Struthers (John Bradley & Diana Grenville) v Patterson Co-partners Architects Ltd, Andrew Patterson, Byan Windeatt; North City Builders Ltd; John Davidd Fitt & David Grant Milne; Master Build Services Ltd; North Shore City Council; Fletcher Building Ltd & Trade Mart Ltd;James Hardie New Zealand Ltd; Plaster Systems Ltd; Tenon Industries Ltd; HM AG; Branz Ltd;

JUDGMENT OF FRATER J : IN THE HIGH COURT OF NEW ZEALAND AUCKLAND REGISTRY : 30th May 2007

Introduction

[1] The plaintiffs' home in Brett Avenue, Takapuna, suffers from leaky building syndrome. They have issued proceedings seeking substantial damages against 13 parties. The ninth and tenth defendants are the Attorney-General, as statutory successor to the liabilities of the Building Industry Association (BIA), and BRANZ Limited (Branz), a fully owned subsidiary of the Building Research Association carrying on business as independent assessors of building products, materials, systems and methods of design and construction. Each has applied to strike out the claims against it. This judgment concerns those applications insofar as they relate to claims in negligence against both defendants and breach of the Fair Trading Act 1986 (the FTA) against Branz.

[2] The hearing of the strike out applications was delayed pending receipt of the Court of Appeal's judgment in ***Attorney-General v Body Corporate 200200*** [2007] 1 NZLR 95 (Sacramento) and the disposal of the subsequent application for leave to appeal to the Supreme Court. The principal issue before me was the application of the Court of Appeal judgment to the circumstances of this case.

Background

[3] In or about October 1997 the plaintiffs retained architects to design a large and luxurious house to be built on their beachfront property. The design used monolithic cladding over untreated kiln-dried timber wall framing. The cladding system consisted of fibre cement sheet material (Hardibacker) coated with reinforced plaster (Duraplast) - together known as the Duraplast/Hardibacker system.

[4] The local territorial authority, the North Shore City Council (the Council) issued a building consent for the construction of the house on 23 December 1997. Work began in January the following year, timber was delivered to the site from June 1998 onwards, the Hardibacker sheeting and Duraplast were supplied in September 1998, the Duraplast applied in November 1998, and the plaintiffs commenced living in the home on 7 October 1999.

[5] From June 2001 onwards it became apparent that a significant amount of moisture had entered the timber framing, causing it to rot. Fifty-two separate defects were identified in the construction of the house. They have since been rectified at a cost of some $1,470,100.

[6] In addition to the BIA and Branz, the plaintiffs have sued:

- the architects who designed the house, prepared the plans, specifications and tender documents and administered the construction contract;
- the builders and Masterbuild Services Limited who guaranteed their workmanship and the materials used;
- the Council which issued the building consent and periodically inspected construction work;
- the manufacturers and suppliers of the timber framing and the Hardibacker and Duraplast systems;
- the applicators of the Duraplast system;
- the manufacturers of the paint and membrane used on the house; and
- the insurers.

[7] As the Crown aptly put it: *Every aspect of the design and construction of the house is being attacked.*

[8] The damages claimed cover the cost of remedial work, loss of use, loss of market value and professional fees. In addition, general, aggravated and punitive damages are sought.

Claims

Against the BIA

[9] In the fourth amended statement of claim three causes of action are pleaded against the BIA:

- Breach of statutory duties under the Building Act 1991;
- Negligence; and
- Breach of the FTA.

[10] At the hearing the plaintiffs abandoned the first and third causes of action, electing to pursue only the claim in negligence.

[11] Central to this claim is the decision of the BIA to adopt revised standard NZS3602:1995 in its Acceptable Solution B2/AS1 as a means of complying with the durability requirements of clause B2 of the building code in relation to timber framing.

[12] The current pleading against the BIA in this regard is as follows:

26.10 The ninth defendant owed a duty of care to the plaintiffs as owners of a home being built for them to exercise reasonable care in connection with its responsibilities and, in particular:

(a) Not [to] approve timber not treated with a fungicide either at all or in conjunction with the use of monolithic cladding systems or without eaves or cavities or under parapets or flat surfaces or decks or for use in a harsh environment;

(b) Failing to investigate at all or reasonably carefully the revocation of the need to boron treat timber because of its fungicidal qualities;

(c) Ignoring all the available scientific evidence and Boron success since 1953 and the 1953 report;
(d) Failing to warn the minister, people within the building industry (including territorial authorities and building certifiers and the public) concerning potential serious and severe implications for the health and safety of occupants; and the enjoyment of their homes;
(e) Failing to take reasonable care to be promptly informed about any serious construction problems arising overseas arising from the use of monolithic cladding systems over untreated timber, particularly those creating a risk of serious and severe consequences for the health and safety of occupants and the enjoyment by occupants of their homes;
(f) When it became aware of such serious construction problems arising overseas to promptly and carefully consider the consequences for New Zealand and to promptly set in train processes to ameliorate and avert the problems in New Zealand.

[13] In his written submissions, Mr O'Callahan articulated the duty in much more general terms, saying that: *"The BIA owed a duty of care to [the plaintiffs] as owners of a new home to take reasonable care in carrying out its statutory functions, powers, duties and obligations to avoid causing foreseeable harm to them and to avoid acts which the BIA could reasonably have foreseen would be likely to injure [them]."*

[14] He summarised the acts and omissions allegedly causing harm to the plaintiffs as follows:
1 approving the use of untreated kiln dried timber as structural framing in a residential dwelling at all; or, alternatively
2 approving the use of such timber for that purpose without excluding from their approval its use in combination with either;
i) monolithic cladding systems; or
ii) certain building designs; and, again, alternatively;
3 having approved the use of untreated kiln-dried timber for residential purposes without these exclusions, failing to warn people within the building industry of specific known risks associated with its use in certain situations (including monolithic cladding systems).

