CITATION: Barwin v. IKO, 2012 ONSC 3969
COURT FILE NO.: CV-09-00005758-CP
DATE: 20120719

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
KEVIN BARWIN Plaintiff	Charles M. Wright, Linda J. Visser, for the Plaintiff
- and -	
IKO INDUSTRIES LTD., CANROOF CORPORATION INC. AND I.G. MACHINE & FIBERS LTD. Defendants	Robert Bell for the Defendants
	HEARD: May 29, 30, & 31, 2012

REASONS FOR JUDGMENT: MOTION FOR CERTIFICATION

Baltman J.

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INTRODUCTION

[1] What value do we place on having a roof over our heads?

[2] This motion for certification alleges that IKO and the other defendants manufactured and sold organic roofing shingles that are defective and prone to premature failure. The plaintiff has brought claims for negligence and breach of consumer protection legislation[1]. He seeks to certify the action as a class proceeding on behalf of persons whose properties contain or contained IKO organic shingles.

[3] Although in their factum the defendants challenged all five criteria under the *Class Proceedings Act, 1992*, during oral argument their counsel advised they opposed the motion primarily on three grounds, which shall therefore be the focus of this decision. The three challenges are:

a) the claim is for pure economic loss and therefore not valid at law;

b) there is no reliable evidence that IKO shingles are in any way defective; and

[1] Although the third as amended statement of claim includes a claim for negligent misrepresentation, that claim was abandoned during oral argument. The statement of claim shall therefore be amended to delete such references.

c) a class proceeding is not the preferable mechanism for resolving these disputes:

[4] At various points in these reasons some of the submissions made by counsel in their facta have been adopted and repeated, in whole or in part.

FACTUAL BACKGROUND

[5] Except where otherwise indicated, the following facts are largely agreed to.

A. The Parties and the Product

[6] The plaintiff, Kevin Barwin, resides in Ottawa, Ontario. In September 1998 Mr. Barwin installed asphalt organic roofing shingles manufactured by IKO at his residence. The shingles were covered by a 20 year warranty period. In April 2010 (12 years into a 20-year warranty), Mr. Barwin became aware that his shingles had begun leaking, falling apart and breaking down. In order to avoid water penetration into his home, he replaced the shingles. He asserted a claim under the warranty but was dissatisfied by IKO's refusal to cover the costs of labour.

[7] IKO Industries Ltd. is an Alberta corporation with its registered head office in Calgary. IKO designs, manufactures, markets and sells roofing materials in Canada. Its materials are used in municipal, industrial, commercial and residential applications across Canada. The focus of this lawsuit, however, is on

the residential applications, particularly organic asphalt shingles used on sloped roofs, as it is those shingles that are allegedly defective.

[8] Asphalt shingles are manufactured by coating a "felt" with "mineral-stabilized" coating asphalt (a mixture of asphalt and mineral matter), and then applying a surfacing of mineral granules that are embedded and adhered to the coating. Two types of felt can be used: (i) organic felts that are saturated with an asphalt material before coating; or (ii) fibreglass felts. The shingles at issue in this case were made with organic felts.

[9] Asphalt roofing shingles are one of the most common roofing materials in Canada and the United States for residential roofs. More than 10.6 billion IKO organic shingles have been sold in Canada, enough to cover over 5 million average sized homes.

[10] IKO has six manufacturing facilities in Canada, including three located in Ontario: Brampton, Hawkesbury and Toronto. It has four sales offices in Canada, including three in Ontario: Madoc, Mississauga and Barrie.

[11] During the relevant years IKO manufactured and marketed roofing shingles under various brand and product names. The shingles were marketed and warranted as offering long-lasting protection for a specified life ranging from 20 to 50 years.

[12] IKO's warranty provides coverage for manufacturing defects resulting in leaks. The warranty has two stages: an initial "iron clad" period (from 1-5 years, depending on the shingle and year of manufacture) during which IKO will pay for both the replacements shingles and the costs of labour to repair or replace them; thereafter, IKO will pay a pro-rated amount of the current value of the shingles, with no contribution toward labour costs. The warranty is not transferable to new homeowners except under limited conditions.

[13] The plaintiff alleges that the IKO organic shingles are not of merchantable quality, are prone to failure as a result of defects, and are not fit for their intended use. He has brought claims for negligence and breach of consumer protection legislation. The consumer protection law claims have only been asserted in respect of those provinces where the legislation explicitly states that it applies in the absence of privity of contract. To date class counsel has been contacted by more than 2,000 putative class members.

[14] IKO stopped selling organic asphalt shingles in 2008 and there are no companies in the industry still making organic asphalt shingles. Fibreglass shingles are now the preferred technology, and are considered longer lasting and better performing shingles.

B. Related Canadian and U.S. Proceedings

[15] Related proceedings have been commenced in Quebec and Alberta. The litigation is being pursued on a national basis in Ontario.

[16] Related class action litigation is currently underway in the United States. The U.S. proceedings were consolidated through the multi-district litigation panel and the consolidated action is being heard in the Central District of Illinois, Urbana Division.

[17] The parties in the U.S. proceedings have undergone significant pre-certification discovery and depositions. The original date for the U.S. certification motion was vacated and the certification motion has not yet been rescheduled.

