IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-2509
[2022] NZHC 985

BETWEEN	BODY CORPORATE NUMBER DPS 91535 First Plaintiff
AND	ARGOSY PROPERTY NO. 1 LIMITED Second Plaintiff
AND	3A COMPOSITES GmbH First Defendant
AND	TERMINUS 2 LIMITED Second Defendant
AND	SKELLERUP INDUSTRIES LIMITED Third Defendant

Hearing: 17 February 2022

Appearances: J A Farmer QC, S P Pope, M J A Taylor & F A A Shahbaz for Plaintiffs
A R Galbraith QC & J Q Wilson for First Defendant

Judgment: 10 May 2022

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 10 May 2022 at 2pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Russell McVeagh, Auckland
Bell Gully, Auckland

Introduction

[1] The first defendant, 3A Composites GmbH (3AC) is a German corporation and manufacturer of a building exterior cladding product branded as Alucobond PE (Alucobond) which was installed on the exterior of the first plaintiff's building in or around 2006-2008.Having been served in Germany with the first plaintiff's proceeding, 3AC filed an appearance and protest to jurisdiction pursuant to r 5.49(1) of the High Court Rules 2016.[1] The first plaintiff now applies pursuant to r 5.49(5) to set aside 3AC's protest to jurisdiction.

Background

[2] The first plaintiff is a body corporate comprising the proprietors of the residential units known as the Cutterscove Resort Apartments located in Mount Maunganui. The second plaintiff, Argosy Property No.1 Limited, owns commercial properties in Don McKinnon Drive, Albany and Favona Road, Māngere.

[3] In its amended statement of claim dated 23 December 2021, the first plaintiff alleges that 3AC's Alucobond cladding product was supplied to it and affixed to the exterior of its building in or around 2006-2008 pursuant to a construction contract entered into with Moyle Construction Limited in 2006. Moyle Construction had been supplied with the Alucobond by the third defendant, Skellerup Industries Limited (Skellerup) which imported and distributed Alucobond in New Zealand between 2005 and 2009. The second plaintiff alleges that its buildings in Albany and Māngere were fitted with Alucobond cladding in or around 2010 or 2011 by construction companies engaged to carry out work on the buildings at a time when the second defendant Terminus 2 Limited (Terminus), then known as Kaneba Limited, had superseded Skellerup, and was the importer and supplier of Alucobond in New Zealand.

[4] The plaintiffs say that Alucobond cladding consists of two aluminium cover sheets with a core containing polyethylene (PE) and other materials laminated and bonded together. The plaintiffs allege that the core in Alucobond PE cladding, supplied and affixed to their buildings as external walls (or parts of external walls),

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1 3AC's initial appearance and protest to jurisdiction dated 5 November 2021 was succeeded by an amended appearance and protest to jurisdiction dated 15 November 2021.

comprised approximately 100 per cent PE which they say is a highly flammable synthetic thermoplastic polymer with a high calorific value similar to that of petrol or propane gas.

[5] The plaintiffs further allege that the Alucobond cladding affixed to their buildings was combustible within the meaning of the New Zealand Building Code (Building Code), and when used as cladding on an external wall or other building element there is a material risk that in the event of a fire the flammable core of the Alucobond will cause or contribute to the rapid spread and severity of fire in a building with the risk of loss of life and damage to the building and adjacent buildings.

[6] The plaintiffs say that over recent years there has been a growing recognition that aluminium composite panels (ACP) with PE cores such as Alucobond are not fit for use as exterior cladding in buildings because of the risk that they will fuel the rapid spread of fire. They note that the October 2019 report of the inquiry into fire at Grenfell Tower in London found that the principal reason why fire spread so rapidly up and down and around the apartment building was because of ACP panels with PE cores which fuelled the fire.

[7] The plaintiffs plead six causes of action against the defendants:

(a) Breach of s 6 of the Consumer Guarantees Act 1993.

(b) Negligence.

(c) Negligent misstatement.

(d) Negligent failure to warn.

(e) Breach of s 9 (misleading or deceptive conduct) of the Fair Trading Act 1986.

(f) Breach of s 13 (false or misleading representations) of the Fair Trading Act.

[8] 3AC bases its notice of appearance and protest to jurisdiction pursuant to r 5.49 on the grounds that it is a German company which is not present in New Zealand. It notes that the plaintiffs effected service of the proceedings on it in Germany without prior leave of the Court by relying on rr 6.27(2)(j)(ii), 6.27(2)(a)(ii) and 6.27(2)(h)(i), notwithstanding that none of those rules which permit service out of New Zealand without leave, are applicable to the plaintiffs' pleaded claims against it. Furthermore says 3AC, there is no other basis for the proceeding to have been served out of New Zealand under the High Court Rules, and therefore the plaintiffs have not established that a New Zealand Court has jurisdiction to determine the claims in the proceeding.

The relevant High Court Rules

[9] Part 6 of the High Court Rules contains the rules regarding service of proceedings, and subpart 4 with service of proceedings out of New Zealand. Service of proceedings out of New Zealand without prior leave may be effected where the claim made falls within the scope of r 6.27:

> **6.27 When allowed without leave**
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> (1) This rule applies to a document that initiates a civil proceeding, or is a notice issued under subpart 4 of Part 4 (third, fourth and subsequent parties), which under these rules is required to be served but cannot be served in New Zealand under these rules (an originating document).
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> (2) An originating document may be served out of New Zealand without leave in the following cases:
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> (a) when a claim is made in tort and—
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> (i) any act or omission in respect of which damage was sustained was done or occurred in New Zealand; or
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> (ii) the damage was sustained in New Zealand:
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> (b) when a contract sought to be enforced or rescinded, dissolved, annulled, cancelled, otherwise affected or interpreted in any proceeding, or for the breach of which damages or other relief is demanded in the proceeding—
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> (i) was made or entered into in New Zealand; or
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> (ii) was made by or through an agent trading or residing within New Zealand; or

(iii) was to be wholly or in part performed in New Zealand; or

(iv) was by its terms or by implication to be governed by New Zealand law:

(c) when there has been a breach in New Zealand of any contract, wherever made:

(d) when the claim is for—

(i) a permanent injunction to compel or restrain the performance of any act in New Zealand; or

(ii) interim relief in support of judicial or arbitral proceedings commenced or to be commenced outside New Zealand:

(e) when the subject matter of the proceeding is land or other property situated in New Zealand, or any act, deed, will, instrument, or thing affecting such land or property:

(f) when the proceeding relates to the carrying out or discharge of the trusts of any written instrument of which the person to be served is a trustee and which ought to be carried out or discharged according to the law of New Zealand:

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

(h) when 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; or

(ii) a defendant to a claim for contribution or indemnity in respect of a liability enforceable by proceedings in the court:

(i) when the proceeding is for the administration of the estate of any deceased person who at the time of his or her death was domiciled in New Zealand:

(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; or

(iii) the enactment applies expressly or by implication to an act or omission that was done or occurred outside New Zealand in the circumstances alleged; or

(iv) the enactment expressly confers jurisdiction on the court over persons outside New Zealand (in which case any requirements of the enactment relating to service must be complied with):

(k) when the person to be served has submitted to the jurisdiction of the court:

(l) when a claim is made for restitution or for the remedy of constructive trust and the defendant's alleged liability arises out of acts committed within the jurisdiction:

(m) when it is sought to enforce any judgment or arbitral award.

[10] Where service of a proceeding has been effected without leave in reliance on r 6.27, and the New Zealand court's jurisdiction is protested under r 5.49 as is the case here, r 6.29 applies:

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.

(2) If service of process has been effected out of New Zealand under rule 6.28, and the court's jurisdiction is protested under rule 5.49, and it is claimed that leave was wrongly granted under rule 6.28, the court must dismiss the proceeding unless the party effecting service establishes that in the light of the evidence now before the court leave was correctly granted.

(3) When service of process has been validly effected within New Zealand, but New Zealand is not the appropriate forum for trial of the

action, the defendant may apply for a stay, or for a dismissal of the proceeding under rule 15.1.

(4) This rule is subject to section 27(1) of the Trans-Tasman Proceedings Act 2010 (*see* rule 5.49(7A)).

[11] Accordingly, when service has been effected out of New Zealand and the court's jurisdiction has been protested pursuant to r 5.49, specified parts of r 6.28 are engaged. It provides:

6.28 When allowed with leave

(1) In any proceeding when service is not allowed under rule 6.27, an originating document may be served out of New Zealand with the leave of the court.

(2) An application for leave under this rule must be made on notice to every party other than the party intended to be served.

(3) A sealed copy of every order made under this rule must be served with the document to which it relates.

(4) An application for leave under this rule must be supported by an affidavit stating any facts or matters related to the desirability of the court assuming jurisdiction under rule 6.29, including the place or country in which the person to be served is or possibly may be found, and whether or not the person to be served is a New Zealand citizen.

(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

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

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

[12] As service of the proceeding was effected out of New Zealand and without leave, r 6.29 mandates that the court must dismiss the proceeding against the party protesting jurisdiction unless the party effecting service (here the plaintiffs) establish that they have a good arguable case that their claim falls wholly within one or more of the paragraphs of r 6.27(2) and, the court should assume jurisdiction by reason of the matters set out in r 6.28(5)(b)–(d). Alternatively, the plaintiffs can succeed in avoiding dismissal of the proceeding if it can establish that, had it applied for leave under r 6.28,

leave would have been granted and it is in the interests of justice that the failure to apply for leave should be excused.

