IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA563/2017
[2018] NZCA 580

BETWEEN	JAMES HARDIE INDUSTRIES PLC First Appellant
	JAMES HARDIE NZ HOLDINGS Second Appellant
	RCI HOLDINGS PTY LIMITED Third Appellant
AND	KAREN LOUISE WHITE AND THE PERSONS LISTED IN SCHEDULE 1 First Respondents
	WAITAKERE GROUP LIMITED Second Respondent
	METLIFECARE PINESONG LIMITED Third Respondent
	FOREST LAKE GARDENS LIMITED Fourth Respondent
	VISION (DANNEMORA) LIMITED (NAME CHANGED TO METLIFECARE DANNEMORA GARDENS LIMITED) Fifth Respondent
	METLIFECARE COAST VILLAS LIMITED Sixth Respondent

Hearing:	13 and 14 June 2018
Court:	French, Cooper and Winkelmann JJ
Counsel:	J E Hodder QC, J A McKay and A J Wicks for Appellants B D Gray QC and J S Cooper QC for Respondents
Judgment:	13 December 2018 at 10 am

JUDGMENT OF THE COURT

A The appeals are dismissed.

B The cross-appeals are allowed and orders made as set out at [128].

C The appellants are jointly and severally liable to pay the respondents one set of costs for a complex application for leave to appeal on a band B basis and usual disbursements. We certify for second counsel.

D Costs in the High Court are to be fixed in accordance with the outcome of this judgment.

REASONS OF THE COURT

(Given by Winkelmann J)

Table of Contents

[1] When may a parent company be liable for defective products made, marketed and sold by its subsidiary company? That is the principal issue on this appeal.

[2] The claimants (because of the appeals and cross-appeals it is easiest to call them the claimants) are past or present owners of homes, commercial buildings and retirement villages clad with exterior cladding products manufactured and supplied by the James Hardie business in New Zealand.[1] In two sets of proceedings (the White proceeding[2] and the Waitakere proceeding[3]) the claimants allege that the James Hardie products (the products) were defective, not watertight, and failed to comply with prevailing building standards.

[3] The defendants are four operating companies and three holding companies in the James Hardie group (the Group). The holding companies pursue this appeal.

[4] The original James Hardie business was established in Melbourne in 1888 but expanded to New Zealand in 1937 as James Hardie & Coy Pty Ltd, now renamed Studorp Ltd, one of the operating company defendants. Studorp initially manufactured and supplied the products in New Zealand, but in 1998 it sold its fibre cement business, including its manufacturing plant, to James Hardie New Zealand, another operating company defendant.

[5] The other operating company defendants are James Hardie Australia Pty Ltd, a company incorporated in Australia which manufactures and supplies fibre cement building products, and James Hardie Research Pty Ltd, again incorporated in

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1 Approximately 1132 homes, four commercial buildings and five retirement villages.
2 CIV 2015-404-2981.
3 CIV 2015-404-3080, the claim in respect of the five retirement villages.

Australia. James Hardie Research carries out the research, development and design of fibre cement building products and systems.

[6] The holding companies are James Hardie Industries Plc (JHI), the ultimate parent of the Group; James Hardie New Zealand Holdings (JHNZH), the immediate parent of James Hardie New Zealand; and RCI Holdings Pty Ltd (RCI), the immediate parent of Studorp. All of the defendants are wholly owned by JHI although some through the intermediary of other wholly-owned subsidiaries. Each of the holding company defendants sought to bring an early end to the claims against them, arguing that since they did not manufacture, market or supply the allegedly defective products, the claimants cannot succeed against them. JHI protested the jurisdiction of the New Zealand courts to determine the proceeding against it, while JHNZH and RCI applied for summary judgment.

[7] In the High Court, Peters J upheld JHI's protest to jurisdiction but only in relation to part of the claim against it.[4] She declined JHNZH and RCI's summary judgment applications.[5] As a consequence, all three holding companies remain defendants in the proceeding.

[8] JHNZH and RCI now appeal the refusal of summary judgment while JHI appeals against the decision in respect of the protest to jurisdiction, to the extent the protest was dismissed. The claimants cross-appeal against those parts of the judgment that upheld JHI's protest to jurisdiction.

[9] This is a general appeal. Accordingly, this Court must make its own assessment of the issues.[6]

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4 *White v James Hardie New Zealand* [2017] NZHC 2105 [High Court judgment] at [144]–[145].
5 At [145].
6 *Austin, Nicholls & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

Factual background

The claims

[10] The properties the subject of the claims in the two sets of proceedings were constructed or re-clad with James Hardie product between 1983 and 2011. They were clad in fibre cement sheets with one or other of the brand names Harditex, Monotek or Titan (sometimes also known as Titan Board) manufactured by either Studorp (prior to 1998) or James Hardie New Zealand. We refer to these three products collectively as the products.

[11] The claimants allege that James Hardie New Zealand and Studorp, together with the other defendants, including the holding companies, engaged in the business of designing, developing, testing, manufacturing, marketing, distributing and selling the product (collectively referred to as the James Hardie Actions). In the course of marketing and distributing the product, the claimants allege that the Group has also made statements about the nature and quality of the products (the James Hardie Product Statements) and has written, published and released technical information for use in conjunction with the products (the James Hardie Product Information). The holding companies are alleged to be liable for the defective products because:

(a) of their direct involvement in James Hardie Actions, James Hardie Product Statements and the James Hardie Product Information;

(b) of their superior knowledge about the James Hardie products, knowledge relied upon by the operating defendant companies;

(c) the operating defendant companies, James Hardie New Zealand and Studorp, acted as their agents, and

(d) in the case of JHI, it assumed responsibility for the operating companies.[7]

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[7] These alternative bases of liability were not pursued in argument in the High Court, and are not pursued before us.

[12] The claimants plead five causes of action against the holding and operational companies (all the defendants) as follows:

(a) *Negligence*: In making supplying and promoting the products, James Hardie (by which we mean all of the defendants) owed a duty of care to take all reasonable steps to ensure that the products would not cause damage, would be weathertight and would comply with applicable standards. James Hardie breached that duty by manufacturing and supplying the products; failing to carry out adequate testing; failing to modify or withdraw the products on learning of the deficiencies; or by permitting these acts or omissions to occur.

(b) *Breach of duty to warn or withdraw products*: The claimants allege that from the early 1990s on James Hardie knew, or ought to have known, that the products would be deficient and that on learning of that, James Hardie owed and breached a duty to warn, inform and/or take reasonable steps to withdraw the products.

(c) *Negligent misstatement*: The claimants allege that James Hardie owed a duty of care to ensure that statements they made promoting the products were true and complete. James Hardie breached this duty by making or authorising James Hardie Product Statements which were not true, correct or complete.

(d) *Breach of Consumer Guarantees Act 1993 (CGA)*: The claimants allege that all James Hardie defendants, including the holding companies, are manufacturers for the purposes of the CGA. As manufacturers, they provided statutory guarantees under that Act, including guarantees that the products were fit for the purpose for which they were marketed, corresponded with the description with which they were supplied and were of an acceptable quality. James Hardie breached those statutory guarantees.

(e) *Fair Trading Act 1986 (FTA)*: The claimants allege all James Hardie defendants were in trade for the purposes of the FTA, and engaged in misleading or deceptive conduct (s 9) and/or made misleading representations

as to the characteristics of the products (s 13(a)). The conduct relied upon is making or authorising the James Hardie Product Statements; endorsing those statements by causing or permitting the James Hardie name and brand to be used in connection with the products and the James Hardie Product Statements; and failing to inform, warn or withdraw the products on learning of the defects. The conduct is said to be misleading or deceptive because it caused the plaintiffs to believe that the products were, in short, fit for purpose.

JHI: application to set aside protest to jurisdiction

[13] We first address the appeal and cross-appeal in respect of JHI's protest to jurisdiction.