[15] The plaintiffs accept that the decision in ***Sacramento*** rules out the claim relating to the third situation and that the Court will strike out that pleading, but reserve their right to argue these matters on appeal. They submit, however, that the pleadings going to the first and second scenarios are distinguishable from the third.

They say that Acceptable Solution B2/AS1 is a wrong standard and impossible to meet.

Against Branz

[16] The plaintiffs have pleaded, and seek to pursue, two causes of action against Branz:
- Negligence; and
- Breach of the FTA.

[17] The essence of the plaintiffs' claim in negligence is that Branz owed them a duty of care when appraising the framing timber and the Hardibacker Sheet and Duraplast/Hardibacker system used in the construction of their home to ensure that they met the requirements of the building code and to amend or revoke its appraisal/approval of the products and system when it received information which indicated otherwise.

[18] In relation to the FTA, the plaintiffs claim that Branz was in trade, that by its misleading conduct it breached ss 9 and 11 of that Act, and that they have suffered loss as a consequence.

Strike out principles

[19] The criteria which apply to the determination of strike-out applications were summarised by Richardson P in ***Attorney-General v Prince and Gardiner*** [1998] 1 NZLR 262 (CA) at 267 as follows: *"A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (**R Lucas & Son (Nelson Mail) Ltd v O'Brien** [1978] 2 NZLR 289 at pp 294 - 295; **Takaro Properties Ltd (in receivership) v Rowling** [1978] 2 NZLR 314 at pp 316 - 317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (**Gartside v Sheffield, Young & Ellis** [1983] NZLR 37 at p 45; **Electricity Corporation Ltd v Geotherin Energy Ltd** [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (**Gartside v Sheffield, Young & Ellis**)."*

[20] Bearing those principles in mind, I turn now to consider the claims in issue in this case.

Negligence

The focus of the hearing

[21] The focus of the hearing, insofar as the negligence claims were concerned, was to determine the nature and extent of the roles that the BIA and Branz each played within the building industry in New Zealand in the closing years of the last century, and their relationships with and responsibilities to individual homeowners in general, and the plaintiffs in particular.

The Building Act 1991

[22] A critical part of that exercise was an examination of the Building Act 1991. That Act has since been superseded by the Building Act 2004 which is not relevant for present purposes. Accordingly, any references hereafter to "the Act" are to the Building Act 1991.

[23] A comprehensive overview of the Act and the provisions in it pertaining to the BIA can be found in paras [5]-[24] of the judgment of the Court of Appeal in Sacramento. They merit careful consideration. See also, concerning the changes wrought by the Act: ***Invercargill City Council v Hamlin*** [1994] 3 NZLR 513 at 526 and ***Auckland City Council v New Zealand Fire Service*** [1990] 1 NZLR 330 at 335.

[24] In summary, the Act significantly reformed the building industry, providing for greater flexibility and reducing regulatory controls to essential safeguards. It gave builders and architects considerable freedom with regard to the building methods and materials they used, provided their work complied with the performance criteria set out in the national building code. These related to matters such as structure (clause BI), durability (B2), access routes (DI), surface water (EI) and external moisture (E2).

[25] The code was an interlocking whole. To be code compliant a building had to achieve all performance criteria specified in the code for the use of the building.

[26] As the purpose of the code was to express functional requirements and performance standards that buildings should meet, the code did not (and could not) specify particular building materials or building methods. It dealt with outcomes rather than the means of achieving those outcomes.

[27] The code consisted of regulations made by the Governor-General in Council on the advice of the Minister, following recommendations from the BIA after consultation with affected persons and organisations.

[28] Primary responsibility for the administration of the code rested with territorial authorities. Under s 24 their functions included:

- administering the Act and regulations;
- receiving, considering and approving or refusing applications for building consents;
- determining applications for waiver or modification of the building code or compliance documents;
- enforcing the provisions of the building code and regulations; and
- issuing project information and memoranda, code compliance certificates and compliance schedules.

[29] Pursuant to s 32 of the Act, all building work had to be carried out in accordance with a building consent issued by the territorial authority. Consent was to be given if that Authority was satisfied, on reasonable grounds, that the provisions of the code would be met if the building work was properly completed in accordance with plans and specifications submitted: s 34(3).

[30] Section 50 of the Act provided an alternative means by which territorial authorities could be satisfied that provisions of the code had been complied with.
Section 50(1) said that:

50. Establishing compliance with building code - (1) A territorial authority shall accept the following documents as establishing compliance with the provisions of the building code:

(a) A building certificate or code compliance certificate to that effect issued by a building certifier under section 43 or section 56 of this Act:

(b) A determination to that effect given by the Authority under section 20 of this Act:

(c) A current and relevant accreditation certificate to that effect issued by the Authority under section 59 of this Act:

(d) Compliance with the provisions to that effect of a document prepared or approved by the Authority under section 49 of this Act.

[31] The BIA's functions were enumerated in s 12, as follows:

12. Functions of Authority

(1) The Authority shall have the following functions under this Act:

(a) After consultation with appropriate persons and organisations, advising the Minister on matters relating to building control:

(b) Approving documents for use in establishing compliance with the provisions of the building code:

(c) Determining matters of doubt or dispute in relation to building control:

(d) Undertaking reviews of the operation of territorial authorities and building certifiers in relation to their functions under this Act:

(e) Approving building certifiers:

(f) Granting accreditations of building products and processes:

(g) Disseminating information and providing educational programmes on matters relating to building control:

(h) Generally taking all such steps as may be necessary or desirable to achieve the purposes of this Act:

(i) Any other functions specified in this Act.