The Court's approach to dismissing a proceeding under r 6.29

[13] The Court of Appeal in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* explained the two-stage approach to the question of whether the party effecting service has established the requirements of r 6.29(1)(a).[2] It said:

> [32] Where r 6.29(1)(a) is relied upon, there is a two-stage inquiry. The party effecting service must first establish under r 6.29(1)(a)(i) that there is a good arguable case that the claim falls wholly within one or more of the paragraphs of r 6.27 (relating to the circumstances in which service overseas may be effected without leave). This part of the inquiry may be regarded as a gateway or threshold which must be established before moving to consider the stage two issues.
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> [33] The good arguable case test required at this stage 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 in which service overseas may be effected without leave. This is a largely factual question to be assessed on the basis of the pleadings and the affidavit or other evidence before the Court. It may be necessary, however, to consider questions of law (or mixed questions of fact and law) as part of the first-stage determination, for example, whether a contract was made in New Zealand or whether it was by its terms or implication to be governed by New Zealand law. Similarly if there is a question as to whether a binding contract was made at all (as in the present case).
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> [34] It may be the case under some of the categories in r 6.27(2) that a conclusion in the first stage of the inquiry may substantially answer part of the second stage of the inquiry. For example, if it is established there is a good arguable case that there has been a breach of contract in New Zealand under r 6.27(2)(c) then the claimant should not have much difficulty establishing at the second stage of the inquiry that there is a serious issue to be tried on the merits. We discuss below the distinction between the tests of good arguable case and serious issue to be tried.
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> (footnotes omitted)

[14] If the party which has effected service shows that it has a good arguable case falling within one or more of the paragraphs of r 6.27(2)(a)–(m), in the second stage under r 6.29(1)(a)(ii) the court must consider whether it should assume jurisdiction by reason of the matters set out in r 6.28(5)(b)–(d). The Court of Appeal in *Wing Hung* also addressed the question of whether there is any significant difference between a

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2 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754.

plaintiff establishing a "good arguable case" and "a serious issue to be tried". The Court observed:

> [41] … in practice, the distinction between the two standards may be difficult to draw. It is clear, however, that the good arguable case test does not require the plaintiff to establish a prima facie case. This recognises that disputed questions of fact cannot be readily resolved on affidavit evidence. On the other hand, there must be a sufficiently plausible foundation established that the claim falls within one or more of the headings in r 6.27(2). The Court should not engage in speculation.
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> [42] The serious issue to be tried test to be applied at the second stage of the inquiry was described by Lord Goff in *Seaconsar* as 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".
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> (footnotes omitted)

[15] Addressing r 6.28(5)(c) and whether New Zealand is the appropriate forum for the trial, the Court of Appeal noted that the onus of showing New Zealand is the appropriate forum for trial is on the party effecting service. The Court of Appeal commented:

> [45] In considering whether another forum is more appropriate, the Court looks for the forum with which the proceeding has the most real and substantial connection. Relevant factors include issues of convenience or expense, availability of witnesses, the law governing the relevant transaction and the places where the parties resided or carried on business.
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> [46] We accept that other relevant considerations also bear on the issue of appropriate forum. These include the cautious approach already discussed to the subjection of foreigners to the jurisdiction of a New Zealand Court; whether other related proceedings are pending elsewhere; whether the New Zealand Court would provide the most effective relief or whether a foreign court is in a better position to do so; whether the overseas defendants will suffer an unfair disadvantage if a New Zealand court assumes jurisdiction; and any choice of jurisdiction previously agreed by the parties.
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> (footnotes omitted)

[16] Turning to r 6.29(1)(b) the Court of Appeal noted that unless a party effecting service establishes both of the matters in r 6.29(1)(a), the court must dismiss the proceeding unless, as an alternative, the party effecting service is able to establish the matters set out in r 6.29(1)(b). Namely, that leave would have been granted if it had been sought under r 6.28, and that it is in the interests of justice that the failure to apply for leave should be excused. The first of these requires the party effecting service to

satisfy each of the four matters set out in r 6.28(5)(a)–(d). As regards the requirement that the party effecting service show that it is in the interests of justice to excuse their failure to apply for leave, the Court of Appeal described it as being a "broad rubric" which may encompass a broad range of considerations.

[17] The Court of Appeal also observed that where multiple causes of action are pleaded r 6.29 requires separate consideration of each:

> [71] It will often be the case that a number of causes of action are pleaded arising from the same set of facts. This case is a good example. But we consider that r 6.29 requires separate consideration of each cause of action. At the threshold stage of the inquiry, the question whether a particular cause of action falls within r 6.27 will depend on which (if any) of the circumstances set out in that rule applies. As this case demonstrates, this aspect requires an assessment of whether the cause of action is in contract, tort, a claim under an enactment or none of those. And in the second stage, an assessment is required as to whether there is a serious issue to be tried will require separate assessment of both the factual and legal bases for each cause of action. There may be commonalities but it is not permissible to reason that if one cause of action passes muster, the others arising from the same or similar facts must meet the criteria too.
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> [72] That said, it will often be appropriate to assess the appropriate forum issue and any other relevant factors supporting the assumption of jurisdiction on a global basis where there are multiple causes of action.

Service out of New Zealand

[18] The plaintiffs say that their proceeding against the defendants falls within the scope of r 6.27 and that they were entitled to effect service on 3AC in Germany without leave pursuant to r 6.27(2)(h)(i), as the first defendant is a necessary and proper party to their claim against the second and third defendants.

[19] They say that there is a serious issue to be tried on the merits and that New Zealand is the appropriate forum for the trial.[3] They note that although 3AC disputes New Zealand as being the appropriate forum, it has not identified any other available forum for the trial and has not presented any evidence on the issue.

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3 High Court Rules 2016, r 6.28(5)(b)–(c).

First cause of action: the Consumer Guarantees Act 1993

The plaintiffs' submissions

[20] The plaintiffs' first cause of action is against all three defendants and alleges that by supplying the plaintiffs with Alucobond PE cladding they breached s 6 of the Consumer Guarantees Act (the CGA) by failing to satisfy the statutory guarantee that the goods were of acceptable quality as defined in s 7 of that Act.[4] The plaintiffs say that they were supplied with Alucobond PE cladding either as consumers as defined in s 2 of the CGA, or alternatively that they derived their ownership or leasehold interest in a building fitted with Alucobond cladding through a predecessor in title who was a consumer as defined in the CGA.

[21] Mr Farmer QC for the plaintiffs says that the CGA has extraterritorial effect, and that 3AC was the manufacturer of the Alucobond PE cladding which was:

(a) supplied in or about 2008 by Skellerup to Moyle Construction Limited for affixing to the first plaintiff's Cutterscove building;

(b) supplied in or about 2010 or 2011 by Kaneba to Stanley Construction for affixing to Argosy's Don McKinnon Drive premises; and

(c) supplied in or about 2010 or 2011 to an unknown construction business for affixing to Argosy's Favona Road building, at a time when the building was owned by a previous owner.

[22] The plaintiffs allege that at the time Skellerup supplied Alucobond for affixing to the first plaintiff's building, Skellerup was being directly or indirectly supplied with Alucobond by 3AC as manufacturer of the product. The plaintiffs say that the Alucobond supplied and fitted to their buildings was not of acceptable quality in accordance with the statutory guarantee in s 6 of the CGA, because:

(a) it possessed material fire risk properties;

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4 Amended Statement of Claim dated 23 December 2021 at [49]–[69].

(b) it had Building Code non-compliance properties; and/or

(c) Building Code non-compliance risk properties;

(d) it is and was not fit for the purposes for which goods of that type are commonly supplied; and

(e) it is and was not safe.

[23] The plaintiffs refer to and rely on the evidence of their expert witness, Simon Weaver, who is a Chartered Professional Engineer and fire engineer. He says that Alucobond is combustible, and that the use of Alucobond when the first plaintiff's Cutterscove building was reclad in 2006–2008 was inconsistent with and contrary to the applicable provisions of the Building Code which required external walls and roofs to be resistant to the spread of fire, appropriate to the fire load within the building and the proximity of other household units and other property. He says that the use of Alucobond PE cladding on the plaintiffs' buildings will cause or contribute to the rapid spread and severity of a fire in the building, including the rapid vertical and horizontal spread of a fire in the building, with the result that in the event of a fire in the building, the use of the Alucobond cladding will increase the risk of loss of life and the risk of extensive damage being caused to the building and its contents, as well as to any adjacent buildings.

[24] The plaintiffs allege that they have or will suffer loss and damage by reason of the fitting of Alucobond on their properties by the cost of removing and replacing the Alucobond on their buildings or alternatively the cost of implementing other measures to rectify the impact of the Alucobond on their buildings by reason of its non-compliance with the acceptable quality guarantee, the reduction in value of their buildings as a result of the Alucobond, increases in their building insurance premia, and the costs of building safety assessments. The plaintiffs accordingly seek an award of damages pursuant to ss 25 and 27 of the CGA.

[25] They say that there is therefore a serious issue to be tried in relation to their first cause of action.

[26] With respect to its argument that 3AC is a manufacturer for the purpose of the CGA, the plaintiffs note that 3AC does not dispute that it is the manufacturer of Alucobond in Germany. They further note that 3AC is the registered proprietor of the Alucobond trademark in New Zealand which was registered in New Zealand on 27 November 2017, and that as owner of the trademark, 3AC has caused or permitted its Alucobond brand to be attached to the Alucobond cladding supplied in New Zealand.

[27] The plaintiffs submit that for their first cause of action to succeed they are not required to show that the CGA has extra-territorial effect as the Act applies to goods supplied to consumers in New Zealand which were manufactured overseas. The plaintiffs say that in enacting the CGA, Parliament intended to strengthen and clarify the rights of consumers by mandating a set of minimum quality standards in respect of the supply of both goods and services, which includes direct rights of redress against manufacturers of goods. They say that the Alucobond cladding was manufactured by 3AC and supplied to New Zealand consumers using 3AC's brand, with the knowledge and consent of 3AC. The plaintiffs accordingly submit that it is sufficient to engage the statutory guarantees in the CGA and that they apply to 3AC as the manufacturer of Alucobond.

[28] The plaintiffs nevertheless submit that the CGA does have extraterritorial effect having regard to its text and purpose. The plaintiffs submit that s 2(1) of the Act contains an expanded definition of a "manufacturer" to include the actual manufacturer of goods and also: (a) any person that holds itself out as being the manufacturer of the goods; (b) any person that attaches its brand or mark, or permits its brand or mark to be attached to the goods; and (c) any person who imports or distributes goods where those goods are manufactured outside New Zealand and the foreign manufacturer of the goods does not have an ordinary place of business in New Zealand.

[29] The plaintiffs say that the first two limbs of the definition of "manufacturer" in s 2(1) are silent as to the place of manufacture of goods, and Mr Farmer submits that properly construed, the third limb (c) does not purport to limit the application of the CGA to local or domestic manufacturers. The plaintiffs say that subclause (c) of the definition merely functions as a tool of convenience to allow consumers to sue local

importers and distributors of goods manufactured outside New Zealand where suing a foreign manufacturer would be inconvenient. The plaintiffs accordingly submit that the provision is permissive in nature and does not limit the scope of the CGA to manufacturers located in New Zealand and to New Zealand importers and distributors of goods where they are made by a foreign manufacturer.

