cases. Otherwise he could not be satisfied a representative proceeding was for the benefit of the intended represented group.[17]

[44] The Judge noted the limited information available to the Court about other members of the proposed group, including the 14 claimants who had signed a litigation funding agreement. He saw it as commercially unreal to think either appellant would find it necessary or desirable to embark on the "inherent unsuitability" allegation in a claim about their own building(s). Rather, the proposed representative proceeding appeared to be sought primarily to enable the appellants to engage a litigation funder in return for a share of any ultimate recoveries.[18]

[45] The Judge also had regard to the prejudice to 3AC, Skellerup and Kaneba in terms of time and expense if they had to defend their manufacture, supply or installation of the Alucobond products "against a potentially contrived allegation the products inherently are incapable of meeting [Building Code] requirements … determination of any contrivance is not an efficient use of scarce Court and other resources".[19]

[46] Ultimately, the Judge did not consider that determination of a claim that the Alucobond products are inherently incapable of providing for a low probability of fire

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16 At [22].
17 At [23].
18 At [26]–[27].
19 At [28].

spread was a substantial or even proportionate aspect of any claim against the respondents.[20] The objectives of representative proceedings were not demonstrably furthered by making the orders sought by the appellants. The application for representative orders was dismissed.[21]

Submissions on appeal

[47] The appellants do not take issue with the principles identified by the Judge as governing the application of r 4.24(b). Rather, they say that the Judge erred in a number of respects in applying those principles.

[48] First, they submit that the Judge erred by considering a single common issue. The Judge should have assessed each of the common issues in the proceeding before deciding whether to grant representative orders. Mr Farmer KC submitted that the courts take an expansive view of whether group members have the same interest in a proceeding for the purposes of r 4.24. Group members do not need to have the same claims or causes of action; rather, they must only have the same interest in the subject matter of a proceeding.[22] That can include a significant common interest in the resolution of any question of law or fact arising in the proceeding. A representative order can be made even though it only relates to some of the issues in the claim. The threshold is not a high one.

[49] Mr Farmer identified numerous common issues, factual and legal, which he says would arise in the proceedings. The appellants provided a litigation plan which set out the common and individual issues identified by the appellants, which would be resolved at Stage 1. Stage 2 of the proceeding would then address individual issues for Group Members. The appellants' proposed litigation plan, which is central to their argument on appeal, is set out in a schedule to this judgment.

[50] The appellants say that if the Judge had taken into account each of the common issues in the proceeding, it would have concluded that the proposed Group Members have a significant interest in those common issues, and would have concluded that

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20 At [29].
21 At [30] and [31].
22 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [55].

resolution of those common issues would lead to the efficient resolution of much of the proceeding, leaving individual issues to be resolved at a second stage.

[51] Second, Mr Farmer submitted that the Judge erred in finding that the appellants' causes of action could not be read without reference to the Building Code, and were contrived. The appellants allege that, when installed on a building, there is a material risk that the Alucobond products cause or contribute to the rapid spread and severity of fire. As a result, they say, the Alucobond products materially increase the risk of harm to building occupants and damage to the building itself and to neighbouring buildings. These are inherent risks that do not rely solely upon the Building Code, although they are consistent with the requirements of the Code. The appellants note that their allegations go beyond the Building Code: for example, they allege that the Alucobond products increase the risk of damage to the building and its contents, the protection of which is not within the scope of the objectives of cl C of the Code.

[52] Third, Mr Farmer submitted that the Judge erred in finding that the appellants had not established that the inherent unsuitability of the Alucobond products was "either a substantial or even proportionate aspect of any claim against the defendants or any of them".[23] Mr Farmer said that the inherent unsuitability of the Alucobond products is a central feature of the pleaded allegations, and is supported by the expert evidence from Mr Weaver. That evidence established that the claims were arguable and needed to be resolved at trial. The Court could not decline to make representative orders based on the strength of the claim.

[53] Mr Farmer also submitted that the appellants' allegation that the Alucobond products are in breach of the Building Code does not need to be assessed on a building-by-building basis. The various pathways to compliance under the Building Code, which have changed over time, allow for sub-groups to be established. The litigation plan provided by the appellants referred to four possible sub-groups.[24] Mr Jeffs, who appeared with Mr Farmer for the appellants, said that at Stage 1 the trial judge could assess whether the Alucobond products met the requirements of the Building Code in

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23 High Court judgment, above n 3, at [29].

24 See para 9 of the litigation plan, in the schedule to this judgment.

respect of each sub-group. The respondents would not be prejudiced by this approach, as they could raise any individual issues at Stage 2 (for example, whether any individual buildings were sprinklered, if relevant).

