IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2015-404-2981
[2017] NZHC 2105

UNDER THE	Consumer Guarantees Act 1993
AND THE	Fair Trading Act 1986
BETWEEN	KAREN LOUISE WHITE AND THE PERSONS LISTED IN SCHEDULE 1 Plaintiffs
AND	JAMES HARDIE NEW ZEALAND First Defendant
	STUDORP LIMITED Second Defendant
	JAMES HARDIE NZ HOLDINGS Third Defendant

Continued over

Hearing:	21 - 23 November 2016
Appearances:	M D O'Brien QC and J S Cooper for Plaintiffs J E Hodder QC, J A McKay and A J Wicks for Defendant
Judgment:	31 August 2017

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 23 August 2017 at 5.15 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: ....

Solicitors:
Adina Thorn, Auckland

Counsel:
M D O'Brien QC, Auckland

Chapman Tripp, Auckland	J E Hodder QC, Wellington
Chapman Tripp, Wellington	J E Cooper, Auckland

AND	RCI HOLDINGS PTY LIMITED Fourth Defendant
	JAMES HARDIE AUSTRALIA PTY LIMITED Fifth Defendant
	JAMES HARDIE RESEARCH PTY LIMITED Sixth Defendant
	JAMES HARDIE INDUSTRIES PLC Seventh Defendant

CIV 2015-404-3080

UNDER THE	Consumer Guarantees Act 1993
AND THE	Fair Trading Act 1986
BETWEEN	WAITAKERE GROUP LIMITED First Plaintiff
	METLIFECARE PINESONG LIMITED Second Plaintiff
	FOREST LAKE GARDENS LIMITED Third Plaintiff
	VISION (DANNEMORA) LIMITED (NAME CHANGED TO METLIFECARE DANNEMORA GARDENS LIMITED) Fourth Plaintiff
	METLIFECARE COASTAL VILLAS LIMITED Fifth Plaintiff
AND	JAMES HARDIE NEW ZEALAND First Defendant
	STUDORP LIMITED Second Defendant
	JAMES HARDIE NZ HOLDINGS Third Defendant

RCI HOLDINGS PTY LIMITED
Fourth Defendant
JAMES HARDIE AUSTRALIA PTY LIMITED
Fifth Defendant

JAMES HARDIE RESEARCH PTY LIMITED
Sixth Defendant

JAMES HARDIE INDUSTRIES PLC
Seventh Defendant t

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Introduction

[1] This judgment determines the following interlocutory applications in these proceedings:

(a) applications dated 16 and 24 February 2016 respectively by the third and fourth defendants, "JHNZH" and "RCIH", for summary judgment, on the ground that none of the plaintiffs' causes of action against them can succeed; and

(b) the plaintiffs' application dated 2 May 2016 to set aside a protest to jurisdiction by the seventh defendant, "JHI". JHI is the parent company of what is referred to as the James Hardie Group ("group") and is domiciled in Ireland.

[2] For reasons which appear below, I dismiss the applications for summary judgment. As a result, it is unnecessary for me to determine an application by the plaintiffs for tailored discovery.[1]g

[3] I also set aside JHI's protest to jurisdiction, subject to the orders made at the end of the judgment.

Background

[4] The proceedings, CIV-2015-404-2981 and CIV-2015-404-3080 ("White" and "Waitakere" respectively), concern products and cladding systems ("products") manufactured and supplied by a company or companies within the group. The products are James Hardie Harditex, James Hardie Monotek and James Hardie Titan board. All are or were made of fibre cement and are or were used for exterior cladding.

[5] The plaintiffs allege that they are the present or prior owners of houses or buildings clad with one or other of the products and that the products were defective, not weathertight and failed to comply with prevailing building standards. They allege

[1] Amended Notice of Application by Plaintiffs for Tailored Discovery Prior to Hearing of the Applications by Third and Fourth Defendant for Summary Judgment dated 1 November 2016.

that resulting moisture ingress has caused damage and loss and that as a result they have incurred various losses including costs of repair, replacement, diminution in value and loss of amenity, as well as emotional harm and distress.

[6] The defendants are the same in each proceeding, as are the allegations and causes of action, these being in tort and under the Consumer Guarantees Act 1993 and Fair Trading Act 1986 ("CGA" and "FTA").

[7] The defendants are all companies within the group. No issue arises as to whether the first, second, fifth and sixth defendants, JHNZ, Studorp, JHA and JH Research, are proper parties to the proceeding as they are or were operating companies who participated in bringing the products to market. The issues arise as to the third, fourth and seventh defendants, that is JHNZH, RCIH and JHI. The essence of their applications/protest to jurisdiction is that at all material times they were passive holding companies and as such cannot be liable for any act or omission alleged to have caused loss. For the avoidance of doubt, I record that the defendants deny the plaintiffs' allegations as to the products' deficiencies.

Issues

[8] The issue on the applications for summary judgment is whether JHNZH and/or RCIH can satisfy me that none of the plaintiffs' causes of action can succeed.

[9] The issues on the application to set aside the protest to jurisdiction are whether the plaintiffs can establish:

(a) a good arguable case that each cause of action falls within High Court Rules 2016, r 6.27 or that the claim has a real and substantial connection to New Zealand; and

(b) that the Court should assume jurisdiction in respect of JHI. In this case, that comes down to whether there is a serious legal issue to be tried on the merits.

Plaintiffs

White proceeding

[10] There are 365 plaintiffs in the White proceeding, some of which are bodies corporate of unit title developments. In total, the White proceeding concerns approximately 1,075 dwellings, units or buildings.[2]

[11] Of those plaintiffs, 10 sue in respect of Monotek and Titan and the balance Harditex. Harditex was withdrawn from the New Zealand market on 1 July 2005.

[12] Although the dates of construction or installation range from 1983 to 2010, the vast majority of claims arise from installations between 1994 and 2003 inclusive. That, however, says nothing about when loss may have been suffered. As to quantum, the plaintiffs' "best guess" at present is that their claim is likely to exceed $200 million.

[13] No other information regarding the plaintiffs is before me, for instance as to which acquired existing dwellings; those who purchased homes or units "off the plans"; whether any plaintiff purchased a site and engaged their own builder and so on, all of which raise matters that might be relevant at trial. As appears below, I have reservations about the confined nature of the evidence the defendants have put before the Court. It is, of course, entirely a matter for them what they choose to disclose at this point. This observation, however, is not confined to the defendants. It would have been a relatively simple matter for the plaintiffs to adduce some illustrative evidence as to the circumstances in which, say, several of them came to acquire the properties they allege are adversely affected.

Waitakere proceeding

[14] There are five plaintiffs in the Waitakere proceeding. Each carries on business as an owner and operator of a retirement village. Four installed Harditex and one installed Monotek. It is not apparent from the statement of claim when the products were installed.

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[2] Affidavit of C G Gray affirmed 21 June 2016.

Defendants

Studorp/JHNZ

[15] The original James Hardie company was established in Melbourne in 1888.[3] This enterprise became James Hardie Industries Limited ("JHIL"), the parent company of the group prior to 2001.

[16] The group commenced business in New Zealand in 1937, as James Hardie & Coy Pty Limited, now the second defendant, Studorp.

[17] JHNZ was incorporated on 15 July 1998, originally as a limited liability company. It became an unlimited liability company on 1 February 2013, that is the liability of its shareholder (JHNZH) to JHNZ became unlimited.

[18] Studorp sold its fibre cement business including its manufacturing facilities to JHNZ on or about 1 November 1998, so several years into the period from which the plaintiffs' claims arise.[4] Studorp is said to have ceased "all material business relevant to this claim" at that time.[5] It is clear on the evidence that Studorp and JHNZ:

(a) manufactured and supplied the products; and

(b) made what are referred to in the statement of claim as the "James Hardie Product Statements" ("JH statements").[6] These statements were made in trade literature regarding the use, characteristics, maintenance etc of the products.[7]

JHNZH/RCIH

[19] The third defendant, JHNZH, was incorporated in New Zealand on 5 October 1998 as a limited liability company, to act as a trustee for two group entities. At all

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3 Affidavit of C G Gray affirmed 2 May 2016.
4 Affidavit of BJW Potts sworn 10 June 2016 at [13.1].
5 Affidavit of S N Carter affirmed 18 February 2016 at [8].
6 Amended Statement of Claim dated 27 October 2016 at [26].
7 Statement of Defence of First and Second Defendants dated 25 February 2016 at [3] and [38].

material times prior to March 2011, JHNZH held 100 per cent of the voting shares in JHNZ.

[20] In March 2011, JHNZH ceased to hold its shares in JHNZ on trust and became an unlimited liability company. The present 100 per cent shareholder of JHNZH is James Hardie NZ Holdings Limited, a company incorporated in Bermuda.

[21] RCIH was incorporated in Australia in August 2002 for the purpose of becoming the holding company of four subsidiaries previously owned by JHIL, JHI's predecessor as parent company.[8] On incorporation, RCIH acquired all of the shares in Studorp, so almost four years after the latter had sold its fibre cement business to JHNZ. Since February 2013, RCIH has been the holding company of James Hardie Australia Pty Limited, being the operating company for James Hardie's Australian business.

JHA and JH Research

[22] The fifth and sixth defendants, JHA and JH Research, were incorporated in Australia. JHA manufactures and supplies fibre cement building products and JH Research carries out research and development work.

JHI

[23] JHI, incorporated as a shelf company in the Netherlands in 1998, became the parent company of the group in early October 2001.[9]

[24] JHI changed its corporate domicile to Ireland in June 2010 and became an Irish public limited liability company in October 2012.[10]

[25] As of 30 June 2014, JHI had two wholly owned subsidiaries, James Hardie Insurance Limited and James Hardie International Group Limited. The latter is itself a holding company, and further holding companies follow it in the corporate structure. The group has operating companies in North America, Australasia, the Philippines and

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8 Affidavit of S N Carter, above n 5 at [7] and [11].
9 Affidavit of BJW Potts, above n 4, at [18] and [20].
10 At [24].

Europe as well as entities providing services such as insurance and finance. At present the group comprises some 47 companies.

Statement of claim

[26] I turn now to summarise the important aspects of the statement of claim. It is fair to say the pleading shows every sign of having been prepared in haste. Terms are used inconsistently and no real effort has been made to identify the grounds on which anyone other than Studorp and JHNZ is liable. All defendants are collectively referred to as "James Hardie". I understand from counsel that limitation issues required expedition at the outset, but the pleading should have been reconsidered when the amended document was filed and served, something I understand did not involve present counsel for the plaintiffs. Any subsequent statement of claim must address these issues.