3AC's submissions

[30] As regards the plaintiffs' first cause of action relating to the CGA, 3AC says that there is no serious issue to be tried on the merits because the plaintiffs' claim is based on ss 25 and 27 of the CGA, and the Act does not have extraterritorial application to manufacturers such as 3AC. It says that the plaintiffs' submission that the claim under the CGA does not require the Court to find that the Act has extra-territorial effect, because the Act applies where goods manufactured overseas are supplied to consumers in New Zealand, is misconceived.

[31] 3AC says that here, where the goods were imported by New Zealand-based distributors who are deemed by the CGA to be the manufacturers of those goods, and those imported goods were allegedly supplied to building owners or construction companies by New Zealand based parties, 3AC can only be liable under the CGA in respect of goods it manufactured outside New Zealand if it also imported, distributed and supplied the goods in New Zealand. 3AC submits that the plaintiffs' interpretation of the CGA would have the effect of imposing New Zealand consumer product standards on any overseas manufacturer notwithstanding that they had not imported, or distributed the goods within New Zealand, and notwithstanding they do not have an ordinary place of business in New Zealand.

[32] Mr Galbraith QC says that it is a well-established principle and approach to statutory interpretation that unless a contrary intention is clear either by words or implication, an enactment is to be presumed as not having extraterritorial effect. He submits that the Court's interpretation of the CGA should focus on the text and scheme of the Act, and he notes that it does not contain any express extra-territorial provision.

[33] Mr Galbraith submits that the two references to "foreign manufacturers" in the CGA both point away from interpreting the Act as being intended to have extra-

territorial effect. He notes that limb (c) of the definition of "manufacturer" creates statutory obligations on an importer or distributor of overseas manufactured goods as if that importer or distributor was the actual manufacturer. Mr Galbraith submits that this is consistent with the CGA not applying to overseas manufacturers. He says that limb (c) would make no sense if an overseas manufacturer of goods who did not have an ordinary place of business in New Zealand is nevertheless covered by the Act, as that would mean that there would be no need for limb (c) as the importer or distributor would be liable as a supplier of the goods in the same manner as is the case for merchants and other intermediaries in the supply chain who acquire goods from New Zealand manufacturers and supply them.

[34] Mr Galbraith notes that the only other reference in the CGA to "foreign manufacturer" appears in the s 2(1) definition of "ordinary place of business in New Zealand", and provides that the term "manufacturer" in the Act does not include a New Zealand subsidiary of a foreign manufacturer. He submits that this means that a foreign manufacturer does not have an ordinary place of business in New Zealand, simply because it has a New Zealand subsidiary with an ordinary place of business in New Zealand.

[35] Mr Galbraith accordingly submits that both of the references to a foreign manufacturer, indicate that the CGA is not intended to impose statutory guarantees on manufacturers outside New Zealand whose goods are imported into New Zealand by New Zealand based importers and distributors. He submits that it is because the CGA does not apply to foreign manufacturers that it contains the provision which deems the New Zealand importer to be the manufacturer for the purposes of the manufacturer's guarantees under the Act, and the New Zealand supplier of goods is responsible for the statutory warranties imposed in respect of supply of the goods.

[36] Mr Galbraith further submits that even if the CGA has extra-territorial effect on 3AC as an overseas manufacturer, the statutory guarantees and warranties imposed by the Act only apply to goods "of a kind ordinarily acquired for personal, domestic, or household use or consumption" in accordance with the definition of the term "consumer" in s 2(1). He submits that the plaintiffs are not consumers within the meaning of the CGA as the Alucobond cladding does not constitute goods of a kind

ordinarily acquired for personal, domestic, or household use or consumption in respect of which the statutory guarantees and rights of redress against suppliers or manufacturers apply.

[37] He notes that the plaintiffs rely on instances of Alucobond being supplied to commercial construction businesses for use in residential construction projects, and submits that does not amount to personal, domestic, or household use or consumption within the meaning of the CGA. Mr Galbraith submits that such supplies are to and for the use of specialist construction businesses for use in their construction projects. He submits that the CGA only applies to goods ordinarily acquired by householders for their personal use, as opposed to construction businesses which acquire the Alucobond for the construction of premises. Mr Galbraith says that evidence before the Court regarding the process by which the Alucobond cladding products were acquired and installed in relation to the buildings owned by the plaintiffs is consistent with that process, and more generally there is no evidence to show that the Alucobond cladding is ordinarily acquired by people for their personal, domestic, or household use or consumption.

First cause of action: analysis

Does the CGA have extra-territorial effect?

[38] The approach to the interpretation of statutes to determine whether or not they have extraterritorial effect was considered by the Supreme Court in *Poynter v Commerce Commission*:[5]

> [36] *Bennion on Statutory Interpretation* states, as a general proposition, that an enactment is to be treated as not having extraterritorial effect unless a contrary intention appears and subject to any relevant rules of private international law. *Craies on Legislation* states, to the same effect, that, in the absence of contrary evidence, a legislative proposition is addressed to anyone who is within the territory to which the proposition extends. An enactment will generally apply to things done and people in the territory to which it extends, and no further. There is a presumption that Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication.
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> [37] These principles are underpinned by considerations of international comity. As Lord Lindley MR put it in *Re A B & Co*, "unless Parliament has

5 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 (footnotes omitted).

> conferred upon the Court that power in language which is unmistakable, the court is not to assume that Parliament intended to do that which might so seriously affect foreigners who are not resident here, and might give offence to foreign Governments". …
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> [38] As early as 1863, Dr Lushington stressed the same point as that made by Lord Simon when he said in *The Amalia* that "the British Parliament has no proper authority to legislate for Foreigners out of its jurisdiction … [no] statute ought, therefore, be held to apply to Foreigners with respect to transactions out of British jurisdiction, unless the words of the Statute are perfectly clear". This principle has been said to apply with even greater strength to Acts which impose penalties. The tenor of these authorities has very recently been affirmed in a context not dissimilar to that in the present case by the decision of the House of Lords in *Office of Fair Trading v Lloyds TSB Bank Plc* in which Lord Hoffmann said that there is a presumption that legislation is not intended to have extraterritorial effect. The key principle which derives from these authorities is that the courts should not treat legislation as having extraterritorial effect unless and then only to the extent Parliament has made that clear by means of express words or necessary implication.
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> …
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> [45] We are by no means insensitive to the suggestion that extraterritoriality issues should now be viewed from the perspective of the substantial changes that have taken place in recent times in the way people and businesses communicate with each other. Nor are we insensitive to what the Court of Appeal called the realities of globalisation. We do not, however, consider it is appropriate in the present context for the courts to impose piecemeal common law glosses on to a statutory code. The more is this so if such glosses require significant development of the common law. It is far better, both in principle and pragmatically, for Parliament to address the issues arising in a comprehensive way rather than for the courts to effect ad hoc additions by a process which does not accord with appropriate principles of statutory interpretation. The presumption that express language or necessary implication is required to achieve extraterritorial effect exists to reinforce the proposition that it is for Parliament, not the courts, to decide what extraterritorial effect an enactment should have. The policy issues in making that assessment are for Parliament, not the courts. The courts simply give effect to such extraterritorial reach as Parliament has clearly specified.

[39] Addressing what the phrase "necessary implication" means in this context the Supreme Court said:[6]

> It is important to recognise that [the Commerce Act 1986] is a code and, for extraterritoriality purposes, the court should confine itself to the express terms of the Act and any additional extraterritorial effect which flows as a matter of inevitable logic from those express terms read contextually in the light of the purposes of the Act. That is what necessary implication means. A necessary implication is not something judicially engrafted on to legislation as a judicial

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6 At [46] (footnotes omitted).

> value or policy judgment, however reasonable that judgment may appear to be.

[40] Applying that approach and those principles to the CGA, it is clear that there are no express words in s 1A of the CGA, in which the legislative purpose of the Act is set out, or elsewhere in the Act, which indicate that Parliament intended the Act to have extraterritorial effect. The only express reference to matters concerning the extraterritorial reach of the Act are those contained in the definitions of the terms "manufacturer" and "ordinary place of business in New Zealand" set out in the interpretation section, s 2(1).

[41] The term "manufacturer" is defined in s 2 of the CGA as:

> 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:
>
> (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.

[42] In my view, the clear inference to be drawn from paragraph (c) of the definition of the term "manufacturer" in s 2(1) of the Act, deeming a New Zealand based importer or distributor of goods manufactured outside New Zealand by a foreign manufacturer who does not have an ordinary place of business in New Zealand, as being the manufacturer of the imported goods for the purposes of the Act, is that the legislative purpose was to provide a remedy for New Zealand consumers of those imported goods, because the reach of the Act does not have extraterritorial effect. The effect of paragraph (c) is to impose on the New Zealand-based importer or distributor of goods, the statutory guarantee of the goods being of acceptable quality.[7] By doing so it imposes legal responsibility on New Zealand-based importers and distributors of goods, the same obligations as are imposed on New Zealand based manufacturers that

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7 Consumer Guarantees Act 1993, s 6(2)(b).

their goods are of acceptable quality as defined by s 7, and renders the importers amenable to claims by consumers seeking redress under the Act.

[43] I consider that paragraph (c) provides a clear signal that the CGA was not intended by Parliament to have extraterritorial effect. There would be no utility in imposing the manufacturer's liability under the Act upon a New-Zealand based importer of goods, if the Act was intended to have extraterritorial reach enabling consumers to seek redress under the Act directly from the manufacturer of the goods outside New Zealand, wherever in the world they may happen to have manufactured the goods.

[44] I agree with Mr Galbraith's submission that paragraph (c) of the "manufacturer" definition is consistent with an interpretation of the Act as not having extraterritorial effect, and I reject Mr Farmer's submission that its purpose is to provide a means for consumers to sue New Zealand-based importers of foreign manufactured goods where suing the foreign manufacturer directly would be inconvenient. In my view, the fact that Parliament has imposed the obligations of the manufacturer's statutory guarantee upon a New Zealand-based importer, is because the Act is not intended to have extraterritorial effect, and Parliament has imposed the manufacturer's statutory obligations upon a New Zealand-based importer of goods to afford New Zealand consumers the protections and rights of redress provided for by the Act in respect of those imported goods.