[54] Next, Mr Jeffs submitted that the Judge erred by focusing on the 14 claimants who had signed litigation funding agreements, rather than focussing on the Group Members as a whole. The proposed Group Members were not limited to persons that had entered into a funding agreement. There was affidavit evidence before the High Court that 14 persons, who collectively owned 30 buildings, had signed funding agreements. This indicated there was a group of engaged plaintiffs committed to advancing the proceeding and thus that it was a proceeding of substance. It should not have been necessary to lead any further evidence about Group Members or their potential claims. A proper assessment of who the Group Members were was relevant to whether the proceeding would have economies of scope and scale. The Judge failed to identify what the alternative to a representative action would be. That alternative, Mr Jeffs said, would be for each Group Member to commence a separate action against the respondents. That would be unwieldy and inefficient. It is precisely the situation the representative action procedure is intended to avoid.

[55] Mr Farmer submitted that the Judge took into account a number of irrelevant or unsubstantiated matters in reaching his decision:

(a) The Judge observed that "grant of representative orders is not intended to recruit the group's members".[25] That observation was based on a misunderstanding of an earlier decision concerning notification orders, not the making of representative orders as such.[26] Representative orders do not "recruit" members. Rather, the scope of the Group Members is determined by the definition of the Group, and whether a proceeding is opt in or opt out.

(b) Mr Farmer said that the Judge appears to have considered that litigation funding was inappropriate or unwelcome in this case. That seems to

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25 High Court judgment, above n 3, at [23].

26 *Ross v Southern Response Earthquake Services Ltd* [2021] NZHC 2452 at [26].

have informed the Court's finding that the proceeding was contrived. However litigation funding is an increasingly common way for plaintiffs to fund a representative action, and allows claims to proceed that might not have been brought, levelling the playing field with well-resourced defendants.[27] This was not a case where the litigation funding arrangement was an abuse of process.

(c) The Judge erred in placing emphasis on the prejudice to the respondents from defending the proceeding. He did not identify any particular reason why they would be prejudiced by defending such a proceeding, over and above the ordinary prejudice to a defendant of facing a claim.

[56] The appellants went on to address a number of additional grounds relied on by the respondents in their notice of intention to support the judgment.

[57] The first additional ground relied on by the respondents is that the appellants are not appropriate representatives for a number of reasons, including that they do not own buildings with Alucobond Plus, there is no evidence of their suitability to act as representatives, and they do not have sufficiently strong claims. Mr Farmer submitted that none of these arguments is credible. The Cutterscove Building has Alucobond PE. But Mr Farmer submitted it is not yet determined whether Argosy's properties at Favona Road and Don McKinnon Drive have Alucobond PE or Alucobond Plus. Although the evidence on behalf of Kaneba is that it supplied Alucobond PE for use on Favona Road and Don McKinnon Drive, no documentary evidence has been proffered to support that claim. Thus it is a trial issue. There was no basis for the respondents' argument that the appellants are unsuitable representatives. The appellants' claims are not amenable to summary dismissal and must be addressed at trial. That is sufficient for the provisional assessment of merits required for the grant of representative orders. The respondents should not be permitted to turn the application for representative orders into a mini-trial.

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[27] Referring to the Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding* (NZLC R147, 2022) at 54.

[58] The next additional ground relied on by the respondents is that they would be unfairly prejudiced by the proposed representative orders. Mr Jeffs submitted that this was not the case. The litigation plan demonstrates how the proceeding could be managed in a two-stage trial. The alternative of each Group Member commencing an individual proceeding, and case managing them together, could result in dozens if not hundreds of individual claims against the respondents. That would be inefficient, and would be likely to increase the burden on the appellants, the respondents and the court.

[59] Nor, Mr Jeffs submitted, would the respondents be prejudiced by an inability to pursue affirmative limitation defences and to pursue claims against third parties. They would be able to raise affirmative defences. The limitation period for a contribution claim does not begin until a tortfeasor's liability to a plaintiff has been determined.[28] So there is little risk of prejudice to the respondents from the time it would take for this proceeding to be resolved.

[60] The respondents' submissions are addressed, as relevant, below.

Discussion

Common issues

[61] We accept Mr Farmer's submission that it is possible to identify issues that would be common to all members of the proposed group. So, for example, issue 4 in the proposed litigation plan — whether Alucobond cladding was and is goods of a kind ordinarily acquired for personal, domestic or household use or consumption — would arise in each Group Member's claim under the Consumer Guarantees Act.[29]

[62] The properties of the Alucobond products, including their combustibility and behaviour when exposed to fire, could also be resolved as a common issue.

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[28] Citing *Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2022] NZCA 624 at [47], [123]–[125] and [147]–[148].

[29] In our judgment on the appellants' appeal in relation to 3AC's protest to jurisdiction, delivered with this judgment, we have concluded that on the material before this Court it is not seriously arguable that Alucobond cladding meets this test. But that is not a final determination of the issue on the merits at trial.

