IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-001143
[2019] NZHC 1614

UNDER	the Consumer Guarantees Act 1993, Fair Trading Act 1996 and High Court Rule 4.24
BETWEEN	DAVID ERIC PAINE and LYNDA CAROLINE BOWERS First Plaintiffs
	…/Plaintiffs cont over
AND	CARTER HOLT HARVEY LIMITED Defendant
AND	AUCKLAND COUNCIL and ORS First to Twenty-Ninth Third Parties

Hearing:	24 June and 1 July 2019
Counsel:	AS Ross QC and RA Havelock for Plaintiffs JG Miles QC, M Heard and ED Nilsson for Defendant FP Divich for Second to Eight, Tenth, Thirteenth, Seventeenth to Nineteenth, Twenty-First to Twenty-Third, Twenty-Fifth, Twenty-Seventh and Twenty-Ninth Third Parties (granted leave to withdraw, abides decision of the Court)
Judgment:	11 July 2019

JUDGMENT OF DOWNS J

This judgment was delivered by me on Thursday, 11 July 2019 at 3 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Adina Thorn Lawyers, Auckland.
Lee Salmon Long, Auckland.
JG Miles QC, Auckland.
AS Ross QC, Auckland.

KEVIN BRYAN START and
FLORENCE ELIZABETH START
Second Plaintiffs

DONALD BRAMWELL JACKSON and
HEATHER MAY PROCTOR JACKSON,
and DONALD BRAMWELL JACKSON,
HEATH MAY PROCTOR JACKSON and
HOLLAND BECKETT TRUSTEE
No. 11 LIMITED as Trustees of the
Jackson Family Trust 2011
Third Plaintiffs

STEPHEN MATHEW DEVCICH,
JESSIE DIANA DEVCHICH and
JOHNNY CHARLES AUGUST as
Trustees of the Devcich Family Trust
Fourth Plaintiffs

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The issues

[1] Shadowclad is a form of external cladding. It is made, supplied and promoted by Carter Holt Harvey Ltd.[1] The plaintiffs have Shadowclad on their homes. On 13 June 2018, the plaintiffs filed a claim against Carter Holt, alleging Shadowclad is inherently defective. The claim is representative. And, funded by a litigation funder.

[2] On 7 June 2019, Carter Holt filed an application to stay or dismiss the claim. Carter Holt contends it is an abuse of process. Carter Holt submits the claim has been brought without the Court's (necessary) permission; the plaintiffs' solicitor made misleading statements in promoting the claim; and funding arrangements are objectionable. Taken together, Carter Holt contends an exceptional remedy is justified.

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1 Carter Holt.

[3] The plaintiffs refute Carter Holt's analysis and note the defendant has taken almost a year to bring its application.

[4] Carter Holt also seeks permission to appeal a ruling I made in March this year,[2] and a stay of the claim until its appeal is heard. The plaintiffs seek timetable directions in relation to the possible staging of trials.[3] More about all these later.

Abuse of process application

Did the plaintiffs require permission to bring their claim?

[5] This limb of the abuse of process application requires only a little legal background; other background is given as the judgment unfolds.

[6] Rule 4.24 of the High Court Rules 2016 provides for representative proceedings—when someone sues or sued on behalf of another or others—and all have the same interest in subject matter. The rule provides:

> **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.

[7] As will be apparent, the rule allows representative proceedings in two different situations. First, when those who are to be represented agree to being so; para (a). Second, when the Court grants permission for the representative proceeding; para (b). The second situation obviously requires a (successful) application for permission. The first does not; the suit may be brought or defended as of right.

[8] It is common ground those represented by the plaintiffs agreed to just that before the claim was filed in June 2018, or later by those who have since joined the

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2 *Paine v Carter Holt Harvey Ltd* [2019] NZHC 478 [*Particulars judgment*].
3 Plaintiffs' application for directions, 10 May 2019.

claim.[4] But, Carter Holt contends the plaintiffs' claim is within the second situation governed by para (b). Central to this argument is the presence of a litigation funder. Carter Holt contends funded representative actions require close supervision by the Courts on a range of issues, including:

> … how the claim is advertised and promoted, what safeguards are in place to ensure accurate communications with represented persons during the course of the claim, whether the terms of funding are appropriate or are unfair or oppressive, whether the proceeding should continue on a representative basis and on what terms, the terms of participation, whether a claim should be conducted on an "opt-in" or "opt-out" basis and what the opt-in or opt-out dates should be.

[9] Carter Holt argues this supervision cannot be easily exercised if plaintiffs do not seek permission under r 4.24(b). So, it contends an application for permission "is a prerequisite to bringing a funded representative proceeding". If this were not so, Courts would be confronted with the difficulty of supervising matters "plaintiffs have elected not to inform the Court or the defendant of", with the defendant then being "roundly criticised as being 'tactical' by the plaintiffs for raising those very matters and asking the Court to exercise supervisory jurisdiction over them".

[10] In short, Carter Holt contends funded representative proceedings should be treated as a *sui generis* category irrespective of the consent of those represented, and therefore within r 4.24(b); permission must be sought.

[11] Carter Holt is correct most, perhaps all, funded representative claims have involved r 4.24(b). This may reflect doubt or dispute over the existence of the same interest, or the absence of consent on the part of some. Or, it may reflect the funder's desire for curial approval given the issues that typically arise in these cases, and which Carter Holt emphasises.[5] However, it is important to be clear about the question. The question is not whether approval is desirable; rather, whether it is required. Three things suggest not.

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4 By signing the funding agreement.

5 Albeit Courts do not approve funding agreements; see *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [28] and *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [76](a).

[12] First, the language of the rule. On the face of r 4.24, permission is not required when consent of those with the same interest has been obtained. The learned authors of *McGechan on Procedure* observe r 4.24: "permits a representative proceeding, *either* with the consent of all the persons who are to be represented *or* as directed by the Court on application".[6] *Sim's Court Practice* appears to have the same view, noting, "It is advisable to seek directions at the outset, or to confine the class to those who have consented, adding further members as consents are obtained."[7]

[13] Second, high authority. In *Credit Suisse Private Equity LLC v Houghton*,[8] the Supreme Court was confronted with a funded representative proceeding. Mr Houghton had obtained the High Court's permission to bring a representative claim under para (b). The issue for the Supreme Court was when the limitation period began. The Court divided, but both the minority and majority treated r 4.24 as meaning what it says.

[14] For the minority, Elias CJ said under the rule, "a person may bring a claim on behalf of others … only with the consent of those with the same interest or 'as directed by the Court on an application'".[9] The Judge continued, "if consent has been given, the plaintiff may file a representative claim as of right. Without consent a representative claim requires the direction of the court".[10] For the majority, McGrath J said:[11]

> Under r 4.24, a representative may sue 'on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding'. A representative action can be commenced with the consent of those to be represented *or* as directed by the Court.

Again, these remarks were made in the context of a funded representative claim.

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6 R Osborne and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR4.24.02] (emphasis added).

7 *Sim's Court Practice* (online ed, LexisNexis) at [HCR4.24.8]. The learned authors later observe "differences of approach" may be required when a litigation funder is involved, albeit without explicit reference to permission under para (a).

8 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541.