[45] Although the CGA is not a legislative code as was the case in *Poynter*, the general principles described by the Supreme Court as applicable to the interpretation of a statute as to whether it has extraterritorial effect are equally applicable here, and I find that there is neither express language nor any necessary implication which would lead the Court to interpret the CGA as being intended to have extraterritorial reach.

[46] The consequence of my finding that the CGA does not have extraterritorial effect and reach means that the plaintiffs cannot succeed in their first cause of action founded on an allegation that 3AC failed to comply with s 6 of the Act by supplying goods that were not of acceptable quality, as the Act does not apply to it. Accordingly, I find that the plaintiffs have failed to show a "good arguable case" or that there is "a

serious issue to be tried" as regards their first cause of action founded on alleged breaches of the CGA.

[47] Although that finding is dispositive of the plaintiffs' first cause of action, I shall nevertheless also address the second ground advanced by 3AC as to why the plaintiffs' first cause of action cannot succeed.

Is Alucobond cladding goods "of a kind ordinarily acquired for personal, domestic, or household use or consumption"?

[48] The term "consumer" as used in the CGA is defined as meaning a person who:

> (a) acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption; and
>
> (b) does not acquire the goods or services, or hold himself or herself out as acquiring the goods or services, for the purpose of—
>
> (i) resupplying them in trade; or
>
> (ii) consuming them in the course of a process of production or manufacture; or
>
> (iii) in the case of goods, repairing or treating in trade other goods or fixtures on land

[49] The plaintiffs submit that they are themselves consumers or that the Alucobond cladding when supplied for affixing to the buildings that they now own, was supplied to the previous building owners who were consumers within the statutory definition. The plaintiffs say that goods will often be capable of being used in various ways, both commercially or personally, and the word "ordinarily" as used in the definition of "consumer" in the Act simply means "as a matter of regular practice or occurrence" or "in the ordinary or usual course of events or state of things".[8]

[50] The plaintiffs submit that goods or services are likely to have been ordinarily acquired for personal, domestic or household use or consumption, either when it is not extraordinary for them to be acquired for those purposes, or where the supplier or manufacturer of the goods holds them out as being suitable for personal, domestic, or

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8 *Nesbit v Porter* [2000] 2 NZLR 465 (CA) at [28]–[29]; and *Sleight v Beckia Holdings Ltd* [2020] NZHC 2851 at [332].

household use or consumption. The plaintiffs say that here there is evidence showing that it was not uncommon for Alucobond cladding to be purchased for private use, and that in the case of the first plaintiff, Alucobond was acquired for domestic use to reclad the Cutterscove apartments in order to remedy weathertightness issues. The plaintiffs also say that Alucobond cladding has been used to clad other residential buildings in New Zealand for the purpose of rectifying watertightness problems which had caused the original exterior façade to fail. By way of examples, the plaintiffs refer to the evidence showing that three commercial construction businesses: The Building Agency; Cudoclad; and Amalgamated Builders Limited, have used Alucobond cladding for residential applications.

[51] In reply the first defendant, 3AC says that the examples provided by the plaintiffs all relate to Alucobond being supplied to commercial construction companies who purchased it for use on residential construction projects. 3AC submits that acquisition of Alucobond panelling by building and construction companies for use in the construction of residential premises is not within the scope of the definition of consumer in the CGA and the acquisitions of Alucobond used on the first plaintiff's Cutterscove building, and on the other buildings identified by the plaintiffs were not goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption within the meaning of the CGA.

[52] 3AC says that the CGA applies to goods ordinarily acquired by householders for their personal use and not to goods purchased by construction companies for use in their construction projects, notwithstanding that the building under construction may be a residential premises to be occupied and used by householders. Mr Galbraith submits in *Kaori Ltd v Shrinkforce Shrink Wrap Services Ltd (in rec)* Duffy J succinctly explained the phrase "ordinarily acquired for personal, domestic, or household use or consumption" in relation to the definition of "consumer" under the CGA, when she said:[9]

> [48] For the plaintiff to be a "consumer" under the Act, the goods or services must have been ordinarily acquired for personal, domestic or household use or consumption. *Nesbit v Porter* [2000] 2 NZLR 465 (CA) at [29] makes it clear that "ordinarily" is used in the Act in the sense of "as a matter of regular practice or occurrence" or in the "ordinary or usual course

9 *Kaori Ltd v Shrinkforce Shrink Wrap Services Ltd (in rec)* [2012] NZHC 3204

> of events or state of things". The defendant's evidence is that for the most part, it supplies its shrink wrapping services to construction or renovation professionals. I accept the defendant's evidence. I am satisfied that the shrink wrapping service that it provides is not something that is ordinarily acquired for personal, domestic or household use. It follows that I find the Act does not apply. But in case I am wrong on this issue, I turn next to consider whether, if the Act does apply, it has been excluded by the contract between the parties.

[53] 3AC notes that the evidence before the Court shows that the Alucobond cladding was acquired by specialist construction companies or businesses for use in commercial, and residential complexes. The first defendant also refers to the evidence showing that the Alucobond was being specified for use in a construction project by design professionals and that it was described in product literature published by 3AC and the second defendant as relevant to large scale building projects.

[54] 3AC further says that the plaintiffs have not produced any evidence to show that Alucobond cladding are goods ordinarily acquired by householders for personal, domestic, or household use or consumption.

[55] The first defendant accordingly submits that the plaintiffs have not established that Alucobond is a kind of product to which the CGA applies.

Does the supply of Alucobond to commercial construction businesses fall within the scope of the CGA?

[56] The purpose of the CGA is set out in s 1A which provides:

> (1) The purpose of this Act is to contribute to a trading environment in which—
>
> (a) the interests of consumers are protected; and
>
> (b) businesses compete effectively; and
>
> (c) consumers and businesses participate confidently.
>
> (2) To this end, the Act provides that consumers have—
>
> (a) certain guarantees when acquiring goods or services from a supplier, including—
>
> (i) that the goods are reasonably safe and fit for purpose and are otherwise of an acceptable quality; and

(ii) that the services are carried out with reasonable care and skill; and

(b) certain rights of redress against suppliers and manufacturers if goods or services fail to comply with a guarantee.

[57] The term "goods" is also defined, and:[10]

(a) means personal property of every kind (whether tangible or intangible), other than money and choses in action; and

(b) includes—

(i) goods attached to, or incorporated in, any real or personal property:

(ii) ships, aircraft, and vehicles:

(iii) animals, including fish:

(iv) minerals, trees, and crops, whether on, under, or attached to land or not:

(v) non-reticulated gas:

(vi) to avoid doubt, water and computer software; but

(c) despite paragraph (b)(i), does not include a whole building, or part of a whole building, attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation.

[58] Unless paragraph (c) applies, exterior cladding such as Alucobond which is attached to and incorporated in a building, is personal property falling within the scope of the definition of "goods" in paragraph (a). However, paragraph (c) excludes from the definition of "goods" a whole building or part of a whole building attached to land unless the building is a structure that is easily removeable and not designed for residential accommodation. Here the Alucobond cladding attached to the exterior of the first plaintiff's apartment building and the second plaintiff's commercial buildings is a building material that has been used and attached to the buildings and is not attached to an easily removable structure not designed for residential purposes. I therefore find that paragraph (c) applies, and that the Alucobond cladding does not come within the scope of the term "goods" as used in the CGA.

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10 Section 2(1).

[59] However, in case I am wrong in that conclusion I now turn to consider whether the plaintiffs come within the definition of "consumer" as used in the CGA. A "consumer" under the CGA is a person who acquires from a supplier "goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption", and who does not acquire the goods or services for the purpose of resupplying them in trade, or consuming them in the course of a manufacturing process. The consumer is therefore, a person who is the 'end user' of the goods, and the provisions of the Act imposing the statutory guarantees are directed at the kind of goods and services "ordinarily acquired for personal, domestic, or household use or consumption".

[60] While the Alucobond cladding is a product that is used in the construction of residential premises used by householders, it is not a product that householders themselves ordinarily acquire for their personal use or consumption. It is a product that is ordinarily acquired by construction contractors or building companies for use and incorporation in the residential and commercial buildings that they construct, and which in the case of residential premises will be used by householders to live in. The plaintiffs' own evidence shows this to be the case as regards the Alucobond purchased by building and construction companies in New Zealand. This interpretation is also consistent with paragraph (c) of the definition of "goods" which excludes whole buildings or parts of whole buildings unless they are easily removeable structures not designed for residential accommodation.

[61] I accordingly find that the CGA does not apply to the Alucobond cladding which was acquired by the construction company for use and fitting to the first plaintiff's Cutterscove residential apartment building, or to the commercial buildings and premises purchased by the second plaintiff. In light of that finding, the plaintiffs' first cause of action founded on the CGA could not succeed.

[62] Furthermore, for the reasons set out above, I have also found that the Act does not have extraterritorial effect and does not apply to the first defendant as an overseas based manufacturer of the Alucobond product that does not have an ordinary place of business in New Zealand, or a person that imports or distributes the product in New Zealand.

[63] As I have found that the plaintiffs' first cause of action could not possibly succeed, it follows that the plaintiffs have failed to show that they have a good arguable case or that there is a serious issue to be tried on the merits as regards their first cause of action, and accordingly I shall uphold the first defendant's protest to jurisdiction in relation to it.

Second, third and fourth causes of action: negligence, negligent misstatement and negligent failure to warn

[64] As the plaintiffs' allegations contained in their second, third, and fourth causes of action involve substantially similar and overlapping allegations of negligence and breaches of duty of care owed by the defendant to them, and for the purposes of 3AC's current application, I shall deal with these causes of action collectively.

Second cause of action — negligence

[65] The plaintiffs' second cause of action alleges that 3AC together with the second and third defendants, owed the plaintiffs a duty to take reasonable care to ensure that the Alucobond cladding it designed, manufactured, and/or supplied:

(a) complied with the Building Act 2004, and the Building Code set out in sch 1 of the Building Regulations 1992;

(b) was not subject to the material fire risk properties;

(c) was not subject to the Building Code non-compliance properties;

(d) was not subject to the Building Code non-compliance risk properties; and

(e) was fit for all of the purposes for which goods of its type are commonly supplied including for the purposes of being used for external walls or other building elements and structures for residential, commercial, or buildings constructed for public or government administration purposes.