[63] We also accept Mr Farmer's submission that the threshold for establishing that Group Members have "the same interest in the subject matter of a proceeding" is not a high one. It is well established that the court should take a liberal and flexible approach in determining whether there is a common interest. The requisite commonality of interest is not a high threshold.[30] A representative order can be made even though it relates only to some of the issues in the claim. The common question need not make a complete resolution of the case, or even liability, possible.[31]

[64] In these circumstances, we accept that the threshold for application of r 4.24 is met: there are persons with the same interest in the subject matter of this proceeding.

Should a representative proceeding be authorised?

[65] However that does not mean that a representative proceeding order will automatically be made. Rather, all it means is that the minimum threshold for the making of such an order has been crossed. The real question in this case is whether the objectives of the High Court Rules — the just, efficient and speedy resolution of proceedings — will be advanced by making the opt out representation order sought by the appellants.

Would the proposed representative proceeding be an efficient use of the court's resources?

[66] We begin by considering whether the proposed representative proceeding would contribute to the efficient resolution of claims relating to the Alucobond products.

[67] We accept Mr Farmer's submission that the appellants allege that Alucobond is inherently unsuitable for use as external cladding, as well as alleging that its use fails to comply with the Building Code. But inevitably a large part of the proceeding will be concerned with compliance with the Building Code. Under the Code, there are no combustibility requirements for some buildings. The requirements that apply to other buildings have varied over time, and depend on factors such as the height of the

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30 *Cridge v Studorp Ltd*, above n 7, at [11(g)–(h)], set out at [23] above.
31 At [11(e)], set out at [23] above.

building, its distance from the boundary, its use, the external wall construction, and other fire safety measures such as sprinklers. That reflects the obvious correlation between those factors and fire safety risk.

[68] The mere fact that a cladding material is combustible does not mean that it is inherently unsuitable for all uses on all buildings: as the respondents note, wood and wood products are commonly used as a cladding material in New Zealand for a range of buildings. It is we think significant that Mr Weaver's conclusion was not expressed at the level of generality that characterises the issues in the appellants' litigation plan. His view, set out at [36] above, was that "*where there are combustibility requirements in the compliance documents of the New Zealand Building Code*, there is no evidence that those requirements have been met for the [Alucobond products]". He implicitly accepted that those products may be consistent with the Building Code where there are no applicable combustibility requirements. That is clear from a reading of the Code. He does not express a view about the inherent unsuitability of the Alucobond products for use as exterior cladding independent of the Building Code and its combustibility requirements, or independent of the features of the building identified at [67] above.

[69] It seems highly implausible that a single undifferentiated answer could be given to the question: "Is Alucobond inherently unsuitable for use as an exterior cladding material in any quantity and on any building?" Rather, it seems inevitable that the answer will correspond to the approach in the Building Code: that is, "it depends".

[70] A more nuanced approach to risks associated with ACP has been adopted in all of the regulatory responses that were drawn to our attention in New Zealand, Australia and elsewhere, with different measures being adopted in relation to buildings of a particular height, or without particular fire safety systems, or with particular uses.

[71] The existence of a material risk to people and structures of the kind that lies at the heart of the appellants' claims does not admit of a single answer when viewed through the lens of the Building Code. Nor is there any reason to think it will admit of a single answer when viewed through the lens of inherent risk. There was no

evidence before us to support such a sweeping proposition, or even to suggest that it is arguable.

[72] We are therefore sceptical about the potential for useful answers of general application to be provided at a Stage 1 hearing, in a manner that would materially contribute to resolution of individual building owners' claims at Stage 2.

[73] Indeed it seems to us that there is a real prospect of inefficiency in the hearing of these proceedings if the Court embarks on the wide-ranging Stage 1 inquiry that the appellants contemplate. Their proposed litigation plan would require the Court to determine, at the Stage 1 hearing, questions about inherent suitability and compliance with the Building Code for a very wide range of permutations of building characteristics, including many characteristics that are not shared by the appellants' buildings. So for example the appellants' Subgroup B focuses on the use of Alucobond products on buildings with a height of 60 metres or more, from 24 November 2017 onwards. The Court could find itself determining a range of issues in relation to tall buildings of this kind, including the risk associated with different extent and location of such cladding, and the interplay between cladding properties and other aspects of external wall construction, and other fire precautions (such as sprinklers) only to find when Stage 2 is reached that no such building is the subject of a claim before the Court. And any findings in relation to this subgroup clearly would not be relevant to the claims against the second and third respondents, neither of which was involved in supply of Alucobond products from November 2017 onwards.

[74] Examples could readily be multiplied. As the respondents point out, the proposed subgroups are not mutually exclusive, do not reflect all relevant building characteristics, and are not comprehensive. Some buildings within the pleaded claim will not fall within any of the subgroups: for example, buildings less than 7 metres high that are more than one metre from a boundary. The subgroups do not reflect all the factors relevant to assessing compliance with the Building Code over the relevant period, so the answer to some issues may vary within the specified subgroups.