9 At [1].

10 At [1].

11 At [126] (emphasis added).

[15] Third, the Courts' liberal approach to representative proceedings. Such an approach is consistent with r 1.2 of the High Court Rules, which seeks to secure the just, speedy and inexpensive determination of proceedings. In *Credit Suisse*, the Supreme Court emphasised "flexibility in how [r 4.24] is applied accords with the modern approach to representative proceedings".[12] In *Visini v Cadman*, the Court of Appeal held consent could be given retrospectively, noting r 4.24 should be "given a wide and liberal interpretation to accord with the spirit and purpose of the High Court Rules",[13] including avoidance of "unnecessary and prejudicial expense, delay and technicality".[14] Carter Holt's submission sits awkwardly with this approach given its insistence on a mandatory rule, an otherwise additional interlocutory step—and associated cost.

[16] The same point can be put another way. As observed, consent is often sought because there is doubt or dispute about whether those concerned have the same interest; who or what is the class? That is not so here. Everyone owns homes clad in Shadowclad. The presence of a funder does not affect this. There is no reason in principle to introduce a requirement the rule does not itself insist on.

[17] Carter Holt contends its argument is supported by the observations of Thomas J in *Cridge v Studorp Ltd*.[15] In *Cridge*, Thomas J emphasised r 4.24(a) requires all persons have the same interest, and consent. The Judge said:[16]

> The requirement of obtaining the consent of all the class members was referred to in *Flowers* and approved in *Credit Suisse*. The policy behind representative actions reinforces that interpretation. Representative actions are intended to corral claims involving the same interest in the same subject matter to avoid a proliferation of proceedings with the same issue. The circumstances of this case, with such a large number of users of the defendant's product, emphasises the correct interpretation of r 4.24; that is, the basis for representation is founded *either* in the consent of all those who have the same interest in the subject matter of the proceeding *or* if the court directs representation on application made by a party or an intending party.
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> The way in which the Application has been framed suggests that, notwithstanding Mr Parker's submissions at the hearing, the plaintiffs accept that court approval is required even in respect of the consenting persons.

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12 *Credit Suisse Private Equity LLC v Houghton*, above n 8, at [129].
13 *Visini v Cadman* [2012] NZCA 122 at [21].
14 At [20].
15 *Cridge v Studorp Ltd* [2015] NZHC 3065.
16 At [53]–[54].

[18] As always, context is everything. Thomas J was asked to make a declaration those who had not yet joined a representative claim should be treated as having done so, thereby potentially avoiding a limitation period. The Judge declined to do so. The issue was not whether permission must be obtained under para (b) when those represented agree to the proceeding under para (a).

[19] In any event, *Cridge* went to the Court of Appeal.[17] For it, French J said:[18]

> If consent has been given, the plaintiff may file a representative proceeding as of right. No other authority for a representative claim than that it is brought with the consent of those represented is necessary. Without consent however, a representative claim requires a court direction.

The Court of Appeal held Thomas J was wrong not to make a declaration.[19]

[20] Consequently, *Cridge* at first instance is distinguishable, spent, and the Court of Appeal's observations consistent with those of the Supreme Court in *Credit Suisse* and its own in *Visini v Cadman*.

[21] All of which means the plaintiffs did not need to seek permission under r 4.24(b) before bringing their claim.

Wrongful encouragement of meritless claims by misleading information?

[22] Ms Adina Thorn is the principal of Adina Thorn Lawyers Ltd, or ATL for short. ATL has extensive experience in leaky building litigation and representative claims. ATL is the plaintiffs' solicitor. Ms Thorn commented publicly about the claim between 28 May 2017 and 13 June 2018 (when, as observed, it was filed). Most of Ms Thorn's comments were through press releases, publication of those, and media interviews. ATL's website provided the vehicle for the balance.

[23] Carter Holt contends within this period, Ms Thorn made misleading statements "designed to encourage registrations of interest in the proceeding for the purpose of achieving sufficient numbers of participants to secure commercial funding". The

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17 *Cridge v Studorp Ltd* [2017] NZCA 376, (2017) 23 PRNZ 582.
18 At [66].
19 At [86].

plaintiffs submit Ms Thorn said nothing misleading, and even if she did, that should not be visited on their claim; the plaintiffs did nothing wrong.

[24] Ms Thorn did not swear an affidavit. This assumed less significance than might otherwise have been the case because Carter Holt made clear if Ms Thorn did, it would reserve its position on her ongoing representation of the plaintiffs, and because ATL's business and practice manager, Ms Mary-Claire Heasley, did.

[25] Ms Thorn's statements are best understood in three categories:

(a) Those drawing a comparison with a claim by the Crown against Carter Holt in relation to Shadowclad on school buildings.

(b) Concerning other means of redress.

(c) About the value of the claim.

[26] First, a point of principle. Carter Holt argues whether a statement is misleading requires objective assessment referable to the audience; here the public and potential claimants.[20] The plaintiffs do not disagree, at least directly, but question the applicability of this analysis given it was open to Ms Thorn to promote the claim, and in the interests of justice she do so. The plaintiffs also question the applicability of case law ultimately traceable to r 4.24(b) given they did not need to seek permission to bring their claim.[21]

[27] To elaborate, misleading statement case law has, thus far, arisen in the context of applications for permission to bring representative claims under r 4.24(b), with those contesting applications identifying alleged misleading statements by the claim's promoter as a basis for refusal of permission. The concern is that by permitting the application in the face of misleading promotion, thereby allowing the claim to proceed, Courts facilitate an abuse of their own processes. In *Southern Response Earthquake*

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20 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].

21 For example, *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 5.

Services Ltd v Southern Response Unresolved Claims Group, Winkelmann J for the Court of Appeal explained matters this way:[22]

> Our starting point then is that there is good reason why the courts should exercise a greater supervisory role in respect of the setting up of representative proceedings than in proceedings where a party pursues its own claim, even if litigation funded. By the "setting up" of a proceeding we mean the funding arrangements and communications with prospective class members. This is because the applicant under r 4.24 is seeking to use a process of the court to enable one plaintiff to represent, and to bind, many. The Court will not grant leave to bring such a claim in circumstances where to do so would be to enable or further an abuse of process. So for example, if the funding arrangement entailed a bare assignment of the represented group's claims, that would amount to an abuse of process which a court could not sanction. Similarly, where the claim has been marketed to prospective litigants with misleading statements, the Court will be concerned not to allow its processes to be used to facilitate that misleading conduct.

[28] It is not obvious why the law should be different simply because permission is not required. If a representative claim is promoted in a misleading way, the integrity of a Court's processes is still impugned, just not quite so directly. The observations of Winkelmann J remain, I think, apposite.

[29] Another consideration supports this view. Lawyers are not allowed to mislead or deceive. Conduct of either nature violates r 11.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, and may violate s 9 of the Fair Trading Act 1986. The test posited by Carter Holt is consistent with these concerns. I adopt it.

Comparisons with the Crown's claim

[30] The Crown is suing Carter Holt in relation to Shadowclad on hundreds of school buildings across New Zealand. Ms Thorn referred repeatedly to the Crown's claim when promoting the possibility of this one. On 4 June 2017, Ms Thorn said this in a Radio Live interview:

> "Shadowclad" is plywood cladding material manufactured by Carter Holt Harvey. The Ministry of Education has brought a legal proceeding alleging that Shadowclad used in certain school buildings is defective. We believe the issue may extend beyond school buildings to homes and commercial buildings that contain the product.

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[22] *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 5, at [78].