[32] Under s 58(1) a proprietor could apply to the BIA for accreditation of any proprietory item being a material, method of construction, design or component relating to building work.

[33] The application had to be accompanied by an appraisal, which was defined in s 58(3) as:

(3) ... a detailed and reasoned technical opinion issued by an appropriately qualified organisation having no proprietary interest in the appraised item.

[34] Section 58(4) stipulated that:

(4) An appraisal shall include –

(a) Identification of the appraised item and its purpose, being a purpose within the scope of the building code; and
(b) Identification of the manufacturer (and the installer if necessary); and
(c) An opinion that the product is suitable for its purpose provided it is manufactured and installed under specified conditions; and
(d) A specification of the product and, if necessary, of the manner of its installation; and
(e) The specific conditions to which the opinion is subject; and
(f) The basis of appraisal; and
(g) A list of other documents (if any) that need to be referred to in order to check that an individual application of the appraised item conforms to the conditions.

[35] Section 59(1) provided that the BIA should accredit the item if satisfied that: "*... if used under the conditions specified in the appraisal, [it] will comply with specified provisions of the building code.*"

[36] But the accreditation process was not followed here.

[37] The particular function at issue in this litigation is that set out in s 12(1)(b). That function is elaborated in s 49 which provided, in part, that:

S49 Documents for use in establishing compliance with building code
(1) The Authority may prepare or may approve ... any document for use in establishing compliance with the provisions of the building code.
(2) Any document, prepared or approved ... under subsection (1) ... shall be accepted for the purposes of this Act as establishing compliance with those provisions of the building code to which it relates, but it shall not be the only means of establishing such compliance.

[38] Approved documents consisted of both acceptable solutions and verification methods. An acceptable solution prescribed a way of complying with a specific part of the building code. A verification method set out a test or other method for confirming that a design would comply. Pursuant to s 49(9), when preparing or amending an approved document the BIA was required to advise all persons and organisations affected by the document of its proposed terms and to give them the opportunity of making submissions.

[39] While building work carried out in accordance with an approved document had to be accepted by a territorial authority or building certifier as establishing compliance with the code (s 50), use of approved documents was not mandatory. If an applicant for a building consent could satisfy the certifying authority on reasonable grounds that another product, material, system or method of design or construction (known as an alternative solution) would comply with the building code, a building consent would be granted.

Acceptable and alternative solutions relevant to this case

[40] The standard for timber to be used in light timber-framed houses in New Zealand is NZS3602. It used to require that H1 treated timber be used for framing. However, in 1995, Standards New Zealand published a revised standard NZS3602:1995 which enabled untreated kiln-dried timber to be used, provided certain conditions were met. One of those conditions was that the in situ equilibrium moisture content of the timber not exceed 18% during the life of the framing.

[41] On 28 February 1998 the BIA adopted the revised NZS3602:1995 in its Acceptable Solution B2/AS1 as a means of complying with the durability requirements of clause B2 of the building code in relation to timber framing. Clauses B2.1 and B2.2 specified that:

B2.1
The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this code.
FUNCTIONAL REQUIREMENT
B2.2
Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.

[42] Clause B2.3.1(a) defined the intended life of the structure of the building, including building elements such as floors and walls, as not less than 50 years.

[43] Clause E2 of the code is also relevant. It provided in material part that:

E2.1
The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.
FUNCTIONAL REQUIREMENT
E2.2
Buildings should be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.
PERFORMANCE
E.2.3.2
Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

[44] Under contract with the product manufacturers Branz assessed and certified the Origin Time Frame and Laser Frame timber, the Hardibacker fibre cement sheet product and the Duraplast/Hardibacker solid plaster system used in the construction of the plaintiffs' house and certified them as alternative solutions.

[45] Origin Timeframe timber (then known as Tasman Timeframe) was first certified in 1994 under No. 279. Certificate No. 282, issued in the same year, related to Laser Frame timber.

[46] Certificate 279 stated that:

Product

This Certificate relates to Tasman Timeframe which is a machine stressgraded, kiln-dried, HI treated radiata pine building timber ...

Distribution, Handling and Storage

Tasman Timeframe is supplied by Tasman Lumber in packets of timber wrapped in a polyethylene sheet. Storage must be off the ground and under cover.

Durability

When used in accordance with this Certificate Tasman Timeframe will meet the performance requirements of NZBC Clause B2.3(a) 50 years and will have a serviceable life in excess of 50 years in dry protected situations where the moisture content is less than 20%.

Maintenance

Maintenance is not required for Tasman Timeframe but maintenance must be carried out on the building external envelope and internal lining system to ensure that they continue to satisfy the requirements of the NZBC so that Tasman Timeframe remains dry.

External Moisture

Tasman Timeframe is kiln-dried to a moisture content between 10 and 16%.

To minimise the up-take of moisture Tasman Timeframe must not be left exposed at any time for more than 14 days and temporary protection of the framing must be provided during inclement weather. Generally kiln-dried timber is slow to take up significant moisture and dries readily.

The instructions of the lining or cladding material manufacturer regarding the maximum moisture content of framing timber before fixing must be

complied with. In any case linings or claddings must not be installed until the moisture content of the framing is below 24%.

[47] Certificate 279 was replaced by Certificate 279A in March 1998 to reflect the adoption by the BIA of NZS3602:1995. The amended certificate covered treatment free as well as H1 treated timber and included the following material paragraphs:

Product

This certificate relates to Origin TM timeframe which is AS1748 machinestress graded (MSG), kiln-dried treated and treatment free radiata pine building timber ...

AS 1748 grades FS or greater have been appraised as an alternative No. I framing grade radiata pine for use as framing timber for buildings which are not in ground contact, and are continually protected from the weather by the building cladding ...