C. The Parties' Experts

[18] The plaintiff retained Dean Rutila, a civil engineer with the U.S. firm of Simpson Gumpertz & Heger ("SGH"). He is also the expert in the related U.S. proceeding. After testing sample IKO shingles as well as samples from the Barwin home, he concluded that the vast majority failed to meet the relevant Canadian standard. He identified numerous common defects which, in his view, caused the shingles to fail prematurely as a result of excessive moisture in the top coating, surfacing and felt.

[19] The defendants have filed a responding report from John Ricketts. Ricketts is a retired asphalt products manufacturing executive. He opines that Rutila's testing methodology is not only flawed and unreliable, but that its conclusions cannot be extrapolated over all product lines manufactured during a 32 year period.

[20] This conflict is elaborated upon below.

THE TEST FOR CERTIFICATION

[21] Certification of the class is mandatory where the requirements in section 5 of the *Class Proceedings Act, 1992* (the "*CPA*") are satisfied. The section 5 requirements are as follows:

> (a) the pleadings or the notice of action disclose a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> > (1) would fairly and adequately represent the interests of the class;
> > (2) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and
> > (3) does not, on the common issues, have an interest in conflict with the interests of other class members.

Class Proceedings Act, 1992, SO 1992, c. 6, s 5.

[22] As noted above, the defendants oppose certification primarily on three grounds:

1. The plaintiff's claim is for pure economic loss, and therefore does not disclose a cause of action;

2. There is no evidence of a common defect in the design or manufacture of the impugned shingles, and therefore the claim does not raise any common issues;

3. Individual remedies lie under the warranty program and/or through small claims court, and therefore a class proceeding is not the preferable procedure for the resolution of any common issues.

[23] In the recent decision of *Williams v. Canon Canada Inc,* [2011] O.J. No. 5049, para. 124, Justice Strathy provided a useful summary of the principles guiding the certification analysis, many of which originated from the Supreme Court of Canada:

(a) The *C.P.A.* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the Ontario Law Reform Commission, *Report on Class Actions,* 3 vols. (Toronto: Ministry of the Attorney General, 1982) and by the Supreme Court of Canada are: judicial

efficiency; improved access to the courts; and, behaviour modification, or the generation of "a sharper sense of obligation to the public by those whose actions affect large numbers of people": *Hollick v. Toronto (City),* [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 at para. 15; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report* (Toronto: The Committee, 1990) at 16-18 and 20; *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 27-29.

(b) The *C.P.A.* is entirely procedural. The certification stage is not meant to be a test of whether the plaintiff's claim will succeed. In the event that subsections (a) through (e) of s. 5(1) of the *C.P.A.* are satisfied, certification of the action by the court is mandatory: *C.P.A.* s. 5(1), *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948 at para. 39 (Gen. Div.).

(c) The *C.P.A.* provides the courts with a procedural tool to deal efficiently with cases involving large numbers of interested parties, as well as complex and often-intertwined legal issues, some of which are common and some of which are not: *Hollick v. Toronto (City)*, above, at paras. 14 and 15; *Bendall v. McGhan Medical Corp.*, above, at para 40.

(d) Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification. Certification is not a ruling on the merits. A certification order is not final. It is an interlocutory order, and it may be amended, varied or set aside at any time: *C.P.A.* ss. 5(5), 10(1) and 10(2); *Bendall v. McGhan Medical Corp.*, above, at para. 42; *Hollick v. Toronto (City)*, above, at para. 16; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report*, above, at 30-33.

(e) The court has no discretion to refuse to certify a proceeding as a class proceeding solely on the ground that one or more of the following are present: (i) the relief claimed would require individual

damage assessments; (ii) the relief claimed relates to separate contracts; (iii) there are different remedies sought for different class members; (iv) the number or identity of class members is not known; (v) the identified class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members: *C.P.A.* s. 6; *Anderson v. Wilson* (1997), 32 O.R. (3d) 400, [1997] O.J. No. 548 at para. 18 (Gen. Div.); varied (1998), 37 O.R. (3d) 235, [1998] O.J. No. 671 (Div. Ct.); rev'd, certification order varied (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494, (C.A.), leave to appeal to S.C.C. dismissed, [1999] S.C.C.A. No. 476, 185 D.L.R. (4th) vii.

(f) The Ontario class proceeding regime does not require common questions of fact and law applicable to members of the class to predominate over any questions affecting only individual members. It furthermore does not require that the representative plaintiff be typical: *Hollick v. Toronto (City)*, above, at paras. 29 and 30; *Bendall v. McGhan Medical Corp.*, above, at para. 48; *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136, [2003] O.J. No. 3556 at para. 48 (S.C.J.).

(g) In order to succeed on a certification motion, the plaintiff requires only a "minimum evidentiary basis for a certification order". It is necessary that the plaintiff "show some basis in fact" for each of the certification requirements, other than the requirement in s. 5(1)(a) that the claim discloses a cause of action: *Hollick v. Toronto (City)*, above, at paras. 22 and 25.

(h) "*Some basis in fact*" is an elastic concept and its application is difficult. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial: *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 at para. 15 (S.C.J.).

ARE THE CERTIFICATION REQUIREMENTS SATISFIED?