[75] Put another way, in circumstances where different categories of building are subject to materially different regulatory requirements, conducting a hearing into

whether the requirements are met for every conceivable category would be inefficient and a poor use of the resources of the Court and the parties absent a good reason to think that the inquiry will be relevant to one or more eventual claimants. The appellants' buildings are not representative of all subgroups. The limited material before this Court about likely claimants does not enable us to form a view on whether claimants in each proposed subgroup are likely to participate in the proceeding. So we cannot be satisfied that the proposed inquiry into the position of each subgroup would be a sensible use of the Court's time.

[76] A related difficulty is illustrated by the inclusion of Alucobond Plus in the appellants' claims. The litigation plan would require the courts to determine a range of issues relating to that product. The appellants accept that the Cutterscove Building is clad with Alucobond PE, not Alucobond Plus. Mr Gouws, the principal of Kaneba, has given evidence that the small quantities of Alucobond that Kaneba supplied for the Favona Road and Don McKinnon Drive buildings were in each case Alucobond PE. The appellants say there is no documentary evidence to this effect. But there is no reason to think that Mr Gouws is in error on this point, and no evidence to that effect. If Argosy does not have access to relevant records, the panels could have been removed for inspection and/or tested to ascertain which product was used. We are not prepared to speculate about the possibility that Alucobond Plus was used (in very small quantities) on one of Argosy's buildings absent such evidence.

[77] If as seems likely the product supplied by Kaneba for the Argosy buildings is Alucobond PE, the trial of the appellants' claims can and should be confined to the characteristics and risks associated with that product. The different characteristics and risk profile of Alucobond Plus will not need to be explored by the courts at all, let alone in relation to a wide range of different types of building and uses.

[78] This difficulty can be seen as casting doubt on whether the appellants are sufficiently representative of the proposed group of claimants. Alternatively, and in our view more accurately, it can be seen as going to the (in)efficiency of the proposed representative proceeding, which would require the courts to inquire into issues that would (at Stage 1) be entirely hypothetical so far as the parties are concerned.

They might become practically relevant at Stage 2, but on the information available to this Court that is a matter of speculation.

The burden on the respondents of defending the proposed claim

[79] For the same reasons that the appellants' proposed representative proceeding risks being an inefficient use of court time, it is likely to be disproportionately burdensome and oppressive for the defendants. They would be required to engage on, and provide discovery and fact and expert evidence about, scenarios that are not raised by either appellant's buildings and may not be raised by any eventual claimant.

[80] The oppressive and burdensome nature of such a claim is especially clear in relation to Kaneba, a small business with a single principal. Cutterscove has no claim against Kaneba. Argosy's claims against Kaneba relate to two small strips of Alucobond for the installation of each of which Kaneba charged around $10,000. If Argosy considers that there is a material risk associated with these small quantities of Alucobond, they could readily be removed and replaced with alternative cladding.[32] But it appears that Argosy has not done so. A claim for the cost of taking remedial measures on this modest scale would not normally be brought in the High Court. It seems likely that considerably more than the cost of such measures has already been spent on including Argosy.

[81] As Kaneba submits, if the litigation funder and the lawyers conducting the claim are aware of a building owner with a more substantial or more typical claim relating to a building clad using Alucobond supplied by Kaneba, that building owner could have been named as a plaintiff in place of Argosy. But despite the lengthy period since this claim was first advertised, it seems none has come forward.

[82] Nor is there any material before this Court to establish that there is a substantial number of similarly situated claimants who wish to pursue claims against 3AC and Kaneba, but are unable to do so for cost reasons. Representative proceedings can be an important way of solving the problem of access to justice where there is a large

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[32] Mr Gouws' uncontested evidence was that the Alucobond strips on the Burger King restaurant at Don McKinnon Drive that Kaneba had supplied could be removed by a tradesperson with a ladder and a screwdriver.

class of similarly situated claimants with low value claims, none of which would individually be worth pursuing, but which collectively justify the cost of proceedings. But there is no evidence before us to suggest that is the position here.

[83] We have some sympathy for Kaneba's submission that Argosy's claims are too minor and too idiosyncratic to serve as useful representative claims. An inquiry into the risks associated with using small strips of Alucobond products for signage on a single storey Burger King restaurant in the middle of a carpark seems unlikely to shed light on the use of that product in the circumstances where the risks that are the focus of the proceeding are most likely to be material. This claim is not a promising springboard for requiring Kaneba to participate in proceedings relating to every supply it made of Alucobond, for a wide range of uses on a wide range of buildings, over a five year period.

[84] There is also real force in the respondents' submission that they will be prejudiced by a representative claim brought on an opt out basis because they will not be able to ascertain what buildings are the subject of the claim until a much later date (realistically, identification of claimants at Stage 2 is unlikely before 2026). That will affect their ability to identify, and join as parties, the persons who were responsible for design of each relevant building and for ensuring compliance of each building with relevant provisions of the Building Code. Delay in identifying parties against whom contribution is sought may not give rise to limitation problems, on the current state of the authorities. But it will inevitably give rise to practical difficulties as documents are lost or destroyed, and as people with relevant knowledge became unavailable. As Mr Leaming, the chief financial officer of Skellerup, explained in his affidavit, Skellerup has had no involvement in Alucobond supply since 2009. Nobody who worked in Skellerup's Alucobond business is currently employed by Skellerup. Because of the time that has passed, Skellerup has limited records from its Alucobond business. Similar difficulties are likely to be encountered in relation to architects, fire engineers and others involved in the construction of relevant buildings from that era. The interests of justice would be better served by identification of all live claims sooner rather than later, in these circumstances.

