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Shadowclad & councils

Third-party claims and 10-year limitation periods tested in court.

JUDGES WILL OFTEN ERR ON THE SIDE OF CAUTION WHEN DEALING WITH STRIKE-OUT APPLICATIONS.

In 2013, the Ministry of Education (MOE) sued Carter Holt Harvey (CHH) over 833 school buildings built using CHH's Shadowclad exterior cladding product. MOE alleges Shadowclad is a defective product and claims for remedial costs to repair the school buildings.

In 2013, CHH filed third-party proceedings against 54 councils. CHH alleged that the councils were responsible because defective building practices had been used during construction which was the cause of MOE's losses (MOE claim).

CHH did not serve the councils with the third-party claim until three years later. The reason for the late service was because CHH had sought to strike out the MOE claim against it. Had CHH been successful with its strike-out application, there would then have been no need to pursue the claims against the councils. CHH's strike-out application was unsuccessful.

As a precaution, in 2016 CHH filed a separate proceeding against the 54 councils naming them as defendants (CHH claim).

In December 2016, CHH served the 54 councils with the MOE claim and the CHH claim.

In 2017, the councils brought a strike-out application which included the following grounds:

- That the councils were prejudiced as a result of the excessive delay in serving the MOE claim; and
- That some of the claims for the schools in the MOE claim were brought more than 10 years after the code compliance certificates had been issued.

There is a high threshold to get over when making a strike-out application. Judges will often err on the side of caution when dealing with strike-out applications, often dismissing them in favour of the claim being resolved in the context of a full trial after the evidence has been heard and tested.

In regard to CHH's delay of three years in serving the MOE claim, the councils argued that in respect of some of the claims, the 10-year limitation period had expired, meaning the councils could not bring claims against the parties responsible for carrying out the allegedly defective building work.

CHH argued that the 10-year limitation period did not apply to claims for contribution and as such the councils could still bring claims against the building parties.

CHH argued that its claims for contribution against the councils was a statutory cause of action and not a cause of action arising out of building work. CHH said that meant the 10-year-long stop limitation period in the Building Act 2004 did not apply.

The court rejected CHH's argument that the 10-year limitation did not apply. It found that the claim by CHH against the councils did arise out of building work.

The court then went on to consider whether the three-year delay in serving the MOE claim was so prejudicial that the claims ought to be struck out.

The court accepted the councils suffered some prejudice. However, only six percent of the claims against the councils had become 10 years time-barred between the date the MOE claim was filed and when it was served. The court considered the prejudice fell well below the threshold required to strike out the MOE claim.

While the threshold to surmount when bringing strike-out applications is high as was demonstrated by this decision, the councils did succeed in having some of the claims for some of the school buildings struck out. This was because the court found that the 10-year-long stop limitation applied so it was prepared to strike out claims for school buildings where the code compliance certificate was issued more than 10 years prior to the MOE claim being filed in December 2013.

The decision has not been appealed. **LG**