A. Do the Pleadings disclose a Cause of Action?

1. The Legal Framework

[24] In *Williams,* the court summarized the principles applicable to this requirement (para. 176):

(a) The certification stage is not meant to be a test of the merits of the action;

(b) The question is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action;

(c) The proper approach to the s. 5(1)(a) requirement is to apply the "plain and obvious" test that is applied on a motion to strike a statement of claim under Rule 21, for failing to disclose a cause of action;

(d) No evidence is admissible for the purpose of determining the s. 5(1)(a) criterion;

(e) All allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;

(f) The pleadings will only be struck if it is plain and obvious and beyond doubt that the plaintiff cannot succeed and the action is certain to fail;

(g) The novelty of the cause of action will not militate against sustaining the plaintiff's claim;

(h) Matters of law which are not fully settled by the jurisprudence must be permitted to proceed;

(i) The pleadings must be read generously to allow for drafting inadequacies of frailties and the plaintiff's lack of access to many key documents and discovery information;

(j) There is a very low threshold to prove the existence of a cause of action.

[25] In this case, the plaintiff pleads both negligence and breach of consumer protection legislation. I shall examine each in turn.

2. The Negligence Claim

[26] In the statement of claim, the plaintiff alleges that the defendants are liable in negligence. In particular, the plaintiff pleads:

(a) The defendants owe a duty of care to the plaintiff and other persons in Canada who are similarly situated to ensure that IKO organic shingles were designed and manufactured properly;

(b) The defendants breached the duty of care as the shingles were negligently designed and manufactured such that, under normal conditions, they will fail prematurely;

(c) The plaintiff was required to replace IKO shingles in order to avoid water penetration into the structure and interior of the home, which can result in structural rotting, water seepage into electrical fixtures (creating a fire hazard) and proliferation of mould and mildew;

(d) As a result of those breaches, the plaintiff and others have suffered damages which include the cost of repairing and/or removing and replacing IKO shingles.

[27] The defendants argue that the claim is based upon pure economic loss, falling in the category of negligent supply of shoddy goods. They submit that shingles do not present the kind of "real and substantial danger" identified by the Supreme Court as capable of supporting a claim in tort: see *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 at paras. 35-43. There the Court drew a distinction between "dangerous" defects in

buildings and merely "shoddy" construction in buildings, finding that compelling policy reasons existed to impose tortuous liability in the former case.

[28] I have two responses to that submission. First, the plaintiff's claim arguably falls within the parameters of *Winnipeg*. He has pled that he replaced his shingles in order to avoid water penetration into his home and the consequent possibilities of mould, mildew and fire hazards. Those are potentially significant threats to an occupant's health and safety. As La Forest J. stated at para. 43:

> I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create **defects that pose a substantial danger to the health and safety of the occupants**. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the **reasonable cost of repairing the defects and putting the building back into a non-dangerous state.** [emphasis added]

[29] Two appellate decisions further support the plaintiff's position, both of which concern negligent construction of a residence resulting in water penetration. In *Mariani v. Lemstra*, [2004] O.J. No. 4283, at paras. 31-32 and 35, the Ontario Court of Appeal upheld the trial judge's finding that the plaintiff's home had been poorly constructed and was dangerous as a result, in part due to water leakage. I recognize that in that case the trial judge heard expert evidence that water infiltration caused the proliferation of toxic mould inside the home. By

contrast, Mr. Barwin is not alleging that he *incurred* water seepage, but rather that he removed the shingles in order to *avoid* water seepage.

[30] However, the Court of Appeal held that a danger need not be immediate in order to constitute a "real and substantial danger". As the court stated, "the operative principle is explicitly preventative." Recovery for repairs is permitted in order to avoid the greater damages associated with personal injury, should the danger materialize.

[31] Similarly, in *Roy v. Thiessen,* [2005] S.J. No. 195, the Saskatchewan Court of Appeal agreed that *Winnipeg Condominium* does not impose a requirement of "imminent risk" of physical harm to found liability. Defects that permit water penetration can result in the structure rotting, water seeping into electrical fixtures, and proliferation of mould or mildew. As the court observed in para. 38:

> The policy goal must be to encourage homeowners to make any necessary repairs as soon as possible in order to mitigate potential losses; they should not have to delay such repairs until there is an imminent danger of harm.

[32] The defendants rely upon *M.Hasegawa & Co. v. Pepsi Bottling Group (Canada), Co.,* [2002] B.C.J. No. 1125 (C.A.). In that case Hasegawa appealed the dismissal of its action for damages from Pepsi for economic loss resulting from the destruction of defective bottled water purchased from Aqua and bottled

by Pepsi. The water contained mould flocs. The B.C. Court of Appeal determined that there is no liability for pure economic loss without the risk of danger. However, as the Court of Appeal observed at para. 50, "whether this product was potentially dangerous is a question of fact for the trial judge", and there the trial judge found that the evidence "fell well short of proving" that the mould flocs were capable of harming humans. The trial judge was undoubtedly influenced by the fact that after the contamination was discovered, the plaintiff attempted to sell the bottled water to parties outside of Japan; he reasonably inferred that the plaintiff would not have tried to do so if there was evidence showing it was a dangerous product. As the finding in that case followed a trial on the merits, it has no application to the s. 5(1)(a) analysis before me.