[27] The (alleged) acts or omissions underpinning the plaintiffs' five causes of action are as follows.

[28] First:[11]

> 3. At all material times JHNZ and Studorp, individually and collectively together with the other defendants, are, or were, engaged in the business of:
>
> (a) designing, developing, and/or manufacturing (Making);
>
> (b) distributing, importing, supplying, and/or selling (Supplying); and/or
>
> (c) marketing and advertising (Promoting);
>
> (collectively, the James Hardie Actions) various exterior cladding products and systems for use on buildings. Further particulars of each defendant's engagement in the James Hardie Actions are set out below.

[29] Each of the seven defendants is alleged to have engaged in the "James Hardie Actions" ("JH actions") as follows:

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11 Amended Statement of Claim, above n 6.

(a) Studorp and JHNZ directly, Studorp to 1 November 1998 and JHNZ thereafter;

(b) JHNZH directly or through JHNZ acting as its agent or alter ego or as part of a single economic unit; and

(c) RCIH, JHA, JH Research and JHI directly or through one or more of the other defendants acting as its agent or alter ego or as part of a single economic unit.

[30] The plaintiffs have since abandoned the allegation that Studorp and JHNZ were the alter ego of the other defendants or that liability may attach on the ground that all defendants are part of a single economic unit. Accordingly, that leaves the allegation of direct engagement in the JH actions or via Studorp and JHNZ as agents.

[31] The plaintiffs also allege an additional ground of liability as regards JHI, which is discussed in the context of the application to set aside the protest to jurisdiction:

> 9. The James Hardie Group, including each of the first to seventh defendants, is managed and operated as a group and, at all times since 12 October 2001, has been ultimately controlled by [JHI] which by virtue of that control assumes responsibility for the actions of each company within the group, including the other defendants.

[32] Thirdly, "James Hardie" (defined as one or more of the defendants) has published technical information including the "James Hardie Product Information", which in turn includes the JH statements. The plaintiffs' third cause of action for negligent misstatement is based on the JH statements, examples of which are:[12]

> ***(4) HARDITEX EXTERIOR CLADDING SYSTEM (June 1993)***
>
> (i) INTRODUCTION
>
> Developed especially for this style of architecture [textured exterior finishes], Harditex is the preferred exterior cladding substrate. When comparing the benefits, Harditex is an exterior cladding in its own right and does not rely solely on the textured coating for its performance as do many other systems.
>
> ...
>
> ***(7) HARDITEX – TECHNICAL INFORMATION (February 1996)***

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12 Amended Statement of Claim, above n 6, Schedule 6 – the James Hardie Product Statements.

(i) Harditex is the ideal lightweight cladding for a monolithic finish, yet it provides you with the comfort and peace of mind that comes with the stability and strength of James Hardie Fibre Cement.

[33] Fourthly, the defendants failed to warn or inform end users or to withdraw the products from the market when they learned of the defects.

[34] Fifthly, the plaintiffs are uncertain as to which defendants may be liable and so have joined all seven in reliance on r 4.3(4), which provides:

> **4.3 Defendants**
>
> (4) A plaintiff who is in doubt as to the person or persons against whom the plaintiff is entitled to relief may join 2 or more persons as defendants with a view to the proceeding determining—
>
> (a) which (if any) of the defendants is liable; and
>
> (b) to what extent.

First cause of action – breach of duty of care

[35] The plaintiffs allege that in making, supplying and promoting the products (all defined above), James Hardie 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 legal and building standards.[13] The defendants are alleged to have breached this 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. This latter allegation is the one that would potentially apply to JHNZH, RCIH and JHI.

Second cause of action – breach of duty to warn or inform or withdraw the products

[36] The plaintiffs allege that the defendants knew, or ought to have known, from the early 1990s onwards that the products would be deficient and that on learning of these matters the defendants owed and breached a duty to warn, inform and/or to take reasonable steps to withdraw the products.[14]

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[13] Amended Statement of Claim, above n 6, at [11] and [24].
[14] At [30] to [33].

Third cause of action – negligent misstatement

[37] The plaintiffs allege that in promoting the products, the defendants owed a duty of care to ensure that statements they made or caused to be made concerning the products were true and complete. The plaintiffs allege the defendants breached this duty by making or authorising the JH statements, which the plaintiffs contend were inaccurate.

Fourth cause of action – Consumer Guarantees Act 1993

[38] The plaintiffs seek redress under Part 3 CGA on the grounds that the products were goods for the purposes of the CGA; that the defendants "manufactured" them; and that, because of their deficiencies, the goods did not comply with the guarantee of acceptable quality or correspond with description, that description being the JH statements.

Fifth cause of action – Fair Trading Act 1986

[39] The plaintiffs allege that the defendants are or were in trade for the purposes of the FTA, and engaged in misleading or deceptive conduct (s 9) and/or made a false or misleading representation as to the characteristics or qualities of the products (s 13(a)).

[40] The conduct relied upon is making or authorising the JH statements; endorsing those statements by causing or permitting the James Hardie name and brand to be used in connection with the products and the JH statements; and failing to inform or warn or to 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.

[41] As to s 13(a) it is alleged that by making or authorising the JH statements in connection with the supply and promotion of the products, the defendants made false or misleading representations to the effect that the products were weathertight and so on.

Statements of defence

[42] By their statements of defence, Studorp and JHNZ admit that they designed, manufactured, marketed and distributed fibre cement cladding; published technical information; and made the JH statements. They also admit that the products were "goods" and that they were in trade for the purposes of the CGA and FTA.

[43] Given its protest, JHI has not served a defence but those of the other defendants consist of bare denials of all allegations of significance.

Applications for summary judgment

[44] Rule 12.2(2) provides:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[45] There was difference between counsel as to how "robust" the Court may be when determining a defendant's application for summary judgment.

[46] Mr O'Brien QC, for the plaintiffs, submitted that it is not enough for a defendant to show that a plaintiff's case has "weaknesses" but rather the defendant must point to a "clear answer" constituting a "complete defence" to each cause of action.[15] In addition, summary judgment ought to be declined if a "fuller investigation into the facts of the case" might affect the outcome.[16]

[47] Mr Hodder QC acknowledged that a degree of caution was required but submitted this case was sufficiently clear cut that the outcome would not be affected by the approach adopted.

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15 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [60], [61] and [64]; and *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA) at [21] and [27].

16 *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, [2007] FSR 3 at [18]. See also *Westpac Banking Corp v M M Kembla New Zealand Ltd*, above n 15, at [62]-[63].

[48] As appears below, I do consider it appropriate to take a cautious approach, particularly because I am not persuaded that all relevant evidence is before the Court. It would have been open to me to determine the plaintiffs' application for discovery but Mr Hodder's preferred approach was to stand or fall on the evidence and arguments before the Court and I have proceeded accordingly.

Respective cases

[49] JHNZH and RCIH's response to each of the causes of action alleged against them may be summarised as follows.

[50] As to the first and third causes of action, they did not manufacture or supply or promote the products, they did not make or authorise the JH statements, and the companies that did – Studorp and JHNZ – were not their agents. As to the remaining allegation in the first cause of action, essentially of a failure to intervene, and the allegation in the second, being the duty to warn etc, JHNZH and RCIH contend that as passive holding companies they were under no duty to the plaintiffs to take the steps alleged.

[51] As to the fourth and fifth causes of action, JHNZH and RCIH submitted that they are not manufacturers for the purposes of the CGA, and did not engage in the misleading or deceptive conduct alleged or make any representation falling within the FTA.

[52] For their part, the plaintiffs submitted that it is not appropriate to determine their case on an application for summary judgment, alternatively that JHNZH and RCIH are unable to satisfy r 12.2.

[53] As to the first, the plaintiffs submitted that this is a case where the "fuller investigation" referred to above might affect the outcome of the case, hence their application for discovery.[17]

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[17] Synopsis of Argument for the Plaintiffs in Opposition to Summary Judgment Applications by Third and Fourth Defendants dated 15 November 2016 at [2.5].

[54] Alternatively, and even without the benefit of any discovery, the plaintiffs submitted that the Court cannot be sure that the plaintiffs are bound to fail against JHNZH and RCIH on every cause of action. Whatever view the Court might take of the other causes of action, the plaintiffs submitted that JHNZH and RCIH had not established that the second cause of action could not succeed for the periods during which JHNZH and RCIH were "imbued with knowledge of the product defects and related issues. Those periods run from incorporation in 1998 for JHNZH and 2002 for RCIH, from which time each company shared directors with the defendant subsidiary in which it held shares (being Studorp and JHNZ respectively) and with other companies within the Group".[18]

Discussion

[55] For reasons set out below, I am not satisfied that the plaintiffs are bound to fail on the second, and the associated part of the fifth, causes of action with the consequence that I decline to grant JHNZH's and RCIH's applications for summary judgment. Given this, it is not strictly necessary for me to discuss the plaintiffs' prospects of success on the other causes of action but I shall do so in case it is of assistance, and subject to making it clear that it is on the basis of the evidence presently before the Court.

Manufacture, supply and promotion

[56] First, it is clear that Studorp and JHNZ undertook the manufacture, supply and promotion of the products in New Zealand. Studorp had manufacturing premises in Auckland, and it transferred or leased those premises to JHNZ when it sold the business. JHNZ has been in continuous occupation of the premises since.[19] The defendants' evidence is that JHNZ has been James Hardie's main operating entity in New Zealand since November 1998 and this would appear to be borne out by JHNZ's audited financial statements for the years ended 31 March 1999 to 2010.[20]

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18 At [2.7].
19 Affidavit of J C Burgess sworn 13 October 2016, at [8].
20 At [11]; and Exhibits A to K.

[57] Secondly, it is also apparent that JHNZH and RCIH were not themselves manufacturers or suppliers of the products. This appears from the evidence of Ms Sarah Carter, "Global Tax Director" of the group, and an employee since 2000.

[58] Ms Carter's evidence is that, prior to March 2011, JHNZH was a trustee of two group trusts. JHNZH's audited financial statements for the years ended 31 March 1999 to 2011, alternatively declarations of non-activity for the years ended 31 March 2008 to 2010, bear out Ms Carter's evidence that it did not trade during this period. Ms Carter's evidence is that JHNZH's sole business since March 2011 has been to receive and apply dividends paid by JHNZ and that it never participated in the JH actions or sought to control Studorp or JHNZ in any way.