High Court judgment

[14] Peters J said the following facts disposed of the negligence and negligent misstatement causes of action. The holding companies were not the manufacturing entities; there was no evidence they made or authorised the James Hardie Product Statements or James Hardie Product Information, and there was no evidence the operating companies undertook these actions as their agents.[8] She reviewed the evidence of JHI's involvement in the affairs of the operating companies, and concluded there was no serious issue to be tried that JHI had assumed responsibility for the actions of the operating companies.[9] The Judge rejected the claimants' argument that the relationship between JHI and its subsidiaries was such that they operate essentially as one.[10] She said the evidence established no more than the "orthodox incidents of a group structure".[11]

[15] In respect of the second cause of action, the Judge said it was common ground a manufacturer may owe a duty to warn — the issue was whether the holding companies did too. She accepted there was evidence tending to prove that the products were defective.[12] She proceeded on the basis the claimants would be able

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8 High Court judgment, above n 4, at [109].
9 At [118].
10 At [112] and [118].
11 At [118].
12 At [120].

to show those defects were made known to JHI. The Judge accepted that the law in the area of holding company liability for the acts or omissions of subsidiaries was developing.[13] She said the evidence before the Court was very brief and so she could not discount the prospect of further relevant evidence coming to light. She noted the absence of evidence as to JHI's receipt of profits from the sale of defective products, and as to the extent to which JHI was informed of risks and liabilities for those products.[14] That evidence, she observed, was within the hands of the defendants. Nevertheless, on the basis of the evidence that had been put before her, she was satisfied that there was a serious issue to be tried on the duty to warn cause of action and failure to warn part of the FTA cause of action.[15]

[16] In respect of the fourth cause of action, breach of the CGA, the Judge accepted that it was arguable that JHI fell within the definition of manufacturer so as to be liable, but found that the exclusion of liability under s 26 of the CGA applied.[16] She said JHI could not be liable for the act or omission of "any person other than the manufacturer" as, if there was an omission, it was that of the company in New Zealand which physically manufactured the product.[17] Given that, the Judge was satisfied that there was no serious issue on this cause of action.

[17] In respect of the fifth cause of action, breach of FTA, the Judge noted she had already determined that there was no serious issue to be tried against JHI to the extent that the cause of action relies upon JHI having made or authorised the James Hardie Product Statements.[18] This ruled out, she said, the claim for breach of s 9 of the FTA and the claim for breach of s 13(a). But if the claimants were able to establish the deficiencies in the product that they alleged, and knowledge on the part of JHI, then she accepted there was a serious issue to be tried that a failure to warn, inform or withdraw the products might constitute a breach of s 9 of the FTA.[19]

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13 At [99].
14 At [122].
15 At [123]–[124].
16 At [129]–[133].
17 At [133].
18 At [135].
19 At [142].

[18] The Judge ruled that JHI's protest to jurisdiction would be dismissed if the claimants filed an amended statement of claim confining their causes of action against JHI to those alleging a failure to warn.[20]

The procedural context of these appeals

[19] Where service of a proceeding has been effected without leave outside New Zealand (as was the case in respect of JHI) and the party served has protested jurisdiction under the r 5.49 of the High Court Rules 2016 (the Rules), then under r 6.29 the Court must dismiss the proceeding unless the party effecting service can show that (a) there is a good arguable case that the claim falls wholly within one or more of the grounds set out in r 6.27(2), (b) there is a serious issue to be tried on the merits, and that (c) New Zealand is the appropriate forum for the trial. The only issue in respect of JHI's protest to jurisdiction is whether there is a serious issue to be tried on the merits. There is a serious issue to be tried on the merits if there is a serious legal issue to be tried and a sufficiently strong factual basis to support the legal right asserted.[21] The test is whether "at the end of the day, there remains a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desires to try...".[22]

[20] Similarly, the issue on RCI and JHNZH's application for summary judgment under r 12.2 is whether these companies have shown that none of the causes of action in the claimants' pleading can succeed.[23]

JHI: duty of care causes of action

Arguments on appeal

[21] The issues raised on the appeal and cross-appeal are broadly the same for the first three (duty of care based) causes of action. Each turns upon whether there is a serious issue to be tried on the facts that JHI owed a duty of care to those who used product manufactured by the New Zealand subsidiaries, Studorp or James Hardie

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20 At [145(b)].

21 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [37]; citing *Harris v Commerce Commission* [2009] NZCA 84, (2009) 12 TCLR 379 at [57]–[61].

22 *Seaconsar Far East Ltd v Bank Markazi Johhouri Islami Iran* [1994] 1 AC 438 (HL) at 452.

23 High Court Rules 2016, r 12.2(2).

New Zealand.[24] It is therefore convenient to address the appeal and the cross-appeal in respect of these causes of action together.

[22] Mr Hodder QC, for the holding companies, argues in support of the appeal that errors in the Judge's reasoning led her to dismiss JHI's protest to jurisdiction in respect of the second and part of the fifth causes of action.

[23] First, the Judge applied the wrong legal test in determining when a parent company may owe a duty of care in relation to the acts of its subsidiaries. Although there are cases in which holding companies have been held liable for the acts of their subsidiaries, those cases establish that such liability is limited to two situations only — where the holding company has exercised direct control over the acts of the subsidiary at issue so that it can be said to have assumed responsibility for them, or where the parent company has "superior knowledge" of the risk of harm arising from the acts of the subsidiary so that it is safe to infer that the subsidiary will rely on the parent deploying that superior knowledge to protect against the relevant risk. In Mr Hodder's submission, neither circumstance applies here.

[24] Second, in allowing the possibility of liability for holding companies doing that which it is in the very nature of a holding company to do, the Judge contemplated imposing liability on a company in its capacity as a shareholder of another company; an approach inconsistent with the doctrine of the corporate veil. Mr Hodder submits that appellate courts around the world have consistently held that the use of a group management structure, including appointment of a parent company's executives to the board of a subsidiary or the issuing of Group policies or directives, does not make the parent liable for the acts of a subsidiary, whether by way of a direct duty of care, "piercing the corporate veil", vicarious liability or otherwise. Drawing upon the long title to the Companies Act 1993, he argues that the law in relation to companies facilitates important policy objectives, and that those objectives would be undermined by the extension of liability for acts of a subsidiary to its parent company. It provides the legal structure for modern enterprise to achieve economic and social benefits, and to manage and spread economic and business risks.

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[24] Rule 6.28(5)(b).

[25] Third, the Judge erred in extending the duty to warn recognised by the Supreme Court in *Carter Holt Harvey* to non-manufacturers.[25] This, Mr Hodder argues, is inconsistent with a line of authorities that such a duty is limited to manufacturers and with the recognised rationale of that duty.

[26] The claimants cross-appeal is in relation to those parts of the High Court judgment allowing JHI's protest to jurisdiction. In respect of the breach of duty causes of action, they argue that the Judge was wrong to find there was no serious issue to be tried; that JHI could not be liable in negligence or for negligent misstatements when it had both control of and active involvement in critical aspects of the subsidiary companies manufacturing business.

Relevant principles

[27] The application of principles emerging from three separate lines of authority are at issue on this appeal. The first is to do with the principle of separate legal personality for corporate entities; the second, the circumstances in which a duty of care will be imposed; and the third, linking the first two together, is a line of authority as to the circumstances in which a parent company may owe a duty of care to those affected by the actions and omissions of its subsidiary.

Separate legal personality and limited liability for incorporated bodies

[28] The central principle of modern company law is that a company has its own legal personality. As the learned authors of *Company Law in New Zealand* explain, to say that a company has its own legal personality is to say two things:[26]

> First, the law treats a company as a legal person, capable of enjoying most of the rights and bearing most of the duties that can be enjoyed or borne by a natural legal person. Secondly, this legal personality is the company's own, in that it is separate from the legal personalities of those persons who hold shares in the company.

[29] These concepts find expression in the Companies Act. Section 15 provides that a company is a legal entity in its own right, separate from its shareholders.

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[25] *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [73]–[77].

[26] Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2016) at 23.

Section 97 provides that a shareholder is not liable for an obligation of the company by reason only of being a shareholder.[27] Section 128 provides that the business and affairs of a company must be managed by or under the supervision of the company's board, a provision which reflects the fact that although a company is a legal entity, it has no corporeal manifestation and must act through others.