[66] The plaintiffs allege that 3AC breached the duty it owed to the plaintiffs by negligently failing to notice, or having noticed, failing to act in response to the fact that Alucobond was designed such that it did not comply with the Building Act and with the Building Code then in force, due to it suffering from Building Code non-compliance properties and/or Building Code non-compliance risk properties (the defects). The plaintiffs further allege that 3AC had and has, a system of production and manufacture of Alucobond which allowed the cladding to be produced suffering from those defects, or alternatively operated a system of production and manufacture that failed to ensure that the Alucobond cladding was free of the defects.

[67] The plaintiffs allege that as a result of the negligence of 3AC, and also that of the second and third defendants by their importing and distributing the Alucobond cladding suffering from the defects, the plaintiffs have and will suffer loss and damage for which they seek damages, interest, and costs.

[68] The plaintiffs allege that 3AC owed them a duty to take reasonable care to ensure that the Alucobond cladding that it designed, manufactured and supplied for use as exterior cladding upon buildings such as theirs complied with the Building Act and Building Code, and was fit for all of the purposes for which goods of Alucobond's type are commonly supplied and used as exterior cladding on residential and commercial buildings. The plaintiffs allege that in breach of its duty of care, 3AC failed to notice or, or having noticed failed to take heed of the fact that Alucobond failed to meet those standards and was consequently not fit for use as exterior cladding on residential and commercial buildings such as the plaintiffs' buildings.

Third cause of action — negligent misstatement

[69] The plaintiffs' third cause of action alleges that 3AC and the second and third defendants, made negligent misstatements representing that Alucobond was suitable for use for external walls or other building elements and structures for residential or commercial buildings, or for buildings constructed for public or government administration purposes or any combination of those uses. The plaintiffs also allege that 3AC made representations regarding the fabrication methods that could be utilised with Alucobond, as well as representations as to Alucobond's fire performance and its

compliance with the Building Code and standards. The plaintiffs allege that these representations were repeated over time and were continuing representations.

[70] The plaintiffs allege that the representations as to the suitability of the Alucobond cladding for those purposes were contained in the documents distributed and/or published in New Zealand by 3AC and by the other defendants for the purposes of promoting the Alucobond cladding product.

[71] The plaintiffs allege that the representations made by the defendants included representations regarding the fabrication methods such as cutting, welding and drilling which could be employed by third parties prior to the Alucobond cladding being fitted to buildings and which would not materially affect the performance and safety of the product, and that Alucobond cladding was a product which protected against fire and/or did not increase the risks associated with fire in a building to which it was fitted. They also allege that 3AC and the second and third defendants represented that Alucobond had passed all fire safety tests required by the Building Code and the applicable New Zealand building standards, and that it complied with the Building Code.

[72] The plaintiffs allege that 3AC and the other defendants owed a duty of care to the plaintiffs not to make false, misleading, or negligent statements in relation to Alucobond which might result in them suffering economic loss or physical harm. They allege that in making the representations 3AC along with the second and third defendants acted in beach of their duties of care owed to the plaintiffs by failing to adequately research and verify the accuracy of the representations they were making, or alternatively having done so failing to ascertain that the representations being made were, or might be false or misleading. They allege that those representations were false and misleading because the Alucobond was not suitable for the various building purposes because of the cladding's fire risk properties, and because the aluminium sheeting of the cladding did not protect the PE core from fire, and because it possessed material fire risk properties. They further allege that the representations were false or misleading because the Alucobond cladding had not passed all of the fire safety tests required by the applicable building codes and standards, and because it was not

compliant with the Building Code by reason of its non-compliance properties and non-compliance risk properties.

[73] The plaintiffs' allegations are supported by the affidavit evidence of Mr Weaver. Mr Weaver, who holds Bachelor of Engineering and Master of Engineering qualifications, explains that he has extensive experience in fire engineering, fire protection, and evacuation. In his affidavit filed by the plaintiffs, Mr Weaver describes his examination of the Alucobond product and its qualities, and sets out his conclusions regarding whether Alucobond is combustible, and as to the combustibility of the first plaintiff's Cutterscove building and how the presence of Alucobond cladding on the building would impact on the building's compliance with the Building Code. Mr Weaver summarises his conclusions as follows:

> In summary, in my opinion, based on the facts, assumptions, reasons and literature referred to above:
>
> (a) Alucobond PE and Alucobond Plus are combustible; and
>
> (b) when the Cutterscove complex was reclad in 2006-2008, the New Zealand Building Code relevantly required external walls and roofs to have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of other household units and other property. In my opinion the presence of Alucobond PE cladding is inconsistent with these requirements; and
>
> (c) where there are combustibility requirements in the compliance documents of the New Zealand Building Code, there is no evidence that those requirements have been met for Alucobond PE and Plus.

[74] In a further affidavit Mr Weaver[11] replies to the second affidavit filed by Ms Gillian Stopford[12] who is a Chartered Professional Fire Engineer, in which she expresses her opinion that Alucobond Plus would pass the relevant international tests.[13] Mr Weaver notes however that Ms Stopford has not responded to the opinions he has expressed about Alucobond PE, which was the product installed at Cutterscove, and has instead focused on Alucobond Plus. Mr Weaver says:

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11 Third affidavit of Simon Weaver, sworn 15 February 2022.
12 Second affidavit of Gillian Stopford, sworn 4 February 2022.
13 At [14].

> As regards Alucobond Plus, Ms Stopford accepts that NFPA 285, BS8414-2 tests, using a typical New Zealand construction, have not been carried out. However, Ms Stopford expresses the view that these tests would, if performed, be passed. Nothing in Ms Stopford's affidavit causes me to change my opinions set out in my first or second affidavit.
>
> At paragraph [13.1], Ms Stopford quotes from the Audit Notes to Dr Enright's report for MBIE. This report is at page 0684 to the exhibit marked SDW-1 to my first affidavit. The passage from which Ms Stopford quotes is at paragraph D on page 0690. It is part of a series of Audit Notes headed "Warning – UK full-scale tests cast doubt on FR products". As appears from paragraph A, the quoted comments relate to the tests performed by BRE Global, not to NFPA 285.
>
> I therefore do not agree with Ms Stopford, that Dr Enright's analysis confirmed that Alucobond Plus would pass NFPA 285 where non-combustible insulation is installed.

[75] The plaintiffs allege that they relied upon the representations made by 3AC and the other defendants by using or permitting their agents to use Alucobond for cladding the exterior of the Cutterscove apartment building when remediating the leaky building/weathertightness faults in 2006–2008, and in relation to the second plaintiff's buildings, when permitting their agents to use and fit Alucobond on their buildings or when acquiring ownership or leasehold interests in buildings fitted with Alucobond.

[76] The plaintiffs say that as a result of their reliance on what they allege were false or misleading representations negligently made by 3AC and the second and third defendants, they have suffered and will suffer loss and damage for which they seek damages, interest, and costs.

[77] The plaintiffs allege that 3AC made representations that its Alucobond product was suitable for use as cladding on exterior walls of residential, commercial, and industrial buildings. The plaintiffs say that 3AC's representations as to the suitability and use of the Alucobond product were made or impliedly made by means of images of various types of buildings fitted with Alucobond contained in documents distributed and/or published by 3AC, the second defendant or Skellerup. They refer to four documents they say contain the representations. These documents and others are also relied upon by the plaintiffs in relation to their allegations regarding the representation concerning the available methods of fabrication of the Alucobond cladding, and the

representations regarding Alucobond's compliance with Fire Performance standards and the Building Code. The documents identified and relied on are:

(a) "Alucobond: at a glance".

(b) 3A Composites Safety Data Sheet, Alucobond, initial release date 14 February 2003, revised date 18 February 2013.

(c) Alucobond: Processing and Technical Data, dated 1 July 2012.

(d) Alucobond: Lap Joint System Manual (v1).

[78] The plaintiffs further allege that the representations made by 3AC regarding Alucobond were expressly or impliedly also made by the second and third defendants in a series of documents published or distributed by them in New Zealand for the purposes of marketing and promoting Alucobond. These documents are identified as:

(a) Alcan Composites, "Alucobond processing at a glance", dated 1 July 2003.

(b) Skellerup Alucobond Standard Details, dated 7 July 2005.

(c) Skellerup Alucobond, Producer Statement – Construction, dated 12 September 2006.

(d) A letter from Skellerup Alucobond to Moyle Construction Limited dated 25 November 2008 enclosing a revised Producer Statement and Guarantee also dated 25 November 2008.

(e) Kaneba, Alucobond Fixed Cassette System, Version 1, dated 24 March 2013.

Fourth cause of action — negligent failure to warn

[79] The plaintiffs' fourth cause of action alleges that 3AC and the second and third defendants owed the plaintiffs a duty of care requiring them to warn the plaintiffs that the Alucobond cladding was not suitable and/or not safe for use on all residential or commercial buildings, or alternatively if it was suitable and safe for only some building purposes what those limited purposes were. The plaintiffs say that the duty of care included a duty to warn the plaintiffs of the effect that different fabrication methods of fitting the Alucobond cladding to buildings had on the behaviour of Alucobond cladding in the event of a fire in the building, that the aluminium sheets of the cladding did not protect the inflammable PE core from igniting, and that the cladding possessed fire risk properties, had not passed fire safety tests and was not compliant with the Building Code. The plaintiffs allege that 3AC and the second and third defendants breached their duty of care owed to the plaintiffs by negligently failing to publicly disclose or otherwise warn the plaintiffs regarding these matters.

[80] The plaintiffs say that as a result of the negligent failure of 3AC and the first and second defendant to publicly or otherwise warn them:

(a) about the limitations of Alucobond in terms of its suitability for building uses and that it is only suitable and safe when used for those limited purposes or when combined with specified materials or technology;

(b) that in the event of a fire, fire resistance and flammability of Alucobond was materially affected by the fabrication methods used when fitting it to buildings;

(c) the aluminium cover sheeting does not protect the PE core of the cladding from igniting in the event of a building fire; and

(d) Alucobond had not passed applicable fire safety standards and was deemed combustible and was either non-compliant or there was a risk that it was non-compliant under the Building Code when used for certain purposes;

they have suffered and will suffer loss and damage for which they seek damages, interest, and costs.

The plaintiffs' submissions

[81] Mr Farmer submits that the plaintiffs have shown that they have a good arguable case that their three causes of action alleging negligence fall within r 6.27(2)(a)(ii) because the claims are made in tort and the damage was suffered in New Zealand. He submits that it is well-established that manufacturers of cladding products owe a duty of care to property owners who clad their buildings with the manufacturer's defective cladding.[14] He further submits that it is arguable that manufacturers of cladding owe a duty to warn the owners of properties clad with the manufacturer's product, about the existence of any defects of their cladding, within their knowledge.