[33] My second, alternative response is that irrespective of whether putative class members' claims fall neatly within the parameters of *Winnipeg Condominum*, the cause of action requirement is satisfied because the Supreme Court left open the possibility of claims for repairs in non-dangerous situations. At para. 41 of *Winnipeg* LaForest J. stated:

> Given the clear presence of a real and substantial danger in this case, **I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings.** It was not raised by the parties. I note that appellate courts in New Zealand and in numerous American states have all recognized some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building. In Quebec, it is also now

> well-established that contractors, subcontractors, engineers and architects owe a duty to successors in title in immovable property for economic loss suffered as a result of faulty construction...**For my part, I would require argument more squarely focused on the issue before entertaining this possibility.** [references omitted, emphasis added]

[34] The defendants point out, nonetheless, that a few years after *Winnipeg* was decided, Sharpe J., as he then was, determined in *TransCanada Pipelines Ltd. v. Solar Turbines Inc.,* [1998] O.J. No. 3594 (Ont. C.J.) that as the case involved exclusively economic loss it did not fall within the exception carved out by *Winnipeg* (para. 30). However, unlike here, the claim in that case was not for the cost of repairs - the defendant had already paid that in full - but rather was for revenues lost while repairs were being carried out, a remedy not addressed in *Winnipeg*.

[35] I recognize that in the subsequent case of *Hasegawa* the B.C. Court of Appeal declined to impose liability for pure economic loss, finding that "it would create an implied warranty of product quality for the sale of commercial products, in the absence of contract." (para. 57). I am not aware that *Hasegawa* has been referred to by any Ontario courts. In any case, our Court of Appeal has since taken a more nuanced approach, as evidenced in *Hughes v. Sunbeam Corporation (Canada) Ltd,* [2002] O.J. No. 3457, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 446.

[36] *Hughes* concerned a defective smoke detector. The Court of Appeal overturned the motion judge who had struck the claim as disclosing no cause of action. On behalf of the court, Laskin J.A. observed that while defective smoke alarms are not in themselves dangerous, reliance upon them may be. This case therefore fell "on the border", and should not be barred without a full evidentiary record and proper consideration of various policy concerns associated with the imposition of liability.

[37] Within the last decade several other Ontario courts have allowed pure economic loss claims to proceed, even where there is no suggestion of potential danger. In *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 (S.C.), Nordheimer J. was also considering a certification motion in a products liability case. Although it was undisputed that the case concerned allegedly shoddy products (plumbing materials), without any dangerous component to them, Nordheimer J. concluded that the plaintiffs' claim disclosed a proper cause of action. As he stated at para. 42:

> It would seem, therefore, that the possibility exists that claims for repairs in non-dangerous situations may yet be held to be recoverable. **It is at least clear that the issue is not foreclosed.** Under the prevailing principles dealing with whether a cause of action is disclosed, it has been held that causes of action which are not settled in the jurisprudence should be allowed to proceed. [emphasis added]

[38] Similarly, in *Bondy v. Toshiba of Canada Ltd.*, [2006] O.J. No. 1665 (S.C.), Brockenshire J. declined to strike out a statement of claim on a Rule 21 motion that pled negligence in the design and manufacture of notebook computers. Although his conclusion was influenced by the fact that the proposed claim was combined with an allegation of negligent misrepresentation, and an allegedly direct relationship between the manufacturer and customer, he "agree[d] completely" with Justice Nordheimer's conclusion in *Garlepy* that where causes of action have not been settled in the jurisprudence, they should be allowed to proceed. (para. 11).

[39] Finally, in *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.), leave to appeal denied [2009] O.J. No. 3438 (Div.Ct.), Lax J. certified a class proceeding which, like *Bondy*, involved allegedly defective notebook computers. After reviewing numerous authorities she concluded that despite some reservations in the jurisprudence as to whether a tort claim for pure economic loss is viable, it was "not plain and obvious that the claim cannot possibly succeed" (para. 57).

[40] This jurisprudence is consistent with numerous directives from our Court of Appeal to the effect that legal issues which are novel, complex and important should normally be decided on a full factual record after trial: *Leek v. Vaidyanathan*, [2011] O.J. No. 200 (C.A.), para. 3; *Haskett v. Equifax Canada Inc. et al.*, [2003] O.J. No. 771 (C.A.), para. 24; *PDC 3 Limited v. Bregman +*

Hamann Architects, [2001] O.J. No. 422 (C.A.), paras. 7-12. I note in particular Feldman J.A.'s observation in *Haskett* that while the court may at this stage "recognize" potential policy concerns, it should be cautious in allowing those concerns to determine, without a Statement of Defence and without any evidence, that it is plain and obvious that there is no cause of action (para. 24).

[41] This case too raises legitimate concerns, of both a practical and policy nature, as to whether liability should be imposed for allegedly defective roofing shingles. That those concerns have not to date been clarified in the jurisprudence underscores the plaintiff's argument that they should not be decided at this stage.