[85] In short, we do not consider that a representative claim of the breadth and generality proposed by the appellants would give the respondents fair notice of the nature and scale of the claims against them, and a fair opportunity to defend those claims.

Alternative pathways for resolving claims

[86] Mr Farmer suggested that the alternative to making representation orders sought was a large number of individual claims brought by building owners.

[87] We are somewhat sceptical about the number of claims that are likely to materialise, on the basis of the material before us. This is not a case where hundreds, or even tens, of claimants have confirmed that they wish to bring a claim against the respondents in respect of the Alucobond products. The evidence of Mr Gouws for Kaneba and of Mr Leaming for Skellerup was that neither had received notification of any claims relating to fire safety in respect of any Alucobond installation work undertaken by them, apart from these proceedings. And as already mentioned, there is no evidence before us that regulators in New Zealand have taken any compliance action in relation to any building clad with Alucobond. The absence of complaints or claims directed to Skellerup and Kaneba, and the absence of widespread regulatory action, cast doubt on the likely number of individual claims if a representative proceeding is not authorised.

[88] Rather than commit extensive resources to resolving the proposed representative claim on the basis of speculation about the likely number of potential claimants, it seems preferable to wait to see what claims are actually filed in the High Court, and then manage those appropriately. If there are common issues which arise in more than one proceeding, those could be tried together. That would avoid the court being called on to hear and determine a wide range of issues that ultimately prove to be relevant to no claim at all.

[89] An opt in proceeding might also be a workable alternative that would enable the just and efficient co-ordinated resolution of claims relating to Alucobond products. An opt in claim would enable multiple claims (including claims that might not otherwise be viable for cost reasons) to be heard together, without giving rise to the

concerns identified above. But as that approach was not proposed by the appellants, we do not consider it further here.

Summary

[90] Standing back, our overall view is that the directions sought by the appellants would be likely to result in inefficiency, poor use of the court's resources, and unjustified and disproportionate burdens on the respondents. It would not be in the interests of justice, and would not be consistent with the objectives of the High Court Rules, to make such an order.

Result

[91] The appeal is dismissed.

[92] Costs should follow the event in the ordinary way. The appellants must pay each respondent costs for a standard appeal on a band A basis, with usual disbursements. We certify for second counsel for each respondent.

Solicitors:
Russell McVeagh, Auckland for Appellants
Bell Gully, Auckland for First Respondent
Gilbert Walker, Auckland for Second Respondent
Chapman Tripp, Auckland for Third Respondent

Schedule

DRAFT LITIGATION PLAN

Note: Paragraph references are to the Amended Statement of Claim dated 23 December 2021 (**ASoC**) and defined terms have the same meaning as in the ASoC.

The listed issues are disputed by one or more of the defendants (fully or in part).[33]

STAGE ONE ISSUES

Common issues (including sub-group issues) and the representative plaintiffs' individual issues, which can be determined at stage one of the proceeding.

Factual matters

1. Whether Alucobond Plus had a core of approximately 30% PE (ASoC at [14(b)]).

2. Whether Alucobond PE Core Cladding had one or more of the Relevant Uses (ASoC at [16]).

3. Whether Alucobond PE Core Cladding was and is commonly bought or supplied in New Zealand for one or more of the Relevant Uses (ASoC at [17(a)]).

4. Whether Alucobond PE Core Cladding was and is goods of a kind ordinarily acquired for personal, domestic or household use or consumption (ASoC at [17(d)]).

5. Whether PE is a highly flammable synthetic thermoplastic polymer; has a high calorific value similar to that of petrol or propane gas; and when ignited has heat of combustion similar to that of petrol or diesel fuel (ASoC at [18]).

6. Whether, in the event of a fire, the aluminium cover sheets of Alucobond PE Core Cladding do not protect the PE Core from ignition for any of the reasons given at [19] of the ASoC.

7. Whether Alucobond PE Core Cladding is combustible building material within the meaning of that term under the Building Code (ASoC at [20]).