[82] Mr Farmer submits that the fact that 3AC was not directly involved in the recladding of the first plaintiff's Cutterscove building does not preclude the existence of a duty of care, as the manufacturer's role in the construction of a residence is 'generic'. Similarly, it does not matter whether or not 3AC specifically referred to the Building Code in its publications regarding Alucobond, as compliance with the code is only one aspect of the plaintiffs' tort claims and they also rely on the lack of fitness for purpose and the fire risk properties of Alucobond.

3AC's submissions

[83] Mr Galbraith submits that each of the plaintiffs' three tort causes of action require there to have been representations or a failure to warn by 3AC to give rise to the duties of care alleged. He says that is consistent with the scope of a manufacturer's responsibilities as described in s 14G of the Building Act, which relevantly provides:

> **14G Responsibilities of product manufacturer or supplier**
>
> …
>
> (2) A product manufacturer or supplier is responsible for ensuring that the product will, if installed in accordance with the

[14] *Cridge v Studorp Ltd* [2021] NZHC 2077 at [678(a)] and [679] referring to *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 96, [2017] 1 NZLR 78.

> technical data, plans, specifications, and advice prescribed by the manufacturer, comply with the relevant provisions of the building code.

[84] Mr Galbraith accepts that the Building Act is not a code, and says that while a claim in tort alleging duties outside the scope of the statutory duties can be brought, it would be extraordinary for a duty of care to exist that was not confined by a manufacturer's instructions and directions as to the appropriate applications and use of their product and regarding the proper methods for fixing and installing the product.

[85] Mr Galbraith notes that in *Cridge v Studorp Ltd* this Court found that James Hardie sold cladding panels to the general market on the basis that it was a sound product which if installed correctly would produce a weathertight home.[15] He submits that a manufacturer's obligations in tort are linked to the particular way in which a product is held out by the manufacturer to the market. And he submits that it would make no sense for a duty to exist other than in relation to the particular use or uses for which a product was intended by its manufacturer, and any obligations in tort must be linked to the particular way in which the product is held out by the manufacturer as appropriate for its use.

[86] He says the plaintiffs must provide some evidence to support their allegations and show that 3AC made representations either directly to them or indirectly to the market, however all they have been able to point to are four documents which fall short of showing that 3AC made any representations regarding Alucobond to the plaintiffs, or that it had a duty to warn them as regards their Alucobond product. Mr Galbraith submits that the documents relied on by the plaintiffs do not contain or convey the pleaded representations or misrepresentations. He notes that three of the documents refer to testing of the Alucobond product carried out in China or European countries and the results of the testing. He submits that apart from setting out the results of the tests referred to, the documents relied on by the plaintiffs contain no representations.

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15 *Cridge v Studorp Ltd*, above n 14, at [678(b)].

[87] Mr Galbraith accordingly submits that none of the three categories of tort claims pleaded by the plaintiffs can succeed as there were no relevant representations made to them by 3AC.

Second, third and fourth causes of action: analysis

[88] The proposition that a manufacturer of building products has a duty of care to ensure that its products are fit for purpose including compliance with building standards contained in applicable legislation and building codes is already well-established in New Zealand. As Simon France J referring to *Carter Holt Harvey Ltd v Minister of Education* observed in *Cridge v Studorp Ltd*:[16]

> [679] Put concisely, the Supreme Court in effect says a manufacturer is conceptually no more immune from tortious liability than any other player involved in the construction of the homes, and there is nothing particular in this case to set it apart. …
>
> …
>
> [681] I consider the proposition of no duty is untenable as regards the sheet[17] itself. If, for example, the sheet's composition was flawed, it is hard to imagine that would not constitute a breach of duty to homeowners suffering loss as a consequence. It would be a latent defect in a product that is a key component in a house which is, for many New Zealanders, the major investment and asset in their life. …
>
> [682] I doubt the label "novel" is particularly appropriate here except in a technical sense of this being the first time in New Zealand one of these cases has required a trial judgment to confirm a duty which various preliminary decisions of our highest courts have recognised likely exists. The manufacturer is the start of a chain of persons involved in the building of a house, and I believe it to be accurate to say a duty has been recognised on every actor subsequent in the chain to the manufacturer. The obvious difference is the manufacturer's role is generic, whereas the role for everyone else in the chain is house specific. …

[89] Having regard to Mr Weaver's affidavit evidence in which he expresses his opinion that Alucobond PE and Alucobond Plus are combustible, and at the time when the Cutterscove building was re-clad in 2006–2008 the Building Code required external walls and roofs to have resistance to the spread of fire, appropriate to the fire load within the building and to the proximity of other household units, and Alucobond PE was inconsistent with those requirements, and there being no available evidence

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16 See *Carter Holt Harvey Ltd v Minister of Education*, above n 14.

17 A cladding sheet manufactured by Carter Holt Harvey Ltd called "Shadowclad".

that either Alucobond PE or Alucobond Plus met those requirements, I am satisfied that the plaintiffs have shown that they have a good arguable case regarding the non-compliance of Alucobond with the New Zealand Building Act and Building Code, and that the use of Alucobond on the first plaintiff's Cutterscove building appears to have resulted in the building's non-compliance with the combustibility requirements of the Building Code.

[90] My finding that the plaintiffs have shown that they have a good arguable case as regards whether the Alucobond supplied and installed on the Cutterscove building and on the second plaintiff's commercial building complied with the applicable Building Code standards, does not of course determine the matter, which will be determined on the basis of full evidence at trial. I am nevertheless satisfied that Mr Weaver's considered opinion which appears to be based on his extensive research, provides a credible foundation for the plaintiffs' allegations regarding the non-complying properties of the Alucobond cladding supplied and installed on the Cutterscove and second defendant's buildings.

[91] Although it was contended on behalf of 3AC that the plaintiffs have failed to produce any evidence that 3AC had made the alleged representations as to the suitability, fabrication, fire performance, and compliance of Alucobond prior to or at the time when the first plaintiff's Cutterscove building was re-clad with Alucobond, I consider that the plaintiffs have nevertheless shown themselves to have an arguable case to prove that representations regarding Alucobond's compliance with the Building Code were made at that time, if not by 3AC itself then by the second and third defendants on its behalf and with its knowledge.

[92] A "Producer Statement – Construction" document issued by "Skellerup Alucobond" addressed to the first plaintiff and dated 12 September 2006 advised:

> In respect of: Supply and installation of Alucobond composite wall cladding in accordance with the principals [sic] as set out in the Skellerup Alucobond specification including typical details and to areas as indicated on Project Management Enterprises architectural drawings.
>
> …
>
> We certify that the works are to be completed in a manner to meet the criteria as set out in the Building Code for Durability (B2) and External Moisture (E2)

> for an alternative product, as defined as Skellerup Alucobond Composite Aluminium wall cladding system and in accordance with Skellerup Alucobond's specification, the system being suitable for the intended use.

[93] Chairman of the first plaintiff, Mr George Kinloch, states that when the first plaintiff was re-cladding the Cutterscove building in order to rectify weathertightness issues, the body corporate chose Skellerup Alucobond because although it was more expensive than other products, it was being marketed and distributed in New Zealand by Skellerup which it considered to be reputable, and it was assumed that the product was safe and complied with the requirements of the Building Code. Although the fire protection provisions of the Building Code were not referred to in the Skellerup Alucobond Producer Statement issued on 12 September 2006 prior to commencement of the re-cladding work by Moyle Construction, it is not unreasonable to assume that it implied that the Alucobond product also complied with any other relevant requirements of the Building Code, including fire protection requirements.

[94] The plaintiffs have also produced an Alcan Composites document entitled "Flying High" which was obtained from web.archive.org (archive dated 5 November 2005) which predates the first plaintiff's decision to use Alucobond when re-cladding Cutterscove. The date of the document is further informed by the inclusion in the document of an Environmental Management Certificate awarded to Alcan GmbH for its compliance with the environmental management system, issued on 6 February 2003 and valid to 5 February 2006. The document refers to Alcan Composites as a "true 'global player'", having a worldwide distribution network for its Alucobond product. The document also contains a table headed, "Fire behaviour of ALUCOBOND panels", in which it sets out the results of testing of Alucobond, Alucobond Plus, and Alucobond A2, against the relevant standards of a number of European countries and Great Britain with the results indicating that it had satisfied their various standards. As regards the standards of Denmark, Norway and Sweden, Alucobond is recorded as "hardly inflammable".

[95] Further documents produced by the plaintiffs as indicating the nature and contents of product information being issued and distributed by 3AC and its representatives including Skellerup are three letters written to MM Architects regarding the cladding to be used on the Aura apartments in Cook Street, Auckland,

regarding the obtaining of a building consent involving the use of Alucobond cladding. In a letter dated 10 May 2005 from a Technical Consultant of Skellerup Alucobond to MM Architects the author lists over a dozen significant buildings in New Zealand on which Alucobond cladding had been used including Auckland, Wellington and Christchurch International Airports, and several major commercial buildings in Auckland during the period from 1992–2005. He states:

> We have been involved with the supply and installation of Alucobond Aluminium Composite Material (ACM) since 1985. During that period Alucobond has been installed to approximately 2,000 buildings throughout New Zealand and the South Pacific.
>
> Alucobond is used extensively as an external cladding material internationally. There are a number of systems available to meet design criteria and regulatory body requirements. …
>
> …
>
> Alucobond has gained acceptance with architects as an ideal product, not only for high-class cladding, but also as a material suitable for providing expressive architectural features.
>
> Our company provides a high quality design, fabrication and installation service backed by Alucobond product warranties of 10 years and 15 years for sealant to ensure that any building developer/owner will have peace of mind.

[96] The letter written by the Managing Director of Alcan Alucobond (Far East) Pte Ltd to MM Architects is dated 27 April 2005. In this letter he sets out a brief history of Alcan's manufacture of Alucobond and says:

> … Today, ALUCOBOND is produced by Alcan Composites in four plants which are located in Germany, the U.S.A, China and in Brazil. In all plants ALUCOBOND is manufactured in accordance with the same stringent quality standards. Their quality management systems are all certified to comply with ISO 9001 standards.
>
> Provided ALUCOBOND panels are applied in accordance with the information provided in the manufacturer's recommendations and design criteria stated in the Processing Manual and Product Data Sheets and in conjunction with other approved building systems and materials, ALUCOBOND panels will satisfy the performance requirement of the New Zealand Building Code B2.3.1 b for use as building envelope for more than 15 years.
>
> As a further reference to prove that ALUCOBOND panels satisfy international standards for external wall cladding applications, we attach a copy of the Agreement Certificate No 97/3411/c issued by the British Board of Agreement (BBA), which is the authority for the assessment of products for construction in the U.K.