Design Information

General

To maximise the benefits of using kiln-dried timber, OriginTM Timeframe must be kept dry as far as possible before and after delivery to site, and after erection on site ...

After construction has been completed, in order to minimise the risk of fungal decay the moisture content of both H1 treated and treatment free timber must be kept below 20% throughout the life of the building ...

E2 External Moisture

If significant wetting cannot be avoided, the framing must be allowed to dry until the moisture content meets the requirements of the cladding and lining manufacturers, or Acceptable Solution E3/AS 1 Paragraph 6.0.2, whichever is the lesser.

Conditions of Certification

1. *Fletcher Challenge continues to have the product reviewed by BRANZ.*
2. *The product continues to be manufactured according to, and in compliance with, the manufacturing specifications and quality assurance measures of Fletcher Challenge Forests, which applied at the time of issue or revalidation of this Certificate.*
3. *The overall quality of the product is maintained by the manufacturer.*
4. *The product is installed and used in accordance with the instructions of Fletcher Challenge Forests, and any instructions and limitations contained in this Certificate.*
5. *The Certificate does not cover uses of the product outside the scope of this appraisal ...*
6. *The product is appraised against performance provisions contained in the NZBC at the time of the appraisal ...*

[48] The relevant Appraisal Certificates for the Hardibacker Sheet and the Duraplast-Hardibacker system are No's 240 (1995) and 309 (1995) respectively.

[49] Certificate 240 (1995) specified that:

Product

This certificate relates to Hardibacker° - Substrate For Solid Plaster, which is a 4.5 mm thick fibre cement sheet ...

The product has been appraised for use as a substrate for solid plaster coatings on timber or steel frame buildings.

[50] In relation to moisture content and watertightness it said:
Handling and storage
Storage must be under over and the sheets must be dry prior to fixing ...
Serviceability
Where Hardibacker° remains dry in service it is expected to have a serviceable life in excess of 50 years.
Maintenance
Regular checks must be made to the whole system to ensure that water is not penetrating cracks, coatings, joints, flashings or trims ...
E2 External Moisture
Hardibacker° will meet the performance requirements of NZBC E2.3.2. when used and installed in accordance with:
- *this Certificate*
- *the manufacturer's Technical Information covered with a solid plaster system in accordance with:*
- *NZS 4251: 1974 finished and detailed to be waterproof in accordance with:*
- *the guidelines in the manufacturer's Technical Information,*
- *the guidelines in BRANZ publication "Good Stucco Practice", dated February 1996,*
- *NZS 3604: 1990 Appendix G*

Installation Information
Installation must be in accordance with the manufacturer's instructions in James Hardie's Technical Information - Hardibacker°, dated June 1996.
Attention is drawn to the following:
Hardibacker° must be dry when fixed in place and the moisture content of the timber framing must not exceed 24%. If the building is to be air conditioned then the moisture content should not exceed 18%.
Finishing
The solid plaster must be protected with a flexible, waterproof coating ...

[51] Certificate No. 309 in respect of the Duraplast-Hardibacker solid plaster system contained similar warnings and provisos with regard to design, maintenance, external moisture and installation.

[52] In an affidavit filed in support of the strike out application, Dr Sharman, a senior manager with Branz, said that while, as part of the appraisal process, Branz reviewed the technical information concerning these products for consistency, it did not deal with the paragraph by paragraph suitability of the technical information. Nor, when appraising different products, such as timber framing and exterior cladding sheets, did it analyse the degree of connection or overlap between the different products; he said that the appraisal of the timber framing products related to their performance in specific locations and subject to the conditions referred to in the certificate.

The *Sacramento* decision

[53] Like Mr and Mrs Struthers, the plaintiffs in the ***Sacramento*** proceedings owned homes affected by leaky building syndrome. They issued proceedings against numerous parties, including the BIA and Branz.

[54] The relevant High Court and Court of Appeal judgments concern the BIA's application to strike out claims that it owed homeowners duties of care in relation to the use of face fixed monolithic cladding systems over untreated timber and that it was negligent in both its supervision of the building certifier and its approval of insurance cover arrangements for the certifier.

[55] The High Court struck out part of the first claim and, in a unanimous decision, a full Bench of the Court of Appeal struck out the rest.

[56] In determining whether the BIA owed the homeowners the alleged duties of care, the Court followed the approach it had itself endorsed in ***Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*** [2005] 1 NZLR 324 and asked whether it was just and reasonable to impose such duties, having regard to both proximity and policy issues.

[57] Factors which they identified as relevant to the determination of the proximity issue are:
- Whether duties of care have been imposed in analogous situations;
- The substantiality of the nexus between the defendant's alleged negligence and the plaintiff's loss;
- General considerations of vulnerability on the part of the plaintiff and the potential burden on the defendant of taking precautions against the risk in issue;
- The nature of the relevant risk: Courts are more likely to find proximity where there is a risk of property damage than where the loss is purely economic and, the larger the class, the less likely that a duty will be imposed.