[30] The principle that a company must be treated like any other independent person with rights and liabilities appropriate to itself extends to groups of companies. Each company in a group of companies "is a separate legal entity possessed of separate legal rights and liabilities",[28] even where, by reason the extent of control exercised over the affairs of the subsidiary, they are "creatures of their parent companies".[29]

[31] As a legal entity, a company can use agents to act for it and it can also act as agent for others. There is however, no presumption that a subsidiary company acts as the agent of its parent.[30] A wholly-owned subsidiary is not, by that reason alone, the agent of the parent company, even where they have directors in common.[31] Something more than the fact of control of the subsidiary by its parent is needed to constitute an agency relationship.

[32] It also follows from these principles of separate legal personality and limited liability that a shareholder does not, by reason only of its position as shareholder, owe a duty of care to anybody. Thus, in *Kuwait Asia Bank EC v National Mutual Life Nominees* it was held that, in the absence of fraud or bad faith, a shareholder who controls the appointment of a director owes no duty to creditors of the company to take reasonable care to see that directors so appointed discharge their duties as directors with due diligence and competence.[32]

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27 This rule does not apply where the constitution provides that the liability of a shareholder is unlimited. Section 97(2) sets out the extent of liability of a shareholder of a limited liability company.

28 *The Albazero* [1977] AC 774 (CA) at 807.

29 *Adams v Cape Industries Plc* [1990] Ch 433 (CA) at 536. See also *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (CA) at 306, 312 and 316.

30 *Salomon v Salomon and Company Ltd* [1897] AC 22 at 43; and *VTB Capital plc v Nutritek International Corpn* [2013] UKSC 5, [2013] 2 AC 337 at [138]–[139].

31 *Attorney-General v Equiticorp Industries Group Ltd (in Statutory Management)* [1996] 1 NZLR 528 (CA).

32 *Kuwait Asia Bank EC v National Mutual Nominees Ltd*, [1990] 3 NZLR 513 (PC) at 532. See also *Thompson v The Renwick Group Plc* [2014] EWCA Civ 635, [2015] BCC 855 at 860.

[33] It is common ground therefore that something more than ownership, and the ability to control which comes with that, is needed to justify the imposition of a duty of care in the circumstances of this case.

The imposition of novel duties of care

[34] The basis upon which a holding company can be liable in negligence in respect of defective product manufactured and supplied by its subsidiary is a developing area of law in other jurisdictions, and a largely untouched area of law in this jurisdiction. Therefore, in New Zealand at least, the claimants can fairly be said to be arguing for the imposition of a novel duty of care upon the holding companies.

[35] The circumstances in which a "novel" duty of care (not previously imposed in earlier case law) will be recognised was discussed by the Supreme Court in *North Shore City Council v Attorney-General.*[33] Blanchard J, writing for himself, McGrath and William Young JJ, said that a party alleging a duty of care in a novel situation must establish first that the loss was a reasonably foreseeable consequence of the defendants' acts or omissions.[34] In novel cases, this is "at best a screening mechanism, to exclude claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss".

[36] If foreseeability is established, the court must then address whether that loss occurred within a relationship that was sufficiently proximate. This requires an examination of the closeness of the connection between the parties, and other considerations such as whether a finding of liability will create "disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff" and whether it will expose the defendant, and those in the same position as the defendant, to indeterminate liability.[35]

[37] At the second and final stage of the inquiry, a court may decide, as a matter of policy, that no duty should be imposed notwithstanding that foreseeability and

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33 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341.
34 At [157].
35 At [159].

proximity are established.[36] It does so because of factors external to the relationship which mean it would not be fair and reasonable to impose the duty upon the defendant. Issues such as the capacity of the parties to insure, impact on the operation of markets, or consistency within the overall legal system may arise.

[38] As may be apparent from Mr Hodder's argument, it is the proximity and policy stage of the inquiry which are the focus of this appeal.

Parent company liability

[39] As noted, the issue of the imposition of a duty of care upon a parent for the acts of its subsidiaries has come before the courts in other jurisdictions, but not previously in New Zealand.

(a) Australian authority

[40] In *CSR Ltd v Wren* the New South Wales Court of Appeal considered a challenge to an award of damages against CSR in the Dust Diseases Tribunal.[37] The Tribunal had found the plaintiff's mesothelioma was caused by inhaled asbestos fibres while the plaintiff was employed by CSR's subsidiary Asbestos Products Pty Ltd. That finding was confirmed on appeal. The Court of Appeal said that the operations of the subsidiary company were managed by CSR staff, to an extent that it was subject to the direction and control of CSR.[38] CSR's duty to the plaintiff was co-extensive with that of his employer, Asbestos Products Pty Ltd. The Court said the imposition of this duty did not do violence to the principles of corporation law enshrined in *Salomon v Salomon*:[39]

> To the extent that Asbestos Products Pty Ltd entered into contracts or engaged in other activity calling into play legal relations, it, Asbestos Products Pty Ltd, incurred its own legal liability. The reason CSR is liable in the circumstances here is because it brought itself into a relationship with the employees of Asbestos Products Pty Ltd by placing its staff in the role of management at Asbestos Products Pty Ltd.

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36 At [160].
37 *CSR Ltd v Wren* (1997) 44 NSWLR 463 (CA).
38 At 484.
39 At 485.

[41] *James Hardie & Co Pty Ltd v Hall* is a decision of the same court issued only a few months after *CSR Ltd v Wren.*[40] A New Zealand-based employee of James Hardie, suffering from asbestos-induced mesothelioma, sought to recover damages not from his employer but from two Australian-based holding companies. On the claimants' case, these companies had management and control of the New Zealand plant, knew of the link between asbestos and disease, and profited from the sale of asbestos from the New Zealand plant. The claimant argued the holding companies owed duties to warn of the risks associated and failed to take steps to ensure a safe work place.

[42] At first instance, the Judge found in favour of the plaintiff.[41] He was satisfied the parent company knew of the risks in connection with asbestos. He was also satisfied that there was control by the parent of the relevant part of the operation because the board of the holding company made recommendations and issued instructions to the New Zealand entity which were acted upon, and it had taken over running aspects of the New Zealand business, including taking responsibility for a safe workplace.

[43] Sheller JA, writing for the Court, set aside the verdict on the ground that the duty of care was not made out.[42] Of the alleged duty, he said:[43]

> While the way in which the case was put and apparently accepted by Judge O'Meally gives lip service to the integrity of the corporate veil, implicitly it lifts it by saying that the control of the workplace was not that of the subsidiary company occupier or employer but, through their influence or control, that of the defendants.

[44] The Judge said that lifting the corporate veil was not justified in the absence of evidence that the New Zealand subsidiary was a mere façade.[44] He distinguished *CSR Ltd v Wren* on the basis that there it was employees of CSR who directed and controlled the system of work. That, he said, "did not involve any question of lifting of the corporate veil".[45]

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40 *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 (CA).
41 At 559.
42 At 584.
43 At 581.
44 At 584.
45 At 583.

[45] These two authorities, *CSR Ltd v Wren* and *James Hardie v Hall*, are difficult to reconcile in light of the factual findings at first instance. It seems that the Court in *James Hardie* took a different view to the trial Judge as to the extent of control exercised by the parent company, although the nature or basis of this disagreement is difficult to assess as the Court does not engage in any detail with the Judge's factual findings. The Court of Appeal in the latter case did not, however, doubt that a parent company could be liable for the acts of its subsidiary where it had taken over running aspects of the subsidiary's business.

(b) English authority

[46] The issue of parent company liability came before the English courts in *Chandler v Cape plc.*[46] The plaintiff had alleged that the parent company, Cape plc, owed its subsidiary's employees a duty of care to create a safe system of work, and had breached that duty, causing him, a former employee, to contract asbestosis some 50 years later.[47] The evidence established that Cape maintained a level of control over the production of asbestos at the site.[48] Products were manufactured in accordance with its specifications, and product development was carried out at a central laboratory with a group chemist.[49] Cape also employed a group medical doctor, who conducted research into the link between asbestos dust and asbestosis, and related diseases.[50] It was conceded that, at the material time, the parent knew that asbestos exposure in substantial concentrations was foreseeably hazardous.[51] The trial Judge found that Cape owed a duty of care to the employee.[52]

[47] On appeal, the Court of Appeal of England and Wales upheld this finding.[53] In dismissing the appeal, Arden LJ, with whom the other Judges agreed, said:

> [78] Given Cape's state of knowledge about the Cowley Works, and its superior knowledge about the nature and management of asbestos risks, I have no doubt that in this case it is appropriate to find that Cape assumed a duty of care either to advise Cape Products on what steps it had to take in the light of

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46 *Chandler v Cape plc* [2011] EWHC 951 (QB).
47 At [7].
48 At [48] and [61].
49 At [56].
50 At [51]–[53].
51 At [62].
52 At [77].
53 *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111.

