IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA269/2022
[2023] NZCA 647

BETWEEN	BODY CORPORATE NUMBER DPS 91535 First Appellant
	ARGOSY PROPERTY NO. 1 LIMITED Second Appellant
AND	3A COMPOSITES GMBH First Respondent
	TERMINUS 2 LIMITED Second Respondent
	SKELLERUP INDUSTRIES LIMITED Third Respondent

Hearing:	7-8 June 2023
Court:	Gilbert, Goddard and Mallon JJ
Counsel:	J A Farmer KC, J L W Wass, S C I Jeffs and A L Robertson for Appellants A R Galbraith KC, J Q Wilson, A M Boberg and S L Cahill for First Respondent M C Harris and Z A Brentnall for Second Respondent M D O'Brien KC, R M Irvine-Shanks and L C Bercovitch for Third Respondent
Judgment:	15 December 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. The decision of the High Court upholding the protest to jurisdiction in respect of the fifth and sixth causes of action is set aside. The protest to jurisdiction in respect of those causes of action is set aside.

B The appeal is otherwise dismissed.

C There is no order as to costs.

REASONS OF THE COURT

(Given by Goddard J)

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Introduction and summary

[1] Two building owners wish to bring proceedings in the High Court against a number of defendants including the first respondent, 3A Composites GmbH (3AC). The litigation relates to a building cladding product branded as Alucobond which is manufactured by 3AC. 3AC is a German corporation that does not have a place of business in New Zealand. The appellants served the proceedings on 3AC in Germany. 3AC filed a protest to the jurisdiction of the New Zealand courts. The High Court set aside the protest to jurisdiction in relation to three tort causes of action: those causes of action can proceed before the High Court. The protest to jurisdiction was however upheld in relation to three other causes of action: one brought under the Consumer Guarantees Act 1993, and two brought under the Fair Trading Act 1986.

[2] The appellants appeal to this Court against the High Court decision upholding the protest to jurisdiction in relation to the Consumer Guarantees Act and Fair Trading Act causes of action. In each case, that turns on whether the appellants' claims against 3AC under those statutes are seriously arguable.

[3] We have reached the same conclusion as the High Court in relation to the Consumer Guarantees Act claim, though our reasoning differs in some respects. We consider that the Consumer Guarantees Act applies to overseas manufacturers of goods that are supplied to consumers in New Zealand, contrary to the view expressed by Davison J. However we agree with the Judge that it is not seriously arguable that Alucobond is a product of a kind ordinarily acquired for personal, domestic, or household use or consumption (which by way of shorthand we refer to as "personal use"). Alucobond is almost invariably acquired by building professionals for incorporation into buildings, rather than being purchased by building owners for their own personal use. We also agree with the Judge that it is not seriously arguable that Alucobond qualifies as "goods" for the purposes of the Consumer Guarantees Act: the term "goods" is defined to exclude 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. The cladding that has been installed as part of the buildings owned by the appellants falls within that exclusion, so does not qualify as "goods" for the purposes of the Consumer Guarantees Act.

[4] We have concluded, by a fine margin, that the appellants have shown that there is a serious issue to be tried in relation to their Fair Trading Act claims. The appellants have identified conduct engaged in by 3AC in New Zealand which is arguably misleading or deceptive in relation to the suitability of Alucobond cladding for certain cladding uses and in relation to its regulatory compliance. They have not established that it is seriously arguable that either appellant relied directly on such conduct. Such evidence as there is suggests they did not. But it is arguable that conduct in New Zealand by or on behalf of 3AC created a misleading impression in the market about the suitability of Alucobond products for certain uses, and about its regulatory compliance, and that this impression influenced designers and others to recommend use of Alucobond products as a cladding material for the appellants' buildings.

[5] There is also real force in the appellants' argument that it would be illogical to permit their negligent misstatement cause of action to proceed before the New Zealand courts, but not the Fair Trading Act causes of action founded on essentially the same allegations.

[6] It follows that the appeal must be dismissed in relation to the Consumer Guarantees Act cause of action, but allowed in respect of the Fair Trading Act causes of action.

[7] We set out our reasons in more detail below.

Background

A claim about aluminium composite cladding

[8] The proceedings relate to two Alucobond products manufactured by 3AC: Alucobond PE and Alucobond Plus. Each product consists of two aluminium cover sheets with a core containing polyethylene (PE) and other materials laminated and bonded together. The core of Alucobond PE cladding is approximately 100 per cent PE. The core of Alucobond Plus is approximately 30 per cent PE and another ethylene compound, and 70 per cent mineral compounds.

[9] Alucobond is one of a number of aluminium composite panel (ACP) cladding products used in New Zealand. The appellants say there has been growing recognition of fire risks associated with use of ACP cladding in recent years, in particular following the fire at Grenfell Tower in London. They say that ACP panels, including Alucobond panels, are combustible and are not fit for use in external cladding in many buildings due to the risk that they will fuel the rapid spread of fire. The appellants say that they are concerned about the risks posed by the Alucobond cladding used on their buildings, and that addressing those risks will cause them loss and expense. They wish to bring representative proceedings against 3AC and two New Zealand distributors of Alucobond products in relation to the Alucobond products used on their buildings.

[10] The distributors against whom the claim is brought are the third respondent, Skellerup Industries Ltd (Skellerup) and the second respondent, which at the relevant time was called Kaneba Ltd (Kaneba).

[11] Skellerup imported and distributed Alucobond in New Zealand between 2005 and 2009.

[12] Kaneba carried on business importing and supplying Alucobond products in New Zealand from 2009 until September 2014. From September 2014 until 2020 Kaneba continued to import Alucobond products for on-sale to other fabricators.

Cutterscove Building

[13] The first appellant (Cutterscove) is the body corporate for a three storey apartment building in Mt Maunganui known as the Cutterscove Resort Apartments (Cutterscove Building). Cutterscove says that Alucobond PE was supplied to it and affixed to the exterior of the Cutterscove Building in 2006 to 2008 pursuant to a construction contract that Cutterscove entered into with Moyle Construction Ltd. Moyle Construction Ltd was supplied with the Alucobond by Skellerup.

Argosy Buildings

[14] The second appellant (Argosy) owns an extensive property portfolio including:

(a) A property at 140 Don McKinnon Drive, Albany, Auckland (Don McKinnon Drive). Don McKinnon Drive is a Burger King restaurant. It has two strips of Alucobond PE totalling approximately 39 m² affixed to its exterior.

(b) A property at 80 Favona Road, Māngere, Auckland (Favona Road). A substantial part of the cladding of Favona Road is Alucobond. Most of that cladding was fitted in 2003. In 2011 Kaneba was engaged to fabricate and fit approximately 26 m² of Alucobond PE to a new pedestrian link bridge connecting two office buildings.

The proceedings

[15] The appellants plead six causes of action against 3AC, Kaneba and Skellerup:

(a) First cause of action: Breach of the guarantee of acceptable quality in s 6 of the Consumer Guarantees Act.

(b) Second cause of action: Negligence.

(c) Third cause of action: Negligent misstatement.

(d) Fourth cause of action: Negligent failure to warn.

(e) Fifth cause of action: Breach of s 9 of the Fair Trading Act (misleading or deceptive conduct).