[58] In relation to policy issues, the Court noted that:
- *The primary issue is whether the duty of care would be consistent with the terms and policies of the statute governing the functions of the defendant; a duty will not be imposed if its effect would be inconsistent with the scheme and policy of the Act;*
- *Statutory functions involving quasi-judicial or legislative powers are not appropriately the subject of duties of care;*

- *The Courts are slower to impose duties of care in relation to omissions to act (non-feasance) than the positive exercise of statutory powers;*
- *The more policy orientated and less operational the power, the less likely a duty will be imposed;*
- *The further removed the policy body is from day to day physical control over the difficulty which directly caused the loss, the less likely the Courts are to impose a duty of care.*

[59] The Court then discussed the practice of formulating situational duties: i.e. when the plaintiffs focus on a defendant's alleged negligence then formulate the proposed duty of care by reference to it, and noted that such an approach is likely to favour a plaintiff. While acknowledging that the process that it involves, of reasoning backwards from apparent negligence to a conclusion, is not an illegitimate process, the Court commented that such reasoning is not without its difficulties. They cautioned that where a plaintiff's case proceeds on the basis of an alleged situational duty, the Court should:

[46] a) *during the proximity phase of the enquiry be careful to ensure that the narrow duty alleged can credibly be regarded as discreet from a broad (and untenable) duty of care in relation to the relevant statutory functions; and*

b) *in assessing policy considerations, analyse carefully the implications in terms of the scheme and structure of the relevant statute, of recognising even a situational duty.*

[60] Applying these principles to the facts of the case before them, the Court of Appeal concluded that the BIA owed none of the duties of care alleged.

[61] In particular, neither:

a) A broad and over-arching duty to all building owners to investigate practices within the building industry and take steps, by promoting an amendment to the building code or by disseminating information, to put an end to or limit practices which were producing outcomes which did not conform to the code; nor

b) A duty in relation to its preparation/approval of documents for establishing compliance with the building code insofar as they related to the use of monolithic cladding systems over untreated timber; or

c) A situational duty to respond to what was said to be mounting evidence of problems associated with the use of face fixed monolithic cladding systems.

[62] The proximity reasons for rejecting a broad over-arching duty were that:

- The relationship between the BIA and the building owners was extremely limited. The only direct links were that the BIA approved the building certifier and that the building systems used in the Sacramento complex involved the use of untreated pinus radiata which had been approved by Acceptable Solution B2/AS1. However, in this regard the Court noted, at [61] (a) that:
  ... very importantly, the way in which untreated pinus radiata timber framing was used in the construction of the Sacramento complex was not as approved in Acceptable Solution B2/AS 1.
- Responsibility for the durability of the Sacramento complex rested more directly on the developers, designers, builders and code compliance certifiers than on the BIA.
- The report of the Building Commission, on which the Act was based, envisaged building owners taking responsibility for the condition of the houses they had bought. It was difficult to see how building owners were vulnerable to inaction on the part of the BIA. Any such inaction in relation to a particular building system could not fairly be taken as amounting to a warranty that the system produced code compliant outcomes. The Statute provided specific processes for giving such warranties.
- On the whole, analogous cases were against the imposition of a duty of care.

[63] Policy considerations pointed in the same direction:

- Many of the roles provided for the BIA under the Act were of a quasilegislative or quasi-judicial nature and aspects of the complaints against it were associated, directly or indirectly, with some of these roles.
- There is no indication in the Act, or its precursor report, to suggest that the BIA had a longstop liability where building certifiers had negligently certified compliance.
- A positive duty of care extending to general superintendence over the building industry in New Zealand would have significant resource implications which would, in all probability, require the Courts to review the reasonableness of the resources allocated to the BIA by the responsible Ministers.

[64] The Court regarded the claim that the BIA was under a positive obligation to take steps in relation to the preparation/approval of code compliance documents and in particular, Acceptable Solution B2/AS1, as a red herring, saying at [64]-[66]:

[64] It is important to recognise that the building system used for the Sacramento complex did not conform to the BIA's "*Acceptable Solution B2/AS 1"* as it did not ensure that the moisture content of the timber framing was less than 18%. Further the body corporate accepts that untreated pinus radiata is suitable for framing timber, providing it is used within the constraints provided for in NZS 3602:1995.

[65] The body corporate is not seeking to show that Acceptable Solution B2/AS1 was intrinsically false or wrong. Indeed, the body corporate's reliance on Acceptable Solution B2/AS1 is very indirect. The claim is that when the BIA issued Acceptable Solution B2/AS 1 in February 1998, it knew (or ought to have known) that untreated timber was being used with facefixed monolithic cladding systems in circumstances where the requirements stipulated in NZS 3602.1995 were not being achieved.

[66] These considerations highlight the reality that an "*Acceptable Solution B2/AS 1*" claim cannot sensibly be looked at on a stand-alone basis. Rather, the arguments as to this document simply form a subset of the arguments which relate to the contention that the BIA ought to have been warning the industry and public of the dangers of monolithic cladding systems over untreated pinus radiata framing or taking other steps to ameliorate the risks of building failure associated with this particular building practice.

[65] The Court took a similarly unyielding position with regard to the alleged situational duty, noting that maladministration by a public body was not, of itself, a ground for awarding damages. In its view, the proximity factors relevant to the determination of the alleged general over-arching duty were equally applicable here. It said:

> *[69] ... it would not necessarily be right to regard the use of face-fixed monolithic cladding over untreated timber framing as a special case. Presumably similar arguments as to situational duties could be raised in relation to any building system (or product, builder, territorial local authority or building certifier for that matter) about which (or whom) complaint had been made to the BIA. As well, the ability of the BIA to respond to concerns about the use of face fixed monolithic cladding systems over untreated timber framing was limited and would have required decisions to be made as to the allocation of resources.*

[66] As it was satisfied that none of the causes of action was sustainable, the Court struck them out.

[67] The plaintiffs did not seek leave to appeal to the Supreme Court against this judgment. However, one of the defendant builders involved in the construction of the complex, Ellerslie Park Holdings Limited, did. They did so on the basis that the Court of Appeal failed to address an additional ground in their cross-appeal against the BIA, namely that the Authority should not have approved the use of untreated kiln-dried timber for framing. The application was declined: see ***Ellerslie Park Holdings Limited v Attorney-General*** [2006] NZSC 44.