> knowledge then available to provide those employees with a safe system of work or to ensure that those steps were taken. The scope of the duty can be defined in either way. Whichever way it is formulated, the injury to the claimant employee was the result. As the judge held, working on past performance and viewing the matter realistically, Cape could, and did on other matters, give Cape Products instructions as to how it was to operate with which, so far as we know, it duly complied.

[48] The Judge summarised the broader principles in play as follows:

> [80] In summary, this case demonstrates that in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.

[49] *Chandler v Cape plc* has been discussed or applied in a number of later decisions of the English Court of Appeal. In *Thompson v The Renwick Group plc* the principal issue was whether a parent company had assumed a duty of care to employees of its subsidiary in health and safety matters by reason of having appointed a director to its subsidiary with responsibility for health and safety matters.[54] Applying *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* the Court held that a duty of care could not be imposed on that basis.[55] There were, however, other circumstances alleged to justify the imposition of a duty of care.[56] The plaintiff pointed to co-ordination between subsidiaries of their business, although there was no evidence the parent company had played a hand in this.[57] The parent was a holding company and there was no evidence that it carried on any business at all other than holding shares.[58]

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54 *Thompson v The Renwick Group Plc,* above n 32.
55 At [25]–[26].
56 At [27].
57 At [36].
58 At [37].

[50] Tomlinson LJ, writing for the Court, found that the facts before the Court fell well short of those required for the imposition of a duty of care.[59] He did however observe that the formulation by Arden LJ set out at [47] above was not intended to be exhaustive of the circumstances in which a duty might be imposed.[60] It merely illustrated, the Judge said, the way in which the test for imposition of a duty of care might be met.[61]

[51] The issue again came before the Court of Appeal of England and Wales in *Lungowe v Vedanta Resources plc.* Zambian citizens had sued a Zambian-registered company and its United Kingdom parent Vedanta for personal damage and injury caused by pollution from a copper mine in Zambia, owned and operated by the Zambian company.[62] Vedanta held 80 per cent of the shares in the Zambian company. The claim pleaded that the parent company owed a duty because the business of the parent and subsidiary were the same; Vedanta knew or ought to have known about the unsafe discharges from its subsidiary's mine; Vedanta had superior expertise, knowledge and materials in relation to the environmental and health issues connected with the discharge; and Vedanta knew or ought to have known that its subsidiary would rely upon that knowledge and those resources.[63]

[52] Writing for the Court, Simon LJ upheld the first instance Judge's refusal to dismiss claims against the Zambian company and Vedenta.[64] He said that a duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary, where the parent company:[65]

> … (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim.

[53] Commenting on the first of the four indicia in *Chandler v Cape plc,* the Judge said that it was not enough that the businesses of the parent and the subsidiary were in

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59 At [39].
60 At [33].
61 At [33]; citing Michael Jones and Anthony Dugdale (eds) *Clerk & Lindsell on Torts* (20th ed, Sweet & Maxwell, London, 2010) at [13.04].
62 *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528, [2018] 1 WLR 3575.
63 At [21].
64 At [136]–[137].
65 At [83].

the relevant respects the same, the parent must also be well placed because of knowledge and expertise to protect the employees of the subsidiary.[66] However, if both parent and subsidiary have such knowledge and expertise, so that they took joint decisions about mine safety, which the subsidiary then implements, then they *both* may owe a duty of care to those affected by the decisions, a duty which could be owed to employees and to those affected by the operations.

[54] *Okpabi v Royal Dutch Shell Plc* was again a case before the Court of Appeal of England and Wales.[67] Nigerian citizens who lived in areas affected by serious and on-going environmental damage caused by leaks from pipelines, brought a claim against a Nigerian incorporated company, Shell Petroleum Development Company of Nigeria Ltd (SPDC), and its United Kingdom parent, Royal Dutch Shell Plc (RDS). The evidence was that the pipelines were operated pursuant to a joint venture between SPDC, the Nigeria National Petroleum Corporation and two other parties. It was the Nigeria National Petroleum Corporation rather than SPDC which held the majority share in the joint venture.

[55] The claimants alleged RDS owed the claimants a duty of care either because it controlled the operation of the pipelines from which the leaks occurred or because it had assumed a direct responsibility to protect the claimants from the environmental damage caused by the leaks.[68] The claimants relied on the imposition throughout the RDS group of mandatory policies, standards, design and practices, and supervision of those practices; an element of financial control over SPDC; and a high level of direction of SPDC's operations.[69] It was held at first instance there was no arguable case that such a duty was owed.[70]

[56] The majority of the Court of Appeal of England and Wales dismissed the appeal.[71] Simon LJ conducted an extensive review of the evidence. He said that the matters relied upon showed concern by RDS to ensure that proper systems were in place to reduce losses and environmental damage, and that there was a system to

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66 At [83].
67 *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191, [2018] Bus LR 1022.
68 At [3].
69 At [86] and [193].
70 *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC), [2017] Bus LR 1335 at [118].
71 *Okpabi v Royal Dutch Shell Plc,* above n 67, at [132] and [209].

ensure best uniform practices.[72] However, the claimants had not demonstrated an arguable case that RDS controlled SPDC's operations or that it had direct responsibility for practices or failures which were the subject of the claim. He drew a distinction between a company which controls or shares control of the material operations on the one hand and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies in order to ensure conformity with particular standards.

[57] Sir Geoffrey Vos agreed with the reasoning of Simon LJ, adding that the facts were distinguishable from *Vedanta,* noting in particular that SPDC had a minority interest in the joint venture, and "therefore the capacity of SPDC (let alone RDS) to avoid the breaches alleged by the claimants is at least questionable".[73]

[58] Sales LJ dissented. He said that the issue was whether RDS had assumed a material degree of responsibility for how the relevant operations of the subsidiary were carried out.[74] He agreed with Simon LJ that simply setting global standards (even if they purport to be mandatory) to guide the conduct of operating subsidiaries would not be sufficient to lead to the imposition of the duty of care on RDS. But, he said, in the particular circumstances of the case, the existence of those standards was capable of providing a mechanism for "the projection of real practical executive control by RDS's CEO and ExCo over the affairs of SPDC, if they wished to".[75] ExCo was an executive committee established within the group, consisting of the head of each of RDS's global businesses. Sales LJ was satisfied that it was arguable, on the evidence, that ExCo's activities involved executive control over the business, and were attributable to RDS.

[59] Following the hearing of this appeal, counsel drew to our attention a further and very recent decision of the Court of Appeal of England and Wales — *AAA v Unilever Plc*.[76] The claimants in that case were employees living on a tea plantation run by the Kenyan subsidiary of the United Kingdom registered parent, Unilever.

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72 At [127].
73 At [197].
74 At [172].
75 At [161].
76 *AAA v Unilever Plc* [2018] EWCA Civ 1532.

The claimants alleged they were victims of serious inter-tribal violence at the time of the 2007 presidential elections, and that their employer, and Unilever, owed them a duty of care in tort to take effective steps to protect them from violence. Sales LJ, with whom the other Judges agreed, found that there was no basis on the documentary evidence to call in question the evidence filed by Unilever and its subsidiary to the effect that risk management policy, so far as it applied to the subsidiary, was framed at the local level.[77] Accordingly, there was no arguable basis for the imposition of a duty of care upon the parent Unilever. The Judge nevertheless set out a helpful summary of the relevant principles as follows:

> [36] There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case. The legal principles are the same as would apply in relation to the question whether any third party (such as a consultant giving advice to the subsidiary) was subject to a duty of care in tort owed to a claimant dealing with the subsidiary. Helpful guidance as to relevant considerations was given in *Chandler v Cape Plc*; but that case did not lay down a separate test, distinct from general principle, for the imposition of a duty of care in relation to a parent company.
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> [37] Although the legal principles are the same, it may be that on the facts of a particular case a parent company, having greater scope to intervene in the affairs of its subsidiary than another third party might have, has taken action of a kind which is capable of meeting the relevant test for imposition of a duty of care in respect of the parent. The cases where this might be capable of being alleged will usually fall into two basic types: (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with: see *Vedanta Resources*, at [83]) the subsidiary's own management; or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk. As to claims of the first type, see *Chandler v Cape Plc; Vedanta Resources* at [83]; and *Okpabi* at [86]–[89] and [127] (Simon LJ) and [141] (Sales LJ). …

(c) Canadian authority

[60] There has also been recognition by the Canadian courts that the imposition of a duty of care on a parent company in consequence of its direct actions in the exercise of control it has over a subsidiary's operations does not entail the piercing of the corporate veil.