> I think the background to understand is the Ministry, the Ministry of Education, have been bringing a claim against Carter Holt Harvey for quite a few years now, I think since about 2013, for Shadowclad. So the Ministry say that 880 odd school buildings have problems with Shadowclad and Shadowclad's a plywood type cladding. And that's been boxing on for a number of years, and on the back of that we've had quite a lot of contact from owners across New Zealand, you know, with the same sort of problems. Shadowclad's been sold nationally for about 30 years and we're seeking registrations of interest to see if there's a class action here on the back of basically the Ministry against Carter Holt Harvey for Shadowclad.
>
> …*[D]elaminating, warping, that's the main allegation that the board breaks down over time.*…
>
> …[The Ministry would be] good people to ask because they've been suing and they've done very well. On the decisions the courts have published in relation to the schools claim against Carter Holt Harvey, they seem to be winning on everything…

[31] On 16 July that year, Ms Thorn told Stuff:

> We're seeking registrations of interest for people that think they've got Shadowclad cladding across New Zealand on our website for a likely class action, which is fully funded, against Carter Holt Harvey. *This is exactly the same claim that the Ministry of Education, the Ministry, are suing Carter Holt Harvey for in relation to 880 school buildings across New Zealand*.

[32] Carter Holt contends the italicised statements are misleading because the Crown's claim against Carter Holt is "significantly different" in two respects.[23] First, that claim is confined to Shadowclad without a cavity (the air gap behind external cladding). Second, it argues "delamination" is not advanced as a defect in the Crown's claim. What constitutes delamination is disputed, but one interpretation of the phenomenon is no more than this: the layers of wood that comprise Shadowclad come apart. Carter Holt argues Ms Thorn cannot have been familiar with the detail of the Crown claim because she asked Carter Holt for that statement of claim. Carter Holt declined to provide it.

[33] The primary allegation in each claim is that Shadowclad is inherently defective, and not fit for purpose as external cladding. It is unlikely the public or potential claimants would consider the absence of a cavity a distinguishing factor; some would not know what a cavity is. Many would regard the two claims as the same given commonality of product and defendant, and coincidence of primary allegation.

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[23] Carter Holt's application, paras 18–19.

So, while there was a whiff of overstatement to Ms Thorn's proposition the plaintiffs' claim was "*exactly* the same",[24] this statement was not misleading.

[34] The same analysis addresses the delamination comment in the Radio Live interview. Other points are relevant too. Most outside of the construction industry would not know what delamination is; I did not. The plaintiffs' expert, Mr John Dalton, says delamination is a feature of the Crown's claim, albeit this nomenclature may not be used in that case.

[35] Moreover, it is not even clear Ms Thorn was referring to the Crown's claim in relation to delamination; context suggests it is at least as likely Ms Thorn was referring to the plaintiffs' claim. Delamination and warping are significant features of it, and Ms Thorn referred to both as comprising the "main allegation" against Carter Holt.

[36] These statements were not misleading.

Other means of redress

[37] The interviews just considered also contain the next category of alleged misleading statements. This exchange occurred in the Radio Live interview:

> **PRESENTER 1**: Why are you wanting to grab this by the throat?
>
> **ADINA THORN**: Oh I don't know if that's fair. I think it's a follow on. I mean if there's people out there with a defective building product, look at it the other way; can that person sue Carter Holt Harvey on their own and get recovery?
>
> **PRESENTER 1**: No.
>
> **ADINA THORN**: Well, put them together in a class action, band them together, take away the risk, the cost of bringing it, put a funder in there and actually you have a viable path.
>
> **PRESENTER 1**: You've got funding, haven't you?
>
> **ADINA THORN**: We've got funding for this stage, and obviously it's all numbers, so if there's enough interest, which there was in James Hardie, then there will be funding for a class action against Carter Holt Harvey.

[24] Emphasis added.

[38] Ms Thorn said this in the Stuff interview:

> **ADINA THORN**: Carter Holt Harvey absolutely deny all allegations against it. This case really turns on this board and whether this board works or doesn't work. And obviously they've got a position on that and obviously we have a position on that and the Ministry has a position on that. I guess the question is why now. I think the answer is there's a global funder that's backing this action and we believe it's a significant issue. And it's not just about the building, this is actually about people's lives, this is about the huge impact on people's lives of having this, the cost of this, and the situation which is you actually can't do anything on your own.

[39] Carter Holt contends these statements were misleading because Ms Thorn said, or at least implied, no other means of redress existed for potential claimants, and this was untrue.[25] Carter Holt has a process for dealing with consumer concerns about Shadowclad. Those anxious about the product could deal with it directly. Or take their own action, including, perhaps, to the Weathertight Homes Tribunal.

[40] These statements could be misleading if they had the effect contended for. However, the public and potential claimants would likely regard them as an expression of opinion that individual suits against Carter Holt would be impracticable due to associated cost and asymmetry of resources, especially given Ms Thorn's references to a class action being "a viable path", to "cost", and to the presence of "a global funder".

[41] It would have been better if Ms Thorn had referred to the possibility of alternative courses; promoters have responsibilities. But again, the absence of such a reference did not make the statements misleading for the reason explained; Ms Thorn's statements would likely have been understood as opinion about the viability of individual lawsuits against a large, well-resourced corporate; indeed, a major player in the New Zealand construction industry.

[42] These statements were not misleading either.

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[25] Carter Holt's application, paras 20–21.

About the value of the claim

[43] On 20 July 2017, a web-based *National Business Review* article said ATL's proposed suit had "already validated claims for $60 million", and ATL "expects … to top $75 million by the end of this month". The same article said Ms Thorn would not be surprised if the total value of claims exceeded "the $100 million mark".

[44] Later statements in the *New Zealand Herald* and reported by *Stuff* refer to the value of the proposed claim as exceeding $40 million.

[45] On 3 April 2018, ATL made a press release referring to "hundreds of property owners" signing to join the proposed action. On 6 August 2018, ATL made another release. It described the claim as "comfortably in excess of $40 million" and "likely to round up to $50 million in the wake of recent developments".

[46] Carter Holt contends all these statements were misleading because there was no "rigorous process to 'validate' claims"; figures differ; and are exaggerated.[26] It contends there cannot have been validated claims for $60 million by 20 July 2017, for, there are now 130 claims or so, and these probably fall well short of $60 million.

[47] As observed, Ms Mary-Claire Heasley is ATL's business and practice manager. Ms Heasley said ATL developed a validation process for ATL's conduct of representative actions, including this one. These include a "traffic light system" in which claims are marked green when the registrant meets all criteria and could be invited to join the action as a plaintiff; amber when there are questions or doubts about the viability of a registrant's claim; and red when it was decided the claim did not meet all criteria for inclusion.

[48] Ms Heasley said she was one of a team who followed "a time-consuming process" of assessing potential claims against Carter Holt. Ms Heasley said ATL's records show the firm spent 220 hours reviewing "responses" to questions of potential claimants in 2017 alone. Some property inspections were conducted by Mr Dalton, the plaintiffs' expert. Ms Heasley produced this flowchart of the process, over page.

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[26] Carter Holt's application, paras 16–17.

Viability of Shadowclad Claim - Steps and Process

A. PRE CALL FOR REGISTRATIONS OF INTEREST

Complaints of Shadowclad over approximately 10 years to Adina Thorn Lawyers

- Owners/ potential clients with Shadowclad contacting firm
- Builders in dispute with Carter Holt Harvey regarding Shadowclad
- Owners with confidential settlements with Carter Holt Harvey regarding Shadowclad
- Concerned owners with Shadowclad
- Owners in correspondence with Carter Holt Harvey regarding Shadowclad on their buildings
- Concerns from building surveyors regarding Shadowclad

1. REGISTRATION OF INTEREST

Question: What year was the building constructed?