[59] As for RCIH, Ms Carter's evidence is that between its incorporation in August 2002 and February 2013, RCIH was classified as a "small proprietary company" by reference to its assets, revenue and number of employees such that it was not even required to file financial statements under the governing Australian legislation. Ms Carter's evidence is that RCIH has never had any employees and that at all material times its sole business has been to receive dividends from its subsidiaries. Ms Carter's evidence is that RCIH also never participated in the JH actions or sought to control Studorp or JHNZ in any way.

[60] The plaintiffs do not contest that Studorp and JHNZ were the manufacturing entities and that JHNZH and RCIH were not. This disposes of much of the first cause of action, but it leaves the allegations that, regardless, JHNZH or RCIH owed a duty to take steps to ensure the products were not deficient, and the allegation that Studorp and JHNZ acted as their agents.

[61] Neither allegation can succeed against RCIH given that it was incorporated after Studorp had ceased manufacturing.

[62] As to the first of these allegations against JHNZH, again I would have thought it bound to fail. The matters alleged – going to manufacture, testing and the like – are distinctly operational in nature and the province of those involved in getting the product to market. Counsel for the plaintiffs submitted that Ms Carter's evidence – to

the effect that JHNZH was merely a passive holding company – should be treated with caution as she has never been a director of any of the first four defendants. There is something in the plaintiffs' submission that the defendants ought to have adduced evidence from a director or directors on these matters. Ultimately, it is not possible, and nor is it necessary, to express a concluded view on this point in the absence of discovery.

Agency

[63] As to the allegation that JHNZ may have manufactured etc as JHNZH's agent, it is common ground that JHNZH's control of 100 per cent of the voting rights in JHNZ does not render JHNZ its agent.

[64] In support of his submission, Mr O'Brien referred me to *Smith, Stone & Knight Ltd v Birmingham Corp*, as an instance in which the Court held that a subsidiary was carrying on business as agent for its parent.[21]

[65] The facts of the case are far removed from the present. Having acquired land under public works legislation, the defendant refused to pay compensation on the grounds that the land was occupied by the subsidiary, and on terms which excluded a right to compensation.

[66] The parent company brought proceedings seeking compensation on the ground that the subsidiary was carrying on business as its agent. The Court accepted this submission for the following reasons. The profits generated from the site were treated as the profits of the parent; the parent appointed the persons conducting the business on the site; the parent was the "head and the brain" of the business; any profits made were due to the parent's skill and direction; and the parent was in constant control.

[67] There is no evidence that any of these matters apply as between JHNZ and JHNZH. On the contrary, Ms Carter's evidence is otherwise. The audited financial statements of both entities provide confirmation also. On the evidence presently

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[21] *Smith, Stone & Knight Ltd v Birmingham Corp* [1939] 4 All ER 116 (KB).

before me, or the lack of it, the allegation that JHNZ acted as JHNZH's agent would also be bound to fail.

JH statements

[68] As to the third cause of action, there is no evidence that either JHNZH or RCIH made or authorised the making of the JH statements. As I have said, Studorp and JHNZ admit they made these statements. This is not surprising. The JH statements were made in trade literature of the kind that a manufacturer might be expected to supply with the product. Because of that, I consider that the third cause of action and that part of the fifth concerned with those statements would also be bound to fail against JHNZH and RCIH.

Consumer Guarantees Act 1993

[69] As to the fourth cause of action, there is no basis for an allegation that JHNZH or RCIH was a "Manufacturer" of the products as that term is defined in the CGA:

> **Manufacturer** means a person that carries on the business of assembling, producing, or processing goods, and includes—
>
> Any person that holds itself out to the public as the manufacturer of the goods:
>
> Any person that attaches its brand or mark or causes or permits its brand or mark to be attached, to the goods:
>
> …

[70] Neither company carried on the business referred to, nor took any step that might bring it within the deeming parts of the definition.

[71] To conclude, on the evidence at present I consider the plaintiffs would be bound to fail against JHNZH and RCIH on the first, third, and fourth causes of action, and on the fifth insofar as it concerns the JH statements.

Duty to warn etc

[72] To succeed on the second cause of action, the plaintiffs will be required to prove that JHNZH and RCIH:

(a) knew or ought to have known of the deficiencies in the products and/or the possible consequences of installation; and

(b) owed a duty of care to warn or inform the plaintiffs of these matters and to take steps to recall the products.

Evidence of complaints

[73] As to the first, the plaintiffs have produced evidence that deficiencies in the products' performance were being reported to Studorp and JHNZ from the mid 1990s on.[22] Some of these related to coatings of the products that were supplied by third parties. Complaints attributed to these issues were circulated to personnel within Australia and New Zealand, and well beyond the operating companies.[23] However, I shall put this evidence to one side because, at least on its face, it is not strictly concerned with complaints as to the products themselves. There is other evidence of complaint, however, including:

(a) An eight page record of complaints regarding Harditex from September 1995 onwards, headed "Faulty Product Report by Product". This refers to matters such as "external moisture entering over life of building"; "sheets have been on the wall for three years joints were failing letting water into the house, upon investigation the sheet edges were de-laminating"; "de-lamination, large bubbles forming" and so on.[24]

(b) Correspondence in August 1997 between Mr Mike Going of Studorp and the Waikato Master Builders Association.[25] This refers to discussions between the two regarding the "Harditex System and performance issues"; and a list of matters for future discussion, such as Harditex being "not realistic for NZ conditions", whether James Hardie would certify "their own jointing and finishing system and guarantee the finished product" and "when did Hardies become aware of the

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22 Affidavit of C G Gray affirmed 1 September 2016.
23 At Exhibit A, see 37 and 47.
24 At Exhibit A, see 3, 4 and 5.
25 At Exhibit A, see 34.

problem with corners rusting out and what action did they take to advise the industry".[26]

(c) A list of concerns raised by nine construction companies, headed "Harditex Problem List 26/8/97". The issues raised include "blistering", "joints breaking down", "rusting corners", "coating lifting", "cracking", "delaminating", "sheet expansion", "Wet frame wall cavity duty of leaking window" and "thermal movement".[27]

[74] It also appears from JHNZ's audited financial statements that it commenced making provision for "potential liabilities arising as a result of claims made, or to be made by customers in relation to recognised sales" from the year ended 31 March 2002.[28] There is no evidence as to whether this provision concerned the products in issue in this case but, if it did, the provision was increased substantially in subsequent years. By 2006 the total provision was approximately $4.3 million, $10.4 million in 2008 and some $39 million in 2010.

[75] The plaintiffs have also filed affidavits from experts in the building industry at the material time supporting their allegations that the products were in fact deficient. For instance, Mr John Dalton, a Registered Building Surveyor, states that he has "extensive experience with weathertightness issues" and has seen many cases involving the use of the products and many suffer from the defects alleged by the plaintiffs.[29] Likewise Mr Peter Lalas, a specialist in all aspects of "façade engineering, including weatherproofing", states that he has identified serious deficiencies having carried out numerous investigations of the products.[30]

[76] The next step in the plaintiffs' argument is that JHNZH and RCIH knew that numerous complaints were being made. The first point the plaintiffs made in this regard is that there is no evidence from any director of JHNZH or RCIH denying knowledge. Secondly, the plaintiffs submitted that they will be able to establish

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26 At Exhibit A, see 32 and 33.
27 At Exhibit A, see 35.
28 Affidavit of J C Burgess, above n 19. See generally Notes to the Financial Statements
29 Affidavit of J M Dalton sworn 5 May 2016.
30 Affidavit of P Lalas sworn 9 May 2016.

knowledge on the part of JHNZH and RCIH by attribution. This is because Studorp and JHNZ knew of the complaints; they, and particularly JHNZH and JHNZ, had directors in common with their holding company; and the knowledge of those directors fell to be attributed to the holding company itself.

[77] It is correct that JHNZH and JHNZ had common directors from incorporation until December 2003, and then again from October 2007. There is less commonality between the boards of Studorp and RCIH.

[78] Mr Hodder submitted that, even if it were proved that one or more directors of JHNZH or RCIH had knowledge, such knowledge would have been obtained outside of that capacity and it did not "migrate" to JHNZH or RCIH. However, it is not possible for me to determine on this application whether or not such knowledge would fall to be attributed to JHNZH or RCIH. Issues of attribution are not straight forward.

[79] Regardless, the plaintiffs are correct in submitting that no director of either JHNZH or RCIH has sworn an affidavit in this proceeding, whether as to knowledge or lack of it or anything else. In those circumstances, I infer for present purposes that one or more of those directors did know of the complaints that were being made. As I have said, I cannot determine the matter of attribution but, even if the plaintiffs are wrong, as Mr Hodder submitted they are, it is conceivable that the holding companies were in possession of knowledge through other means. For instance, JHNZH may have been in receipt of JHNZ's financial statements recording the provisions I have referred to above. Also, as the plaintiffs submitted, some of the directors of JHNZH and RCIH were also "executive employees of James Hardie and held management roles within the group". For example, Mr Donald Salter, a director of JHNZH and RCIH, was the group tax manager in Australia. Further, Mr John Moller, a director of RCIH, was the group Executive Vice President, Building Products, Asia Pacific.

[80] To conclude on this point, for present purposes I propose to assume that the plaintiffs will be able to show JHNZH and RCIH knew that complaints were being made regarding the adequacy of products manufactured and supplied by each of their subsidiaries.

Carter Holt Harvey Ltd v Minister of Education

[81] The next issue is whether the existence of a duty to warn is arguable in principle. Mr Hodder accepted that it is arguable. This appears from *Carter Holt Harvey Ltd v Minister of Education*, in which Carter Holt Harvey Limited ("CHH") applied, unsuccessfully, to strike out a proceeding brought by the Minister and other plaintiffs.[31]

[82] The Court of Appeal held that whether CHH was subject to a duty to warn would depend on all the circumstances and the facts proved at trial, a decision upheld by the Supreme Court.[32] Having analysed the various aspects of the relationship between CHH on the one hand and, on the other, the Minister and other plaintiffs, the Court could not rule out that the plaintiffs would be able to establish that the duty was owed. One obvious and important point of distinction between that case and the present of course is that CHH was the manufacturer of the products, which JHNZH and RCIH were not.