[97] The British Board of Agreement Certificate issued to Alcan in relation to the Alucobond Cladding System includes a section entitled: "Behaviour in relation to fire" which sets out the results of tests of Alucobond as against two British Standards and concluded that the product had achieved the Class 0 requirement as defined in the national Building Regulations.

[98] While these letters written by management of Skellerup Alucobond and Alcan Alucobond (Far East) Pte Ltd obviously involve parties other than the plaintiffs, they do inform an assessment of the likelihood of similar representations being made by 3AC and the second and third defendants regarding Alucobond to the market during the period prior to the first plaintiff deciding to use Alucobond for the re-cladding of its building.

[99] The "Alucobond: at a glance" document also referred to and relied on by the plaintiffs is undated. The document exhibited to Mr Weaver's affidavit was obtained by Mr Weaver from a New Zealand website in 2020. While it is undated and there is no evidence as to when it was first distributed and made accessible to the public via the internet, its terms imply that it is likely that it (or the substance of its contents) was distributed over a period commencing well before 2020. The document contains the following:

> **ABOUT ALUCOBOND**
>
> ALUCOBOND came into existence in 1969. Since then it has not only been the most preferred brand of aluminium composite material (ACM) or panel (ACP) for architecture cladding applications, but also shaped the way buildings are looking and built worldwide.
>
> …
>
> ALUCOBOND adapts perfectly to the buildings' contours. It can easily be cut and shaped, without having to compromise on the surface finish, compared to other ACM/ACP or metal cladding materials commonly available in the market. Whether soft curves or perfect flatness, ALUCOBOND will provide a perfect design. The unmatched properties of this material can give shape to any project - from a private home to a corporate building, from a stadium to an airport, from a shopping mall to an institution. Be it a façade cladding or a roofing application, be it an interior column cladding or a ceiling application, can give it a distinguished look which will last forever.
>
> ALUCOBOND can boast of being the only truly global ACM/ACP manufacturer, having production facilities, customer service sites and distribution partners all over the world, reaching out to customers with best

quality products along with seamless service at all times. The advantage of this global presence is best seen in a situation - wherein an architect or a façade consultant could be based in [a] certain part of the world, the local consultant could be based in another, and the fabricator could be based in yet another part, ALUCOBOND helps by joining the dots and is able to serve all the stakeholders with utmost proficiency.

Reasons to choose ALUCOBOND:

…

- Right formulation and quality of mineral-filled core for non-combustible (ALUCOBOND A2) and fire-retardant (ALUCOBOND plus) product.

…

THE PRODUCT

ALUCOBOND

ALUCOBOND is a rigid, yet flexible façade material for architectural uses. ALUCOBOND is extremely weatherproof, impact-resistant and break-proof, vibration-damping, and ensures easy and fast installation. ALUCOBOND is produced with various core thicknesses in a continuous lamination process and then customised regarding dimensions.

ALUCOBOND plus

ALUCOBOND plus has been developed exclusively for the more stringent requirements of the fire prevention regulations in architectural products. Thanks to its mineral-filled core ALUCOBOND plus meets the stricter requirements of the fire classifications. It is hardly inflammable and offers all the proven product properties of the ALUCOBOND family, such as flatness, formability, resistance to weather and easy processing.

ALUCOBOND A2

ALUCOBOND A2 is the only non-combustible aluminium composite panel used in architecture that fulfils the respective standards worldwide. Thanks to its mineral-filled core, ALUCOBOND A2 meets the strict requirements of the fire regulations and enhances the possibilities for the concept and design of buildings. ALUCOBOND A2, just like all the products of the ALUCOBOND family, allows simple processing, is impact-resistant, break-proof and weatherproof and, above all non-combustible.

[100] Having regard to these materials located and produced by the plaintiffs in which representations are made regarding the fire-resistant properties of Alucobond panelling and its compliance with fire protection building standards and legislation, I am satisfied that the plaintiffs have shown that they have a good arguable case on all three of their negligence causes of action.

[101] I am satisfied by the contents of Mr Weaver's affidavit[18] that the plaintiffs have an arguable case that the Alucobond panels supplied and used in the recladding or cladding of the plaintiffs' buildings did not meet the applicable provisions of the New Zealand Building Code and that the combustibility of the Alucobond panels and the associated fire risk to buildings and their occupants was a feature of the product that was discoverable by 3AC prior to the first plaintiff's use of the product for re-cladding its Cutterscove building in 2006–2008. While I note that Ms Stopford in her affidavit disputes Mr Weaver's opinion regarding the combustibility of Alucobond PE and Alucobond Plus and as to their compliance with the relevant requirements of the Building Code, at this stage of the proceeding it is not necessary or appropriate for the Court to endeavour to determine the dispute between the expert witnesses engaged by the parties and who have filed affidavits. At this early stage of the proceeding it is sufficient for the plaintiffs to show that they have a good arguable case in support of their allegations set out in the three negligence causes of action, and I am satisfied that they have done so.

[102] As already noted, I am also satisfied that the plaintiffs have shown that they have a good arguable case that 3AC owed them a duty of care to ensure that its Alucobond product was fit for purpose and use as an exterior cladding material, and that it did not meet the requirements of the applicable provisions of the Building Act and Building Code as regards fire protection. Such a duty if found to exist is likely to also include a duty requiring 3AC to warn the plaintiffs that the Alucobond cladding was not suitable and/or not safe for use on all residential or commercial buildings, or alternatively if it was suitable and safe for only some building purposes what those limited purposes were, and furthermore to warn them that in the event of a fire in their building, that the Alucobond's aluminium cladding would not protect and prevent the inflammable PE core from igniting.

[103] In this context it is also important to note that at this stage there has been no discovery and it is realistic to expect there to be a significant amount of documentation that would be required to be discovered by 3AC and the other defendants regarding

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[18] Affidavit of Simon David Weaver, sworn 29 November 2021.

the promotional materials and statements made to the public prior to 2006 regarding the properties of Alucobond, should the plaintiffs' claim be allowed to proceed.

[104] For these reasons I find that the plaintiffs have established that they have a good arguable case in relation to each of the negligence causes of action which fall within r 6.27(2)(h)(i), 3AC being 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 being a serious issue as between the plaintiffs and 3AC that the court ought to try.

Fifth and sixth causes of action: the Fair Trading Act 1986

[105] The plaintiffs' fifth and sixth causes of action are respectively founded on alleged breaches of ss 9 and 13 of the Fair Trading Act (FTA). Although each cause of action is ultimately to be considered individually, it is convenient to also deal with both of them together in this section of my judgment.

[106] The plaintiffs' fifth cause of action alleges that 3AC and the other defendants, made the representations (or failed to provide warnings) the plaintiffs have relied on for their tort claims, in trade in connection with the supply, or possible supply of Alucobond cladding, or in connection with the promotion of the supply of Alucobond cladding. The plaintiffs allege that 3AC and the second and third defendants engaged in conduct, in trade, that breached s 9 of the FTA by:

(a) making representations regarding the suitability of the Alucobond cladding for use as part of an external wall or attachment to an external wall in buildings or building elements where the buildings were intended to be used for residential purposes; commercial or industrial purposes; public or government administration purposes or any combination of those uses or applications;

(b) failing to give appropriate warnings as to quality, or alternatively as to limitations regarding safe and appropriate uses; and

(c) by aiding and abetting, counselling or procuring, or being in any way either directly or indirectly knowingly concerned with, or party to the matters alleged in (a) and (b).

The plaintiffs' submissions

[107] The plaintiffs say that the promotional material published and distributed by 3AC regarding Alucobond was intended to have global reach. They say that since at least 2004, 3AC's website has contained material promoting Alucobond with representations as to its fire performance qualities and suitability for use as a cladding on residential and commercial buildings. Examples of this promotional material is produced in the affidavit of the plaintiffs' witness Ms Amelia Cina. The plaintiffs say that this material was freely available to be accessed and downloaded by New Zealand consumers. The plaintiffs say that 3AC's intention that its promotional materials included New Zealand consumers is evident from the fact that its website referred to building projects in New Zealand where Alucobond has been used and included information where New Zealand consumers could find out how to purchase Alucobond. The plaintiffs also note that promotional and specification materials from the 3AC website have been located on the property files of a number of local authorities in New Zealand which further supports their allegation that 3AC's intention that its marketing materials have a global reach did reach New Zealand and did result in New Zealand consumers purchasing Alucobond for use on their New Zealand buildings.

[108] The plaintiffs note that 3AC appointed an exclusive distributor of its Alucobond product in New Zealand and authorised the publication in New Zealand of promotional and technical information about Alucobond as evident by the letter previously referred to, written by the Managing Director of Alcan Alucobond (Far East Pte) Ltd to MM Architects in Auckland to which he annexed the British Board of Agreement certificate and technical information relating to Alucobond. The plaintiffs refer to a press release dated 19 April 2005 entitled: "Skellerup adds another premium brand to portfolio", in which Skellerup announced that it had purchased the assets of

the exclusive New Zealand importer, fabricator and installer of Alucobond. The press release states:[19]

> The acquisition continues Skellmax's growth strategy outlined in the 2004 Annual Report of purchasing businesses that complement existing operations. Alucobond currently has 25% market share in New Zealand so there are significant opportunities to grow the business using our sales and marketing representation. Aluminium cladding complements our range of waterproofing cladding products and strengthens our sales offer to architects of specialist products for cladding of buildings.