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77 At [30] and [40].

[61] In *Choc v Hudbay Minerals Inc* the Ontario Superior Court of Justice allowed a claim to proceed to trial against a Canadian holding company relating to alleged human rights abuses by its wholly-owned subsidiary's employees.[78] The Court said that the allegations rested upon the holding company's "on-the-ground" control, and not upon its shareholding control.[79]

Principles to be applied

[62] These authorities reveal a developing body of principles as to the circumstances in which a duty of care may be imposed upon a parent company for the acts or omissions of its subsidiary. They also show that the law is far from settled in Australia, the United Kingdom or Canada. The following principles can however be extracted.

[63] A parent company does not owe a duty of care in respect of the operations of its subsidiary merely because it has the ability, through its shareholding, to control the operations of its subsidiary by appointing directors to it.[80] That is a consequence of the application of the principle of separate corporate personality. However, it is also a consequence of that principle that, as with all legal entities, a company's actions are capable of having legal consequences for it. The principles that apply to the imposition of a duty of care upon any party can apply to a parent company. This is not a surprising conclusion. After all, the law does not shield a company from the legal consequences of contracts it enters into as part of its support of the operations of its subsidiaries. It is not clear to us why the law should shield the parent from the consequences of actions taken to support a subsidiary that bring it into such proximity with a claimant so as to justify the imposition of a duty of care.

[64] The principles of liability for a parent company are not therefore inconsistent with New Zealand company law. We do not accept Mr Hodder's submission that the imposition of such a duty of care undermines the policy objectives of the Companies Act, or more generally, the policy behind the development of the

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78 *Choc v Hudbay Minerals Inc* 2013 ONSC 1414, (2013) 116 OR (3d) 674; see also *United Canadian Malt Ltd v Outboard Marine Corp of Canada Ltd* (2000) 48 OR (3d) 352 (Sup Crt).

79 At [67].

80 *Kuwait Asia Bank EC,* above n 32; and *Thompson v The Renwick Group Plc,* above n 32.

principles of incorporation and separate legal personality for the corporate form. Nor do we accept his argument that the principle of separate legal personality should be applied to immunise holding companies from the legal consequences of their actions, just because those actions fall into the category of companies doing what they usually do within large corporate groups.[81] The principles we have outlined do not cut across or undermine the concepts underpinning separate legal personality, indeed they depend upon them. We are satisfied that, given a sufficient factual basis, the claimants should be permitted to argue for the application of these principles in New Zealand.

[65] Mr Hodder also argues the Judge was wrong to allow claims to proceed in a case which falls outside the two categories outlined in *Chandler*. As we come to shortly, there is evidence sufficient to bring this proceeding within those two categories. But in any case, as our discussion of the authorities makes clear, the categories described in *Chandler* were not intended to be exhaustive and have developed in more recent cases. It would be wrong for us, at this interlocutory stage, to rule out the possibility that more bases for liability will be recognised or that these two categories will develop still further. Our analysis of the authorities suggests the following three categories of potential liability:

(a) where the parent takes over the running of the relevant part of the business of the subsidiary;[82]

(b) where the parent has superior knowledge of the relevant aspect of the business of the subsidiary, the subsidiary relied upon that knowledge, and the parent knew or ought to have foreseen the alleged deficiency in process or product; and

(c) more generally where the parent takes responsibility (irrespective of superior knowledge or skill) for the policy or advice which is linked to the wrongful act or omission.[83]

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81 A similar submission was rejected by Arden LJ in *Chandler v Cape plc,* above n 53, at [67].

82 *CSR Ltd v Wren,* above n 37; and *Lungowe v Vedanta Resources Plc,* above n 62.

83 *Lungowe v Vedanta Resources Plc,* above n 62, at [83]; and *Okpabi v Royal Dutch Shell Plc,* above n 67, at [86]–[89], [127] and [141].

[66] It is clear that the mere fact of coordination within a group is not enough. Evidence will need to show that coordination results from control by or reliance upon the parent, and that control is in some way relevant to the alleged wrong.[84] There is some comment in the cases to the effect that it is not enough that the parent publishes guidelines or policies which it requires the subsidiary adhere to, and that there must be evidence of enforcement of those policies or guidelines.[85] We are not prepared to put the matter so narrowly at this point. We prefer to leave to be decided, within the facts of a particular case, whether it is sufficient for the imposition of a duty that a parent company publishes the guideline, policy or specification later implicated in the wrongful act or omission and requires the subsidiary to adhere to it.

The evidence

[67] It is next necessary to address whether, given these developing principles, there was a serious issue to be tried on the available evidence that JHI owed the alleged duties. As we have earlier noted, that turns upon issues of policy and proximity. We have addressed the policy issues raised by Mr Hodder above and turn to the factual issues bearing upon proximity.[86]

[68] The evidence for the applications came from several sources. Affidavits were completed by James Hardies executives, employees and former employees describing the operations of the Group. The claimants also relied upon affidavits provided by various experts, commenting upon the degree of integration and control that can be deduced from James Hardies' corporate structure and accounts. For the purposes of these issues at least, we have not found the expert evidence of substantial assistance and do not propose to refer to it further.[87] Finally, a number of documents have been produced from a variety of sources.

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84 *Thompson v The Renwick Group Plc*, above n 32, at 865.

85 *Okpabi v Royal Dutch Shell Plc,* above n 67, at [196].

86 For the purposes of this appeal we do not understand issue to be taken with issues of foreseeability. Nor did we understand issue to be taken, again for the purposes of this appeal, that the holding companies would have been aware that complaints were being made about the quality of the product.

87 Although we do note that Mr Peter Lalas evidence contains evidence of his own participation in a James Hardie design process in Australia, for a product not the subject of this proceeding. That evidence is not however of assistance at this point of the proceeding.

Affidavit evidence

[69] We briefly summarise the holding companies' affidavit evidence. The James Hardie Group has operations spread over the globe. Over the last thirty years or so, the Group has restructured a number of times, with the objective of minimising its exposure to taxation and managing "legacy issues" arising out of personal injury claims against the Group flowing out of its earlier production of asbestos-based concrete.[88]

[70] JHI was incorporated in 1998.[89] It became the ultimate parent of the James Hardie Group on 12 October 2001, pursuant to a scheme of arrangement. Its current corporate form is as an Irish public limited liability company.

[71] Mr Bruce Potts was legal counsel for James Hardie Australia Pty Ltd and company secretary to a number of companies in the James Hardie Group, including RCI and two of the Australian operating companies — James Hardie Australia Pty Ltd and James Hardie Research Pty Ltd.

[72] The critical part of Mr Potts' evidence relates to how the Group operated over the decades critical to the claims. During the period 1980 to 1995, Mr Potts says the Group was a conglomerate, which he defines as a group of companies in which one company owns a controlling stake in a number of smaller companies, each of which conduct their own business. At points in time during this period the Group owned and operated a wide range of businesses, dealing in products such as envelopes, polyethylene pipes, fabrics, switchgear, telephones, paint and wallpaper, aircraft leasing and mini-series production. Mr Potts says that the New Zealand product Harditex "was just one product offered by one relatively small business in the James Hardie Group (whose subsidiaries were providing thousands of products and services in multiple countries at that time)". It was a necessary consequence of this corporate structure, says Mr Potts, that the ultimate parent company had no role in the operations of its subsidiaries.