[83] This leads to the next and critical point, which is whether there is any prospect of the plaintiffs establishing that JHNZH and RCIH owed the duty alleged.

[84] To establish such a duty the plaintiffs will need to prove forseeability of loss – I would not expect that to be difficult in a case such as the present; a sufficiently proximate relationship with JHNZH and RCIH; and that it is fair, just and reasonable to recognise a duty of care.[33]

[85] The plaintiffs have pleaded various matters which they allege are relevant to whether the duty is owed.[34] Those that might conceivably apply to JHNZH and RCIH are that the products were highly specialised; that they were in possession of information as to the 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 plaintiffs; that any end user would expect such

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[31] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106.
[32] *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78.
[33] *Attorney-General v Carter* [2003] 2 NZLR 160.
[34] Amended Statement of Claim, above n 6, at [26] and [32].

products to be fit for purpose; that the defects were latent; and that failure of the products might cause loss to an end user.

[86] Mr Hodder submitted that the most that can be said for the plaintiffs is that JHNZH and RCIH had the capacity to control the two subsidiaries and, arguably, knowledge but these matters fall well short of the circumstances in which a parent or holding company might owe parties such as the plaintiffs a duty of care.

[87] The plaintiffs accept that more than the capacity to control will be required but rely on the matters to which they have referred in their pleading, as to which see [85] above.

Authorities

[88] Both parties referred me to authorities in which the Court has considered whether in any given circumstances a parent or holding company has owed the plaintiff concerned a duty of care.

[89] To take some examples, the plaintiffs referred me to *CSR Ltd v Wren*, in which the New South Wales Court of Appeal found that CSR owed a duty to protect Mr Wren, an employee of its subsidiary, from the risk of foreseeable injury.[35] This was because CSR's staff were in fact responsible for the operational aspects of the subsidiary's enterprise, and therefore the conditions in which Mr Wren worked.[36]

[90] A different result was reached in *James Hardie & Co Pty Ltd v Hall*, to which Mr Hodder referred me.[37] Mr Hall, the executor of the estate of an employee of what is now Studorp, brought proceedings against JHIL and James Hardie & Co Pty Limited. Mr Hall alleged that those companies owed the deceased a duty of care as they had control and management of Studorp's factory in Auckland. At all material times JHIL owned 95 per cent of the shares in Studorp but there was no evidence that the defendants were responsible for workplace safety at Studorp's plant. The Court held that, at most, the defendants could have insisted that proper workplace standards

[35] *CSR Ltd v Wren* (1997) 44 NSWLR 463; [1998] Aust Torts Reports 81-461 (CA) at 483E.
[36] At 485D.
[37] *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 (CA).

were maintained but they owed no duty to the deceased to do so. Studorp was in control of the workplace, not the defendants.

[91] The next case to which the plaintiffs referred me is *Chandler v Cape plc*, a decision of the English Court of Appeal. The Court upheld a finding that Cape plc ("Cape") owed a duty of care to Mr Chandler, who had been employed by Cape's subsidiary and who was suffering from asbestosis.[38]

[92] The Court confirmed that a duty to prevent a third party causing damage to another would be imposed only if that duty were made out on the facts of the case and not simply because the company concerned was the parent of the third party. The Court found that Cape owed a duty to the employee to advise the subsidiary of the steps that the subsidiary was required to take to provide a safe system of work, alternatively to ensure that the subsidiary took those steps.[39]

[93] As with *CSR v Wren,* the facts of *Chandler* are a long way from the present. There was a lengthy history of dealings between Cape and the subsidiary in respect of the site in issue. Moreover, Cape's knowledge of the risks of working with asbestos and how those risks might be managed was superior to the subsidiary's. These factors were highly material to the Court's decision. There is no similar evidence in this case at present.

[94] Quite aside from these differences on the facts, Mr Hodder submitted that *Chandler* could not assist the plaintiffs because they have no prospect of meeting the criteria the Court laid down, being:

> 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

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38 *Chandler v Cape plc* [2012] EWCA Civ 525, [2012] 1 WLR 3111.

39 At [78].

> 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.

[95] As to item (1), Mr Hodder submitted that the plaintiffs could not establish that the businesses of JHNZH or RCIH, or JHI for that matter, were the same as Studorp's or JHNZ's in a relevant respect – holding company versus operating company. As to (2), there is no evidence that JHNZH or RCIH had "superior knowledge" to Studorp or JHNZ on some relevant aspect. Mr Hodder submitted that this requirement for superior knowledge is essential, and referred me to another decision of the English Court of Appeal, *Thompson v The Renwick Group plc*.[40] The Court in that case allowed an appeal by the parent company on the grounds that it was not better placed by reason of superior knowledge or expertise to protect its subsidiary's employees.

[96] The parties have since provided me with three further first instance decisions, all concerned with interlocutory applications protesting jurisdiction or to strike out.[41] These cases were brought by plaintiffs against parent companies located in England including their subsidiaries as subsequent defendants, for personal injury, damage to property and other injuries; damages arising from pollution and environmental damage; and a failure to maintain or restore law and order. In the first two, the High Court said that there was a real issue to be tried that the parent might owe the duty alleged. In neither of these cases was the criteria identified in *Chandler* considered to be necessarily determinative. In the third, being the *Royal Dutch Shell* case, the Court said that there was no serious issue to be tried and that discovery would not alter the position.[42] Most importantly, all of these cases emphasise the need to have all the facts established before any determination is reached.

Decision

[97] Drawing these matters together, the reasons I am not satisfied that the plaintiffs will inevitably fail on their second cause of action are these.

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40 *Thompson v The Renwick Group plc* [2014] EWCA Civ 635.

41 *Lungowe v Vedanta Resources plc* [2016] EWHC 975 (TCC); *Okpabi v Royal Dutch Shell plc* [2017] EWHC 89 (TCC); and *AAA v Unilever plc* [2017] EWHC 371 (QB).

42 *Okpabi v Royal Dutch Shell*, above n 41.

[98] First, to establish the duty they allege, the plaintiffs will need to do more than rely on JHNZH's and RCIH's capacity to control the two subsidiaries by their shareholdings. Also, if the criteria in *Chandler* were adopted in this case, and if nothing were to emerge on discovery, the plaintiffs would be most unlikely to succeed. However, I do not know that the Court will consider it appropriate to adopt the criteria in *Chandler* as determinative. As I have said, the more recent cases to which I have referred anticipate that other matters may be relevant to the analysis. If so, the grounds the plaintiffs have pleaded (see [85] above) will be relevant to the analysis, even if not sufficient on their own.

[99] Secondly, relevant evidence may well come to light. Aside from the lack of evidence from directors, there is no evidence of board minutes or reports to insurers or possibly to other companies in the group. Given that, it is not possible to be certain of the facts. As the Court of Appeal said in *Westpac v M M Kembla New Zealand Ltd*:[43]

> [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. ... novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

[100] For these reasons, JHNZH and RCIH have not satisfied me that the plaintiffs are bound to fail on their second cause of action and likewise on that part of the plaintiffs' fifth cause of action under s 9 FTA that relies on the same alleged omission. I decline the applications for summary judgment accordingly.

[101] For completeness, I do not consider there is anything in the plaintiffs' submission that JHNZH's assumption of unlimited liability after March 2011 makes it apparent that JHNZ and JHNZH are "closely connected". This change in status occurred late in the period under scrutiny and it is common ground that it is likely to have occurred for tax reasons emanating from the United States.

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[43] *Westpac Banking Corp v M M Kembla New Zealand Ltd*, above n 15.

Application to set aside protest to jurisdiction

Rule 6.29

[102] Much of what I have said above applies equally to the plaintiffs' application to set aside JHI's protest to jurisdiction. The starting point, however, is the relevant procedural provisions.

[103] The application to set aside falls to be determined under r 6.29(1), as the plaintiffs served their proceeding without leave under r 6.27.[44] The effect of r 6.29(1) is that I must dismiss the proceeding unless the plaintiffs establish the matters in r 6.29(1)(a) or (1)(b), and they rely on both in this case. These rules incorporate all or part of r 6.28, of which r 6.28(5) is relevant:

> **6.29 Court's discretion whether to assume jurisdiction**
>
> (1) If service of process has been effected out of New Zealand without leave, and the court's jurisdiction is protested under rule 5.49, the court must dismiss the proceeding unless the party effecting service establishes—
>
> (a) that there is—
>
> (i) a good arguable case that the claim falls wholly within 1 or more of the paragraphs of rule 6.27; and
>
> (ii) the court should assume jurisdiction by reason of the matters set out in rule 6.28(5)(b) to (d); or
>
> (b) that, had the party applied for leave under rule 6.28,—
>
> (i) leave would have been granted; and
>
> (ii) it is in the interests of justice that the failure to apply for leave should be excused.
>
> ...
>
> **6.28 When allowed with leave**
>
> (5) The court may grant an application for leave if the applicant establishes that—
>
> (a) the claim has a real and substantial connection with New Zealand; and
>
> (b) there is a serious issue to be tried on the merits; and

44 High Court Rules, r 5.49(7).

(c) New Zealand is the appropriate forum for the trial; and

(d) any other relevant circumstances support an assumption of jurisdiction.

[104] There is no issue as to New Zealand being the appropriate forum. The principal issues are whether the plaintiffs have established:

(a) a good arguable case that their claim falls wholly within one or more paragraphs of r 6.27 or, if not, that the claim has a real and substantial connection to New Zealand. Rule 6.27(2) lists the circumstances in which service may be effected outside of New Zealand without leave.

(b) a serious issue to be tried on the merits.

[105] Each cause of action is to be considered separately.[45]

[106] The "good arguable case" test does not relate to the merits of the case but to whether the claim falls within one or more of the circumstances under r 6.27(2).[46] This is a largely factual question to be assessed on the basis of the pleadings and evidence before the Court. The plaintiff is not required to establish a prima facie case but a sufficiently plausible foundation that the claim falls within one or more of the headings in r 6.27(2).

[107] 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. The test is whether "at the end of the day, there remains a substantial question of law or fact or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desires to try".[47]

Rule 6.27(2)

[108] The paragraphs of r 6.27(2) on which the plaintiffs rely are as follows:

6.27 When allowed without leave

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45 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754.
46 At [33].
47 At [42].

(2) ...