8. Whether, when used as cladding fitted as part of, or as an attachment to, an external wall or other building element, there was, and is, a material risk that Alucobond PE Core Cladding will (ASoC at [21]):

    a. cause or contribute to the rapid spread and severity of a fire, including the rapid vertical spread and/or horizontal spread of a fire in the building; and

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[33] There are two instances where it is unclear if the matters are disputed. This uncertainty is noted as it arises.

b. as a result, will:

i. increase the risk of loss of life in the event of a building fire;

ii. increase the risk of damage to the building and/or building contents in the event of a building fire;

iii. increase the risk of damage to adjacent land or property;

iv. in the event of a building fire, adversely impact the ability of occupants of the building to evacuate;

v. in the event of a building fire, adversely impact the ability of the firefighting authorities to minimise the damage to the building and building contents, and to mitigate against the loss of life or injury to persons in the building; and

vi. represent a material risk to occupants' health and safety in terms of the Health and Safety at Work Act 2015.

9. Whether, and to what extent, the Building Code regulated the use of Alucobond PE Core Cladding (ASoC at [28]).[34] This could be determined at stage one by using sub-groups as follows:

a. Whether, and to what extent, the Building Code regulated the use of Alucobond PE Core Cladding in Relevant Buildings with external walls that are 1 metre or less from a boundary, except if that boundary is a road, railway or open public space. (**Subgroup A**)

b. Whether, and to what extent, the Building Code regulated the use of Alucobond PE Core Cladding to Relevant Buildings with a height of 60 metres or more (from 24 November 2017). (**Subgroup B**)

c. Whether, and to what extent, the Building Code regulated the use of Alucobond PE Core Cladding to Relevant Buildings with a height of 7 metres or more (until 10 April 2012) or 10 metres or more (from 10 April 2012) and which have sleeping on the upper levels of the building. (**Subgroup C**)

d. Whether, and to what extent, the Building Code regulated the use of Alucobond PE Core Cladding to Relevant Buildings with any one of the following height-to-boundary ratios and which are not otherwise subject to combustibility requirements under the Building Code: (**Subgroup D**)

i. 20 m wide x 25 m tall and 30 m or less to the boundary;

ii. 20 m wide x 40 metres tall and 36 m or less to the boundary;

iii. 20 m wide x 60 metres tall and 42 m or less to the boundary.

10. Whether, and to what extent, any Relevant Buildings are excluded from any of Subgroups A–D if they are sprinkler protected (ASoC at [28]).

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[34] It is unclear if this is disputed.

11. Whether Alucobond PE Core Cladding satisfied Acceptable Solution C/AS1 or C/AS2 when used in relation to any of Subgroups A–D (ASoC at [31]).

12. Whether Alucobond PE Core Cladding satisfied Verification Method C/VM2 when used in relation to any of Subgroups A–D (ASoC at [32]).

13. Whether Alucobond PE Core Cladding satisfied any Alternative Solution when used in relation to any of Subgroups A–D (ASoC at [33]).

14. Whether Alucobond PE Core Cladding was subject to any CodeMark certificate for any of the Relevant Uses (ASoC at [34]–[35]).

15. Whether Alucobond PE Core Cladding when fitted as part of, or as an attachment to, an external wall or other building element did not comply with clauses C1, C2.1, C2.2, C2.3, C3.1, C3.2 (except for on importance level 1 buildings), C3.3, C3.5 and/or C3.7 of the Building Code at the time of supply to any of Subgroups A–D (ASoC at [36]).

16. Whether there was a material risk that Alucobond PE Core Cladding when fitted as part of, or as an attachment to, an external wall or other building element did not comply with clauses C1, C2.1, C2.2, C2.3, C3.1, C3.2 (except for on importance level 1 buildings), C3.3, C3.5 and/or C3.7 of the Building Code at the time of supply to any of Subgroups A–D (ASoC at [37]).

17. Whether the Cutterscove Building is fitted with Alucobond PE in or about 2008 (ASoC at [39]).

18. Whether the use of Alucobond PE on the Cutterscove Building did not, and does not, comply with the Building Code (ASoC at [42]–[43]).

19. Whether the use of Alucobond PE Core Cladding on the Don McKinnon Drive did not, and does not, comply with the Building Code (ASoC at [44]–[45]).

20. Whether the use of Alucobond PE Core Cladding on Favona Road did not, and does not, comply with the Building Code (ASoC at [46]–[47]).

21. Whether the state and condition of Alucobond PE Core Cladding were of a kind that: (ASoC at [48])

    a. visual inspection would not detect; and/or

    b. would require specialist skill or expertise to:

        i. detect; and/or

        ii. understand the implications thereof; and/or

    c. once Alucobond PE Core Cladding is incorporated into a building are not able to be inspected; and/or

    d. are latent, in that until Alucobond PE Core Cladding is incorporated into a building and a fire at that building occurs, the relevant state and condition of the goods will not be known.

Second cause of action: Negligence

22. Whether 3A Composites owed Group Members a duty to take reasonable care to ensure it designed, manufactured and/or supplied Alucobond PE Core Cladding in accordance with the matters at [71] of the ASoC.

23. Whether 3A Composites breached that duty for the reasons at [74] of the ASoC.

24. Whether Kaneba owed Group Members a duty to take reasonable care to ensure that the Alucobond PE Core Cladding it imported, distributed and supplied was in accordance with those matters at [72] of the ASoC.