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88 The claimants allege that the restructuring has also been for the purpose of managing exposure to asbestos related claims. We do not need to address that issue however.

89 It has changed its name, and the nature of its incorporation over the years. The detail of its history is not relevant for present purposes.

[73] However over the period 1996 to 2002, James Hardie reduced the range of businesses by selling subsidiaries, to focus on its core business of fibre cement.

[74] Mr Potts says JHI's accounts for the period 2002 to 2010 show no recorded expenses and only income from its subsidiaries. From 2002 to 2014, JHI had only financial assets, debtors and cash in hand. It follows, he says, JHI had no capacity to conduct the James Hardie Actions over the period as that would have required JHI to record expenses or list assets other than shares in subsidiaries in its financial reports.

[75] Mr Russell Chenu is a non-executive director of JHI, and was the Chief Financial Officer (CFO) for the Group from 2004 to 2013. His evidence is that the board of JHI does not concern itself with operational decisions concerning the business of its subsidiaries, leaving those matters to the managers of the subsidiaries. JHI's board concerns itself with resolution of legacy matters such as asbestos personal injury funding models and tax disputes. It also addresses capital allocation and management, including major capital decisions of subsidiaries, and issues of capital buy back and dividends. He claims that during his time as CFO and on the managing board of JHI, it had no involvement in operational decisions in New Zealand, such as product launches, modifications and withdrawals. Decisions on products were made by the managers of the relevant subsidiary.

[76] Mr Donald Cameron held various financial roles including Company Secretary of James Hardie Industries Ltd, (JHI's predecessor as parent company of the James Hardie Group) until 2000 when he moved to the Netherlands to continue the treasury and management role with the group of companies located there. Mr Cameron says that James Hardie Industries Ltd acted as a passive holding company, leaving it to the subsidiaries how they managed their businesses to generate the returns. This was particularly the case with the New Zealand business — since it was a mature business, the Board of the then parent did not get involved in running the business at all.

[77] Ms Natasha Mercer, Company Secretary of JHI since 2013, says in her affidavit that since she joined that company it has had only three staff. These staff are involved in providing company secretarial and governance advisory services.

JHI does not have staff involved in product development, commercialisation, manufacturing, marketing or in managing litigation — all of that is left to the relevant staff in the respective operational subsidiaries in the different countries in which those subsidiaries are incorporated.

[78] Mr John Dybsky, Senior Marketing Manager for North American operations, provided evidence that the Group's intellectual property is centralised, explaining that it is owned by James Hardie Technology Ltd and licensed to the subsidiaries. Those subsidiaries are then free to use the trademarks and other intellectual property in their marketing material how they see fit so long as they do not breach the terms of their licence or the James Hardie Trademark Usage Guidelines.

[79] Ms Maree Anast, Intellectual Property Co-ordinator for the Group, says that the Group has distinct country-specific brands and branding strategies. While Harditex is sold in both Australia and New Zealand, Monotek and Titan were developed specifically for the New Zealand market by James Hardie New Zealand and were not sold outside New Zealand.

[80] The claimants filed affidavits from Mr Pat O'Hagan. He was employed by James Hardie in New Zealand before JHI took over as the ultimate parent, at a time when the ultimate parent was an Australian-based company. He says that the New Zealand James Hardie business seemed to operate as a branch of the Australian business, with all major decisions and leadership coming from Australia. The operation in Penrose was run as a sales and manufacturing division with only a small manufacturer's quality assurance laboratory in Auckland to test products after they had been manufactured. There was no wider testing or research done in Auckland. He claims much of the brand and technical literature was developed in Australia because there was no research and development team in New Zealand.

Documentary evidence

[81] The claimants also rely upon documentary evidence. A download of the James Hardie New Zealand website in 2016 presents the business in New Zealand as part of a single, multi-national business, with statements such as "[o]ur major operations span Australia, New Zealand, Asia, Europe and the United States.

We employ over 2,500 people who generate revenue of more than A$1.55 billion a year." Then later in the document:

> Today, James Hardie is purely a fibre-cement business. … James Hardie is the world market leader in the development of fibre cement building products and related building systems. The company pioneered technology for the manufacture of cellulose fibre reinforced cement as an alternative to asbestos cement in Australia during the 1980's.

[82] The annual report for JHI, the first issued after it took over as parent company, also presents the Group as a single business, stating that "James Hardie is a world leader in fibre cement …The Hardie brand is recognised by distributors, builders, contractors and homeowners as being synonymous with superior quality and value". JHI reports that it is investing in research and development, and that it employs 120 scientists, engineers, and technicians in "Core Research" and "Product & Process Development". It lists product development sites in Sydney, Australia and Fontana, California but none for New Zealand. The launch of a product in New Zealand, Linear weatherboard, is cited as an example of this research and development strategy working.

[83] JHI's 2014 Annual Report records that the Board of JHI can and has delegated authority to the CEO "to manage the corporation within specified authority levels". It seems from a download of the website for the Australian business, that the CEO is assisted in this by a senior executive team with responsibility for James Hardie's international operations, including production and sales in New Zealand.

Our analysis of the evidence

[84] Some things emerge clearly from the affidavits and the documents, and are not really at issue. All of the other defendant companies are wholly owned by JHI, even if owned through other wholly-owned subsidiaries. It is also clear that whilst the James Hardie Group may have diversified during the eighties and nineties, it has always had extensive interest in cement-based businesses and by the late nineties, when JHI took over as parent, it was a Group with a singular business focus upon fibre cement products. Finally, it is clear that the Group coordinates its business across the very many subsidiaries.

[85] There is however little common ground as to how this coordination is achieved. The affidavits filed for the holding companies paint a picture of JHI as a dormant holding company with a board performing a purely governance role, zoomed out a long way from the detail. Although JHI may have had three employees, they are said to be doing company secretarial work.

[86] Yet this description is at odds with the picture that emerges from JHI's annual reports, and Australian and New Zealand website material. First, this material suggests the JHI Board has delegated authority to the CEO. The CEO works with a management team in overseeing and directing, to an extent it is admittedly difficult to determine from the available evidence, the operations of the subsidiaries. The existence of such a management structure is consistent with the description in the JHI materials of a multi-national business pursuing, in these different locations, a single business strategy. It is also consistent with the material suggesting that a JHI executive team directs and coordinates Group activities, including those in New Zealand.

[87] Secondly, the material describes a group which uses group resources for research and development (with research centres apparently in Australia and the United States of America but not in New Zealand). Those activities, and the various manufacturing operations spread over the globe, are portrayed as being under the control of the JHI-based executive team.

[88] Thirdly, the Australian and New Zealand marketing websites represent James Hardie as a single entity, with international resources and brand reputation which is explicitly linked to the products sold by the local businesses.

[89] These three threads of evidence provide an evidential narrative that JHI had direct involvement in the manufacturing operations in New Zealand through, at least, its senior executive team. The existence of a top down management structure and the pooling of technical and resource facilities suggests that the JHI executive team had superior knowledge about the technical specifications of the products, and some level of control over the local operations. This view of the way in which the Group operates is corroborated by the evidence of Mr O'Hagan. Although somewhat dated

(in the sense he describes events prior to JHI taking over as parent) it is the best evidence we have as to how operations within New Zealand were managed within the Group. Mr O'Hagan describes the New Zealand business as operating as a branch and taking direction from elsewhere. At the relevant time, "elsewhere" was Australia where the Group parent company was based. We attach significance to Mr O'Hagan's evidence because it is the only evidence which describes in any detail how the New Zealand business operated.

[90] The totality of this evidence admittedly only creates a sketchy picture. But it was the holding companies that were in a position to provide the detail as to how the Group coordinates (as it obviously does) and how the New Zealand business operated within that Group. They did not do so. Nor did they provide evidence from directors, managers or staff of Studorp or James Hardie New Zealand of how the New Zealand companies are brought within the Group strategy, how they access Group resources or how Group guidance or policy is applied to them. Although these are separate legal entities to the holding companies, they are wholly-owned subsidiaries and could be expected to cooperate with their parents in the provision of such evidence.