(a) ... a claim is made in tort and—

(i) any act or omission in respect of which damage was sustained was done or occurred in New Zealand; or

(ii) the damage was sustained in New Zealand:

…

(e) ... the subject matter of the proceeding is land or other property situated in New Zealand, or any act, ... affecting such land or property:

…

(g) ... relief is sought against any person domiciled or ordinarily resident in New Zealand:

(h) ... any person out of the jurisdiction is—

(i) a necessary or proper party to proceedings properly brought against another defendant served or to be served (whether within New Zealand or outside New Zealand under any other provision of these rules), and there is a real issue between the plaintiff and that defendant that the court ought to try ...

(j) when the claim arises under an enactment and either—

(i) any act or omission to which the claim relates was done or occurred in New Zealand; or

(ii) any loss or damage to which the claim relates was sustained in New Zealand ...

First and third causes of action

[109] The plaintiffs submitted that their first and third causes of action fall within r 6.27(2)(a), (e) and (g). Taking their statement of claim at face value, that is correct. Regardless, for the reasons given above, there is no serious issue to be tried that:

(a) JHI manufactured, supplied or promoted the products or that JHNZ did so as JHI's agent. JHI could not have any liability for any act by Studorp, given that it became the parent company three years after Studorp ceased to manufacture.

(b) JHI made or authorised the JH statements.

(c) JHI owed a duty to ensure that JHNZ manufactured and supplied adequate products. As I said above, these are distinctly operational matters. I do not consider there is a serious issue to be tried that a parent company of a large group, domiciled abroad, could owe a duty to the plaintiffs to ensure that products manufactured in New Zealand for New Zealand conditions were fit for purpose and adequately tested.

[110] That leaves the allegation that JHI as parent company assumed or assumes responsibilities for the acts or omissions of the group.

[111] The particulars given by the plaintiffs of this allegation are these: JHI's and the group's core business is the production and sale of fibre cement building products; JHI conducts its business through its subsidiaries, receives the profits of the group and the group is consolidated for financial and reporting purposes; JHI's board determines the strategic direction etc of the group, and JHI appoints the group chief executive and other senior management; JHI knows of and monitors risks and liabilities within the group; JHI owns and controls the use of the James Hardie name and brand; JHI has ultimate control over and responsibility for the development, manufacture and sale of products; and JHI holds itself out as a single global business and a world leader in fibre cement.

[112] Mr O'Brien did not dispute that the parent company of a group does not by that status alone assume liability for the acts or omissions of its subsidiaries.[48] A parent company of a group is as much a separate legal entity as every subsidiary within the group. The plaintiffs submitted, however, that the relationship between JHI and its subsidiaries is such that they operate essentially as one. In support of this submission, the plaintiffs adduced evidence from a chartered accountant, Mr Simon Rutherford. This evidence asserts that it is "reasonable to assume" JHI's directors had knowledge and control over product design and manufacture and was involved in issues relating to New Zealand operations.[49] Mr Rutherford's evidence is to the effect that JHI and its subsidiaries appear to operate in a manner reflecting "a high degree of co-ordination

48 See *Adams v Cape Industries plc Ltd* [1990] Ch 433 (CA) at 532D; and *Savill v Chase Holdings (Wellington) Limited* [1989] 1 NZLR 257 (CA) at 306.
49 Affidavit of S G Rutherford sworn 2 May 2016.

and integration”.[50] In support of this statement Mr Rutherford referred to various matters largely appearing from JHI’s annual reports, such as centralised group cash, liquidity and foreign exchange management; substantial expenditure on a central research and development unit; and centralised ownership of intellectual property.

Defendants’ evidence

[113] In response to this evidence, the defendants filed affidavits as to the manner in which the parent company has conducted its business. The essence of this evidence is that the operations of individual companies within the group have always been a matter for those companies and not for the parent. That parent – whether JHI or JHIL before it – does not and never has involved itself in those operations or sought to manage or control them.

[114] Mr Donald Cameron was company secretary and chief accountant/treasurer of JHIL from 1994 until 2003. His evidence is that the group was a conglomerate of numerous different businesses in different countries. Each business ran as an entirely separate entity, under the control of their local general managers. The New Zealand business was mature and the JHIL board did not get involved in its operation. Decisions as to product development, modification and withdrawal were left entirely to local management.

[115] Mr Russell Chenu was the chief financial officer of the group and all subsidiaries from 2004 to 2013, a member of JHI’s managing board from 2006 to 2010 and is presently a non-executive director of JHI. Mr Chenu’s evidence is that between 2004 and 2013, the board was occupied with financial and investment matters far removed from the New Zealand business. Whilst CFO and a member of the board, Mr Chenu had no involvement in operational decisions in New Zealand. JHI did not involve itself in these matters and all decisions were made by managers of the relevant subsidiary.

[116] Mr Potts has been legal counsel of JHA since August 2005 and company secretary for JHA, RCIH and JH Research. Mr Potts states that he does not consider

[50] Affidavit of S G Rutherford sworn 29 August 2016 at [5].

JHI managed or controlled the JH actions, either directly or by managing or controlling Studorp or JHNZ.[51] Each subsidiary undertakes its own "product development, management, manufacture and distribution" and is responsible for understanding and complying with local regulatory obligations.[52] It is for an operating subsidiary to manage its product design and operational issues. The gist of Mr Potts' evidence is that JHI is and always has been a holding company, existing to hold the shares in its subsidiaries, to receive the dividends they declare and that it has operated without incurring any expenses.

[117] Ms Natasha Mercer, company secretary of JHI since September 2013, states that at present JHI's primary activity is to hold shares in the subsidiaries, comply with regulatory matters and receive dividends, and that she understands this to be a continuation of JHI's longstanding practice. At present JHI has three employees, all concerned with governance matters.

[118] As Mr Hodder submitted, the pleaded particulars referred to in [111] above are the orthodox incidents of a group structure. The matters to which Mr Rutherford referred are the very items that a parent company would be expected to co-ordinate. The evidence of Mr Cameron and the other deponents to whom I have referred cannot be controversial. It would be very surprising if the parent company of a large group were involved in the conduct of the day-to-day affairs of its subsidiaries situated in several jurisdictions. To conclude on this point, I do not consider that there is a serious issue to be tried that JHI has assumed responsibility for the actions of its subsidiaries.

Second cause of action

[119] The plaintiffs submitted that there is a good arguable case that the second cause of action, as against JHI, falls within r 6.27(2)(a)(i) or (ii). As I said above, there is no dispute that a duty of the nature alleged is arguable. Given that, I accept the plaintiffs' submission that there is a good arguable case.

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51 Affidavit of BJW Potts, above n 4, at [26].
52 At [27].

[120] As the plaintiffs submitted, the senior personnel who have given the evidence referred to above have not denied that JHI knew that complaints were being made impugning the adequacy of the products. On the contrary, Mr Potts' evidence is that it did not become mandatory for JHI to make provision in its financial statements for the risks associated with "leaky building litigation" until 2013, as prior to then the relevant financial threshold had not been met. The inference to be drawn from that evidence is that there was prior knowledge.

[121] I referred above to the basis on which the plaintiffs have pleaded JHNZH and RCIH owed them a duty to warn etc. Those matters apply equally to JHI with the following additional matters also pleaded: JHI's claims in its annual reports to have expertise in the manufacture of fibre cement building products; JHI's ultimate receipt of profits derived from the sale of the products; and JHI's (alleged) knowledge and monitoring of risks and liabilities within the group.

[122] I do not set any store by the claims to expertise. They are made in relation to the group as a whole, and to those reading the annual report. There is no evidence before me as to JHI's receipt of dividends representing the profits derived from the sale of the products, and nor of the extent to which JHI was informed of risks and liabilities. Such evidence is within the hands of the defendants.

[123] I accept the plaintiffs are likely to have a more difficult task in establishing the duty they allege against JHI, than against JHNZH and RCIH. There is no geographical proximity, knowledge may be more difficult to prove, and there are various layers of subsidiary companies in between JHI on the one hand and Studorp and JHNZ on the other. Also, this is a parent company with operating entities in several jurisdictions. Ultimately, however, I am not able to distinguish JHNZ, RCIH and JHI.

[124] In those circumstances, on the basis of the evidence that has been put before me, I am satisfied that there is a serious issue to be tried on this cause of action.

Fourth cause of action

[125] The plaintiffs contend that there is a good arguable case that their claim against JHI under the CGA falls within r 6.27(2)(j)(i) or (ii).

[126] The plaintiffs allege that the products failed to comply with the guarantee of acceptable quality and to correspond with description because of their deficiencies and the failure to test those products adequately.[53] If so, 25 CGA permits a right of redress against a manufacturer of the goods concerned.

[127] The plaintiffs allege that JHI was a "manufacturer" of goods by virtue (a) and (b) of the following definition:

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

[128] There is no satisfactory evidence as to (a). There is evidence that the JH brand and/or mark were attached to the products, as referred to in (b).[54] JHI's response to this is that JHNZ, not JHI, attached the brand or mark and that JHI did not cause or permit the same. A subsidiary, James Hardie Technology Limited, owns the group's intellectual property and licenses it to companies within the group.[55] Thus Mr Hodder's submission is that JHI is not within (b) of the definition.

[129] There is no evidence before me as to whether James Hardie Technology Limited was the owner of the brand and mark as at 2001. Regardless, I accept the plaintiffs' submission that it is clearly arguable that the brand or mark is JHI's, and not the subsidiary's, and the fact that JHI has granted ownership or control to a subsidiary does not preclude a finding that JHI "permitted" the attachment of the brand or mark to the goods. This is sufficient to establish a good arguable case that the claim arises under an enactment within r 6.27(2)(j)(i) and (ii).

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53 Amended Statement of Claim, above n 6, at [49].
54 Affidavit of P J O'Hagan sworn 29 August 2016 at [11].
55 Affidavit of J Dybsky sworn 13 October 2016.

[130] This brings me to the issue of whether there is a serious issue to be tried. Mr Hodder submitted there was not because, even if JHI were a manufacturer, s 26 CGA would preclude a right of redress. 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
>
> ...
>
> (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
>
> ...

[131] Mr Hodder submitted that this provision excludes liability on the part of JHI because the grounds on which the plaintiffs allege the goods fail to comply with the guarantees in issue (see [126]) are not due to an act, default or omission of JHI or of its servant or agent.