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

[16] The appellants' pleading is lengthy (some 53 pages) and complex. But in essence they plead that there is a material risk that Alucobond PE and Alucobond Plus,

when used as cladding, will cause or contribute to the rapid spread and severity of a fire, including the rapid vertical spread and/or horizontal spread of a fire in a building. They allege that these Alucobond products are inherently unsuitable for use as external cladding due to their combustibility, and did not and do not comply with the New Zealand Building Code, which sets performance standards for buildings including (in cl C) standards relating to protection from fire. They say that the products have been negligently designed, that the respondents have made misleading claims about the suitability of the products for use as external cladding, and that the respondents have failed to give appropriate warnings about the risks inherent in use of the products as external cladding.

[17] The proceedings were served in New Zealand on Kaneba and Skellerup, which are New Zealand companies. The proceedings were served by the appellants on 3AC in Germany without the prior leave of the Court, relying on rr 6.27(2)(j)(ii), 6.27(2)(a)(ii) and 6.27(2)(h)(i) of the High Court Rules 2016 (High Court Rules).

Rules governing service of proceedings outside New Zealand

[18] Rule 6.27 of the High Court Rules sets out the circumstances in which proceedings may be served on a defendant outside New Zealand without the leave of the Court. As relevant, it provides:

> **6.27 When allowed without leave**
>
> …
>
> (2) An originating document may be served out of New Zealand without leave in the following cases:
>
> (a) when a claim is made in tort and—
>
> (i) any act or omission in respect of which damage was sustained was done or occurred in New Zealand; or
>
> (ii) the damage was sustained in New Zealand:
>
> …
>
> (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:

…

(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):

…

[19] A defendant who is served out of New Zealand may object to the jurisdiction of the New Zealand Court to hear the claim against them. As already mentioned, 3AC filed an appearance under protest to jurisdiction under r 5.49(1) of the High Court Rules. The appellants applied to set aside 3AC's protest to jurisdiction under r 5.49(5). Rule 5.49 provides, as relevant:

5.49 Appearance and objection to jurisdiction

(1) A defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.

…

(5) At any time after an appearance has been filed, the plaintiff may apply to the court by interlocutory application to set aside the appearance.

…

[20] Rule 6.29 of the High Court Rules provides for determination of protests to jurisdiction under r 5.49:

> **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.
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> …

[21] Rule 6.29 cross-refers to the criteria for service of proceedings outside New Zealand with the leave of the Court set out in r 6.28. As relevant, r 6.28 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.
>
> …
>
> (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.

[22] As this Court explained in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, r 6.29 requires a two-stage inquiry:[1]

> [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.
>
> [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).
>
> [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.

[23] This Court went on to explain the distinction between the "good arguable case" standard that applies under r 6.29(1)(a)(i) and the "serious issue to be tried on the merits" test that applies under r 6.28(5)(b):[2]

> [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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1 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 (footnote omitted).

2 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 1 (footnotes omitted).

> [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".

[24] It was not suggested before us that there was another available forum which would be more appropriate than New Zealand for the trial of the claims. We therefore need not address that limb of r 6.28(5).

[25] As this Court also explained in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, where multiple causes of action are pleaded r 6.29 requires each cause of action to be considered separately:[3]

> [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.
>
> [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.

High Court judgment

[26] There was no dispute before the High Court about the test to be applied to determine 3AC's protest to jurisdiction. There does not appear to have been any real challenge by 3AC to the existence of a good arguable case that one or more limbs of r 6.27(2) applied. And as already mentioned, although 3AC formally disputed that New Zealand was the appropriate forum for determining the claims against it, 3AC did not identify any other available forum for the trial and did not present any evidence

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3 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 1.

on that issue. So the central issue before the High Court was whether, on each of the causes of action, there was a serious issue to be tried on the merits.[4]

Consumer Guarantees Act cause of action

[27] The Judge found that there was no serious issue to be tried in relation to the claims against 3AC under the Consumer Guarantees Act for three reasons. First, the Judge accepted 3AC's argument that the Consumer Guarantees Act was not intended to have extraterritorial effect, in the sense that it applied to manufacturers that do not have an ordinary place of business in New Zealand. The Judge considered that the purpose of the definition of the term "manufacturer" was to impose on a New Zealand-based importer or distributor of goods the statutory guarantee that the goods are of acceptable quality.[5] Those obligations are imposed on the New Zealand-based importer to afford New Zealand consumers the protection and rights of redress provided for by the Act in respect of imported goods. The obligations are imposed on that importer in place of the overseas manufacturer.[6]

[28] The Judge referred to the decision of the Supreme Court in *Poynter v Commerce Commission*, which affirmed a presumption that "Parliament does not intend to assert extraterritorial jurisdiction, which can be rebutted only by clear words or necessary implication".[7] The Judge considered that the Consumer Guarantees Act contains neither express language nor any necessary implication which would lead the Court to interpret that Act as intended to have extraterritorial reach.[8]

[29] The Judge went on to accept 3AC's argument that the Alucobond cladding attached to the exterior of the appellants' buildings fell within the exclusion from the term "goods" set out in paragraph (c) of the definition of that term, which excludes whole buildings or parts of whole buildings unless they are easily removable structures not designed for residential accommodation. The Judge considered that the Alucobond cladding attached to the exterior of the appellants' buildings is a building

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4 High Court Rules 2016, r 6.28(5)(b), applicable via r 6.29(1)(a)(ii).

5 *Body Corporate Number DP 91535 v 3A Composites GmbH* [2022] NZHC 985, [2022] NZCCLR 4 [High Court judgment] at [42].

6 At [44].

7 At [38], referring to *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [36].

8 At [44]–[45].

material that has been used and attached to the buildings, and is not attached to an easily removable structure that is not designed for residential accommodation. It followed that the Alucobond cladding did not come within the scope of the term "goods" as used in the Consumer Guarantees Act.[9]

[30] The Judge also accepted 3AC's argument that the appellants did not come within the definition of "consumer" for the purposes of the Consumer Guarantees Act. He considered that Alucobond cladding is a product that is used in the construction of residential premises used by householders, but it is not a product that householders themselves ordinarily acquire for their personal use or consumption. It is a product ordinarily acquired by construction contractors or building companies for use and incorporation in the buildings they construct. The Judge considered that this approach to the definition of the term "consumer" was consistent with paragraph (c) of the definition of "goods", which as noted above provides that whole buildings and parts of buildings are not "goods" for the purposes of the Consumer Guarantees Act (with certain exceptions not relevant here).[10] For this reason also, the first cause of action founded on the Consumer Guarantees Act could not succeed.[11]

[31] The Judge concluded that for these three reasons, the appellants had failed to show that there is a serious issue to be tried on the merits as regards their Consumer Guarantees Act cause of action against 3AC. The protest to jurisdiction in relation to that cause of action was upheld.[12]

Negligence causes of action

[32] The Judge then went on to consider the second, third and fourth causes of action brought in negligence, negligent misstatement and negligent failure to warn. The Judge considered that 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

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9 At [58].
10 At [59]–[60].
11 At [61].
12 At [63].

well-established in New Zealand.[13] The Judge was satisfied that the appellants had shown they have a good arguable case regarding the non-compliance of Alucobond with the Building Act 2004 and the Building Code, and that the use of Alucobond on the Cutterscove Building appeared to have resulted in the building's non-compliance with the combustibility requirements of the Building Code. The evidence of the appellants' expert, Mr Weaver, provided a credible foundation for those allegations.[14]

[33] The Judge also accepted that the appellants had shown that they had an arguable case that representations regarding Alucobond's compliance with the Building Code were made prior to or at the time when the Cutterscove Building was reclad with Alucobond, if not by 3AC itself then by Kaneba and Skellerup on 3AC's behalf and with its knowledge. The Judge referred to a number of documents which in his view arguably conveyed relevant representations.[15]

[34] Having regard to the materials in which representations were made regarding the fire-resistant properties of Alucobond panelling and its compliance with fire protection building standards and legislation, the Judge was satisfied that the appellants had shown that they have a good arguable case on all three of their negligence causes of action.[16]

[35] The Judge concluded that the appellants had established that they had a good arguable case that each of the negligence causes of action fell within r 6.27(2)(h)(i), as 3AC was a necessary or proper party to proceedings properly brought against another defendant served within New Zealand, and there was a serious issue to be tried as between the appellants and 3AC.[17]

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13 At [88], referring to *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78; and *Cridge v Studorp Ltd* [2021] NZHC 2077, [2022] 2 NZLR 309 at [678(a)] and [679]–[682].