Answer: Pre June 2003
OUT

Answer: Post June 2003
CONTINUE

Question: **How do you know that the building is clad in part or whole with Shadowclad plywood cladding?**

We have received answers such as:

- Receipts on file
- On plans/ contract for build
- We purchased or built with it - made the decision to use it
- Expert reports have identified Shadowclad
- CH H has been on site
- Seen the board with the Shadowclad stamp

2. QUESTIONNAIRE TO ASSESS VIABILITY

Registrants asked to:

- Upload photo of entire building
- Upload close up photo of cladding
- Upload photo of damage
- Upload any receipts which show you, the builder or the property developer purchased Shadowclad for use on your building
- Upload WHRS / WHT or expert reports (builder, inspector, assessor, surveyor, engineer)
- Have you previously had any communications with CHH or the building supply company or builder regarding issues with the cladding - upload any documents relating to that contact

Answer: Viability is questionable

Answer: Viability Confirmed
CONTINUE

3. FURTHER INQUIRIES AND REVIEW

- Contact made with registrant to further verify any queries around limitations, damage and proof of Shadowclad
- Refer to solicitor for legal input

Answer: OUT

4. INVITATION TO JOIN SHADOWCLAD CLASS ACTION

Registrants emailed invitation to join action along with plaintiff pack documents. Registrants sign to action and become plaintiffs

[49] Ms Heasley also explained how the figures above were generated. These were based on ATL's extensive leaky building claims experience; its experience with representative claims; conversations with Mr Dalton; "remediation estimates for each home based on [ATL's] assessment process"; and an admixture of art and science. Ms Heasley said 423 potential claims were registered with ATL by 3 April 2018. The figure rose to 442 potential claims by 14 June 2018.[27]

[50] Ms Heasley's evidence answers the allegation ATL did not have a rigorous validation process. So too data. That potential claims numbering 442 have been reduced to approximately 130 claims implies ATL has sifted appropriately. Ms Heasley's evidence also confirms "hundreds of property owners" had signed to join the proposed claim. Likewise, Ms Heasley's evidence demonstrates the $40 million figure was not misleading. In 2009, the Department of Housing and Building published a report saying the average cost of recladding a single-level home was $300,000. So, only 133 homes were required to reach $40 million; fewer once allowance is made for inflation and ever-rising construction costs.

[51] However, Ms Heasley's evidence does not address the accuracy of the statements about $60 million in "validated" claims, claims exceeding $75 million by the end of the month, and potentially exceeding "the $100 million mark". These figures were offered in July 2017, not later. And, as will be recalled, later figures went down, not up. Ms Heasley's affidavit is silent on the number of claims with ATL in July 2017. Ms Heasley could have produced this figure. But did not.

[52] The plaintiffs acknowledge these statements were "outliers" and "extravagant". However, they argue they may not be quotations of Ms Thorn. Therefore, Carter Holt has not established these were Ms Thorn's statements.

[53] There are two answers to this submission. First, the figures must have come from someone. Second, if they did not come from Ms Thorn, it is odd she did not take steps to correct them. It is unarguable Ms Thorn spoke with the *National Business Review* about this time because she is quoted about the value of the claim increasing "quickly", the public's responsiveness to it over "winter", and the fact the claim was

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[27] The number swelled to 544 in June 2019.

"funded". The article also refers to "Related Audio" with Ms Thorn, and "Play, Add to My NBR Radio". I infer these references concern an audio recording embedded in the web-based article in which Ms Thorn speaks with someone on behalf of the *National Business Review*.

[54] I conclude Ms Thorn made the statements at [43]. I also conclude these statements were misleading for the simple reason the numbers cannot be right; they are much too high. I return to this topic later.

Many meritless claims?

[55] The final aspect of this element of the abuse of the process application does not concern allegedly misleading statements; rather, the consequences of Ms Thorn's promotional tactics.[28] Carter Holt submits Ms Thorn encouraged potential claimants to register their interest even if they were unsure when their external cladding was installed, or what it was, "to have a better chance of meeting thresholds for litigation funding to be … available".[29] It says the "predictable result of encouraging and accepting registrations for participation" absent a rigorous validation process is the inclusion "of a significant number of claims which completely lack merit". The submission relies heavily on the evidence of Mr Neil Alvey, a building surveyor retained by Carter Holt.

[56] Mr Alvey has sworn three affidavits. Mr Alvey's most recent identifies alleged dissonance between the plaintiffs' particulars and his visual examination of 17 of the 130 buildings in the claim. Mr Alvey believes:

(a) Five buildings do not have any of the damage alleged.

(b) Another five have minimal damage of the type alleged.

(c) Two are not clad in Shadowclad.

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28 Carter Holt's application, paras 3–14.

29 ATL's website poses a series of questions and answers, including: "The building I own was constructed more than 15 years ago. Should I still register? Yes. As with any legal action, certain time limitations will apply. However, these can be complex. Registration will allow us to assess whether your claim is viable".

(d) Five "are misdescribed in some sense as to the cladding installed and the extent and location of that cladding".

(e) The Shadowclad on one was installed more than 15 years ago (and so time barred).

(f) Damage to the 17 properties is "the result of installation defects", not more.

[57] Carter Holt contends another three homes in the claim are governed by "full and final" settlement agreements between it and their owners. Taken together, it is submitted this provides another basis to stay or dismiss the claim.

[58] As discussed, the plaintiffs do have procedures to validate potential claims. So, this part of the argument has already been considered, and rejected. Moreover, the plaintiffs contest Mr Alvey's opinion, in part by testimony from their expert, Mr Dalton. Similarly, the plaintiffs contest the applicability of the settlement agreements, noting these are quite circumscribed by related correspondence.[30] More detail in relation to either subject is unnecessary. It is sufficient to observe these matters are for determination at trial, and most likely, only after the question of Shadowclad's allegedly inherent defective nature has first been determined. It would be wrong to *assume* Mr Alvey is correct, deploy this assumption to conclude the plaintiffs' claim encompasses an array of meritless ones, stay the claim on this basis, and in so doing, deny the plaintiffs an opportunity to contest Mr Alvey's opinions.[31]

[59] This reasoning also addresses Carter Holt's related argument that, based on its experience from the Crown's claim, "around a third of the buildings will not be clad in Shadowclad". The opinion is contestable, and speculative.

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30 The same correspondence appears to refute Mr Alvers' opinion Shadowclad was not on one home; Carter Holt agreed to replace the Shadowclad on it with new Shadowclad.

31 Carter Holt contends the most recent affidavits on behalf of the plaintiffs' experts acknowledge the homes will need to be examined, and this constitutes a "fundamental shift" in their position. I do not consider the evidence implies a change of position; the parties and their experts continue to differ on *when* examination is necessary.

[60] To recapitulate, the statements at [43] are misleading; all others were not. And, ATL did not encourage meritless claims.

The funding agreement

[61] The final aspect of the abuse of process application concerns the plaintiffs' funding agreement with Harbour Fund III Limited Partnership, or Harbour. Harbour is a limited partnership in the Cayman Islands. Its ultimate parent is Harbour Litigation Funding Ltd, Europe's largest.

[62] Carter Holt advances a wide-ranging attack on the funding agreement.[32] The plaintiffs' defence is equally broad. The plaintiffs filed affidavits from two Queen's Counsel; one from England; the other, Hong Kong. Each essentially said the agreement would be considered unremarkable in each place.