[68] The reason given was that as the applicant had failed to give notice of its intention to rely on the additional claim in its appeal to the Court of Appeal, and, as it was not represented at the hearing where counsel for the body corporate specifically disavowed the argument currently being pursued, that argument was not put in issue or addressed by the Court of Appeal. In the circumstances, the Supreme Court considered it inappropriate to allow a new point to be argued at the second appellate level.

Claim against the BIA

[69] The Crown's primary argument was that the claims in negligence against the BIA are so similar to those which were rejected by the Court of Appeal in Sacramento that there is no proper basis on which to distinguish them.If the BIA were not under a duty to amend B2/AS 1 or to issue warnings about the use of untreated timber and monolithic claddings, it would be an anathema for a duty to nonetheless exist in relation to the approval of B2/AS1 in the first place. Alternatively, Mr Mathieson submitted that even if a material distinction can be made between the factual circumstances of the two cases, the Court of Appeal's reasoning in Sacramento applies equally to this one. The Crown's third, and fallback argument was that, on the face of the pleadings there was no causal connection between the use of untreated timber in the construction of the property and the BIA's promulgation of B2/AS1.

[70] In response, Mr O'Callahan referred to [65] of Sacramento where the Court of Appeal recorded that, in the proceedings before them, the plaintiff was:
... not seeking to show acceptable solution B2/AS I was intrinsically false or wrong
- and submitted that the plaintiffs should be allowed to run that argument now.

[71] He gave two reasons why the BIA was negligent in approving NZS3602:1995 as an acceptable solution for meeting the 50 year durability requirements of timber building elements:

- *First, the standard is wrong because it can still be met if the moisture content of the timber occasionally exceeds 18%. The standard does not say that timber must be prevented from becoming wet at all. Yet if it does, even sporadically, for example as a result of an occasional leak in the roof or an overflowing washing machine, it becomes vulnerable to attack from fungal organisms. As it is practically impossible to avoid such incidents, the only way of achieving durability for the required period is to treat the timber with a fungal inhibiting product.*
- *Secondly, and alternatively, because even the most meticulously performed building work will produce an environment which will result in periods where the long-term in-situ moisture range of the timber is greater than 18%, the standard is impossible to meet. Accordingly, even if the industry had every confidence of being able to comply with the standard by best-known building practices, the BIA, which knew, or ought to have known better, should have qualified the standard by excluding its use with certain building designs.*

[72] The plaintiffs' case is that these arguments are factually based and cannot be determined in advance of trial. They say that it cannot be assumed that claims against other parties about unacceptably poor workmanship or negligent design or inspection of work will all succeed. If the claims against the BIA are proved at trial, issues of contribution, causation and responsibility as between the various defendants will still need to be determined.

[73] On the basis that the facts, as alleged, are accepted for the purposes of the strike-out application, Mr O'Callahan argued that:

- The test for a duty, as stipulated in ***Donoghue v Stevenson*** [1932] AC 562, is met as:
  it is obvious that the BIA's positive act in approving untreated timber would directly affect new homeowners such as the plaintiffs;

- Even though their claim is against a public body, it should be treated as an ordinary claim of negligence. The distinction between policy and operational areas of activity, is "*neither helpful nor relevant*": see Buckley: The Law of Negligence (Butterworths) at [15.11] and [15.13].
- The starting point is to examine the statute, not for whether it expressly allows for a private duty, but whether owing a duty would be inconsistent with it.
- There is nothing in the Act which necessarily excludes or is inconsistent with finding a duty of care. In particular, s 10(3)(c) states that the BIA is capable of suing and being sued, s 89 prohibits proceedings against a member of the BIA acting in good faith, but not the BIA itself, and s 91(3) expressly contemplates civil proceedings against the BIA. And while some of the statutory functions of the BIA, such as those under 12(c), may be termed quasi judicial in nature, it has mixed functions, and each function must be considered in its own context.

[74] While accepting that policy decisions are exempt from civil liability, Mr O'Callahan submitted that approving a document pursuant to ss 12 or 49 was not such a decision. Rather, it was the implementation of Government policy, enshrined in the Act itself. Section 12(1)(b) of the Act did not require the BIA to approve documents for use in establishing compliance with the building code but if it opted to do so, the territorial authority did not need to approve that aspect of the building in deciding whether or not to grant building consent. In terms of s 50(1)(d) the territorial authority was bound to accept that what had been done met the functional requirements of the code. In this case that meant that it could accept, without more, that the timber used would last for 50 years. To this extent, the approval process took away from territorial authorities part of their inspection and certification role. Accordingly, the argument went, the BIA's approval role was no different from that of the territorial authorities, and, in carrying out that role, the BIA, like the territorial authorities, owed a duty of care to those who relied upon their expertise.

[75] Finally, in addition to these statutory and contextual arguments, Mr O'Callahan addressed the other criteria noted in ***Rolls Royce*** for determining whether a duty exists, saying that:

- The group to whom the alleged duty is owed is not indeterminate. The class consists of the owners of new homes constructed using untreated timber. What is "new" is limited by s 91 to those falling within the 10 year long stop provision for bringing claims.
- The plaintiffs are vulnerable - the approval gave the standard the stamp of authority and allowed non-durable framing to be used in their home.
- If anything, the argument for the imposition of a duty is weaker in the analogous building inspection cases than in the case of the BIA because, unlike the territorial authorities, the BIA had a choice whether or not to consider promulgating an acceptable solution.
- Whether the plaintiffs have other remedies must await trial.
- Following Hamlin the distinction between physical and economic loss is doubtful, but, to the extent that the loss in this case was economic, it arises out of the physical properties of the timber with the consequent risk to health and amenity.
- The importance of homeownership in New Zealand is a policy factor supporting the claimed duty and there is no policy basis to negate the proposition that if the BIA chose to do something they must do so with care. Cases such as ***Yuen Kun Yeu v Attorney-General of Hong Kong*** [1988] 1 AC 175 and ***Holtslag v Alberta*** [2006] ABCA 51 can be distinguished on the basis that the officials in those cases were acting in a quasi-legislative capacity and were obliged to make a determination, whereas the BIA had a choice whether to act at all.