14 High Court judgment, above n 5, at [89]–[90].

15 At [92]–[99]. These documents are discussed in more detail below in the context of the Fair Trading Act cause of action.

16 At [100]. The reference to the "good arguable case" test is an error as the threshold is whether there is a serious issue to be tried on the merits. But it is immaterial, since the "good arguable case" threshold is more demanding.

17 At [104].

Fair Trading Act causes of action

[36] Finally, the Judge considered the fifth and sixth causes of action under the Fair Trading Act. The Judge's analysis focussed on s 3(1) of the Fair Trading Act, which provides:

> **3 Application of Act to conduct outside New Zealand**
>
> (1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct relates to the supply of goods or services, or the granting of interests in land, within New Zealand.
>
> …

[37] The Judge found that it was clear that 3AC had never established itself as a trading entity in New Zealand. There was no evidence it had ever engaged in carrying on the business of selling and supplying its product to consumers in New Zealand. The Judge considered that it followed from that finding that the appellants' claims against 3AC founded on the Fair Trading Act could not possibly succeed.[18]

[38] The Judge also considered that it was clear from the evidence of Mr Kinloch on behalf of Cutterscove that neither 3AC nor Skellerup made any representations to him on behalf of Cutterscove regarding Alucobond and its suitability for use for the recladding of the Cutterscove Building. Nor was there any evidence of representations made to Argosy at any relevant time. The Judge said:

> [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 [Cutterscove] 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 [supplying] 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 [Cutterscove] regarding the suitability of Alucobond or its properties, including its compliance with any applicable provisions of the Building Code.

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[18] At [117].

> [119] I also agree with [3AC'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 [Cutterscove] proceeding to use Alucobond on its building in 2006–2008, and similarly no representations being made to [Argosy], 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.

[39] The Judge concluded that the appellants had failed to show they had a good arguable case against 3AC in relation to the two causes of action brought under the Fair Trading Act.[19]

Limitation arguments

[40] Finally, the Judge considered limitation arguments advanced by 3AC. Because he had concluded that the Consumer Guarantees Act and Fair Trading Act claims could not be pursued against 3AC in New Zealand, it was unnecessary to consider the argument that they were time-barred.[20] No limitation issue was raised by 3AC in relation to the negligence and negligent misstatement causes of action. 3AC argued that the fourth cause of action — negligent failure to warn — was time-barred. The Judge considered that it was premature to determine limitation issues at this stage of the proceeding. That issue was best left until the question of whether a representative class action was approved had been decided. Only then would the full scope of the proceeding be known, and the composition of the plaintiff group be determined.[21]

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19 At [122].
20 At [124].
21 At [129].

Result — protest partly upheld

[41] The Judge upheld the protest to jurisdiction in relation to the causes of action under the Consumer Guarantees Act and the Fair Trading Act. The protest to jurisdiction in respect of the negligence causes of action was dismissed.[22]

[42] As both parties had been successful in part, there was no order as to costs.[23]

Issues on appeal

[43] The appellants appeal against the Judge's decision to uphold the protest to jurisdiction in respect of the Consumer Guarantees Act and Fair Trading Act causes of action. They say that the Judge's analysis of the territorial scope of each of these statutes was incorrect. They say there is a serious issue to be tried on the merits in relation to each of these claims. They say that the Judge's finding that there is no serious issue to be tried in relation to the Fair Trading Act causes of action on the basis that there was no evidence of representations made by 3AC to the appellants regarding Alucobond at the relevant times cannot be reconciled with the Judge's conclusion that there is a serious issue to be tried on the negligent misstatement cause of action.

[44] We address each of these causes of action below.

Serious issue to be tried under the Consumer Guarantees Act?

Relevant provisions of the Consumer Guarantees Act

[45] We begin by setting out the relevant provisions of the Consumer Guarantees Act.

[46] The purpose of the Consumer Guarantees Act is set out in s 1A:

> **1A Purpose**
>
> (1) The purpose of this Act is to contribute to a trading environment in which—
>
> (a) the interests of consumers are protected; and

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22 At [130].
23 At [131].

(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.

[47] The appellants' claims against 3AC are brought under s 6 of the Consumer Guarantees Act, which provides for the guarantee of acceptable quality:

6 Guarantee as to acceptable quality

(1) Subject to section 41, where goods are supplied to a consumer there is a guarantee that the goods are of acceptable quality.

(2) Where the goods fail to comply with the guarantee in this section,—

(a) Part 2 may give the consumer a right of redress against the supplier; and

(b) Part 3 may give the consumer a right of redress against the manufacturer.

[48] In order to identify whether there is a serious issue to be tried in relation to the liability of 3AC as a manufacturer under s 6, it is necessary to consider:

(a) Whether Alucobond comes within the scope of the term "goods" as defined for the purposes of the Consumer Guarantees Act.

(b) Whether Alucobond was supplied to the appellants as "consumers", as that term is defined for the purposes of the Consumer Guarantees Act.

(c) The circumstances in which the Consumer Guarantees Act applies to a manufacturer that does not have a presence in New Zealand.

[49] The term "consumer" is defined in s 2(1) to mean 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

[50] The term "goods" is defined as follows:[24]

> **goods—**
>
> (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

[51] As s 6(2) makes clear, where there is a breach of the guarantee of acceptable quality, a consumer may have remedies against both an immediate supplier of the

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

goods and the manufacturer of those goods. The term "manufacturer" is defined as follows:[25]

> **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

[52] It is common ground that 3AC does not have an ordinary place of business in New Zealand. So persons such as Kaneba and Skellerup that import or distribute Alucobond products are treated as if they were the manufacturer of those goods (putting to one side for the time being the question of whether Alucobond cladding was supplied to the appellants as "goods").

[53] The term "supplier" is defined as follows:[26]

> **supplier—**
>
> (a) means a person who, in trade,—
>
> (i) supplies goods to a consumer by—
>
> (A) transferring the ownership or the possession of the goods under a contract of sale, exchange, lease, hire, or hire purchase to which that person is a party; or
>
> (B) transferring the ownership of the goods as the result of a gift from that person; or
>
> (C) transferring the ownership or possession of the goods as directed by an insurer; or
>
> (ii) supplies services to an individual consumer or a group of consumers (whether or not the consumer is a party, or the consumers are parties, to a contract with the person); and
>
> …

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25 Section 2(1).
26 Section 2(1).