[132] Mr O'Brien rejected this, and submitted that "the manufacturer" in s 26 is to be read as JHI and JHNZ together, so that if, for instance, the goods fail to comply as a result of JHNZ's omission, that omission is ascribed to all manufacturers for the purpose of s 26. I am not satisfied that construction is correct. Aside from anything else it would seem to defeat the purpose of the provision, which on its face is to confine liability to those responsible for non-compliance.

[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 JHNZ 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.

Fifth cause of action

[134] The plaintiffs contend that there is a good arguable case that their cause of action under the FTA also falls within r 6.27(2)(j)(i) and (ii).

[135] I have already determined that no serious issue to be tried arises against JHI to the extent this cause of action relies upon JHI having made or authorised the JH statements. This rules out one part of the claim for breach of s 9 FTA, and the claim for breach of s 13(a).

[136] The balance of the claim comprises allegations that JHI breached s 9 by:[56]

> (a) "Endorsing the [JH statements] by causing or permitting the James Hardie name and brand to be used in connection with the [products], and the [JH statements]"; and
>
> (b) failing to inform and/or warn the plaintiffs of the deficiencies in the products and/or to take reasonable steps to withdraw them from the market.

[137] Mr Hodder's first submission was that by s 3 FTA, JHI may only be liable if it were "carrying on business" in New Zealand at the material time. Section 3 FTA provides:

> **3 Application of Act to conduct outside New Zealand**
>
> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the

56 Amended Statement of Claim, above n 6, at [55](b) and (c).

> extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.

[138] Section 3 would be relevant if it were alleged the conduct occurred outside New Zealand but, as I understand it, the plaintiffs' submission is that the alleged conduct took place in New Zealand and that JHI's place of residence or business does not preclude liability in that case.[57]

[139] I am satisfied that it is reasonably arguable the act/omission in issue did occur in New Zealand and, given that, I am satisfied that there is a good arguable case that this part of the fifth cause of action falls within r 6.27(2)(j), as the plaintiffs contend.

[140] As to the conduct itself, I do not consider that any permission JHI may have given for the use of its name or brand could constitute an "endorsement" of the JH statements. Permission to use a name and brand is no more than that – permission.

[141] As to the failure to warn, Mr Hodder submitted that silence, without more, does not constitute misleading or deceptive conduct.[58] In support of this submission Mr Hodder referred me to *Unilever New Zealand Ltd v Cerebos Gregg's Ltd*, in which the Court of Appeal said that silence may only amount to a misrepresentation if it conveys a meaning that is false. That was the only authority to which I was referred on this point but my own researches have indicated – not surprisingly – that whether silence has constituted misleading or deceptive conduct in any given instance has been the subject of litigation, with each case decided on its facts.[59]

[142] If the plaintiffs establish the deficiencies they allege, and knowledge on the part of JHI, then I accept there is a serious issue to be tried that a failure to warn, inform or withdraw the products may constitute a breach of s 9 FTA. Whether the plaintiffs will be able to establish the other matters required to be proved before the Court may make an order under s 43 FTA cannot be predicted at this stage.

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57 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 45, at [104].

58 *Unilever New Zealand Ltd v Cerebos Gregg's Ltd* (1994) 6 TCLR 187 (CA) at 192.

59 *Hieber v Barfoot & Thompson Ltd* (1996) 7 TCLR 301 (HC); *Guthrie v Taylor Parris Group Cossey Ltd* (2002) 10 TCLR 367 (HC); and *Money World New Zealand 2000 Ltd v KVB Kunlun New Zealand Ltd* [2006] 1 NZLR 381 (HC).

Orders

[143] The Court may determine an application to set aside on terms, whether under r 5.49(8) or under the general power of the Court to make an order on terms.[60]

[144] Accordingly, I may make an order dismissing the proceedings unless the plaintiffs file and serve amended statements of claim against JHI confined to the second and that part of the fifth causes of action in respect of which I have found there is a good arguable case and a serious issue to be tried on the merits.

[145] I make the following orders:

(a) I dismiss the applications by JHNZH and RCIH for summary judgment;

(b) JHI's protest to jurisdiction will be dismissed if the plaintiffs file amended statements of claim within 20 working days of the date of this decision, confining their causes of action against JHI in accordance with [144] above.

(c) If not, JHI's protest to jurisdiction will be allowed and all proceedings against it dismissed.

(d) JHNZH and RCIH are to pay the plaintiffs' costs and standard disbursements on their applications for summary judgment.

(e) At present, I shall defer any order as to costs on the application to set aside the protest. The parties may file memoranda if they are unable to agree.

(f) There is leave to apply.

---

60 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 45, at [65] and [66].

Peters J

SCHEDULE OF PLAINTIFFS

AARON DENNIS WEATHERLEY AND DALE JANET WEATHERLEY

ABDUL WAHAB AND FIROZA ALI

ACCOUNTING NOW TRUSTEE COMPANY LIMITED, CARL GEORGE GRAY AND HINERUA GRAY

ADELE DONACHIE AND JAMES PATRICK DONACHIE

ADRIAN NEVILLE WALDING

ADRIENNE EILEEN STEAD MARTIN AND PETER HUDSON MARTIN

ADRIENNE SHIRLEY LAW AND DARREN MARK LAW

AE-JIN I AND YONG-UG I

ALAN TEMPLEMAN AND CAROLYN TEMPLEMAN

ALAN JAMES ROBERTSON

ALAN KEITH HEWARD, HELEN WINTERBOTTOM AND BURROWS TRUSTEE SERVICES LIMITED

ALAN MALCOLM GEORGE HULSE AND SUSAN-LEIGH HULSE

ALANZ RENTALS LIMITED

ALAYNA ANN BATCHELDOR AND JENNIFER DELCIE BATCHELDOR

ALAYNA ANN JONES AND GAVIN MARK JONES

ALES ALASHKEVICH

ALISDAIR HUGH REID AND JANE REBECCA REID

ALISON JOAN CULLEN (ALISON JOAN JONES)

ALISON JOAN CURTIS, GARY DEAN CURTIS AND GARY WILLIAM MAYO

ALISON JUNE WATSON, BERNARD PIERRE LAMUSSE AND MICHAEL STUART WATSON

AMANDA ELIZABETH HOLDER AND GEOFFERY JOHN HOWSON

AMANDA GAYLEEN FLEMING, GAVIN ANDREW MCGHIE FLEMING AND PAUL JAMES TUSTIN

AMANDA MARGUERITE RICHARDS AND GELLERT NAGY

AMAR RAMAN AND ANITA RAMAN

AMARJEET SINGH KANWAL AND RIPUDAMAN KAUR KANWAL

ANDREA ALICE BILTON, BEE CHOO TEE, JOHN CARLETON LINDSAY AND TODD INWOOD BILTON

ANDREW JOHN MASTERS AND SANDRA ANNE MASTERS

ANDREW PHILLIP SPRINGGAY AND BRUCE HARVEY REID

ANGELA NOREEN ROBINSON

ANNA CHAN AND KIM HUI WONG

ANNAMARIE CATHERINE GREEN AND GYW TRUSTEES NO. 4 LIMITED

ANNE MARIE WILKINSON (ANNE-MARIE WILKINSON) AND BEN ROGER WILKINSON

ANNE RHODES

ANTHONY ALFRED LYNDON AND GLYNIS LYNDON

ANTHONY CLIVE SANDLANT AND JENNIFER JANE KENT

ANTONY MICHAEL BLACK

ARTHUR LOO, CYRIL YOUNG AND EUGENE JOHN YOUNG

ARTHUR PAUL SUMMERFIELD, B K & P TRUSTEES LIMITED AND FIONA ALISON SUMMERFIELD

AZAM KHAN AND ZUREEN KHAN

BALJINDER KAUR DEVGUN AND MANJIT SINGH DEVGUN

BARBARA HELEN DAVIES AND MARK GEORGE JOHN CHASE

BARRY JOHN NEILSEN AND JOANNE DOROTHY STANLEY

BARRY VICTOR MACLEAN, GAIL ROBIN KNIGHT AND TREVOR LLOYD KNIGHT

BELINDA VALERIE RODRIGO, MARK GARY HACKNER AND VALMARK INDEPENDENT TRUSTEE LIMITED

BERNARD FRANK GERAGHTY AND ROBYN MARIE GERAGHTY

BERNICE MARY REVILL AND DAVID JOHN REVILL

BETTY BROWN, CEDRIC PAUL BROWN, PATRICIA LAGITUAIVA KENNEDY AND PETER NOKISE ELIA

BEVERLEY ANNE EVANS, CLAYTON ROBERT JONES, DARRYL CLAYTON JONES AND REX LESLIE COOPER

BEVERLEY GRACE MALPAS AND
BRUCE FREDERICK MALPAS

BHAGVATI RAMAN

BLAIR JOHN CAIRNCROSS, BRIAR
LEAMING PALMER AND MURRAY
ROSS CLOUGH PALMER

BODY CORPORATE 107810 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 107810

BODY CORPORATE 169774 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 169774

BODY CORPORATE 181423 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 181423

BODY CORPORATE 194769 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 194769

BODY CORPORATE 199854 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 199854

BODY CORPORATE 200436 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 200436

BODY CORPORATE 202283 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 202283

BODY CORPORATE 206564 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 206564

BODY CORPORATE 206626 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 206626

BODY CORPORATE 207812 AND ALL
UNIT OWNERS WITHIN BODY
CORPORATE 207812

BODY CORPORATE 25244 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 25244

BODY CORPORATE 312850 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 312850

BODY CORPORATE 330920 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 330920

BODY CORPORATE 335843 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 335843

BODY CORPORATE 361399 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 361399