[63] Given this challenge—and response—principle is important. *Southern Response* is again instructive.[33] *Southern Response* involved a representative claim supported by a litigation funder. Permission to bring the claim was required under r 4.24(b). At first instance, Gendall J concluded approval of funding arrangements was necessary. The correctness of this was questioned in the Court of Appeal. On behalf of that Court, Winkelmann J surveyed the law, including the decision of the Supreme Court in *Waterhouse v Contractors Bonding Ltd.*[34]

[64] *Waterhouse* involved a litigation funder but was not a representative action. The Supreme Court held it was not the role of the Courts to act as general regulators of litigation funding agreements, or to give prior approval of such arrangements, at least in cases not involving representative actions. This, obviously, left open the issue for the Court of Appeal in *Southern Response*.

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32 Carter Holt's application, paras 22–26.

33 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 5.

34 *Waterhouse v Contractors Bonding Ltd*, above n 5.

[65] Unlike Gendall J in the High Court, the Court of Appeal concluded it was not within the role of Courts to "approve" litigation funding arrangements in representative actions.[35] Winkelmann J explained why:[36]

> Even so, we do not consider it appropriate to speak of the Court "approving" funding arrangements and marketing materials. First, we see no basis for the court to assume such a power. There is nothing in r 4.24 which enables a court to approve funding arrangements or communications, and in the absence of rules creating a regime for approval, the status of any such approval would be uncertain. Would approval preclude the represented or others from later complaining that the material was misleading? Of more concern perhaps is that court approval, in this context at least, could reassure prospective claimants that all is well with the claim, so that they do not undertake their own assessment. There also must be questions about the institutional capacity of the courts to approve such arrangements in what is at best, in this country, a developing market for litigation funders, and given the absence of any detailed rules of procedure or legislation as exist in other jurisdictions. Rule 4.24 cannot bear the weight of a complex funding approval scheme.
>
> We agree with Mr Cooke that in reviewing the materials for this purpose, the primary concern of the Court will be to ensure that its processes are not used in a way which amounts to an abuse, and in particular that it does not sanction such an abuse by the grant of leave. As this court noted in *Saunders v Houghton (No 1)*, the requirement in the High Court Rules that proceedings be determined in a "just and speedy" manner reflects "the fundamental principle … that there must be no abuse of process" in the way the proceeding is run. We acknowledge that in that case this Court used the language of approval. But when the passage in question is read in context, we think it apparent that the Court was not laying down a requirement that there be an approval process for funding arrangements and marketing of representative claims. The proper approach is as we have set out above.

[66] This discussion would be incomplete without reference back to *Waterhouse*. The Supreme Court held if a funding arrangement assigns the cause of action to the funder, this constitutes an abuse of process.[37] Glazebrook J explained whether there has been an assignment "is assessed through consideration of the terms of the agreement as a whole, including the level of legal control by the funder and its remuneration."[38] Consequently, the "litigation funding agreement and its terms would clearly have to be before the Court to enable it to decide on any such application".[39]

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35 *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group*, above n 5, at [76](a).
36 At [79]–[80].
37 *Waterhouse v Contractors Bonding Ltd*, above n 5, at [57].
38 At [61].
39 At [61].

Carter Holt's submission

[67] Carter Holt contends the funding agreement constitutes an abuse of process because it contains "elements … antithetical to right-thinking people", and because it assigns the causes of action to Harbour. More simply, Carter Holt contends the agreement is inappropriately one-sided, and Harbour has an improper level of control, such that the claim is assigned to it. The same features are advanced for each argument:

(a) Harbour appoints ATL as solicitors.[40] ATL selects the representative claimants.[41] The representative claimants have authority to determine which claims are pursued.[42]

(b) The plaintiffs are required to follow ATL's "reasonable legal advice", including in relation to settlement.[43] Plaintiffs authorise the representative claimants to "make a Settlement Decision, provided … [ATL] has advised that the Settlement Decision is reasonable in all the circumstances".[44] Carter Holt stresses these terms invert the client-lawyer relationship. It is "one thing to require the plaintiffs to act reasonably; another to make them follow (reasonable) legal advice".

(c) Harbour sets the budget without reference to the plaintiffs.[45]

(d) Harbour may refer to Queen's Counsel a concern the representative claimant is not following ATL's advice, or a concern ATL's advice may not be reasonable in all the circumstances.[46] Queen's Counsel's opinion binds the plaintiffs and ATL.[47] But, only Harbour has the right to trigger this process.

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40 Funding agreement, cl 20.1.
41 Clause 20.1.
42 Clause 5.1(a).
43 Clause 6.1(i).
44 Clause 13.1.
45 Clause 20.1.
46 Clause 14.1.
47 Clause 14.2.

(e) The dispute resolution mechanism for the plaintiffs' benefit is "murky".[48]

(f) A plaintiff's termination rights are modest. A plaintiff may not terminate the funding agreement unless Harbour materially breaches it, and the breach has gone unremedied for 30 days.[49] Conversely, Harbour may terminate at "its sole discretion", with seven days' notice.[50]

(g) Harbour can vary the agreement with only the consent of the representative claimants until "funding arrangements [are] approved by the New Zealand Courts".[51]

(h) The agreement acknowledges the plaintiffs have been given an opportunity to obtain independent legal advice.[52] This is contrary to the Code of Conduct for Litigation Funders to which Harbour's ultimate parent subscribes (as a Member of the Association of Litigation Funders of England & Wales). This because cl 9.1 of the Code goes further; it requires a funder "take reasonable steps to ensure that the Funded Party shall have received independent [legal] advice on the terms" of the funding agreement.

(i) English law governs the agreement.[53] Harbour is offshore; as observed, a resident of the Cayman Islands.

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48 This provision reads:
Disputes Resolution
15.1: In the event of any dispute between You and Harbour in relation to any matter arising from this Agreement, You agree that where applicable, the dispute will be initially dealt with following the process set out in clause 14 of this Agreement and otherwise referred to a third party ("Assessor") agreed between Harbour and You within 10 Business Days. Harbour and You agree to use best endeavours to resolve the dispute and agree to be bound by the decision of the Assessor.
15.2: You and Harbour agree that each will pay its own costs and expenses in relation to a dispute dealt with under this clause 15, save that the costs of the Assessor appointed shall be split equally by Harbour and You.

49 Funding agreement, cl 12.1.

50 Clause 11.1.

51 Clause 19.4.

52 Clause 4.1.

53 Clause 19.12.

Analysis

[68] With one exception I quickly come to, the funding agreement *precludes* Harbour from controlling the claim. Clause 5.1(a) of the agreement requires the representative claimant to determine, in consultation with ATL "and without direction from Harbour", what claims should be pursued. Clause 5.2(b) of the agreement requires the representative claimant give "day to day instructions" to ATL, "without direction from Harbour". By the same clause, the representative claimant makes "binding decisions in relation to all matters concerning the claims", again, "without direction from Harbour".

[69] The foreshadowed exception concerns security for costs (and analogous decisions). Clause 5.1(d) provides Harbour does not have control over, or the right to make decisions in, the claim, save for security for costs, "any financial or other commitments or undertakings" by Harbour.[54] This is unremarkable.

[70] The significant power vested in a representative claimant is not inappropriate. Likewise, the requirement a representative claimant follow ATL's reasonable legal advice, including in relation to settlement. A claim as large and complex as this might otherwise be unworkable. Representative claimants act for all plaintiffs. So too, of course, ATL. If representative claimants were permitted to disregard reasonable legal advice, they may seek to prefer their interests. True, other means could address these objectives, for example, a plaintiffs' committee. However, the issue is not the means chosen, but whether Harbour has an improper level of control or the agreement inappropriately one-sided.