[91] The evidence provided by the holding companies is expressed in general terms — little detail is provided. They say that the subsidiaries were in charge of their own businesses. But this evidence does not account for the role played by the JHI senior executive team. Ms Anast claims that two of the products were invented in New Zealand. But the holding companies do not explain the role the research facilities provided and directed at the group level, had in testing those products for markets or in developing the technical material to support their manufacture, sale and marketing. Nor does the evidence filed for the holding companies account for the extent to which the Group, in marketing materials from the New Zealand website, stands behind the quality of the product, using the reputation of the Group to sell product.

Serious issue to be tried on duty of care causes of action?

[92] Applying the legal principles we have identified to our analysis of the evidence, is there a serious issue to be tried on the duty of care causes of action? The best evidence we have as to how the Group coordinates comes from

the documentary material, and the evidence of Mr O'Hagan. That suggests a top down approach to coordination and a pooling of technical knowledge and research. At this very preliminary stage, and given the absence of detailed evidence from the holding companies, we consider there is sufficient evidential narrative:

(a) tending to prove direct involvement by JHI, through the senior executive team, in the New Zealand company's manufacturing business, and in the making of the various statements and claims about the business;

(b) to suggest superior knowledge on the part of JHI in connection with manufacture and the technical qualities of the product; and

(c) that a JHI-led executive team coordinated Group operations requiring compliance with Group policies and use of Group resources.

[93] We are satisfied this evidential narrative is sufficient to raise a serious issue that conduct of JHI brings it within those categories described above in which a duty to warn may be imposed upon parent companies in connection with the activities of their subsidiaries.

[94] It is next necessary to address the claimants' cross-appeal of Peters J's refusal to set aside the protest to jurisdiction in respect of the negligence and negligent misstatement causes of action.

[95] We differ from the Judge's view that there is a basis to distinguish the duty to warn cause of action from the other two tort based causes of action — negligent manufacture and negligent misstatement. As to negligent manufacture, on the evidence available at this interlocutory stage, it is arguable that through its senior executive team JHI was responsible for and involved in the setting of standards for the products, including the necessary testing or directing the testing of products.

[96] As to the negligent misstatement cause of action, James Hardie argues it has no prospect of success because JHI made no statements. Although the technical

literature used in the New Zealand market may have included the James Hardie logo, it was, argues JHI, clearly material produced by the New Zealand operating companies — it had New Zealand addresses and referred to New Zealand companies.

[97] But there are contrary arguments that build on the use of the James Hardie logo, and the fact that on its website, the New Zealand business is presented as just part of the international James Hardie business, rather than as a separate entity. And even if this material is properly construed as issued by James Hardie New Zealand, on the evidence we have seen it remains arguable that JHI had a duty of care in respect of that material. This is on the basis that JHI was responsible for the content of the material or because it had superior knowledge about the content, *and* knew that James Hardie New Zealand was relying upon it for the accuracy and adequacy of that content.

[98] It follows that JHI's appeal in respect of the duty to warn cause of action fails, while the claimants' cross-appeal in respect of the negligence and negligent misstatement causes of action succeeds.

JHI: Fair Trading Act appeal and cross-appeal

[99] JHI appeals the Judge's setting aside of its protest to jurisdiction in connection with that part of the FTA cause of action that alleges a failure to warn the claimants of deficiencies in the product or to take reasonable steps to withdraw the products. JHI argues that silence in itself does not constitute misleading and deceptive conduct. That is true, but it is not the claimants' case. The claimants argue that in all the circumstances JHI's failure to warn conveyed that the representations were true.

[100] Silence can, in certain contexts, amount to misrepresentation. The issue is whether, in the particular circumstances of marketing and supply of these products, the fact of JHI's silence affirmatively conveyed a meaning which was misleading or deceptive.[90] We accept that if the statements were those of JHI, then a failure to correct untrue or misleading statements could well amount to conduct falling within s 9. Moreover, if JHI had lent its reputation to the product claims (which it is arguable it

[90] *McAlister v Lai* [2018] NZCA 141 at [27].

had) it could be expected to correct any misrepresentation. We therefore see no reason to differ from the view of Peters J that this aspect of the FTA cause of action raises a serious issue to be tried.

[101] The claimants cross-appeal the Judge's refusal to set aside the protest to jurisdiction in respect of the other part of the FTA cause of action. The claimants rely on s 45(2) of the FTA which provides:

> **45 Conduct by servants or agents**
>
> …
>
> (2) Any conduct engaged in on behalf of a body corporate—
>
> (a) by a director, servant, or agent of the body corporate, acting within the scope of that person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the actual or apparent authority of the director, servant or agent—
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

[102] The claimants argue that JHI's CEO and the senior executive team directed, consented or agreed to the product statements made by James Hardie New Zealand, and did so as directors, servants or agents of JHI for the purposes of s 45(2) and within their actual or apparent authority. At this point, given the evidence set out above, we consider there is a serious issue to be tried as to the involvement of JHI directors, servants and agents in the James Hardie Products Statements and James Hardie Product Information. Again, whether there was such involvement or whether that involvement was enough to found liability are issues for trial, best decided with the benefit of all of the evidence.

[103] It follows that JHI's appeal in respect of the FTA cause of action is dismissed and the claimants' cross-appeal is allowed.

JHI: Consumer Guarantees Act cross-appeal

[104] The claimants cross-appeal the Judge's finding that the protest to jurisdiction should succeed in respect of the CGA cause of action. It will be recalled that the Judge found that it was seriously arguable that JHI was a "manufacturer" of goods for the purposes of the CGA because the definition of manufacturer includes "any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods".[91] The claimants support that finding. But the Judge also found, incorrectly on the claimants' argument, that the defence under s 26 of the CGA applies.

[105] Section 26 provides:

> **26 Exceptions to right of redress against manufacturers**
>
> Notwithstanding section 25, there shall be no right of redress against the manufacturer under this Act in respect of goods which—
>
> (a) fail to comply with the guarantee of acceptable quality only because of—
>
> (i) an act or default or omission of, or any representation made by, any person other than the manufacturer or a servant or agent of the manufacturer; or
>
> (ii) a cause independent of human control, occurring after the goods have left the control of the manufacturer; or
>
> (iii) the price charged by the supplier being higher than the manufacturer's recommended retail price or the average retail price:
>
> (b) fail to correspond with the guarantee as to correspondence with description because of—
>
> (i) an act or default or omission of a person other than the manufacturer or a servant or agent of the manufacturer; or
>
> (ii) a cause independent of human control, occurring after the goods have left the control of the manufacturer.

[106] For its part, JHI says that the Judge was correct to apply the s 26 defence but did not in fact need to, since JHI was not a manufacturer for the purposes of the CGA.

[107] As discussed above, s 2(1) of the CGA defines "manufacturer" and provides:

> **manufacturer** means a person that carries on the business of assembling, producing, or processing goods, and includes—

[91] Consumer Guarantees Act 1993, s 2(1).

(a) any person that holds itself out to the public as the manufacturer of the goods:

(b) any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods:

(c) where goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand, a person that imports or distributes those goods.

[108] JHI says it did not hold itself out as a manufacturer of the products and did not apply its marks to the goods, since the evidence is that the intellectual property is centralised in James Hardies Technology Ltd.

Analysis

[109] We accept JHI's argument that there is difficulty with the Judge's finding that it was arguable that JHI permitted use of its mark, since the evidence is persuasive that another company in the Group owned the mark. That being the case, it is hard to see how JHI could be said to have permitted use of "its brand or mark". However that is not the only basis on which the claimants argue that JHI is a manufacturer. They also contend that JHI held itself out to the public as a manufacturer of the goods, falling within the first category of the definition under s 2(1).

[110] As we have outlined, the marketing material in connection with the New Zealand business presents it as part of the overall Group. That material makes no distinction between the parent and its subsidiaries as to which is the manufacturer. The statutory definition of manufacturer captures those who hold themselves out as manufacturer, even if not involved in the physical manufacturing process. It seems to us that there is a serious issue whether, by allowing its own reputation to be attached to the New Zealand product to the extent that it did, JHI held itself out to the public as manufacturer of the product. We are not persuaded such an approach creates too open ended a liability or that it impermissibly cuts across separate legal personalities. It is simply an application of the statutory definition of manufacturer.