[42] The defendants' alternative submission is that the tort duty being asserted by the plaintiff is "parasitic" to the IKO warranty, in that it carries an expectation that the shingles will perform perfectly for the entire warranty period. This submission mischaracterizes the plaintiff's theory in two ways: first, the plaintiff alleges that IKO shingles fail *before* the expiration of the warranty period; second, the plaintiff treats the warranty not as a guarantee but as some evidence regarding the reasonable life expectancy of the shingles.

3. <u>The claim for breach of Consumer Protection Legislation</u>

[43] The consumer protection law claims are asserted solely in respect of those provinces where the legislation explicitly states that it applies in the

absence of privity of contract, namely British Columbia, Saskatchewan, Manitoba, Quebec, and New Brunswick. During argument the defendants mounted no serious attack on these claims, and I see no reason why they should not proceed. Those claims will be determined under the consumer protection legislation of the particular province in which the class member resides.

B. Is there an Identifiable Class?

[44] The definition of an identifiable class serves three purposes: (a) identify persons with a potential claim; (b) define who will be bound by the result; and (c) describe who is entitled to notice: *Bywater v. T.T.C.*, [1998] O.J. No. 4913, para. 10.

[45] In this case the proposed class definition is:

> All persons that own, have owned, lease, or have leased, and all those who have or may pursue claims through or in the name or right of those who own or have owned, lease or have leased, buildings, homes, residences, or any other structures located in Canada that contain or have ever contained IKO organic shingles.

[46] With respect to the consumer protection law claims, the plaintiff proposes the following subclass:

> All persons that own, have owned, lease, or have leased, and all those who have or may pursue claims through or in the name or right of those who own or have owned, lease or have leased, buildings, homes, residences, or any other structures located in British Columbia, Saskatchewan, Manitoba, Quebec and/or New Brunswick that contain or have ever contained IKO organic shingles.

[47] The defendants' primary objection to the proposed class is that, given that IKO sold 30 different brands over a 30 year period, there can be no common design feature which would permit the Court to extrapolate a finding with respect to the plaintiff's shingles to the shingles on each class member's roof. However, as I explain below, the plaintiff's expert (Rutila) has already addressed this issue, and demonstrated at least some basis in fact to conclude that the numerous defects he found in IKO shingles (including the plaintiff's) extend across all their brands and manufacturing locations.

[48] Moreover, inclusion in the class does not depend on the merits of the claim or the outcome of the litigation. In *Griffin* (which concerned allegedly defective computers), the defendants objected to the class definition on the basis that it included persons whose computers did not fail or whose computers were repaired under warranty. The court rejected these complaints on the basis that in product liability cases, because of the prohibition of merit-based definitions, the class definition will invariably include persons without a cause of action: para. 69. The court agreed with the reasoning of Justice Cullity in *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.), para. 78:

> In any class action involving claims in tort for personal injury, or economic loss, it is possible that the claims of some class members will be unsuccessful. This is virtually ordained by the authorities that preclude merits-based class definitions.

C. Are there Common Issues?

1. The Legal Framework

[49] An issue is common where it constitutes a substantial ingredient of each class member's claims and "where its resolution is necessary to the resolution of each member's claim." The commonality question should be approached purposively; the central question is whether certifying a class would avoid duplication of fact-finding or legal analysis. It is not necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim: *Hollick v. Toronto (City)*, above, at para. 18; *Western Canadian Shopping Centres Inc.*, above, para. 39.

2. Common issues relating to the negligence claims

[50] The plaintiff proposes the following common issues relating to the negligence claims:

(a) Did the defendants, or any of them, owe a duty of care to class members to:

(1) ensure that the IKO organic shingles were designed and manufactured properly and in a good and workmanlike manner;

(2) ensure that the IKO organic shingles would under normal conditions, usage and applications last a reasonable period of time;

(3) engage in adequate research and testing in respect of the design of IKO organic shingles;

(4) accurately represent the nature and quality of the IKO organic shingles; and

(5) upon discovering that the IKO organic shingles were defective and prone to premature failure, promptly remove the IKO organic shingles from the marketplace, disclose the defects to class members, and take other appropriate remedial action?

(b) Did the defendants, or any of them, breach any of the above-listed duties of care to class members?

(c) If at the conclusion of the common issues trial the court finds that the IKO organic shingles are defective and prone to premature failure, are class members entitled to mitigate their damages by removing and replacing their IKO organic shingles?

[51] It is undisputed that implicit in those allegations is the existence of a defect in the design and/or manufacture of the shingles. If the plaintiff can establish some factual basis to demonstrate that the product has a common defect across all class members, then, as with many product liability cases, it may be ideally suited to class certification: *Chace v. Crane Canada Inc.*, [1997] B.C.J. No. 2862 (C.A.), para. 16. That is because proof of the product's defect need only be made once, and can then be applied to the entire class of purchasers, "thereby providing access to justice where it would be impractical to take individual proceedings": *Williams*, above, para. 121.

[52] But whether a common defect exists in this case is hotly contested: while the plaintiff argues it has compelling evidence from Rutila that the shingles contain systemic defects, the defendants maintain that Rutila is neither qualified to offer an opinion on the topic, nor capable of pointing to *any* reliable evidence of a common defect.

[53] I disagree with the defendants, on both points. I shall deal first with Rutila's expertise. Rutila has a B.S. and M.S. in civil engineering from the University of Michigan, and more than 30 years experience in the design and construction of buildings, as well as in the investigation and repair of deteriorated roofing and waterproofing systems.