[54] Section 27 sets out a consumer's rights of redress against a manufacturer where there is a breach of a relevant guarantee, including the guarantee of acceptable quality:

> **27 Options against manufacturers where goods do not comply with guarantees**
>
> (1) Subject to subsection (3), where a consumer has a right of redress against a manufacturer in accordance with this Part, the consumer, or any person who acquires the goods from or through the consumer, may obtain damages from the manufacturer—
>
> (a) subject to subsection (2), for any reduction in the value of the goods resulting from the failure—
>
> (i) below the price paid or payable by the consumer for the goods; or
>
> (ii) below the average retail price of the goods at the time of supply,—
>
> whichever price is lower:
>
> (b) for any loss or damage to the consumer or that other person resulting from the failure (other than loss or damage through a reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure.
>
> (2) Subject to subsection (3), where the consumer, or any person who acquires the goods from or through the consumer, is entitled by an express guarantee given by the manufacturer to require the manufacturer to remedy the failure by—
>
> (a) repairing the goods; or
>
> (b) replacing the goods with goods of identical type,—
>
> no action shall be commenced under subsection (1)(a) unless the consumer or that other person has required the manufacturer to remedy the failure and the manufacturer—
>
> (c) has either refused or neglected to remedy the failure; or
>
> (d) has not succeeded in remedying the failure within a reasonable time.
>
> (3) This section shall not apply to any person who acquires goods from or through a consumer unless that person comes within the terms of paragraph (b) of the definition of consumer in section 2.

Appellants' submissions

[55] Mr Farmer KC and Mr Wass, who appeared for the appellants, challenged each step of the Judge's reasoning in relation to the Consumer Guarantees Act. First, Mr Farmer submitted that as a matter of interpretation, the three limbs of the definition of "manufacturer" are not disjunctive. More than one limb can apply in any given case. The application of the Consumer Guarantees Act to overseas manufacturers would be consistent with the consumer protection objectives of that legislation. It would enable New Zealand consumers to proceed against either the overseas manufacturer or any New Zealand importer. It would ensure an even playing field as between New Zealand and overseas manufacturers. As a matter of statutory interpretation, the Consumer Guarantees Act is most naturally read as extending to overseas manufacturers of goods that are supplied in New Zealand. It is supply in New Zealand that is the relevant connecting factor, not the location of the manufacturer.

[56] Mr Wass submitted that the same result would be reached by applying orthodox choice of law principles. Product liability focusses on place of injury. The applicable law should be the law of the place of injury, by analogy with the standard approach to negligence causes of action.

[57] Similar legislation in Australia has been interpreted as applying to overseas manufacturers of goods supplied in the relevant Australian jurisdiction.[27]

[58] Second, Mr Farmer submitted that Alucobond panels are goods which are used or consumed in a domestic setting as a matter of regular practice. The legislation is not concerned with the contractual chain of supply. It is irrelevant whether or not the goods were purchased by intermediaries before being supplied to a consumer. What is relevant is the character of the goods, determined by their ultimate use or consumption. The purpose of the Consumer Guarantees Act is to protect the domestic end-user

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[27] See *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd* (1994) 51 FCR 540 at 546–547; *Leeks v FXC Corporation* [2002] FCA 72, (2002) 118 FCR 299 at [10]–[17]; and *Gill v Ethicon Sàrl (No 5)* [2019] FCA 1905 at [3121].

regardless of the chain of supply.[28] A homeowner who reclads their house acquires the cladding product. They are entitled to expect that product will meet the standards prescribed by the Consumer Guarantees Act, in the same way as they would expect a domestic fridge or stove to do so regardless of whether they buy it from the contractor or from the importer. The Judge's approach to the definition of "goods" conflated the contractual chain of supply with the use of the product and undermines the purpose of the legislation. If the identity of the purchaser is important, there was evidence before the Court that Alucobond panels were supplied directly to end-users.[29]

[59] Third, Mr Farmer submitted that the definition of "goods" makes it clear that fixtures incorporated into a building qualify as goods. The exception relating to buildings in paragraph (c) of the definition applies to homes or offices sold as such, not to items such as cladding or other goods incorporated into a building. If the Judge's approach was correct, numerous goods would lose protection as soon as they were incorporated into an existing building.

3AC's submissions

[60] Mr Galbraith KC, who appeared for 3AC, supported the Judge's reasoning on each of these issues.

Does the Consumer Guarantees Act apply to overseas manufacturers?

[61] We accept the appellants' submission that the Consumer Guarantees Act applies to an overseas manufacturer of goods that are supplied in New Zealand. This reading of the Act is in our view consistent with its text and purpose. It is consistent with broader principles of private international law. And it is consistent with the approach adopted by the Australian courts to corresponding legislation.

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[28] See *Bunnings Group Ltd v Laminex Group Ltd* [2006] FCA 682 at [111]–[113]; *Capital and Coast District Health Board v Beca Carter Hollings & Ferner Ltd* [2018] NZHC 2862 at [25]–[27]; and *Minister of Education v Carter Holt Harvey Ltd* [2014] NZHC 681 at [87]–[93].

[29] The evidence of Mr Gouws, the principal of Kaneba, was that Kaneba's customers included "building owners, to whom Kaneba was contracted to fabricate, supply and/or install Alucobond panels". He said Kaneba was often contracted to supply and install small quantities of Alucobond for projects such as garage doors.

[62] We set out again, for ease of reference, the definition of the term "manufacturer":[30]

> **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

[63] The definition is inclusive. Plainly an overseas manufacturer of goods is a person that carries on the business of assembling, producing or processing those goods. Each of the three paragraphs that follows is an extension of that core concept. They will often overlap: a person that holds itself out to the public as the manufacturer of the goods will often be a person that attaches its brand or mark to the goods. There is nothing in the text or the scheme of the definition to suggest that a strictly disjunctive reading was intended.

[64] Reading the Act as a whole, the relevant territorial connecting factor is in our view the supply of goods in New Zealand. Where goods have been supplied in New Zealand, the Act attaches certain consequences to that supply, both for the immediate supplier and for certain other businesses. It is not accurate to describe the availability of relief in respect of a supply of goods to a consumer in New Zealand against a person outside New Zealand as an "extraterritorial" application of the Act. Rather, the application of the Act turns on a relevant supply taking place in New Zealand.

[65] Put another way, supply to a consumer in New Zealand is the central focus or "hinge" of the Act, which provides the necessary territorial connection with New Zealand.[31]

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30 Consumer Guarantees Act, s 2(1).

31 *BHP Group Limited v Impiombato* [2022] HCA 33, (2022) 405 ALR 402 at [59] per Gordon, Edelman and Steward JJ.

[66] We accept the submission that the purpose of paragraph (c) of the definition is to provide a New Zealand consumer with the ability to seek redress against an importer or distributor of goods manufactured outside New Zealand because this can be expected to be simpler and less costly than an attempt to bring proceedings against a manufacturer abroad. In most consumer claims, cross-border litigation is unaffordable and impractical. So the importer or distributor is required to stand in the shoes of the overseas manufacturer, to facilitate effective relief for a consumer with a claim under the Act in respect of defective goods supplied to them in New Zealand.

[67] However the availability of such relief does not imply that the manufacturer should be excused from liability. The fact that there is an importer or distributor based in New Zealand is not a reason to exclude the primary responsibility of the manufacturer for the quality and safety of the goods they produce.