BODY CORPORATE 76482 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 76482

BODY CORPORATE 79006 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 79006

BODY CORPORATE 81004 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 81004

BODY CORPORATE 82332 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 82332

BODY CORPORATE 83247 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 83247

BODY CORPORATE 84548 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 84548

BODY CORPORATE 84747 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 84747

BODY CORPORATE 85928 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 85928

BODY CORPORATE 86062 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 86062

BODY CORPORATE 86105 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 86105

BODY CORPORATE 86494 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 86494

BODY CORPORATE 87152 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 87152

BODY CORPORATE 89908 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 89908

BODY CORPORATE 90860 AND ALL UNIT OWNERS WITHIN BODY CORPORATE 90860

BRENDA EILEN BAXTER, JANICE ROBIN HALL AND WAYNE BRIAN BAXTER

BRENT JAMES WEIR AND CECILIA MAI YE YU

BRETA JILL TRAFFORD AND COLIN BRITTAIN TRAFFORD

BRIAN DESMOND KRIEL, DAVID THOMAS KRIEL AND MARIANA SOPHIA KRIEL

BRIAN JAMES MORTON AND JESSIE ELIZABETH MORTON

BRIAN PAUL COOPER AND SVETLANA COOPER

BRIDGET LOUISE GRAY AND PETER ARTHUR GRAY

BRUCE CALDER MARTIN AND LYNETTE FRANCES MARTIN

BRYAN WILBERT TAYLOR AND MAIRI HELEN TAYLOR

CASSANDRA ANN SOUTHEY AND DWAYNE JOHN SOUTHEY

CATHERINE HELEN FITZGERALD

CATHERINE MAY NOLEN AND JAMES PATRICK NOLEN

CHANTAL ELIZABETH VAN ROOY AND KEITH SYDNEY VAN ROOY

CHARLES ANTHONY DALRYMPLE

CHARLOTTE JOE MONTEIRO AND NEIL MANUEL D'SOUZA (D'SOUSA)

CHARLOTTE REBECCA HUGHES

CHEN LIU AND KAI GUO

CHI ZHANG

CHRISTINA MARIE RUSH AND MICHAEL SAUNDERS RUSH

CHRISTINE ANNE GARTHWAITE AND RANDALL AMOS GARTHWAITE

CHRISTINE ELAINE OLSEN AND STEPHEN JACK OLSEN

CHRISTOPHER BLAIR TAYLOR AND MARGARET JOAN TAYLOR

CHRISTOPHER JAMES DOMS AND JILLIAN LEE SCAFIDI

CHRISTOPHER JAMES PARK AND DEBRA SUSAN PARK

CHRISTOPHER JAMES PETERS AND KEIRA MCCULLOUGH

CHRISTOPHER JOHN DAVIS, JILLIAN LEA RICHES AND ROBERT RICHES

CHRISTOPHER JOSEPH FREEMAN AND RACHEL LOUISE MACKAY

CHRISTOPHER LAWRENCE ELLIS

CHRISTOPHER PAGUNTAIAN DE VEGA AND PRISCILLA DE VEGA

CHRISTOPHER PATRICK HOLLAND AND JOANNE ELIZABETH HOLLAND

CHRISTOPHER RICHARD BARRY AND JULIA DAWN BARRY

CHRISTOPHER STUART HIGGINS AND FRANCES IRENE NEEDHAM

CJ MCMASTER TRUSTEES LIMITED AND CHRISTOPHER JOHN MCMASTER

CLAIR OLIVER AND DERRICK OLIVER

CLAIRE BROWNLIE

CLAIRE PHILIPPA LOUISE ANDERSON AND MARK ANTHONY ANDERSON

CLINTON DOUGLAS BROWN AND LINDSAY LORRAINE TRAYES (LINDSAY LORRAINE BROWN)

CLINTON NAUDE AND PAULA NAUDE

CLIVE GARDNER TRUSTEE COMPANY LIMITED, JILIAN FRANCES BAILEY AND MARK IDRIS DAVIES

COLIN CLIFFORD EVANS AND PRISCILLA JEAN EVANS

COLIN DOUGLAS STRINGER, ELISABETH MARY STRINGER AND GERARD JOHN SULLIVAN

COLIN LESLIE PINFOLD AND JANINE KAY PINFOLD

COLLEEN FRANCIS GIBSON (COLLEEN FRANCES GIBSON), PAUL CHARLES GIBSON AND THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED

COLLEEN JOYCE RASELL AND KEVAN RICHARD RASELL

CRAIG ALEXANDER TEAZ AND KAY MARIE TEAZ

CRAIG THOMAS O'SHANNESSEY, YEW LI CHOOI, PCBAMS INVESTMENTS LIMITED, GUN38 LIMITED, JENNIFER ELIZABETH LEVINSON, RALPH LEVINSON, SAMANTHA JANE HALE AND TAKIRUA LIMITED

CROY PROPERTIES LIMITED

CST TRUSTEES (2007) LIMITED, EMMY MARGARETA VAN MIDDELAAR AND LOTHAR TOM VAN MIDDELAAR

DAEWOONG CHAE AND YEON JEONG LIM

DAMIAN FRANCIS CHASE

DARLENE CATHERINE LUKE AND JOHN CHRISTOPHER LUKE

DARREN JOHN ROWE AND SOPHIA FRANCESCA CAPERNAROS

DARREN PAUL EDWARDS AND DINA RACHMAWATI EDWARDS

DARRYL ANTHONY SANG, MEILING LEE AND RONALD FONG SANG (DARRYL ANTHONY SANG AND MEILING LEE)