[54] The defendants complain that Rutila "has no expertise in shingle design or manufacture", and therefore cannot provide an expert opinion which supports any allegation of defect. I am not persuaded that one needs hands-on experience in the design or manufacture of a product in order to develop expertise in it. Rutila has 25 years experience in roofing investigations. During that period he has been involved in several hundred shingle investigations. He has led major design projects involving roofing and waterproofing for all types of buildings. He has lectured and written extensively on building durability, effective roofing and waterproofing systems, and the investigation and repair of building leakages.

[55] SGH, where Rutila is employed, is a large engineering firm in the U.S., with several testing laboratories, including a laboratory designated for the testing of roofing materials.

[56] While not determinative, I note that Rutila has previously given evidence before courts in the U.S. In two instances, including the related U.S. proceeding, he was the subject of a "*Daubert*" motion, wherein the court was asked to decide whether his testimony was both "reliable" and "relevant". In both cases, the court was satisfied on both accounts.

[57] I am easily persuaded that based on his knowledge, experience and training, Rutila is qualified to offer an opinion on the question of premature failings of organic shingles and their causes.

[58] On the second point of whether there is any foundation to Rutila's opinion in this case, I am satisfied that his expert report provides the requisite "some basis in fact" that the defective nature of the IKO shingles can be determined on a class wide basis. As noted, Rutila is also the expert in the related U.S. litigation. In the context of that litigation, he had access to 165 sample IKO organic shingles, 98 of which were manufactured in Canada. He conducted various tests on these samples, as well as three samples provided by Mr. Barwin.

[59] Rutila concluded that the vast majority of samples did not meet the relevant industry wide standards (CSA A123.1). He opined that as a result of moisture invasion, the shingles crack, curl, blister, split, warp, delaminate, blow off and otherwise deteriorate prematurely. In particular, he identified the following common defects:

a) underweight top coating (asphalt and filler) mass;

b) excessive fine mineral matter in the surfacing;

c) underweight asphalt saturant in the felt; and

d) non-standard design, including the application of extra surfacing on portions of the tabs.

[60] He concluded that these defects cause shingles exposed to the weather to prematurely fail as a result of excessive moisture in the top coating, surfacing and felt.

[61] The defendants maintain that because there are many different designs that have been manufactured and sold throughout the proposed class period, the essential ingredient of a common issue is missing. Moreover, they argue, the results of testing aged, weathered, deteriorated "complaint" shingles are not evidence that newly manufactured singles were defective. And, they add, there can be numerous causes of shingle malfunction, including poor installation and inadequate venting. For all those reasons, the defendants assert that Rutila's test results cannot be extrapolated to any IKO shingles which are the subject matter of this proceeding.

[62] In my view, Rutila addressed those concerns sufficiently for the purposes of this motion, in several respects. First, the vast majority of samples tested – 159 of 168 shingles, including the three from the Barwin home - failed to meet

the relevant Canadian standard. Ninety-eight of those shingles were manufactured in Canada[2].

[63] Second, as IKO no longer produces organic shingles it was impossible for Rutila to do comparison testing on new shingles; however, he did test numerous "unweathered" shingles that were recovered from various sources, including un-used "exemplar" shingles that IKO had retained, "attic stock" (leftover shingles retained by homeowners), and "un-used" shingle sales boards (shingles installed on a board and used to illustrate the shingles to potential customers). He then compared those to the weathered shingles collected, which were from 9 to 16 years old.

[64] Third, in the context of the U.S. litigation, Rutila explained that the following factors enable him to extrapolate the results from the shingles tested to all IKO organic shingles:

- The results were consistent across product lines and when comparing exposed and unexposed samples;
- IKO represented that the shingles were made the same way the entire time;

[2] Ricketts (the defendants' expert) acknowledged that many of the shingles purchased by U.S. homeowners, particularly in the northern states, were likely manufactured in Ontario.

- The product specifications did not change.

[65] He concluded, "Based on these results, the defects in the IKO organic shingles extend across IKO product names and locations of manufacturing." Rutila stated once comparable samples are available in Canada, it is expected that similar tests will yield similar results.

[66] Fourth, Rutila also considered and rejected other possible causes of deteriorating shingles, including poor installation, inadequate ventilation, or other structural deficiencies on the roofs in question. Significantly, Rutila also found the same defects on uninstalled shingles.

[67] This is unlike the cases of *Poulin v. Ford Motor Company of Canada*, [2006] O.J. No. 4625 (S.C.) and *Ernewein v. General Motors of Canada Ltd.*, [2005] B.C.J. No. 2370 (C.A.) where the alleged lack of commonality in the design was fatal to the certification motion. *Poulin* involved allegedly defective door latch mechanisms, while *Ernewein* involved fuel system designs. In both cases the plaintiffs failed to provide an evidentiary basis for the alleged ability to extrapolate from one product to another, and therefore the requirement for commonality was not met. Here, by contrast, Rutila has directly addressed that question both in his testing and in his report.