[68] Moreover obvious difficulties would arise in cases where a consumer purchases goods online from an overseas distributor, so there is no New Zealand-based person that comes within paragraph (c) of the definition. On 3AC's approach, the consumer would have no rights under the Consumer Guarantees Act against a manufacturer of the goods in this scenario. That result would be difficult to reconcile with the purpose of the legislation.

[69] Concurrent liability on the part of the overseas manufacturer and any New Zealand-based importer or distributor is in our view consistent with the focus of the legislation on providing meaningful remedies to consumers of goods supplied in New Zealand. Any loss or damage can only be recovered once; so there is no unfair duplication of liability.

[70] The concept of extraterritoriality, as that term was used by the Supreme Court in *Poynter*, is not relevant in the present case. As already explained, the supply of goods to a consumer in New Zealand provides the necessary link to this jurisdiction. The relevant conduct — the supply of goods to a consumer in New Zealand — takes place in New Zealand; the Act then prescribes the consequences of those goods being defective or unsafe.

[71] The other material difference between the Consumer Guarantees Act and the Commerce Act 1986, which was the focus of the Supreme Court's decision in *Poynter*, is that s 4 of the Commerce Act 1986 specified "the only circumstances in which the Act applies to conduct outside New Zealand". So there was no room for grafting on a further extension to other conduct overseas.[32] Mr Poynter had done nothing in New Zealand and had never sent any communications to New Zealand.[33] The conduct of others in New Zealand could not be attributed to him without doing violence to the scheme of extra-territorial application for which Parliament had expressly provided.[34] By contrast, liability under the Consumer Guarantees Act does not depend on conduct of the supplier or manufacturer in New Zealand. Rather, the Act imposes responsibility on suppliers and manufacturers for the quality and safety of products supplied in New Zealand to New Zealand consumers. That liability is strict, not conduct-based.

[72] We also accept Mr Wass' submission that this approach is consistent with Australian authority. In *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd* the Federal Court of Australia held that the definitions of "manufacturer" contained in the Manufacturers Warranties Act 1974 (South Australia), which were very similar to those found in the Consumer Guarantees Act, were not mutually exclusive and may often overlap. One limb of the definition provided the consumer with a right of action against the importer.[35] But that did not

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32 *Poynter v Commerce Commission*, above n 7, at [15] per Elias CJ and [46], [62] and [78] per Tipping J (for the majority).

33 At [1] per Elias CJ and [20] per Tipping J (for the majority).

34 At [7] per Elias CJ and [52] and [55] per Tipping J (for the majority).

35 Manufacturers Warranties Act 1974 (South Australia), s 3. The definition read as follows:
manufacturer, in relation to manufactured goods, means—
(a) any person by whom, or on whose behalf, the goods are manufactured or assembled; or
(b) any person who holds himself out to the public as the manufacturer of the goods; or
(c) any person who causes or permits his name, the name in which he carries on business, or his brand, to be attached to or endorsed upon the goods or any package or other material accompanying the goods in a manner or form that leads reasonably to the inference that he is the manufacturer of the goods; or
(d) where the goods are imported into Australia, and the manufacturer does not have a place of business in Australia, the importer of the goods;

mean that the consumer did not have the right to pursue an action against the foreign manufacturer. Von Doussa J said:[36]

> Paragraph (d) of the definition, in a case to which it applies, provides a consumer with a cause of action against the importer where procedural or other difficulties would make it impracticable to bring an action against the foreign manufacturer, but a construction which denies the consumer the right to pursue an action against the foreign manufacturer where no real difficulty exists in doing so, or where the local importer is insolvent or without the means to meet a judgment, does not promote the purpose or object of the Act. A construction which permits action against both the actual manufacturer, and any other person who comes within pars (b), (c), or (d) would promote that purpose or object.
>
> …
>
> In my view the Act by defining "manufacturer" to *mean* (a) ... (b) ... (c) *or* (d) does not intend that each of the four paragraphs be read as mutually exclusive. The definition prescribes a class comprising people falling within the four situations as described in pars (a) to (d). The construction of the definition would have given rise to no difficulty had the wording been that "manufacturer" *includes* (a) ... (b) ... (c) ... or (d) ... Nor would there have been difficulty if the wording had been "manufacturer" *includes* (a) ... (b) ... (c) ... *and* (d). The word "and" in a definition in that form would have given the definition of a cumulative effect in that the four paragraphs together would indicate who was a manufacturer, and a dispersive effect would be given to the paragraphs by the word "includes", so that the application of any one or more of the paragraphs would render a person a "manufacturer" …
>
> …
>
> In my opinion the definition should be construed by reading the four pars (a) to (d) as constituting a class of persons who are defined as the "manufacturer". The paragraphs should be construed as alternatives, but not as mutually exclusive alternatives. There may be more than one person who comes within the class which is defined. In the present case on the footing that a particular switchgear item was manufactured by the second respondent, imported into Australia by the first respondent, and the second respondent had no place of business in Australia, both the first and the second respondents could be a "manufacturer".
>
> I therefore reject the first contention of the second respondent. I consider it is open on the pleadings for the second respondent to be held to have been a "manufacturer".

[73] The same conclusion was reached by Finn J in *Leeks v FXC Corporation* in relation to a similar definition in the Trade Practices Act 1974 (Cth).[37]

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[36] *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd*, above n 27, at 546–547.

[37] *Leeks v FXC Corporation*, above n 27, at [16].

[74] More recently, in *Gill v Ethicon Sàrl (No 5)*, Katzmann J said in relation to the corresponding provision of the Trade Practices Act 1974 (Cth) that it is "beyond doubt that proceedings may be brought against a foreign manufacturer and a local deemed manufacturer for the same contravention(s)".[38]

[75] We note that the New Zealand provision uses the "includes" wording that von Doussa J considered even clearer than the wording that he was required to interpret in *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd*. We agree.

[76] Thus if one approaches the question of whether a claim by a consumer in relation to goods supplied in New Zealand is available against an overseas manufacturer under the Consumer Guarantees Act as a matter of statutory interpretation the answer is, we think, clear. On its face the Act applies, and there is no good reason to read it more narrowly.

[77] The same result is reached if one approaches the question through the lens of established private international law choice of law principles. Where a claim is brought in tort in relation to goods that have caused personal injury, private international law principles favour application of the law of the place of injury, not the place of manufacture. As this Court has observed, applying the law of the place of manufacture would produce the unsatisfactory result of different products on the same shelf being subject to different product liability regimes.[39] There is broad support for a similar approach to product liability claims, which can be thought of as a species of statutory tort.[40]

[78] There is a strong argument that the applicable law, where a consumer brings a product liability claim in respect of goods supplied in New Zealand, is New Zealand law. The relevant New Zealand law is found in the Consumer Guarantees Act.

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38 *Gill v Ethicon Sàrl (No 5)*, above n 27, at [3121], citing *Leeks v FXC Corporation,* above n 27 at [13].

39 *McGougan v DePuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916 at [59].

40 For a helpful discussion of relevant principles see Maria Hook "Does New Zealand consumer legislation apply to a claim against a foreign manufacturer?" [2022] NZLJ 201 at 203–204.

[79] Thus, whether one focusses on the interpretation of the Consumer Guarantees Act itself, or on private international law principles of general application, the same result follows: a consumer may bring proceedings in respect of goods supplied to that consumer in New Zealand against the overseas manufacturer of those goods under the Consumer Guarantees Act.