[111] We note that there is a further argument available to the claimants — that through the efforts of its senior executive team, JHI directly involved itself in the business of testing, producing or processing of the allegedly defective goods. On the

evidence available at this preliminary stage, we are satisfied that this also would cross the serious issue threshold.

[112] That brings us to the s 26 defence. In construing s 26, we take into account the broader consumer protection purpose of the CGA and also the extension of the definition of manufacturer beyond the party selling the goods once manufactured. Construed as a whole, we consider that the purpose of s 26 is to ensure that a person who falls within the definition of manufacturer is not held liable for breaches of guarantees which are completely beyond his or her control.[92] As the claimants put it, it provides a limited absence of fault defence.

[113] The Judge, whose reasoning JHI supports, saw it as clear that any breach of the guarantee of acceptable quality and any failure to correspond with the description was due entirely to the acts of a third party, James Hardie New Zealand.[93] She said:

> [133] Sections 7(1), 9 and 25(b) CGA set out when goods will be of acceptable quality and correspond with description. It is conceivable goods may fail to comply with the guarantees if assurances or qualities conveyed by their branding do not eventuate. In my view, and admittedly without the benefit of any argument, that is why the definition of manufacturer is deemed to include a party lending their brand or mark to the product. In this case, the plaintiffs have pleaded non-compliance on unrelated grounds, that is the manufacturing process arising from the alleged acts and omissions of [James Hardie New Zealand] and possibly other parties. Given that, I am satisfied that Mr Hodder's submission as to the effect of s 26 is correct and there is no serious issue to be tried that JHI is liable under the CGA.

[114] This reasoning turned upon her finding that JHI's liability as a manufacturer flowed from the affixing of its brand. We have identified alternative ways in which JHI may properly be categorised as a manufacturer for the purposes of the Act. It follows from this different reasoning, that were JHI found to be a manufacturer because it represented itself as such or because of its own involvement in the process, the s 26 defence would not be available to JHI. The factual issues as to its involvement in the design, testing, manufacture and preparation of technical material are issues to be addressed at trial.

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92 See also Barry Allan and others (eds) *Gault on Commercial Law* (online ed, Thomson Reuters) at [CG26.01].

93 High Court judgment, above n 4.

[115] It follows therefore that the claimants cross-appeal in respect of the CGA cause of action against JHI should be allowed.

[116] We address one issue by way of postscript in relation to the JHI appeal and cross-appeal. Studorp ceased manufacture before JHI became the ultimate Group parent. The claim against JHI in respect of Studorp-manufactured product is therefore undoubtedly more difficult than the claim in respect of James Hardie New Zealand manufactured product. However that is not an issue we need address in detail at this point, as all claims encompass manufacture by both Studorp and James Hardie New Zealand. We also note the claimants' intention to argue that JHI had continuing duties to warn in respect of products sold by its then subsidiary Studorp, even if the products were manufactured and sold before JHI became the parent of Studorp. That seems to us to raise issues capable of serious argument in this Group context.

RCI and JHNZH: appeals on summary judgment

[117] It will be recalled that RCI is the parent company of Studorp. The latter company was the New Zealand manufacturing entity up until 1998. RCI was incorporated and became the holding company in 2002, after Studorp ceased manufacturing the cladding product.

[118] JHNZH, was incorporated in New Zealand on 5 October 1998 as a limited liability company, to act as a trustee for two group entities.[94] In March 2011, as part of a restructuring of the group, the trusts were dissolved and JHNZH acquired all of the shares in James Hardie New Zealand, the principal trading arm of the New Zealand group.[95] JHNZH has no employees.

High Court judgment

[119] In the High Court, Peters J declined to grant RCI's and JHNZH's applications for summary judgment.[96] The Judge proceeded on the basis that the claimants would be able to prove RCI and JHNZH knew of the issues that were arising with

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94 Prior to March 2011 it was called James Hardie NZ Trustee Ltd.
95 JHNZH became an unlimited company on 25 February 2011.
96 High Court judgment, above n 4, at [100].

the product.[97] (That approach is not contested on appeal.) She said that if the criteria in *Chandler* were adopted in this case, and if nothing were to emerge on discovery, the claimants would be most unlikely to succeed.[98] But she observed the law was developing, and some of the matters pleaded might be relevant to an enlarged analysis, including: the companies were in possession of information as to defects, whereas the building industry and end users were not; that both companies knew the products would be installed in buildings to be owned or occupied by end users such as the claimants; that any end user would expect such products to be fit for purpose; that the defects were latent; and that the failure of the products might cause loss to an end user.[99] She also noted that further evidence might come to light on discovery, given the absence of evidence from directors of the two companies, board reports, or reports to insurers or to other companies in the Group.[100] Although she doubted whether the other claims were arguable, she found that the duty to warn causes of action were not bound to fail.[101] That being the case, the application for summary judgment could not succeed. Both companies appeal against that finding.

Arguments on appeal

[120] RCI argues that since it became the holding company after Studorp ceased manufacturing, and was not the holding company of James Hardie New Zealand, there was no arguable basis upon which it could have a duty to warn. JHNZH says that it became parent company of James Hardie New Zealand only at the very end of the claim period and again, on that basis, the claim cannot succeed.

[121] Each advance arguments that they were inactive holding companies with no involvement in or responsibility for any aspect of design, testing, manufacture or marketing of the product, so that there is no basis to find the required proximity for the imposition of a duty. The Judge they say must then have contemplated the imposition of a duty to warn on the basis of their shareholding in the operating companies, an analysis which involves lifting the corporate veil. Both argue the Judge

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97 At [79].
98 At [98].
99 At [85].
100 At [99].
101 At [100].

was wrong in her assessment that the evidence was incomplete. The evidence was that RCI's and JHNZH's sole business was to receive dividends from their subsidiaries and, in the case of JHNZH, repay borrowings from another group company. Neither was involved in the business of Studorp or James Hardie New Zealand. These were passive companies with no employees. They did not, and could not, involve themselves in the allegedly wrongful actions.

[122] The claimants support the Judge's analysis that the evidence is incomplete and does not tell the full picture of the Group operations. As to the time at which those companies became the parent of an operating company, they say the duty to warn and to withdraw the products is ongoing; it does not end with manufacture. They argue that to determine whether the companies had a duty to warn in respect of defects in the product, it is necessary to understand the roles and reporting structure of the New Zealand operation and how it interacted with all of the holding companies. That is information within the possession of the holding companies and has yet to be produced.

Analysis

[123] We have already observed the absence of evidence from officers or personnel of the New Zealand operating companies. To that observation we add the absence of evidence from any of the directors of RCI or JHNZH. We also take into account the likelihood that further evidence may come to light following discovery processes. As to the latter point, this Court said in *Westpac Banking Corp v M M Kembla New Zealand Ltd*:[102]

> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

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102 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA).

[124] As noted, the limited evidence available provides some narrative of group coordination, pooling of resources and knowledge and a top down approach to management within the Group.

[125] As to the timing of RCI and JHNZH becoming parents of the respective operating companies, we accept that it is arguable there was a continuing duty to warn. That duty could arise as information about defective product came to light, and could relate to product already sold, and product yet to be sold.

[126] To conclude then, this is not a case in which it is possible to confidently conclude on the basis of affidavit evidence alone, that the duty to warn cause of action, and associated FTA claim, are bound to fail. The documentary record put forward is incomplete, as identified earlier. The affidavit material is notable for the absence of evidence from those directly involved in the New Zealand operation. This is a proceeding in which the issues should be resolved at trial, with the benefit of evidence. We are satisfied therefore that the Judge did not err in declining to grant RCI and JHNZH's application for summary judgment.

Result

[127] The appeals by James Hardie Industries Plc, James Hardie NZ Holdings and RCI Holdings Pty Ltd are dismissed.

[128] The respondents' cross-appeals are allowed and:

(a) James Hardie Industries Plc's protest to jurisdiction is set aside in full;

(b) The order requiring the respondents to file an amended statement of claim is set aside.

[129] The appellants are jointly and severally liable to pay the respondents, as a group, one set of costs for a complex application for leave to appeal on a band B basis and usual disbursements. We certify for second counsel.

[130] Costs in the High Court are to be fixed in accordance with the outcome of this judgment.

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