[68] Nor is it like *Garlepy*, above, which related to allegedly defective plumbing products. There the court observed that there were a myriad of reasons why a class member's plumbing system might fail and therefore concluded that the common issues requirement was not met. Here, Rutila has expressly ruled out other possible explanations for the widespread defects he found.

[69] In any case, *Garlepy* is inconsistent with a number of cases that have certified product liability and other negligence claims, notwithstanding that individual inquiries might be necessary in respect of causation: *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, paras 36-37. As Lax J. observed at para. 91 in *Griffin*, above:

> Idiosyncratic and difficult issues of causation and damages did not prevent certification in *Bywater, Cloud, Tiboni, Medtronic Inc., LeFrancois, Heward,* and *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136 (Ont.S.C.J.) These are all cases where disparate harm to class members required individual assessments of causation and damages.

[70] Finally, the defendants attacked Rutila's testing methodology as unreliable and unscientific. In my view, that is an issue for trial, where based on a full record and *viva voce* evidence the common issues judge can determine whether Rutila's methodology is sufficient to support his conclusions.

[71] In conclusion, I am satisfied that Rutila's opinion, even after factoring in its alleged deficiencies, provides at least some basis in fact that IKO shingles have a common defect across all class members and do not perform in

accordance with the reasonable expectation of consumers that they be durable and suitable for use as an exterior roofing product.

3. Common issues relating to the Consumer Protection Legislation

[72] Although the specific provisions vary as among the different provinces represented, the relevant legislation creates a cause of action for persons injured as a result of unfair or deceptive practices. Unfair or deceptive practices are generally defined to include inaccurate representations regarding the quality and/or character of the goods. In some jurisdictions (New Brunswick and Saskatchewan), the relevant legislation creates implied warranties that the goods are durable and suitable for its intended purpose.

[73] In *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019, at para. 110, Strathy J. observed that the common issues relating to alleged breach of consumer protection legislation were "ideally suited for resolution on a class-wide basis".

[74] In this case, the court is asked to consider two common documents:

(a) The packaging in which the IKO organic shingles were sold contained a representation that IKO organic shingles comply with CSA A123.1;

(b) The applicable warranties referenced a specific warranty period. The provision of a specific warranty period along with the fact that the limited warranty expires at that time suggests that under normal circumstances, IKO shingles would be expected to perform for at least that period of time.

[75] To the extent that the consumer protection law claims related to implied warranties, breach of the implied warranties can be determined through a finding that IKO shingles are defective and prone to premature failure. Rutila's evidence provides some basis in fact that this can be determined on a class-wide basis.

D. Is a class proceeding the preferable procedure in this case?

1. The Legal Framework

[76] The preferability requirement has two concepts at its core: first, whether a class proceeding is a fair, efficient and manageable method of advancing the claims, and second, whether the proceeding is preferable to other reasonably available means of resolving the claims of class members. In addressing those concepts, the preferability inquiry considers the three goals of class actions: (i) judicial economy, (ii) access to justice; and (iii) behaviour modification: *Kafka v. Allstate Insurance Co. of Canada*, [2011] O.J. No. 1683 (S.C.), paras. 206-7; *Hollick*, above, para. 27.

[77] The term "preferable" is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim, and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute. The preferability determination must be made by looking at the common issues in context, meaning the importance of the common issues must be taken into account in relation to the claims as a whole: *Hollick,* para. 28; *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, paras. 55-58.

2. Analysis

[78] In my view a class proceeding is the preferable procedure for resolving the dispute, for several reasons.

[79] First, a class proceeding is a manageable method of advancing the litigation. A determination of the common issues would resolve whether there was a duty of care, whether the duty of care was breached and whether the defendants committed an unfair or deceptive practice in violation of the relevant consumer protection legislation.

[80] The defendants submit that if certification is granted, the common issues trial will ultimately proceed as a series of trials: one negligent design inquiry for

each brand of shingle. This submission turns on the alleged absence of a common defect, an argument which I have already dismissed for the purposes of this motion and which will become irrelevant if the trial judge finds a common defect.

[81] The defendants further argue that a myriad of causation and damages assessments will necessarily arise, thereby eliminating the theoretical goals of efficiency and economy. They cite the following perceived difficulties, as examples:

a) Determining which shingles failed because of a defect and which because of a myriad of other causes;

b) Calculating pro-rated/premature labour expenses, which will vary by homeowner depending on:

- what portion of the roof needs to be replaced;
- the anticipated labour cost, depending on how far in the future the repairs will take place; and
- since organic shingles are no longer manufactured, the type of shingle being chosen as a replacement;

c) how long claim administration is to last and how limitation periods affect individual claims.

[82] I do not see these issues as prohibitive. As the court noted in *Boulanger v. Johnson & Johnson Corp.*,[2007] O.J. No.179 (S.C.), a case dealing with allegedly unsafe drugs, "[w]hile individual issues of proximate causation, allocation of fault and damages would remain, their resolution will be considerably influenced by the outcome of the common issues trial." (para. 53) If the common issues judge determines that the defendants were not negligent, or that any defect cannot be extrapolated from one product to another, these issues would become irrelevant.