[109] The plaintiffs allege that the defendants' conduct was misleading and/or deceptive, or likely to mislead or deceive as to: the nature; characteristics; suitability for purpose; standard; quality; composition; performance characteristics; uses; and/or benefits of Alucobond cladding. The plaintiffs allege that the defendants represented that Alucobond had the characteristics and qualities that meant it was suitable for use on residential and commercial premises, and that it was a product that protected against fire, did not have material fire risk properties, Building Code non-compliance properties, or Building Code non-compliance risk properties, when each of those representations was untrue. The plaintiffs further allege that they and their agents relied on the defendants' representations and were misled and deceived by them, which had caused the plaintiffs loss or damage. As regards the first plaintiff the loss and damage suffered as a result of their reliance on the alleged misleading and/or deceptive representations includes the cost of removing the Alucobond fixed to their building and replacing it with another product that complies with the Building Code, or implementing measures to rectify the effect on the Cutterscove building caused by the non-compliance of Alucobond with the Building Code and CGA guarantee as to acceptable quality, and the reduction in value of the Alucobond cladding as a result of its fire risk and non-complying characteristics.

[110] The plaintiffs seek relief against 3AC by way of damages, and other relief under s 43 of the FTA, together with interest and costs.

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19 Affidavit of Amelia Cina, sworn 29 November 2021).

3AC's submissions

[111] Mr Galbraith notes that although s 3 of the FTA expressly extends its reach to those engaging in conduct outside New Zealand, it does not apply to the plaintiffs' claims against 3AC, as 3AC is and has not been resident in New Zealand and has not been carrying on business in New Zealand. He therefore submits that the initial gateway provided by s 3 for a claim against an overseas party such as 3AC does not apply.

[112] Mr Galbraith says that a claim under the FTA fundamentally requires there to have been a representation made by someone, to someone, and relied upon by someone. He submits that the plaintiffs have failed to produce any evidence that 3AC made representations relating to the supply of products in New Zealand on which the plaintiffs relied. Mr Galbraith says that none of the plaintiffs' witnesses assert that they or their agents received or relied on any representations made by 3AC, and he notes that Mr Kinloch's evidence is that he was impressed that Skellerup was a reputable company and assumed that the product they were supplying would be safe and complied with the relevant requirements of the Building Code. He further notes that the second plaintiff has not presented any evidence on the issue of whether a representation was made and relied upon.

[113] Mr Galbraith says that the documents relied on by the plaintiffs were not published or distributed by 3AC, but by the second or third defendants. He notes that some of the documents relied on by the plaintiffs post-date the cladding and construction of the plaintiffs' buildings and are documents sourced from files relating to other properties, and they cannot assist the plaintiffs' case as they were not documents that they relied on in deciding to purchase and use Alucobond on their buildings. Mr Galbraith disputes the plaintiffs' contention that 3AC impliedly adopted the various statements made by the second and third defendants regarding Alucobond. He submits that the most that can be said is that 3AC had given its permission to the second and third defendants to use its Alucobond name and brand, but that is not enough to amount to the making of a representation by 3AC itself.

[114] As to the Alucobond technical literature and product specifications relied on by the plaintiffs as amounting to making or containing representations, Mr Galbraith says that in each case the documents produced by the plaintiffs post-date the re-cladding and construction undertaken by the plaintiffs in relation to their buildings, and they cannot have been relied upon by the plaintiffs in connection with their decisions to use Alucobond on their buildings. Furthermore, none of the documents that pre-date the construction and re-cladding of the plaintiffs' buildings contain any representations regarding the requirements of the New Zealand Building Code.

[115] He accordingly submits that the FTA causes of action cannot possibly succeed and the Court should dismiss them.

Fifth and sixth causes of action: analysis

[116] Section 3(1) of the FTA provides:

> This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.

[117] It is clear from the evidence produced by the plaintiffs that 3AC has never established itself as a trading entity in New Zealand. As evident from the 19 April 2005 press release issued by Skellerup, 3AC had appointed a New Zealand company to be an exclusive importer and distributor of its Alucobond products in New Zealand. While 3AC has clearly promoted its Alucobond product globally in a manner that extended its marketing and promotion of its products to consumers located in New Zealand, there is no evidence that it has ever engaged in carrying on the business of selling and supplying its product to consumers in New Zealand. In light of that finding, the plaintiffs' claims against 3AC founded on the FTA cannot possibly succeed.

[118] However, it is also quite clear from Mr Kinloch's evidence that neither 3AC nor Skellerup made any representations to him on behalf of the first plaintiff regarding Alucobond and its suitability for use for the re-cladding of the Cutterscove building. Mr Kinloch presumed that as Skellerup was a reputable company it could be relied on to be suppling a product that was suitable and safe for the purposes of the re-cladding

of Cutterscove. While it was not unreasonable for Mr Kinloch and the body corporate to proceed to make its decision to use the Alucobond product being supplied by Skellerup, the making of such an assumption cannot be reframed as amounting to a representation made by Skellerup for and on behalf of 3AC regarding the suitability of Alucobond for the Cutterscove re-cladding. It is clear that neither 3AC nor its agents made any representations to the first plaintiff regarding the suitability of Alucobond or its properties, including its compliance with any applicable provisions of the Building Code.

[119] I also agree with the first defendant's submission that the various documents identified and relied on by the plaintiffs as containing information regarding Alucobond that could amount to representations regarding the product, either post-date the building work undertaken on the plaintiffs' buildings or make no mention of the New Zealand Building Code and compliance with it.

[120] In the absence of any evidence to show that 3AC made any representations whatsoever to the plaintiffs regarding Alucobond prior to the first plaintiff proceeding to use Alucobond on its building in 2006–2008, and similarly no representations being made to the second plaintiff, there is no foundation for the sixth cause of action brought pursuant to s 13 of the FTA alleging the making of false and misleading representations.

[121] For the same reasons, I find that there is no evidence that 3AC engaged in conduct that was misleading or deceptive or likely to be misleading or deceptive of the plaintiffs in relation to their choice and use of Alucobond on their buildings.

[122] I accordingly find that the plaintiffs have failed to show that they have a good arguable case against 3AC in relation to their fifth and six causes of action based on ss 9 and 13 of the FTA.

Limitation issues

[123] Pursuant to s 4(1)(a) of the Limitation Act 1950, actions founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[124] In its notice of opposition 3AC contends that the plaintiffs' CGA and FTA claims are time barred. Having regard to my findings that the plaintiffs have failed to show that they have a good arguable case against 3AC in relation to those causes of action, it is unnecessary to address or determine the limitation issue as regards them.

[125] No limitation issue is raised by 3AC in relation to the plaintiffs' second (negligence) and third (negligent misstatement) causes of action. Therefore the only remaining limitation issue raised by 3AC that requires consideration and determination relates to the fourth cause of action (negligent failure to warn).

[126] Mr Galbraith notes Mr Kinloch's evidence that he first learned of the potential dangers of aluminium composite panels in June 2017 following the Grenfell Tower fire, and that the body corporate first learned that the Alucobond was combustible in 2020. Mr Galbraith also notes that the second plaintiff's representative says that it engaged a contractor to remove panels from its two Auckland buildings in November 2021 to investigate whether they were Alucobond panels. He submits that the evidence provides no seriously arguable basis for applying a reasonable discoverability extension to the limitation period. He submits that at the latest the alleged dangers of aluminium composite panels were discoverable in June 2017 in the context of the media reporting and commentary regarding the Grenfell Tower fire. He notes that neither plaintiff says that they discovered any particular new information about the safety of the panels after that date. He says it is significant however that both plaintiffs were solicited by litigation funders and announced in November 2019 that they were exploring the commencement of a class action.

[127] Mr Farmer notes that the first plaintiff only discovered that the Alucobond cladding on its building was defective (by reason of being combustible) in late 2020. He also notes that Mr Kinloch in his affidavit says that he first learned about the potential dangers associated with aluminium composite panelling after the Grenfell Tower fire in London which occurred in June 2017. The Body Corporate first learned that the Alucobond cladding was combustible in 2020 and in late 2020 it commissioned a contractor to remove one of the panels from the exterior of the Cutterscove building. An inspection of the panel showed it to be an Alucobond brand product. Mr Farmer further notes that the plaintiffs' proceedings were filed and

commenced on 18 December 2020. He submits that the plaintiffs' fourth cause of action (negligent failure to warn) is therefore within time when the reasonable discoverability test is applied. He submits that application of the reasonable discoverability test to the plaintiffs' claim is conventional, and says that the first plaintiff's discovery in late 2020 that its building was clad with Alucobond that was combustible marks the point at which its economic loss occurred and the cause of action was complete and arose.

[128] Mr Farmer accordingly submits that application of the reasonable discoverability test means that the plaintiffs' fourth cause of action is well within the time for commencing an action in tort. He says that furthermore, the proposed representative nature of the plaintiffs' claim is relevant to when limitation issues are considered. He submits that even if the plaintiff does face limitation obstacles as regards its claims, there will be other claimants in the plaintiff group who do not have to contest with limitation issues and who are likely to have valid claims amounting to serious issues to be tried. Mr Farmer says that the Court should not at this preliminary stage of the proceeding decline jurisdiction because of limitation issues, because doing so would be to pre-empt the Court's broad powers to deal with specific limitation issues that may arise following the joinder of other parties. Mr Farmer submits that in the context of this proceeding limitation issues are more appropriately addressed and considered in relation to individual parties. He says that the objectives of r 4.24 can still be served by the Court assuming jurisdiction and allowing the representative plaintiff to advance the issues which are common to the members of the group. And by assuming jurisdiction and setting aside its protest to jurisdiction, 3AC will not suffer any prejudice because it will still be able to raise a limitation defence, and do so at a more appropriate stage of the proceeding.

Decision on limitation issues

[129] I consider that it is premature to determine limitation issues at this preliminary stage. The issue of whether it is appropriate to apply a reasonable discoverability extension of the limitation period is a matter best left until the issue of whether a representative class action is approved, and if so whether there are limitation issues that apply to members of the plaintiff group that require evidence to be presented

regarding the reasonable discoverability of the cause, or causes of action relied on. I agree with Mr Farmer that 3AC will not be prejudiced by the Court deferring consideration and determination of limitation issues until the full scope of the proceeding is known and when the composition of the plaintiff group is determined should a representative action be permitted to proceed.

Result

[130] For the reasons set out above I find as follows:

(a) The first defendant's protest to jurisdiction as regards the plaintiffs' first, fifth and sixth causes of action succeeds and is upheld.

(b) The plaintiffs have shown that they have a good arguable case against the first defendant in relation to the second, third, and fourth causes of action which the Court should hear and determine. The first defendant's protest to jurisdiction in respect of those causes of action fails and is dismissed.

Costs

[131] As both parties have been successful in part, I make no order for costs. Costs shall lie where they fall.

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Paul Davison J