[80] We are conscious that on this reading of the Consumer Guarantees Act, an overseas manufacturer might be exposed to liability even if it did not know its products were being sold in this country, for example because a distributor in another country was on-selling some of the product it had purchased into New Zealand. Indeed a manufacturer might find itself liable to a New Zealand consumer under the Act even if it had consciously chosen not to sell its product in this country, but the product found its way here indirectly. However it was not suggested to us that these concerns arise in the present case. We therefore need not consider whether such a result would go beyond the purpose of the Act, or whether private international law principles provide a solution to any apparent injustice in such a case.

[81] Although we have reached a view on the application of the Consumer Guarantees Act to overseas manufacturers that differs from that of the Judge, we agree with the Judge that the appellants' claims against 3AC under the Consumer Guarantees Act do not raise any serious issue to be tried on the merits for two other reasons:

(a) The Alucobond panels that were incorporated into the buildings owned by the appellants are not "goods" for the purposes of the Consumer Guarantees Act.

(b) Neither appellant qualifies as a "consumer" for the purposes of the Consumer Guarantees Act in relation to the supply of Alucobond panels.

[82] These barriers to a claim by the appellants against 3AC are closely related.

[83] The difficulty is starkest in relation to the claims by Argosy. Argosy purchased Favona Road in June 2013. Kaneba fabricated and installed Alucobond panels on the

link bridge on the property in 2011, at a time when the property was owned by Brookfield Multiplex Funds Management Ltd. Argosy acquired the entire building, incorporating its cladding, from Brookfield. It is clear that what Argosy acquired from Brookfield was not goods: rather, it was a whole building attached to land. Section 6 of the Consumer Guarantees Act applies where goods are supplied to a consumer. Part 2 then gives that consumer a right of redress against a supplier of the goods, and pt 3 gives the consumer a right of redress against a manufacturer of those goods. But here, nothing that qualifies as "goods" was supplied to Argosy.

[84] For the sake of completeness, we note that s 27 of the Consumer Guarantees Act provides for rights of redress against a manufacturer by a person who acquires goods from or through a consumer, provided that person comes within the terms of paragraph (b) of the definition of "consumer" in s 2.[41] So the right of redress against the manufacturer of goods survives a sale by one consumer to another. But it still must be the relevant goods that have been acquired by one consumer, and then sold by that first consumer to the second consumer. Here, no relevant goods were sold by Brookfield to Argosy.

[85] Mr Farmer placed considerable emphasis on the express inclusion in the definition of "goods" of goods attached to, or incorporated in, any real or personal property. However when this limb of the definition is read together with paragraph (c) it seems clear to us that it refers to chattels such as kitchen appliances that remain identifiable as separate goods, albeit attached to or incorporated into a building. This limb of the definition does not include the building as a whole, or elements of the building that do not retain a separate identity as goods. Where for example Consumer A builds a new house, and purchases appliances for that house, then sells the house with those appliances to Consumer B, Consumer B will have rights of redress against the manufacturer of the appliances. But Consumer B will not have rights of redress against the manufacturer of integral elements of the structure of the house itself, such as its exterior cladding or its roof, which have been incorporated into the building and have lost any separate identity as goods.

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[41] Consumer Guarantees Act, s 27(3). That is, the indirect acquirer must not have acquired the goods or services, or hold themselves out as acquiring the goods or services, for the purpose of resupplying them in trade; consuming them in the course of a process of production or manufacture; or repairing or treating in trade other goods or fixtures on land.

[86] Argosy was the owner of Don McKinnon Drive at the time that Kaneba installed two strips of Alucobond in 2011. But the unchallenged evidence given by Mr Gouws on behalf of Kaneba is that the Alucobond that Kaneba fabricated and installed at Don McKinnon Drive in 2011 was supplied to Antares Restaurant Group Ltd, which was the principal under the relevant building contract. It appears that Argosy, if it has acquired rights in respect of the cladding installed on the building, must have done so through Antares. But what Argosy has acquired is part of the building it owns (apparently by virtue of its ownership of the building and incorporation of the Alucobond cladding into that building as a fixture by the tenant, though this is not clear). Put another way, Argosy acquired the Alucobond cladding only when it became an integral part of the building that Argosy owns.[42]

[87] Similarly, the cladding installed on the Cutterscove Building has been incorporated into that building. It is artificial to describe the cladding which has been fabricated and installed as an integral part of the building as goods for the purposes of the Consumer Guarantees Act. The cladding has lost its separate identity. It forms part of a building which is expressly excluded from the scope of the "goods" to which the Act applies.

[88] That view is confirmed by the scheme of the Act, which assumes that the goods have a continuing separate identity. The focus of the remedial provisions is on repair of the goods or replacement of the goods, or loss in value of the goods. There are other remedies, including damages for any loss or damage to the consumer resulting from the failure to comply with the guarantee. But the remedial provisions of the Act are not readily applied to claims in respect of items that have been incorporated into a building so as to lose their separate identity.[43]

[89] Even if the Alucobond panels came within the definition of "goods" for the purpose of the Consumer Guarantees Act, it is we think clear that those panels are not goods of a kind ordinarily acquired for personal, domestic, or household use or

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42 We express no view on whether Argosy is the owner of these panels. Mr Gouws' evidence is that the panels are simply screwed onto the top of pre-existing Alucobond panels, and could be removed by unscrewing them and taking them down. That raises a question as to whether the panels are decorative items that have not become fixtures. We need not determine this issue.

43 See Parts 2 and 3 of the Consumer Guarantees Act, in particular ss 18, 19 and 27.

consumption. There was no evidence before the High Court of sales of Alucobond panels to end-users in their original manufactured form as flat panels. It was not suggested in evidence that Alucobond panels are sold at retail for use by consumers in building or repairing their own homes. All the evidence before us, including the evidence of Mr Gouws of Kaneba, related to the use of Alucobond panels by building professionals (including Kaneba) to carry out work on a building by fabricating and installing the panels on that building. In the process of supply, the panels are modified and lose their separate identity. They become part of the building. That is, the panels are acquired by a building professional to be used to construct, or repair, fixtures on land. The owner of the building does not acquire the panels as such; rather, the owner of the building acquires a building or part of a building as a result of the materials consumed and work performed by the building professional.

[90] In *Capital and Coast District Health Board v Beca Carter Hollings & Ferner Ltd* the High Court held that it was arguable that copper pipes incorporated into a hospital building were goods that had been supplied to a consumer for the purposes of the Consumer Guarantees Act. The District Health Board sought to join the importer of the copper pipes to existing proceedings in order to pursue a claim against it as the manufacturer of the pipes for the purposes of the Consumer Guarantees Act. The Judge had limited evidence before her, but considered there was sufficient evidence for the purposes of a joinder application to show it was arguable that the pipe supplied may be ordinarily for residential, and therefore domestic, purposes.[44] Similarly, the Judge considered there was insufficient evidence before her to explore whether the plaintiff purchased a completed building, or the pipes were supplied as a component under the terms of the relevant contract. The Judge considered this would require a detailed examination of the documents and the circumstances and concluded the issue was arguable.[45]

[91] We express no view on whether the copper pipes that were the focus of that claim could be regarded as retaining a separate identity as goods for the purposes of the Consumer Guarantees Act. That decision can be distinguished on the basis that, in the present case, there is uncontroverted evidence that Alucobond panels are not

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44 *Capital and Coast District Health Board v Beca Carter Hollings & Ferner Ltd*, above n 28, at [27].
45 At [29]–[30].

ordinarily acquired for personal, domestic, or household use or consumption. It is not sufficient that the panels are used for residential purposes, in the sense that they are incorporated into dwellings. The question is whether individuals or households *ordinarily* purchase those goods. In the present case, the evidence is sufficient to show that Alucobond panels are not ordinarily acquired by individuals or households; rather, individuals and households contract for houses to be built, or work to be done on their houses, in a manner that consumes Alucobond panels in order to construct or repair the dwelling.