[76] As far as I am aware the validity of B2/AS 1 has not been subject to judicial scrutiny. The plaintiffs' contention that it is a wrong standard and impossible to implement may well be right. I accept that that cannot be determined without the benefit of further evidence. But that is not the point. The point in issue in relation to the negligence claim is whether, in implementing the standard, the BIA owed the plaintiffs a duty of care. In my view no material distinction can be drawn in that regard between approving the standard simpliciter, and approving it without exclusion (the first and second situations set out in [14] above). The duty must either cover both situations or neither. And Mr O'Callahan did not argue otherwise.

[77] In addressing the duty issue this Court is not working with a clean slate. The framework for discussion has been laid out by the Court of Appeal in its judgment in Sacramento. I believe I am bound by that Court's comments at [66], that the arguments about Acceptable Solution B2/AS1 can not be looked at on a stand-alone basis; rather, they are a sub-set of the wider arguments, rejected in that case, regarding the duty to warn. I also believe that I am bound by the Court's general findings with regard to the BIA, namely:

- that the relationship between the BIA and building owners was extremely limited;
- that responsibility for the durability of the building rested more directly on others, such as the builders and code compliance certifiers, than on the BIA;
- that owners were not especially vulnerable to inaction by the BIA;
- that the relevant roles of the BIA under the Act were of a quasi-legislative or quasi-judicial nature; and
- that the BIA did not owe a positive duty of care extending to general superintendence over the building industry.

[78] It follows that I reject Mr O'Callahan's attempt to persuade me otherwise - that notwithstanding the Court of Appeal's (admittedly obiter) statement to the contrary, there was a material difference between the role played by the BIA in relation to homeowners when it approved the standard and subsequently.

[79] I agree with Mr Mathieson that under the Act, the BIA was given functions more appropriately carried out at a central Government level. It was a Crown entity (s 10). As such it was required to follow ministerial policy directions (s 14) and was subject to the Public Finance Act 1989 (s 10). It had limited staff and limited funding. The manner in which it was funded and how it spent those funds was prescribed by statute (see Part IIIA). It was not an enforcement agency. While it could review the operations of territorial authorities (s 15) and building certifiers (ss 51-52, 54-55), this largely involved a review of their systems, as distinct from individual building work. It could not take action in respect of a building that was not code compliant. That was for the territorial authority alone (ss 42-43, 64-78). Nor could it direct territorial authorities or building certifiers to issue building consents or assess the quality of the design of a building or the workmanship of individual builders.

[80] Before approving a document it was required to undertake a wide ranging consultative process little different from making recommendations about amending the code itself. Approval could only be granted after an open process of notification and submission (ss 12(3) and 49(9)). However, there is nothing in the Act to support a requirement that approval be coupled with identification of possible building risks. As well as being unduly onerous, such a requirement would be in direct conflict with the performance based criteria of the Act. It was for all persons involved in a building project to meet the requirements of an approved document if they sought to achieve code compliance by that method.

[81] Significantly, once it had approved a document as a means of achieving code compliance the BIA had no power to require that it be used. Except in the limited circumstances set out in ss 17-20, builders were free to elect to use an alternative solution and the BIA had no role in determining whether that alternative solution achieved code compliance. As Mr Mathieson described them, the territorial authorities were the gatekeepers of the regime.

[82] Nor do I accept Mr O'Callahan's submission that because territorial authorities had to accept work done in accordance with the approved standard, that created some type of equivalence between the BIA and the territorial authorities and that the BIA thereby moved closer in the proximity chain to consumers.

[83] This argument was raised and rejected in Holtslag v Alberta. That case concerned claims by homeowners in Alberta who used untreated pine shakes as roofing material, that the director of building standards owed them a duty of care in issuing product listings under the relevant Alberta building codes authorising their use. Although the roofs did not leak, within five to eight years after installation the shakes were extensively decayed.

[84] The Alberta Court of Appeal agreed with the trial Judge that there was insufficient proximity between the director and the appellants to ground a prima facie duty of care. They rejected the appellants' argument that the relationship with the director was similar or analogous to that between a building inspector and a property owner, saying that:

> *[27] ... a building inspector has a direct relationship, based on direct contact, with an individual house owner or purchaser who suffers an ultimate loss. The inspector's duties, which are mechanical or supervisory, could result in liability, but on a case by case basis. These are not analogous to the acts of the director in issuing a product listing. The director is not performing a mechanical or supervisory task.*

[85] The Court found that the statute itself did not support the imposition of a duty. The relevant code provided that the director: "*... may issue lists of materials or products that, in his opinion, satisfy the requirements of this code and, after listing, may be used to fulfil the requirements of this code.*"

[86] In the particular circumstances of that case, the Court concluded that the director's decision to issue a product listing was closer to the policy and legislative powers exercised by the Lieutenant Governor in Council than the powers of a building inspector.

[87] But the fundamental reason that the Canadian Court decided not to impose a duty of care in Holtslag was a policy concern: that the director had no means of controlling the number of homeowners who used various approved products in their residences. Potential liability would therefore be virtually indeterminate, as would potential litigation costs - in other words, recognising a duty of care in this situation would give rise to unlimited liability to an unlimited class.