[71] Similarly, that ATL chooses the representative claimants is unremarkable. The plaintiffs are spread across New Zealand. It is reasonable to assume some plaintiffs are better equipped to make the important decisions required of representative claimants, and equally reasonable to assume ATL is well placed to select the representative claimants from the plaintiffs' pool. Relatedly, while Harbour has

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54 Funding agreement, cl 5.1(d).

appointed ATL the plaintiffs' solicitor, this can be changed; Harbour may not unreasonably withhold consent to a change of representation.[55]

[72] It is also unremarkable Harbour sets the budget without reference to the plaintiffs: Harbour is expending its own money. I pause here to address an ancillary point. Carter Holt observes amendments to the budget require ATL's consent, and the agreement is objectionable for this reason too. It submits "agreements between lawyers and funders, able to be reached and varied without reference to the client, are impermissible", citing *Clairs Keeley (a firm) v Treacy*.[56]

[73] The plaintiffs in *Clairs Keeley* were victims of what was described as the "finance brokers scandal".[57] The plaintiffs brought a representative claim against a host of defendants. The claim was funded by a litigation funder. The first instance Judge, Scott J, held the arrangement involved champerty, but declined to stay the claim. A majority of the Western Australian Court of Appeal reversed.[58]

[74] Templeman J gave the primary judgment. He considered it incorrect to conclude a litigation funding agreement was champertous merely because it provided the funder with a share of the claim's proceeds.[59] Templeman J said the correct approach required determination of whether the litigation funder was "maintaining" the claim.[60] This required "consideration of the arrangements as a whole".[61]

[75] Templeman J held the funder was maintaining the action. This because the chairman of the funder would "exert the greatest possible influence over the litigation"; the plaintiffs were mere puppets.[62] The Judge was also troubled a component of the solicitors' fees would be paid out of the commission of the funder. This meant the solicitors had a conflict of interest.[63] This provides the context for the Judge's observation it was "an extraordinary thing for an agent to enter into a costs

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55 Funding agreement, cl 6.1(e).
56 *Clairs Keeley (a firm) v Treacy* [2003] WASCA 299.
57 At [41].
58 Murray J dissented.
59 At [55].
60 At [55].
61 At [55].
62 At [132].
63 At [169].

agreement on behalf of his clients, and not tell them".[64] Carter Holt's reading of *Clairs Keeley* is thus available, but its extrapolation of principle to this case, strained.

[76] I return to my broader analysis. Provision for involvement of Queen's Counsel is not an instrument of control. If a representative claimant or plaintiff does not follow ATL's advice because, say, they consider it unreasonable, reference of that dispute to Queen's Counsel benefits everyone. Queen's Counsel are independent—irrespective of who appoints them.[65] A related point arises too. As Dobson J said in *Strathboss Kiwifruit Ltd v Attorney-General*:[66]

> More importantly, the mechanisms for resolving major disputes contemplate the involvement of independent third parties with appropriate expertise. Reputationally, if in no other respect, that will provide a fetter on the funder's ability to act unreasonably.

[77] The other dispute resolution mechanism is not objectionable.[67] Carter Holt contends this clause is of "dubious enforceability", because it refers to "an unnamed 'Assessor', with an undefined role". The short answer is that Courts are obliged to make provisions like this work.[68]

[78] Termination rights are not as one-sided as Carter Holt contends. A plaintiff may "provide instructions or exercise a right to opt out" of the claim.[69] If he or she does, the agreement terminates.[70] Harbour has undertaken not to terminate the claim other than in accordance with the Code described earlier, meaning it may not unless it reasonably:[71]

(a) Ceases to be "satisfied about the merits of the dispute".

(b) Believes the claim is "no longer commercially viable".

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64 *Clairs Keeley (a firm) v Treacy*, above n 56, at [162].

65 Carter Holt argues the agreement is unclear about who appoints Queen's Counsel. Harbour has given an undertaking Queen's Counsel would be jointly instructed, at least if the question concerns termination.

66 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596, (2015) 23 PRNZ 69 at [73].

67 The provisions are reproduced in fn 48.

68 *Sudbrook Trading Estate v Eggleton* [1983] 1 AC 444 (HL).

69 Funding agreement, cl 12.4.

70 Harbour remains entitled to that plaintiff's proceeds.

71 Association of Litigation Funders "Code of Conduct for Litigation Funders" (January 2018) <http://associationoflitigationfunders.com/documents/> at cl 11.2.

(c) Believes there has been "a material breach" of the funding agreement by a plaintiff or plaintiffs.

I accept the plaintiffs' submission Harbour's credibility as a litigation funder provides a commercial imperative for it not to terminate without good cause.

[79] The variation provision—see [67](g)—is balanced. The agreement would be unworkable if every plaintiff had to agree to its variation (unlike the representative plaintiffs). And, as observed earlier, the significant power conferred on representative plaintiffs is not inappropriate.

[80] The funding agreement does not quite conform to the Code's expectation in relation to the provision of independent advice, and for the reason Carter Holt advances; see [67](h). But, this point goes nowhere: it says nothing about an assignment of the causes of action, or the existence of an abuse of process.[72]

[81] There is nothing objectionable about the agreement being governed by English law, or Harbour being resident elsewhere. Capital for litigation may often be available outside New Zealand; Harbour is known to our Courts;[73] and complexity is a fact of modern life. None of this stops our Courts from requiring security for costs (I directed Harbour provide $614,000 until completion of discovery) or exercising the diligent supervision of New Zealand law. Whether an agreement assigns causes of action or constitutes an abuse of process is, obviously, determined by just that.

[82] All of which explains my telegraphed conclusion: I am satisfied the funding agreement does neither. None of this should be understood as endorsement of the funding agreement; still less "approval". As the case law makes clear, these are not matters for Courts. However, it is impossible to assess whether an agreement is an abuse because of its terms without significant discussion of those terms.

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72 Carter Holt also questioned why the plaintiffs initially resisted security for costs on the basis they owned realty in New Zealand, when the agreement requires Harbour to provide security for costs if needed. I acknowledge the point, but it has been overtaken by events given my security order of March; see *Particulars judgment*, above n 2, at [79].

73 *White v James Hardie New Zealand* [2019] NZHC 188.

[83] I mentioned earlier two affidavits from Queen's Counsel in other jurisdictions, both filed by the plaintiffs. I have not relied on either; their relevance and substantial helpfulness are doubtful.[74] Nor have I relied on two affidavits from Mr William (Bill) Wilson QC, both of which were sworn and filed in the *Strathboss* case in 2014 and 2015. Both were annexed to an affidavit from Carter Holt's solicitors on the basis they were in the firm's possession. Mr Wilson's testimony is not part of the record in this claim. It does not become so by someone attaching it to another affidavit, at least without more. In any event, this evidence was not relevant or substantially helpful to my task.

Discovery

[84] This leaves one issue in relation to the funding agreement. Carter Holt seeks discovery of three redacted schedules and two related agreements: a relationship agreement between Harbour and ATL; and a retainer agreement between the plaintiffs and ATL.[75] Carter Holt submits it is entitled to this information citing *Waterhouse* (see [66]); and absent its "visibility", cannot properly ventilate its abuse of process application. The plaintiffs decline to provide the information on the bases it is irrelevant; confidential; and discovery would provide Carter Holt an unfair tactical advantage.

[85] I have not seen the information sought; Carter Holt expressed concern about its *ex parte* consideration. However, I have sufficient detail to determine—and dismiss—the application.