[92] Mr Farmer submits that a homeowner who reclads their house acquires the cladding product. They are entitled to expect that product will meet the standards prescribed by the legislation, in the same way as they would expect a domestic fridge or stove to do regardless of whether they buy it from the contractor or from the importer. He says the Consumer Guarantees Act protects the domestic end-user regardless of the chain of supply. They are entitled to seek a remedy against a supplier (which, in the circumstances, may include the tradesperson who acquires the goods on their behalf, or the distributor, where the sale contract provides for property to pass directly to the consumer) or the manufacturer.

[93] The flaw in this argument is that a homeowner who contracts with a building professional for their house to be reclad will not normally enter into a contract to purchase goods in the form of cladding panels.[46] Rather, the homeowner will usually contract for the recladding service to be provided. In the course of providing that service, the relevant building professional purchases and uses/consumes cladding panels to (re)construct the house. The homeowner ends up with a reclad house, with cladding panels incorporated in it: the panels lose their separate identity as goods. This is quite different from direct or indirect purchase of a fridge or stove; an item distinct from the building, albeit attached to it.

[94] In summary, we agree with the Judge that there is no serious issue to be tried on the merits under the first cause of action based on the Consumer Guarantees Act.

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[46] There may be some types of cladding panels that are ordinarily acquired by consumers as distinct goods, for example where such panels are sold by hardware and building supplies retailers to the general public. But there was no evidence before us to suggest that Alucobond is sold in this manner.

It is not seriously arguable, on the evidence before us, that the Alucobond panels are "goods" for the purposes of the Act, or that those panels were supplied to consumers for the purposes of that Act. The Judge was right to uphold the protest to jurisdiction in respect of the Consumer Guarantees Act cause of action.

Serious issue to be tried in relation to Fair Trading Act causes of action?

Relevant provisions of the Fair Trading Act

[95] Section 9 of the Fair Trading Act provides that no person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[96] Section 13 is concerned with false or misleading representations. It provides:

> **13 False or misleading representations**
>
> No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—
>
> (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
>
> (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
>
> (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
>
> (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
>
> (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
>
> (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
>
> (g) make a false or misleading representation with respect to the price of any goods or services; or
>
> (h) make a false or misleading representation concerning the need for any goods or services; or

(i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; or

(j) make a false or misleading representation concerning the place of origin of goods or services.

[97] Section 43 provides for orders that may be made by a Court where a person has suffered, or is likely to suffer, loss or damage by conduct of another person that constitutes a contravention of relevant provisions of the Act, including ss 9 and 13.[47] The Court may make an order directing the person who contravened the Act to pay the amount of the loss or damage to the person who suffered that loss or damage.[48]

[98] Section 3 (set out at [36] above) provides for the Act to apply to certain conduct outside New Zealand by a person resident or carrying on business in New Zealand. It is implicit in s 3 that the Act applies to conduct within New Zealand. Section 3(1) then extends the application of the Act to certain conduct that takes place outside New Zealand. We return to this below.

Submissions on appeal

[99] Mr Farmer submitted that the Judge misunderstood the Fair Trading Act. Whether or not 3AC carries on business in New Zealand is irrelevant. The appellants claim that 3AC engaged in conduct in New Zealand that was misleading and deceptive, including making representations to the New Zealand market.

[100] Mr Farmer said that there is sufficient evidence for present purposes to establish a serious issue to be tried in relation to whether 3AC has engaged in misleading and deceptive conduct in the way that it marketed Alucobond in New Zealand, directly and/or through its distributors. To the extent there is any factual uncertainty, that is a matter for trial.

[101] For 3AC, Mr Galbraith agreed that the existence of a serious issue to be tried turns on whether it is arguable that 3AC engaged in conduct in New Zealand that

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47 Fair Trading Act 1986, s 43(1)(a).
48 Section 43(3)(f).

breached s 9 or s 13 of the Fair Trading Act. He said the Judge was right to find there was no evidence of misrepresentations or any other misleading conduct by 3AC in New Zealand. Nor, he said, is there any evidence that any representations or other conduct were relied on by the appellants, or by any agent of the appellants. To the contrary, Mr Kinloch's evidence for Cutterscove was that he relied on Skellerup as a reputable party, and gained the impression that Alucobond was a safe and reputable product. Argosy offers no evidence on reliance at all. There is no evidence from any agents, proposed group members or others whose conduct in reliance on the alleged misleading and deceptive conduct could have caused loss to the appellants.

Discussion

[102] As this Court explained in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, s 3(1) of the Fair Trading Act extends the application of that Act to conduct that occurs overseas where the defendant carries on business in New Zealand and the conduct relates to the supply of products in New Zealand. But, importantly, the Fair Trading Act also applies to false and misleading conduct in New Zealand, regardless of where the defendant is incorporated and where it carries on business.[49] Communications made from outside New Zealand to recipients in New Zealand constitute conduct in New Zealand for the purpose of ss 9 and 13 of the Fair Trading Act.[50]

[103] It follows that the Judge erred in finding that because s 3(1) of the Fair Trading Act does not apply to 3AC, the appellants' claims against 3AC founded on the Fair Trading Act cannot possibly succeed.[51] It was common ground before us that s 3(1) did not apply here. But that is not decisive. Rather the inquiry must be whether there is a serious issue to be tried as to whether 3AC engaged in conduct in New Zealand that breached the Fair Trading Act.

[104] We accept Mr Farmer's submissions that if the Judge's findings in relation to the negligent misstatement cause of action are correct, it must follow that there is a serious issue to be tried under the Fair Trading Act. It is therefore necessary to review

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49 *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 1, at [102]–[110].
50 At [106].
51 High Court judgment, above n 5, at [117].

with some care the evidence on the basis of which the Judge concluded that it was arguable that representations regarding Alucobond's compliance with the Building Code were made at relevant times by or on behalf of 3AC.

[105] The first document referred to by the Judge was a "Producer Statement — Construction" document issued by "Skellerup Alucobond" addressed to Cutterscove dated 12 September 2006.[52] That producer statement certified that the works were to be completed in a manner to meet the criteria set out in the building code for durability (B2) and external moisture (E2).

[106] We do not consider that this document assists the appellants: it was not issued by 3AC, and there is no evidence to suggest that it was issued on behalf of, or with the prior approval of, 3AC. Equally if not more importantly, the producer statement is confined to durability and external moisture requirements under specific clauses of the Building Code. It expresses no view on compliance with cl C of the Building Code in relation to protection from fire. The Judge said that it was "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".[53] However we do not consider that it is seriously arguable that a specific producer statement of this kind, given for a particular purpose under the building regulatory scheme, can be read as implicitly certifying matters to which it does not refer.