25. Whether Kaneba breached that duty for the reasons at [75] of the ASoC.

26. Whether Skellerup owed Group Members a duty to take reasonable care to ensure that the Alucobond PE Core Cladding it imported, distributed and supplied was in accordance with those matters at [73] of the ASoC.

27. Whether Skellerup breached that duty for the reasons at [75] of the ASoC.

28. Whether Cutterscove and/or Argosy has suffered or will suffer loss and damage by reason of the negligence of 3A Composites, Kaneba and/or Skellerup (ASoC at [76]).

29. Whether Cutterscove and/or Argosy are entitled to damages, interest, costs and/or any other relief against 3A Composites, Skellerup and/or Kaneba (ASoC at [77–79]).

Third cause of action: Negligent misstatement

30. Whether expressly or by implication 3A Composites, Kaneba and/or Skellerup made the: (ASoC at [81]–[84]):

    a. Suitability Representation (including that Alucobond PE Core Cladding was suitable, among other things, use on buildings with residential, commercial or government purposes);

    b. Fabrication Representation (including that the various methods by which third parties could fabricate and install Alucobond PE Core Cladding would not materially affect the performance and safety of the cladding);

    c. Performance Representation (including that Alucobond PE Core Cladding protected against, and did not increase the risks associated with, fire in buildings to which it was fitted); and/or

    d. Compliance Representation (including that Alucobond PE Core Cladding had passed all fire safety tests required by the Building Code and standards in New Zealand).

31. Whether the Representations were continuing representations (ASoC at [85]).

32. Whether 3A Composites, Skellerup and/or Kaneba qualified or contradicted the Representations and/or gave the Relevant Quality Warnings and/or Relevant Limitation Warnings (ASoC at [86]).

33. Whether 3A Composites, Skellerup and/or Kaneba owed Group Members a duty of care not to make false, misleading and negligent statements in relation to Alucobond PE Core Cladding that might result in economic loss or physical harm (ASoC at [87]–[89]).

34. Whether the Representations were false or misleading for the reasons at [91]–[94] of the ASoC.

35. Whether 3A Composites, Skellerup and/or Kaneba breached that duty of care by making any of the Representations (ASoC at [90]).

36. Whether Cutterscove relied upon the Suitability Representation in relation to the Cutterscove Building or alternatively, derived its ownership or leasehold interests through a predecessor in title who had relied upon the Representations (ASoC at [95] and [97]).

37. Whether Argosy relied upon the Suitability Representation in relation to Don McKinnon Drive and/or Favona Road or alternatively, derived its ownership or leasehold interests through a predecessor in title who had relied upon the Representations (ASoC at [95]–[96]).

38. Whether Cutterscove and/or Argosy has suffered or will suffer loss and damage by reason of the negligence of 3A Composites, Kaneba and/or Skellerup (ASoC at [98]).

39. Whether Cutterscove and/or Argosy are entitled to damages, interest, costs and/or any other relief against 3A Composites, Skellerup and/or Kaneba (ASoC at [99–101]).

Fourth cause of action: Negligent failure to warn

40. Whether 3A Composites, Kaneba and/or Skellerup knew or ought to have known about the matters at [103] of the ASoC.

41. Whether 3A Composites, Kaneba and/or Skellerup had a duty to warn Group Members of the matters at [104] of the ASoC.

42. Whether 3A Composites, Kaneba and/or Skellerup breached that duty by failing, adequately or at all, to make the Relevant Quality Warnings and/or Relevant Limitation Warnings (ASoC at [105]–[109]).

43. Whether Cutterscove and/or Argosy has suffered or will suffer loss and damage by reason of the negligence of 3A Composites, Kaneba and/or Skellerup (ASoC at [110]).

44. Whether Cutterscove and/or Argosy are entitled to damages, interest, costs and/or any other relief against 3A Composites, Skellerup and/or Kaneba (ASoC at [111]–[113]).

First cause of action: Breach of s 6, Consumer Guarantees Act 1993

45. Whether Cutterscove was supplied with Alucobond PE Core Cladding as a consumer or, alternatively, derived its ownership or leasehold interest in the Cutterscove Building through a predecessor in title who was a consumer (ASoC at [50]–[53]).

46. Whether Argosy was supplied with Alucobond PE Core Cladding as a consumer or, alternatively, derived its ownership or leasehold interest in Don McKinnon Drive and/or Favona Road through a predecessor in title who was a consumer (ASoC at [50], [54]–[62]).

47. Whether Alucobond PE Core Cladding is not and was not fit for the purposes for which goods of that type are commonly supplied and/or the Purposes and/or safe as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable having regard to the nature of the goods and all relevant circumstances of the supply of the goods (ASoC at [63]).

48. Whether Alucobond PE Core Cladding does not and did not satisfy the Acceptable Quality Guarantee (ASoC at [64]).

49. Whether the failure of Alucobond PE Core Cladding to satisfy the Acceptable Quality Guarantee is and was of a substantial character because of the reasons at [65] of the ASoC.