[86] On 25 January 2019, the plaintiffs voluntarily provided Carter Holt the funding agreement. Carter Holt did not contest redactions or pursue the other agreements until shortly before this hearing. The funding agreement explicitly overrides the other agreements in the event of inconsistency.[76] So, Carter Holt has the master agreement, and obviously, all its provisions (apart from the schedules).

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74 Evidence Act 2006, ss 7 and 25.
75 Carter Holt's application, paras 27–28.
76 Funding agreement, cl 19.7.

[87] Carter Holt has not been prejudiced in its conduct of its abuse application. As observed, its attack has been wide-ranging. Nothing in the funding agreement gives rise to concern. It is highly likely discovery of the other agreements or schedules would give Carter Holt an unfair advantage given the nature of the concealed information; for example, the budget. And, had I been troubled by lack of discovery, I would have called for, and inspected, the information despite Carter Holt's potential objection.

Do the statements to the National Business Review amount to an abuse of process?

[88] To refresh memories, the plaintiffs did not need to seek permission for their claim and funding arrangements are unobjectionable. So too Ms Thorn's statements, save for those on 20 July 2017 to the *National Business Review*. Hence the headlined question.

[89] The misleading statements were confined to a single occasion. They went unrepeated. The statements did not concern funding *arrangements*, unlike *Southern Response*. The misleading element was primarily about value (and by implication, number) of claims. That claims had been registered with ATL by 20 July is beyond doubt. It is also relevant Ms Thorn was pre-eminently making a forecast. The mix implies misplaced exuberance in the context of a single media interview, not worse.

[90] It is almost certain sufficient claimants would have come forward irrespective of this publicity, quite apart from the fact we are dealing with one article only in the *National Business Review*. Evidence adduced by the plaintiffs reveals concerns about Shadowclad were public knowledge. The Crown's claim was filed in 2013. Unsurprisingly, it attracted publicity. In 2014, a *Fair Go* programme featured 24 homes on which Shadowclad allegedly failed. In 2015, the Commerce Commission investigated Carter Holt in relation to Shadowclad. Mr Dalton said concerns about Shadowclad had been ventilated within the construction industry and related ones. And, Ms Heasley said ATL received inquiries about Shadowclad some time before the claim was filed. New Zealand is a small place. People talk. It follows this is not a

case in which misleading statements have prompted a claim that would not otherwise have been brought against Carter Holt about its product.

[91] For these reasons, I am satisfied the misleading statements fall well short of an abuse of process, and equally satisfied no corrective action is required, including in relation to the plaintiffs' representation.

[92] I would not have granted a stay even if I had concluded the conduct amounted to an abuse. A stay would be hopelessly disproportionate to the wrong—again see [89]–[90]—and unfair to the plaintiffs. They did nothing improper. This makes it unnecessary to comment on the plaintiffs' affidavits in which they voice contentment with Ms Thorn and ATL, anxiety at the prospect of a stay, and frustration with Carter Holt. I have not relied on this evidence either.

[93] I was told Carter Holt has complained to the New Zealand Law Society about Ms Thorn's promotion of the claim. This judgment should not be read as expressing a view about that complaint.

[94] The abuse of process application is dismissed.

Permission to appeal in relation to particulars and an associated stay

[95] Earlier this year, Carter Holt sought nine categories of particulars from the plaintiffs. I granted three and declined six.[77] Carter Holt seeks permission to appeal[78] and a stay of proceedings pending appeal.[79] Permission is sought on the bases the proposed appeal raises arguable errors of law of "significant importance" to Carter Holt, and "issues of wider significance" or precedential value.

[96] Knowledge of my earlier judgment is assumed.

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77 Particulars judgment, above n 2.
78 Senior Courts Act 2016, s 56(3).
79 Court of Appeal (Civil) Rules 2005, r 12(3).

Principle

[97] The need for permission to appeal acts as a "filtering mechanism", ensuring unmeritorious appeals of interlocutory orders do not cause unnecessary delay.[80] The Court of Appeal has said permission should only be granted when:[81]

> … the significance or implications of an arguable error of fact or law, either for the particular case or for the applicant or as a matter of precedent, warrants the further delay which the appeal process would involve.

Arguable errors of significant importance to Carter Holt?

[98] Carter Holt submits arguable error is apparent across the breadth of the judgment. Carter Holt has helpfully prepared a draft notice of appeal. Alleged errors occupy five and a half pages. However, most involve a recapitulation of arguments already rejected. To these, Carter Holt adds a new submission, a précis of which follows.

[99] Carter Holt contends the judgment fails to address its "primary argument" particularisation of alleged defects is necessary to demonstrate their nature, location and extent. So too liability and loss under the Building Code. Carter Holt submits the problem is exacerbated by the particulars already given by the plaintiffs, for, these are "hopelessly unreliable". Here, Carter Holt relies again on the evidence of Mr Alvey and the points made earlier in support of the abuse of process application; see [55]-[59]. Carter Holt also relies on a shortage of experts caused by the Crown's claim. The defendant contends this shortage compounds the difficulties confronting it: an indeterminate claim populated by inadequate, unreliable particulars. Carter Holt submits scrutiny is required of the plaintiffs' approach, which has wrongly encouraged people to "have a go" absent proper vetting of representative claims.

[100] I am not persuaded this submission is arguable in the sense it enjoys real prospect of appellate success.

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80 *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [13].
81 *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2018] NZCA 291 at [17].

[101] First, it is important to be precise about the nature of the plaintiffs' claim. The plaintiffs allege Shadowclad is inherently defective, hence the product will fail irrespective of design, construction or maintenance. That some of the buildings allegedly clad in Shadowclad may suffer construction or other defects does not necessarily say anything about the likelihood Shadowclad is inherently defective. Equally, that some of the buildings may suffer only minor damage says nothing about the likelihood Shadowclad is inherently defective. Damage and loss must be understood in this context, not the much more common one of a conventional leaky building claim.

[102] I accept numbers could be relevant, as Carter Holt puts it, "in the real world". Imagine, for example, 100 homes clad in Shadowclad being sound in every respect. That the cladding had been installed and maintained correctly on all 100 homes may say something about Shadowclad's properties as exterior cladding. My point, however, remains; the mere fact of correct or incorrect installation says nothing about whether Shadowclad is inherently defective; the product could be inherently defective *and* badly installed. In any event, even the best builders are not perfect "in the real world". Building products must acknowledge the prospect of minor error and still be effective.

[103] Second, this component of the proposed appeal is not really about the provision of particulars, especially given Carter Holt's stance those provided are "hopelessly unreliable". Rather, it is that the plaintiffs' homes should have been closely examined by experts (at the plaintiffs' expense) before bringing their claim, and the plaintiffs' "failure" to do so is now prejudicing Carter Holt. The abuse of process application puts this beyond doubt; the point was not quite so evident when the particulars application was argued earlier this year. However, what I said then remains true:[82]

> … limited inspection of the plaintiffs' 131 homes is unlikely to yield more information about damage and loss than is already known. Intensive examination would. But, this is expensive. It would not be right to visit this cost on the plaintiffs now. I acknowledge the presence of a litigation funder, about whom more shortly. I acknowledge also the argument this should tip the balance. However, this claim is ultimately brought by homeowners about their homes, and one by its pleadings that adequately informs Carter Holt of the plaintiffs' case—for now.

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82 *Particulars judgment*, above n 2, at [68].

[104] Third, I have already rejected the core premise animating this argument: ATL did sift viable claims; see [50].