[107] The Judge next referred to a document produced by 3AC titled "Flying High" which was obtained from a web archive dated 5 November 2005.[54] It thus pre-dates Cutterscove's decision to use Alucobond to reclad the Cutterscove Building. The document makes general statements about the suitability of Alucobond panels as a construction material for use in residential and commercial buildings. It includes a page setting out information about the fire behaviour of Alucobond panels, identifying various countries, tests conducted for the purpose of those countries' building regulatory regimes, and resulting classifications of Alucobond. The appellants say this document was published on the website of 3AC (then called Alcan). That website was

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52 At [92].
53 At [93].
54 At [94].

referred to in Alcan branded materials that were circulated in New Zealand around the same time. The appellants say this document alone demonstrates a serious issue to be tried.

[108] We accept that this document appears to have been accessible to New Zealand consumers and their suppliers and advisers at the relevant time. It makes both express and implied representations about the suitability of Alucobond for various purposes, which the appellants claim are misleading. We accept the appellants' submission that this document establishes a serious issue to be tried in relation to whether 3AC breached ss 9 or 13 of the Fair Trading Act in at least some of the respects pleaded. However that is not sufficient. There must be a serious issue to be tried in relation to each appellant's claim that they suffered loss by reason of that conduct. We return to this below.

[109] The Judge next referred to three letters sent by Skellerup and a subsidiary of 3AC to MM Architects regarding the cladding to be used on the Aura Apartments in Cook Street, Auckland in relation to a building consent application involving the use of Alucobond cladding.[55] The letter from Skellerup to MM Architects identified a number of significant buildings on which Alucobond cladding had been used in New Zealand, and emphasised its suitability for such use. The letter from the 3AC subsidiary, sent in April 2005, sets out a brief history of the manufacture of Alucobond, and refers to the quality of the product and to compliance with Building Code Section B Durability Requirements. The letter attached, as "a further reference to prove that Alucobond panels satisfy international standards for external wall cladding applications", a certificate issued by the British Board of Agreement, which is described as the authority for assessment of products for construction in the UK. The attached certificate included a section headed "Behaviour in relation to fire" which set out the results of tests of Alucobond as against two British Standards, and concluded that the product achieved the requirements of the British Building Regulations.

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55 At [95]–[98].

[110] The Judge considered that although these letters involved parties other than the appellants, they "do inform an assessment of the likelihood of similar representations being made by 3AC and [Kaneba] and [Skellerup] regarding Alucobond to the market during the period prior to [Cutterscove] deciding to use Alucobond for the recladding of its building".[56]

[111] Finally, the Judge referred to a document entitled "Alucobond: At a Glance" which was undated.[57] The Judge noted it had been obtained by Mr Weaver, the appellants' expert, from a New Zealand website in 2020. The Judge considered that it was likely that it had been distributed over a period commencing well before 2020.[58] This document contained a number of general statements about the suitability of Alucobond for cladding applications. It identified, as one reason to chose Alucobond:

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

[112] The document went on to make representations about the fire prevention performance of Alucobond Plus and Alucobond A2 (the latter product is not the subject of these proceedings).

[113] The appellants say that these documents are sufficient to show that it is likely that throughout the relevant period, 3AC was generating material about its Alucobond product that made claims about its suitability for relevant uses, and its fire protection characteristics, and that this material was being addressed to and read by recipients in New Zealand. They say that it is only following discovery that they will be able to provide evidence of specific communications, and communications to the market generally, and call evidence about the impression that 3AC set out to create in relation to its product in the New Zealand market.

[114] As already mentioned, we accept that there is a serious issue to be tried in relation to whether 3AC engaged in conduct in New Zealand that breached the Fair Trading Act at the relevant times. However on the material before us it is less clear whether that there is a serious issue to be tried in relation to the existence of a

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56 At [98].
57 At [99].
58 At [99].

claim by each appellant against 3AC for compensation for loss or damage suffered by that appellant by reason of such conduct.

[115] Again, we begin with Argosy. Argosy has not provided any evidence addressed to the question of reliance on conduct of 3AC, direct or indirect, that has caused it loss. It seems quite clear that Argosy did not itself rely on any such conduct: it says it was not aware that it had Alucobond panels on any buildings until it investigated this in 2021. Any relevant reliance would either need to be market-wide reliance on the suitability of Alucobond, which extended to advisers and/or suppliers to Argosy, or reliance by Argosy's tenant in the case of Don McKinnon Drive, or by the previous building owner in the case of Favona Road.

[116] The same is true of Cutterscove: the evidence given by Mr Kinloch does not identify any material generated by 3AC that he saw before the decision on use of Alucobond on the Cutterscove Building was made. It seems clear he was relying on the reputation of Skellerup, not anything said or done by 3AC in connection with Alucobond.

[117] If it is necessary for each claimant to establish a serious issue to be tried in relation to reliance on specific statements made by or on behalf of 3AC on the part of the claimant, or on the part of an identified agent or supplier, it seems clear that that threshold is not met. The question then becomes whether it is open to a claimant to pursue a claim under the Fair Trading Act based on a general (misleading) impression created in relation to a product over a period about the suitability of that product for particular uses, or about the regulatory compliance of that product, which has influenced the approach of market participants to that product in a manner that is likely to have contributed to the product's use on the claimant's building(s).

[118] We consider that it would be premature to rule out this approach to liability under the Fair Trading Act in the context of a protest to jurisdiction. There are authorities that provide a measure of support for such an approach, and none that were

drawn to our attention that authoritatively preclude it.[59] There is a substantial question of law that the appellants genuinely wish to try.[60]

[119] If that approach to liability is arguably sufficient, then we accept that there is (just) enough evidence to establish that there is a serious issue to be tried in relation to reliance by some relevant person, via general market impressions, in the present case.

[120] It is important to bear in mind the rationale for requiring a claim to meet the "serious issue to be tried on the merits" threshold. A foreign defendant should not lightly be required to defend proceedings in New Zealand unless there is an arguable case for them to answer. Here, the Judge dismissed the protest to jurisdiction in relation to the negligent misstatement cause of action, and there has been no appeal from that decision. So 3AC is required to defend in New Zealand essentially the same allegations that underpin the Fair Trading Act causes of action. The incremental litigation burden that would arise from being required to defend the Fair Trading Act causes of action is negligible. In circumstances where these allegations will need to be the subject of discovery and a trial, it is difficult to see the justification for denying each appellant the ability to pursue essentially the same allegations in reliance on the Fair Trading Act, as well as the tort of negligent misstatement. We therefore conclude, by a fine margin, that the appeal should be allowed in relation to the Fair Trading Act causes of action, and that the protest to jurisdiction in respect of those causes of action be set aside.

Costs

[121] The appellants have thus succeeded in relation to the Fair Trading Act causes of action. They have been unsuccessful in relation to the Consumer Guarantees Act cause of action. Given the measure of success enjoyed by each party, we consider that costs should lie where they fall.

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59 *Commerce Commission v Bennett and Associates Ltd* (1995) 6 TCLR 691 (CA) at 694; *Gilmore v Smith* (2002) 10 TCLR 392 (HC) at [32]; and *McVicker v Vodafone (NZ) and Ors* HC Auckland CIV-2005-404-180, 3 April 2006 at [62]–[64].

60 See the test in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 (HL) at 452 per Lord Goff, quoted with approval by this Court in *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd*, above n 1, at [42]: see [23] above.

Result

[122] The appeal is allowed in part. The decision of the High Court upholding the protest to jurisdiction in respect of the fifth and sixth causes of action is set aside. The protest to jurisdiction in respect of those causes of action is set aside.

[123] The appeal is otherwise dismissed.

[124] There is no order as to costs.

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