[83] Similarly, in *Griffin*, a products liability case, the court observed at para. 90 that the defendant's submission that the individual issues "outweigh and overwhelm" the common issues is a "familiar refrain in contested class proceedings, particularly in negligence actions". Lax J. did not agree that the so-called "multitude of individual issues" made the proceeding unmanageable. She held that the trial judge could use the "extensive powers and discretions" conferred on the court by s. 25 of the *CPA* to "fashion efficient and fair procedures" to resolve the individual issues. Whether and to what extent other factors contributed to the product failures can be determined by individual mini-trials, references or other methods as directed by the trial judge.

[84] As our Court of Appeal noted in *Cloud v. Canada (Attorney General)* [2004] O.J. No. 4924 (C.A.), paras. 75-6 and 84, the drafters of the *CPA* specifically rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. The critical question to be asked "is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action." In my view the answer here is undoubtedly "yes".

[85] Second, there is no other procedure that would be preferable to a class proceeding. The warranty does not cover labour costs beyond the initial "iron clad" period of 3-5 years. Small Claims Court is expensive and cumbersome for cases such as these. The individual claims are relatively small – in the range of $3,000 to $$8,500 – and would be far outweighed by the cost of retaining an expert to assess and testify regarding the alleged design defect. The testing process for Barwin's shingles took 1.5 days to complete, and Rutila's fees to date are approximately $30,000.

[86] Thus in the absence of this proceeding, the majority of claims would likely not be advanced at all. In *Griffin*, the court observed that it is "fanciful to think that any claimant could pursue an individual claim in a complex products liability case." (para. 92) And in *LeFrancois v. Guidant Corp*, [2008] O.J. No. 1397 (S.C.),

at para. 93, Cullity J. observed that the fact that individual actions are possible does not mean they are preferable:

> The fact that individual actions have been commenced in the United States is not significant. The question is not whether individual actions are possible – but whether a class proceeding is preferable to individual actions by each of the approximately 2000 members of the putative class.

[87] Nor is insurance coverage much of a panacea, for several reasons. First, it doesn't come free: homeowners have paid premiums to obtain coverage and may well be subject to an *increased* premium and/or higher deductible following a water claim. Second, claims for water damage are notorious "red flags" to insurers, signalling that there may be latent yet undiscovered damage that will result in future claims, and may well trigger a termination of insurance altogether, leaving the policyholder – and his/her dependants – in a precarious position.

[88] This underscores the importance of a decent roof over one's head. As Ricketts acknowledged, "anything to do with your house or maybe your car is a concern because those are some of your biggest investments and a roof is certainly a significant part of a home."

[89] Moreover, any notion of judicial economy would be destroyed if each potential class member were required to proceed individually against the defendants and prove the same negligence and consumer protection claims. Multiple proceedings and the consequent waste of judicial resources is now a

huge concern not just in the Central West region of Ontario -- one of the busiest in Canada – but throughout the country. And by resolving common issues in a single proceeding, the danger of producing inconsistent results through a multiplicity of trials is avoided.

[90] Finally, to the extent that damages are paid to putative class members, there will be an incentive for the defendants and others similarly situated to refrain from manufacturing and selling defective products in Canada. This will further the objective of behaviour modification.

E. Is there an adequate representative plaintiff?

[91] Under the *CPA*, there must be a representative plaintiff who:

a) Would fairly and adequately protect the interests of the class;

b) Has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and

c) Does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[92] I am satisfied that the proposed representative can adequately represent the interests of the class with respect to the negligence claim. I also believe he

can fairly represent the proposed subclass with respect to the consumer protection legislation. Although he personally has no interest in that issue, their causes of action share common issues of law and fact. I note that in *Griffin*, separate representation was not required as there was a nexus between the representative plaintiffs and class members because they all purchased or leased the identical product from the same manufacturer: para. 97.

[93] Moreover, the proposed litigation plan sets out a workable means of advancing through the major steps of the litigation, including notifying prospective members, document exchange, discovery and other steps leading to the common issues trial. In terms of the resolution of individual issues, the plan contemplates:

a) A summary claims procedure, whereby putative class members provide evidence to substantiate that they had IKO organic shingles, that their shingles failed prematurely and their resulting damages;

b) Appointing an adjudicator to make determinations regarding class membership, causation and damages; and

c) A mechanism whereby the defendants can challenge causation before a court-appointed referee.

[94] In their factum, the defendants have raised several concerns about the litigation plan, in particular the proposed notice program and where the evidentiary onus on causation lies. These points were not pressed during argument and, as currently outlined, I do not find them sufficient to bar the proceeding. However, should concerns remain, counsel may address them by way of case conference.

CONCLUSION

[95] For the reasons set out above, I certify this action as a class proceeding. To the extent there are any outstanding matters to be resolved before the formal certification order can be taken out, the parties may arrange a case conference with me. If the parties cannot reach an agreement with respect to costs, this can also be addressed at the conference.

Baltman J.

Released: July 19, 2012

CITATION: Barwin v. IKO, 2012 ONSC 3969
COURT FILE NO.: CV-09-00005758-CP
DATE: 20120719

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KEVIN BARWIN

Plaintiff

- and –

IKO INDUSTRIES LTD., CANROOF CORPORATION INC. AND I.G. MACHINE & FIBERS LTD.

Defendants

REASONS FOR JUDGMENT: MOTION FOR CERTIFICATION

Baltman J.

Released: July 19, 2012