50. Whether Cutterscove has suffered or will suffer loss and damage by reason of the Alucobond PE Core Cladding that was fitted to the Cutterscove Building and the failure to comply with the Acceptable Quality Guarantee (ASoC at [66]).

51. Whether Argosy has suffered or will suffer loss and damage by reason of the Alucobond PE Core Cladding that was fitted to Don McKinnon Drive and/or Favona Road and the failure to comply with the Acceptable Quality Guarantee (ASoC at [66]).

52. Whether Cutterscove and/or Argosy are entitled to damages, interest, costs and/or any other relief against 3A Composites, Skellerup and/or Kaneba (ASoC at [67]–[69]).

Fifth cause of action: Breach of s 9, Fair Trading Act 1986

53. Whether 3A Composites, Kaneba and/or Skellerup were in trade (ASoC at [115]).[35]

54. Whether 3A Composites, Kaneba and/or Skellerup engaged in the Misleading or Deceptive Conduct as at [116] of the ASoC.

55. Whether Cutterscove was misled or deceived by, or relied upon, the Misleading or Deceptive Conduct in relation to the Cutterscove Building or alternatively, derived its ownership or leasehold interests through a predecessor in title who had relied upon the Misleading or Deceptive Conduct (ASoC at [117]–[119]).

56. Whether Argosy was misled or deceived by, or relied upon, the Misleading or Deceptive Conduct in relation to Don McKinnon Drive and/or Favona Road or alternatively, derived its ownership or leasehold interests through a predecessor in title who had relied upon the Misleading or Deceptive Conduct (ASoC at [117]–[119]).

57. Whether Group Members have suffered or will suffer loss and damage by reason of the Misleading or Deceptive Conduct (ASoC at [120]).

58. Whether Cutterscove and/or Argosy are entitled to damages, interest, costs and/or any other relief against 3A Composites, Skellerup and/or Kaneba (ASoC at [121]–[123]).

Sixth cause of action: Breach of s 16, Fair Trading Act 1986

59. Whether 3A Composites, Kaneba and/or Skellerup were in trade (ASoC at [125]).[36]

60. Whether 3A Composites, Kaneba and/or Skellerup made the false and misleading representations at [126] of the ASoC.

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35 It is unclear if this is disputed.

36 It is unclear if this is disputed.

61. Whether Cutterscove was misled or deceived by, or relied upon, the false and misleading representations in relation to the Cutterscove Building or alternatively, derived its ownership or leasehold interests through a predecessor in title who had relied upon the false and misleading representations (ASoC at [127]).

62. Whether Argosy was misled or deceived by, or relied upon, the false and misleading representations in relation to Don McKinnon Drive and/or Favona Road or alternatively, derived its ownership or leasehold interests through a predecessor in title who had relied upon the false and misleading representations (ASoC at [127]).

63. Whether Cutterscove and/or Argosy are entitled to damages, interest, costs and/or any other relief against 3A Composites, Skellerup and/or Kaneba (ASoC at 128]–[130]).

STAGE TWO ISSUES

The group members' individual issues, which can be determined at stage two of the proceeding.

1. Whether each Group Member is within the definition of "Group Member" in [9] of the ASOC.

2. Whether each Group Member owns or previously owned, or leases or previously leased, a Relevant Building fitted with Alucobond PE Core Cladding manufactured by 3A Composites.

3. Whether each Group Member owns or previously owned, or leases or previously leased, a Relevant Building fitted with Alucobond PE Core Cladding supplied by Kaneba and/or Skellerup.

4. Whether there are any individual reasons specific to a Group Member as to why the use of Alucobond PE Core Cladding would not be in breach of the Building Code.

5. In relation to the third cause of action, whether each Group Member, their agents and/or people involved in the design, construction and maintenance of buildings to which Alucobond PE Core Cladding is now or was a part relied on any of the Representations to their detriment.

6. In relation to the first cause of action, whether each Group Member was supplied with Alucobond PE Core Cladding as a consumer or, alternatively, derived its ownership or leasehold interest in a Relevant Building through a predecessor in title who was a consumer.

7. In relation to the fifth cause of action, whether the Misleading or Deceptive Conduct misled, deceived and/or was relied upon by each Group Member, their agents and/or other people whose conduct relied on the Misleading or Deceptive and caused loss or damage to each Group Member.

8. Generally, whether Group Members have suffered or will suffer loss and damage by reason of any of the first to sixth causes of action against 3A Composites, Kaneba and/or Skellerup.

9. Generally, whether Group Members are entitled to damages, interest, costs and/or any other relief by reason of any of the first to sixth causes of action against 3A Composites, Skellerup and/or Kaneba.

10. Whether the entitlement of each Group Member to relief is barred or reduced by any affirmative defence pleaded by any one of 3A Composites, Kaneba and/or Skellerup.