DARRYL JAMES MATTHEWS AND JOHN FRANCIS ARMSTRONG

DAVID JOHN PHILLIPPS AND SANDRA JEAN KEIGHTLEY-PHILLIPPS

DAVID JOHN SLYFIELD AND JENNIFER DAWN SLYFIELD

DAVID JOSEPH DICKINSON AND PAULINE DICKINSON

DAVID NEIL LAWSON AND JENNIFER ANNE LAWSON

DAVID PALMER DUDLEY

DAVID REX MUSGRAVE

DAVID RICHARD CAMPBELL AND RACHAEL EMMA DOCHERTY

DEBORAH JOANNE DAY, MARILYN JOY DAVIES AND STEPHEN GREGORY DAY

DEBORAH MAREE HARRISON AND ROBYN LENORE HOLMES

DEBORAH MAUDE BEDFORD

DEBRA LEE BATHURST AND RICHARD STEPHEN BATHURST

DEDAN RANDOLPH PERCY, DENNIS NORRIS AND SHIRLEY-ANN KELLY PERCY

DEIDRE ANNE JORDAN, DENNIS MICHAEL GRAHAM AND GRAEME CHRISTOPHER JORDAN

DENISE BARBARA KNAPP

DENISE LYNDA SMITH AND GLENN IAN SMITH

DENYSE MARTIN AND SIMON JOHN VICTOR HARDLEY

DON HENRY CASAGRANDA, EVE ELIZABETH CASAGRANDA AND ROGER HOLMES MILLER

DONALD DAVID MCCLOUD AND VIVIENNE MARIE ELDER-SMITH

DONALD JOHN JELLYMAN, GERALDINE CLARE JELLYMAN AND MICHAEL BRUCE STRINGER

DONALD MARSHAL MACKAY

DOUGLAS ARTHUR SAUNDERS AND ELIZABETH JUNE SAUNDERS

EDMUND GRANT READ, LYNLEY SUSAN READ AND NEW ZEALAND TRUSTEE SERVICES LIMITED

EILEEN CARMEL STEVENS AND MICHAEL EDWARD STEVENS

EILZABETH MARGARET LOWNDES AND PERPETUAL TRUST LIMITED

ELIG CREATIVE SOLUTIONS LIMITED

ELISABETH ANNE KNIGHT AND KEITH LEE KNIGHT

ELIZABETH ANNE LAMB AND KEITH BRIAN CHAPMAN

EMENY NO. 62 TRUST COMPANY LIMITED

ERIN MALCOM BEACHAM AND LESLEY BEACHAM

EVAN RICHARD CRAWFORD AND LOIS ADELINE CRAWFORD

EVAN VARSOS NATHAN AND PANIA TYSON-NATHAN

FAIRLAWN FARMS LIMITED

FAM HOW CHAN AND SIOW HOONG PEY

FELICITY JANE SCOTT

FERRUCCIO RAFAEL FURLANI AND IRENA MARIA ANNA KOLODZINSKI

FIONA HYND AND PHILIP DAVID HYND

FRANCES RUSBRIDGE

FREDRICK TULOTO THOMPSON AND TULOTELE TERESA THOMPSON

GARRY SEYMOUR CARTER AND GAYLENE ANNE CARTER

GARY LOADER AND SUSAN JAYNE LOADER

GARY WILLIAM PALLETT AND SUZANNE GEORGINA PALLETT

GAVIN ALEXANDER WHITE, KENNETH CHARLES WOOD AND MAREE ANNE WOOD

GAVIN ROLF LARSEN AND KAREN LARSEN

GAYLE KATHLEEN HILLIS, J T TRUSTEE CO. LIMITED AND MARK GORDON HILLIS

GENE PAUL BENNETT AND NICHOLA THERESA GALJAARD HARMSEN

GEOFFREY ARTHUR JONES AND LAETITIA ELIZABETH TOWNSEND

GILBERT SWAN TRUSTEE SERVICES LIMITED, JOHN ROBERT ELSTON AND ROBYN BEVERLEY ELSTON

GILLESPIE PROPERTY GROUP LIMITED

GINA LOUISE MOORE

GJ & LP FURNISS TRUSTEE COMPANY LIMITED, GORDON JAMES FURNISS AND LEONEE PHYLLIS FURNIS

GLC PROPERTY LIMITED

GLEN CHRISTOPHER PEREIRA AND MELANIE BLANCHE GRACE PEREIRA

GLENDA JOANNE ADAMS AND KEVIN STUART ADAMS

GLENDA KAY CHOY AND SYDNEY BERNARD CHOY

GLENIS KAYE WHEELER AND STEPHEN JOHN WHEELER

GLENN STUART MCKAY AND ALLANNAH MAREE BURKE

GQ TRUSTEES LIMITED, GRANT PEARCE SCHWIETERS AND RAEWYN MAREE SCHWIEERS

GRAEME ALASTAIR MORTON-JONES AND MARGARET DIANE COPE MORTON-JONES

GRAEME DICKSON PATTERSON REES AND RACHEL DOROTHEA REES

GRAEME JORDON MACKAY AND JUDITH ANNE MACKAY

GRAEME MANLY SYMES AND HELEN FRANCES SYMES

GRAEME MERVYN LANG AND PAMELA MARY LANG

GRAEME REGINALD EDWARD SPENCER, GRAHAM CONRAD JENNINGS AND NEISHA PAMELA THERESA JENNINGS

GRAEME WILLIAM MCCREADY AND GWENDA LOUISE MCCREADY

GRAHAM ALAN ROSS, JOHN BRUCE CANDY AND KIRSTY ELIZABETH SWADLING

GRAHAM DEREK MCDONALD AND MARIA DOUCELINE MCDONALD

GRAHAM JOHN WALLACE AND JAN SUSAN WALLACE

GRANT DONALD MOODIE, PETRONELLA CATHARINA FRANCIS AND WARWICK GLENN FRANCIS

GRANT DOUGLAS FISHER AND SUZANNE MARIE FISHER

GREGORY MARK MOODY AND NEW ZEALAND TRUSTEE SERVICES LIMITED

GTA TRUSTEE LIMITED AND NOEL DAVID STEVENS

HARINDER SINGH

HARVEY NORMAN PROPERTIES (N.Z.) LIMITED

HELEN ANNE SEARANCKE, MARK EDWARD BETTY AND MARTIN JOHN SEARANCKE

HENRY CHAIM LEVY, JANET GORDON LEVY AND WBL TRUSTEES LIMITED

HILARY FREDA PATTON

HOCK BANG TOK, LEANG SENG BEY AND SENG LIM

HONOR MAY RONOWICZ AND STEVEN JOHN RONOWICZ

HUGH DAVID MCKINNON AND JANICE FAYE MCKINNON

INGRID ANN GREENWOOD, SUSAN PATRICIA MACDONALD AND THOMAS MILTON SYDNEY GREENWOOD

JACK BURRES OLIVER, MARGOT GILLIAN OLIVER AND GRAEME FRANK THOMPSON

JACKSON RUSSELL TRUSTEE SERVICES LIMITED AND TRACEY KATE LEWIS

JACQUELINE ANNE DEARMAN AND ROGER MARTIN DEARMAN

JACQUELINE SUSANA LUSTIG AND DANIEL ALBERTO CHARPENTIER

JAMIE SIM AND LAWRENCE SIM

JANNETTE HELEN LOUISA MACLEAN

JEANIE ELLEN MURTAGH

JENNIFER CHAN, PAKMAN TRUSTEES LIMITED AND WENG KEY CHAN

JENNIFER LEA HILL AND MICHAEL JAMES HILL

JENNIFER LEIGH DOHERTY AND JONATHAN BEDE DOHERTY

JENNIFER SYLVIA BRASH

JI XIAN LI AND WONG & BONG TRUSTEE COMPANY LIMITED

JILLIAN PATRCIA HYNDMAN AND JOHN WILLIAM HYNDMAN

JIN FENG CAI AND ZHIQUN FAN

JIN YAO AND XIAOYAN SHI

JINBAI ZHANG AND WEI CHEN

JIPS PROPERTY LIMITED

JIT KHENG TENG

JOAN GLADYS DUNCAN AND THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED

JOANNA LOIS FERRIS

JOCELYN ANN CHRISTENSEN AND JOHN ROBERT ADAMS

JOHN FAIRLEY WADHAM AND CHARMAINE ISOBEL WADHAM

JOHN STUART SHARP AND NOREEN MARGARET SHARP

JOHN WALTER WRIGHT AND SHIRLEY JOY WRIGHT

JOHN WHARETOROA BARCLAY-KERR, ROBERT BRUCE WHARETOA KERR AND TURANGA HOTUROA BARCLAY-KERR

JUDIT RICK-GRAY AND STEPHEN HENRY GRAY

JUDITH ANNE JOHNSON

JULIE ANN MCHARDY AND MARK ANDREW MCHARDY

JUPING ZHOU AND XIAO-WEN YU

JURGA MIKUTAITE AND PETR KUKULSKY

JUSTIN MARK QUENTIN SCHOLER (SCHLER)

KAMIGRY LIMITED

KAREN LOUISE WHITE

KAREN MAUREEN GRIGGS AND DENNIS BARRY SPOONER

KATHLEEN JULIA FISHER, KEITH JAMES FISHER AND WADHAM GOODMAN TRUSTEES LIMITED

KEITH ANDREW MARTIN

KELVIN RICHARD DOO AND LESLEY DOO

KENNETH ALAN HORNER, NERYDA CATHERINE SULLIVAN AND CATHERINE REBA HUNT

KENNETH RICHARD PASCOE, MOLLY PARAMERE PASCOE AND WAYNE BOBERG

KESH MARIE GILMOUR

KEVIN BARTON OSBORNE, MARTIN GARRY GREEN AND MARY ASHBY GREEN

KEVIN JAMES ROONEY AND PHYLLIS ROSE NICOL

KEVIN LEIGH, LP CORPORATE TRUSTEE LIMITED AND SHARON MARIE BISLEY LEIGH

KIRSTY JEAN BELLRINGER AND OWEN ANDREW HACKSTON

KURT DAMMERS AND SHERRYN ANNE DAMMERS

LAMBERTUS JOHANNES MARIA VERDONK

LAURA JAYNE GAHAN AND ROSS BRIAN TURNBULL

LESLEY SJARDIN AND RENÉ JOHAN SJARDIN

LEYETTE KAREN CALLISTER AND PAUL WILLIAM CALLISTER

LINDA BRIDGES TRUSTEE LIMITED

LINDA JEAN THOMPSON

LINDA SU-LING WONG

LISA JOAN MCDONALD AND OWEN FRANCIS FRY

LJ TRUSTEE SERVICES LIMITED AND PAMELA RITA CRISP

LORRAINE ANN BRYENTON, MURRAY JAMES FALLOON AND PETER WOOLNOUGH BRYENTON

LORRAINE ELIZABETH FELLOWES

LUCY-MAY HOLTZHAUSEN AND NORMAN HOTLZHAUSEN

LUKE JOSEPH DANE AND ROMY KAIRN DANE

MAHOMED HANIF ABDULLA AND YOLANDA TANIA ABDULLA

MARGARET ANNE CLOTHIER

MARIE ANNE GRETCHEN FERNANDEZ BORJA

MARIE FLEXMAN AND ROSS JAMES FLEXMAN

MARILYN ANNE MACLENNAN

MARILYN GRACE RICHARDS AND RAY ANTHONY GRAHAM RICHARDS

MARILYN YVONNE GOLDFINCH AND SHARLENE MARY HOLDER

MARION FAYE MOLLOY AND PETER REX MOLLOY

MARK DOUGLAS CHANDLER

MARY MCNEIL DENIZE, ROGER HOLMES MILLER AND WILLIAM DAWSON DENIZE

MATTHEW JONATHAN KENNY

MEGAN ROSE BARNES

MERH INVESTMENTS LIMITED

MICHAEL ALFRED GRIFFITHS AND ROBYN RUTH GRIFFITHS

MICHAEL HENRY PAINTER AND NICOLA LOUISE PAINTER

MICHAEL JAMES FOOT

MICHAEL LEO PIERCE, NICOLA ANN PIERCE AND TREVOR FRANCIS PIERCE

MICHAEL LEON LLOYD AND JULIE ELAINE LLOYD

MICHAEL MADHU RALM

MICHAEL THOMPSON

MILAN PETER VEGAR

MILAN PETER VEGAR AND TANYA MARISSA VEGAR

MURRAY GEORGE KELSALL, NOELINE SHERRY BERGHAN AND WILLIAM LINTON GOSS

MURRAY JOHN GOODSON

NAVDEEP KAUR, RAVTESH DHILLON AND SARBJIT SINGH DHILLON

NEVILLE EDWIN WILKINS AND SANDRA KAYE THORPE

NIALL SHANE FARRELL

NICOLA LAURICE LOWE, STUART ANDREW MACKENZIE (STUART ANDREW MACKENZIE)

NOEL EDWIN HAYMAN, NORMA JOAN HAYMAN, PHILIP JOHN MCDONALD AND LARK MOTELS LIMITED

PAMELA JOY WRIGHT AND PAUL PETERSEN

PEIQIN GUAN AND YUNYUE GUI

PENELOPE ANN O’NEILL

PENELOPE MARGARET FEYEN AND
ROBERT JACK FEYEN

PERCY THOMSON TRUST

PETER JOHN MARCHANT STRINGER,
CECELIA ANNE STRINGER AND
JOHN CAMERON MIDDLETON (1/2
SHARE) AND CECELIA ANNE
STRINGER, PETER JOHN MARCHANT
STRINGER AND JOHN
CAMERON MIDDLETON (1/2 SHARE)

PETER WILLIAM MARTIN AND
HELEN ELIZABETH MARTIN

PHILLIP JOHN BRETT AND
KATHERINE MARY BRETT

PHILLIP MICHAEL JONES

PING XUE

PONGA ROAD LIMITED

RAMESH RANCHHOD

ROBYN MARIE CAREW

ROGER GEORGE PROCTER, PAULINE
JANICE PROCTER AND GEOFFREY
LEONARD PROCTER

SAILENDRA KUMAR SINGH AND
USHA KIRAN SINGH

SATYANARAYANA GONUGUNTLA,
TEJASWI GONUGUNTLA AND
VIJAYALAXMI GONUGUNTLA

SEW VEM ANG AND SIEW HEE KOH

SHABNAM MIRASAN AND TRAVERS
HARLEY GRAY

SHANE ANDREW MERCER

SHANE MARTIN GASKIN

SHAOHE ZHANG AND XIAOHUI VAN

SHED INVESTMENTS LIMITED

SHENG LI

SHIRLEY DORIS PATTIE, BEVERLEY JOY VERKUYLEN, MICHAEL JAMES PAXTON GRAHAM JOHN PATTIE, LORRAINE FAY CREASY AND SHIRLEY DORIS PATTIE

SONIA ANNE GOODWIN, SUSAN ELIZABETH LANE, TREVOR MAURICE LANE AND VAUGHAN MAURICE LANE

SOPHIE YANGZHU LI

SPLASH INVESTMENTS LIMITED

STANLEY OWEN SMITH, MARGARET HEATHER ROSE SMITH AND CHATFIELD AND CO TRUSTEE COMPANY

STEPHEN DAVID BRISTOWE

STEPHEN DEREK RUTHERFORD AND GABRIELLE DONNA RUTHERFORD (GABRIELLE DONNA HAGEN)

STEPHEN KARL WILLIAMS AND VICKI MICHELLE RULE

STEPHEN NEIL KINGSBURY, WENDY ANNE KINGSBURY AND MICHAEL DRUMMOND MACFARLANE

SUNSET COAST RENTALS LIMITED

TAURAYI WILLIAM MATIZA AND SIBONGILE FLEVIA MOY

TONY DARRELL GILES AND LINDA MARGARET GILES

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