[105] Fourth, as also discussed in the context of the abuse of process application, Carter Holt's argument risks confusing trial issues for antecedent ones. Likewise, Mr Alvey's related evidence. Mr Alvey may be correct in his opinions. Or not. These matters are for substantive proof for trial, not interlocutory ones about the adequacy or otherwise of the plaintiffs' pleadings, especially when the claim remains an obvious candidate for staging, in which there would be a preliminary trial to determine if the plaintiffs can establish Shadowclad is inherently defective.

[106] Fifth, these points answer Carter Holt's submission about expert scarcity; examination of the plaintiffs' homes is not required now.

[107] Sixth, I remain of the view Carter Holt understands the case it must meet:

(a) The statement of claim particularises the alleged defects and "risk characteristics" of Shadowclad. These are reproduced in the particulars judgment from [45], and not in-extensive.

(b) The central proposition of the plaintiffs' case is not complex. As I said in the particulars judgment, there are only so many ways one can say a product is inherently defective. "Imagination is finite."[83]

(c) Relevant schedules to the statement of claim "fairly inform Carter Holt of the *material* aspects of the plaintiffs' claim in relation to Shadowclad's alleged defects and risks",[84] including applicable standards of the Building Code.

[108] For completeness, whether particulars should be ordered is a legal question, and one based on the adequacy of the pleadings. Doubt attaches to whether expert

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83 *Particulars judgment*, above n 2, at [49].
84 At [53], emphasis in original.

opinion on this issue, either from Mr Alvey or the plaintiffs' expert, Mr Dalton, is substantially helpful.[85]

[109] All but one of the remaining arguments Carter Holt wishes to advance on appeal are addressed in the particulars judgment. These too lack real prospect of success for reasons explained therein.

[110] Carter Holt's last argument concerns third parties. Carter Holt has joined 29 councils as third parties. Carter Holt accepts this part of the case can be "parked". However, it contends it cannot provide the joined councils with particulars unless the plaintiffs first provide it particulars. Carter Holt is troubled its action against the third parties risks being a nullity, relying on *Body Corporate 348047 v Auckland Council [Imperial Gardens Apartments]*.[86]

[111] In *Imperial Garden Apartments*, Faire J was confronted with a statement of claim that said, "The Imperial Gardens Apartments [complex] was constructed with building defects"[87]. The defects were not identified. The statement of claim continued, "The defects have resulted in damage to the Imperial Garden Apartments".[88] The statement of claim did not specify what the damage was. Nor did the statement of claim give any indication as to what the repairs might involve. Faire J concluded the statement of claim was so poorly pleaded it was a nullity.

[112] *Imperial Garden Apartments* was unusual, and distinguishable. There is little risk of Carter Holt suffering the same fate. This conclusion should not be treated as acceptance of Carter Holt's position it cannot provide particulars because of the plaintiffs' stance. More need not be said about this; no evidence was adduced, or correspondence exhibited, of the exchange(s) between Carter Holt and third parties.

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85 Evidence Act, s 25.
86 *Body Corporate 348047 v Auckland Council* [2014] NZHC 2971 [*Imperial Gardens Apartments*].
87 At [12].
88 At [12].

Issues of wider significance or precedential value?

[113] Representative claims, including those concerning allegedly defective building products, are increasingly common. Because of this, Carter Holt contends the particulars judgment may be "influential when particulars requests are determined in subsequent cases". Carter Holt argues this heightens the need for appellate scrutiny, especially as the particulars judgment "unfairly prejudices defendants" by, among other things, "exempting representative plaintiffs from the requirement to provide … particulars".

[114] This characterisation of the judgment is awkward. The judgment does not "exempt" the plaintiffs from providing particulars. It holds those provided by the plaintiffs are adequate given the pleadings. Moreover, the particulars judgment endorses reasoning of Asher and Fogarty JJ from the Crown's claim against Carter Holt.[89] Carter Holt lodged but then abandoned its appeal in that litigation.

[115] Two final points in relation to permission. First, context is everything with particulars; like chameleons, particulars are coloured by their surroundings. Consequently, the prospect of a definitive guideline judgment is possible, but remote. Second, it is not clear the fact this claim is representative adds anything to the potential appellate mix, save perhaps interest.

[116] Permission for an appeal is declined.

A stay pending appeal?

[117] This conclusion means Carter Holt's application need not be addressed.[90] However, I would have declined a stay even if I had granted permission for an appeal. Carter Holt would not suffer prejudice if the claim continued while it awaited its appeal; nothing detrimental to its interests would have happened along the way. Conversely, a stay would have precluded the plaintiffs from seeking case management directions, including potentially important directions for a staged trial; in other words,

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89 *Minister of Education v Carter Holt Harvey Ltd* [2014] NZHC 681 and *Minister of Education v James Hardie New Zealand* [2014] NZHC 2432.

90 Court of Appeal (Civil) Rules 2005, r 12(3).

impeded meaningful progress towards trial despite the plaintiffs' interlocutory success.

[118] Carter Holt contends Mr Dalton's and Ms Heasley's affidavits demonstrate the plaintiffs are agnostic about a long wait. I approach these differently. That the plaintiffs may be resigned to this possibility given delay in relation to the Crown's claim does not make this attractive. Litigants are entitled to the efficient dispatch of justice, a proposition affirmed by r 1.2 of the High Court Rules.[91]

[119] Carter Holt said it would be "helpful" if I acknowledged its particulars application was legitimate. It considers itself besieged by unfair accusations of tactical delay. I accept *some* of its application was: Carter Holt succeeded in relation to three categories of particulars. But, further delay would be undesirable, particularly as I have now ruled (twice) the balance of its application lacked merit. The claim was filed over a year ago, hence the final topic below.

Directions in relation to the plaintiffs' application for case management

[120] On 10 May 2019, the plaintiffs filed an application seeking case management directions; more specifically, staged trials. The plaintiffs contend there should be a preliminary trial to determine if Shadowclad is inherently defective; whether Carter Holt knew or ought to have known that; if Carter Holt owed the plaintiffs a duty of care; and if so, whether it breached that duty.

[121] On 14 June 2019, Carter Holt filed a notice of opposition to the application. Carter Holt does not oppose staged trials "in principle". However, it submits the plaintiffs have provided no evidential basis for staged trials, and expert examination is required as an antecedent step.

[122] The plaintiffs seek timetable directions to progress their application. Carter Holt contends "the whole process is premature" and there should be a case management conference before that step is taken. I disagree. I heard the parties on this issue after the other applications had been argued; a further hearing or conference

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[91] High Court Rules 2016, r 1.2 provides: "The objective of these rules is to secure the just, *speedy*, and inexpensive determination of any proceeding or interlocutory application" (emphasis added).

would add cost but nothing new. The application was filed two months ago. It is time to progress it—and the claim more generally. I direct:

(a) Carter Holt is to file and serve any further evidence in response to the plaintiffs' application by **5 pm, Monday, 12 August 2019**.[92]

(b) The Registry is to allocate the **first-available, one-day fixture before me after 12 August**.[93]

(c) The plaintiffs' submissions are to be filed and served **seven working days** before the hearing.

(d) Carter Holt's submissions are to be filed and served **three working days** before the hearing.

(e) Each party's submissions must not exceed **15 pages**.

Costs

[123] I can think of no reason why the plaintiffs should not have costs. If the parties disagree, they may file brief memoranda.

……..

Downs J

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92 The plaintiffs' application implies all their evidence has been adduced; a position implicitly confirmed at the hearing by suggesting the next step was for Carter Holt to adduce its evidence.

93 The parties agree one day is sufficient.