[88] Mr O'Callahan submitted that the situation in this case was different: that the class of people to whom the BIA owed a duty is determinate and readily ascertainable and that liability was thereby limited. It is not. For one thing, the class would not be restricted, as the plaintiffs suggest, to homeowners alone. It would necessarily have to extend to all people who used untreated timber since 1998, including the owners of commercial premises such as the motel owners in ***Three Meade Street Ltd v Rotorua District Council*** [2005] 1 NZLR 504. But unlike territorial authorities, which would have a record of every property for which building consent was sought and could review the way they assessed the work, the BIA had no direct knowledge of how houses were built and how they would be affected by the standard. In other words, they had no way of predicting who would be affected.

[89] I accept, however, as Mr O'Callahan argued, that the fact that a public authority acted pursuant to a statutory power or public duty does not necessarily negate the existence of a duty. The question is whether the relevant statutory provisions are sufficient to exclude it: ***Gorringe v Calderdale Metropolitan Borough Council*** [2004] 1 WLR 1057; [2004] 2 All ER 326 at 339.

[90] I accept also that, in determining this issue, it is not necessarily helpful to examine the activity in terms of whether it involved matters of policy or discretion on the one hand, or operation on the other: see discussion in this regard: Todd The Law of Torts in New Zealand (Brookers 4ed) 2005 6.6(1) at 264-268. While the Court of Appeal

made reference to this distinction in Sacramento, it is noteworthy that it did not analyse the case before it in those terms. It focused, instead, on the quasi-legislative or quasi-judicial nature of the BIA's role: see Sacramento [62] (a).

[91] The decision of the Privy Council in ***Yuen Kun Yeu v Attorney-General of Hong Kong*** is relevant in this regard. In that case four plaintiffs who had each lost money they had deposited with a registered deposit-taking company which, it later transpired, its managers were running fraudulently, brought an action in negligence against the Attorney-General of Hong Kong as representative of the Commissioner of Deposit-Taking Companies. The issue for the Privy Council was whether the Commissioner, in exercising his statutory supervisory functions over deposit-taking companies, owed a duty of care towards would-be depositors.

[92] The Privy Council held that the Commissioner owed no such duty. While acknowledging that it was reasonably foreseeable that if an uncreditworthy company were placed or allowed to remain on the register, persons who might in future deposit money with it would be at risk of losing that money, the Judicial Committee recorded that mere foreseeability of harm is insufficient to create a duty of care. They found that the Commissioner's power to refuse registration, and to revoke or suspend it was discretionary and quasi-judicial in character. He did not have any power to control the day to day management of any company, and such a task would require immense resources. At 195 the Privy Council said: "*In these circumstances their Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister a company the commissioner should owe any statutory duty to potential depositors. It would be strange that a common law duty of care should be superimposed upon such a statutory framework*."

[93] I am satisfied that in approving documents under s 49, the BIA was similarly carrying out a regulatory or quasi-legislative function. I agree with Mr Mathieson that the process was a conventional administrative process involving making technical and commercial judgments about the document, which was then used by all players in the industry; although its decisions were subject to judicial review, the BIA could not be compelled to exercise its discretion in a particular way.

[94] For all the foregoing reasons, I am satisfied that the proposed duties of care can not be substantiated. Each one of the plaintiffs' claims against the BIA must therefore be struck out.

[95] Finally, for completeness, I note, without determining the matter, that if, contrary to the foregoing, I had found that the BIA did owe the plaintiffs a duty of care, that would not resolve everything. In order to succeed on their claim the plaintiffs would have to establish causation, and, on the pleadings at least, I believe they would have difficulty in doing so. There are two obvious stumbling blocks:

- The primary basis for their claim is that the way the house was constructed allowed the ingress of water but they do not identify the standard as the cause of the problems with their home;
- Secondly, there is a problem with timing. The BIA did not promulgate B2/AS1 adopting NZS3602:1995 until February 1998, after both the building consent had been issued and work on the house started. It follows that any decision to use untreated timber in the house can not have been made in reliance upon it.

Branz

[96] The factual basis on which the plaintiffs claim that Branz owed them duties of care to

i) appraise or approve products which met the requirements of the building code and

ii) amend or revoke its appraisal certificates when it received information which indicated a breach of the code are set out in para 28.2 of the fourth amended statement of claim, as follows:

a) Branz carries on business as an independent assessor of building products, materials, systems and methods of design and construction;

b) Branz is aware that territorial authorities and building certifiers rely on their appraisal certificates when they carry out their functions pursuant to the Building Act;

c) Branz charges manufacturers of products to appraise them;

d) Branz holds itself out as having a world-wide reputation in areas including durability of building materials and systems, weathertightness, ventilation and structural engineering; ...

e) The purpose of Branz' appraisal certificate is to have participants in the building industry [including homeowners] rely on them; ...

f) Branz has appraised the Origin Time Frame, Laser Frame and Duraplast products or systems;

g) Branz claims to consider issues of buildability when it appraises building products;

h) Origin Time Frame timber, Laser Frame timber and the Duraplast/Hardibacker cladding system were all used in the plaintiffs' house;

i) General reliance was placed on Branz by the plaintiffs to carry out its duties to ensure compliance with the building code and Building Act; ...

j) The control that Branz has over the appraisal process by either granting or refusing such an appraisal;

k) By holding itself out as an expert in the building field, Branz assumes responsibility to those who have relied directly or indirectly upon its expertise;

l) Branz receives funding from each building consent application fee for the construction of residential homes;

m) The lack of any policy reason to preclude the imposition of a duty. ...

[97] Branz are said to have breached the alleged duties by:

28.5 a) Approving untreated timber for general use without suitable qualification, warning or limitation;

b) Failing at any time to warn the plaintiffs or their architects (and the public and people within the building industry) that the monolithic cladding systems used in the plaintiffs' new house did not or may not manage moisture ingress (i.e. prevent ingress or prevent it from wetting the timber once through the cladding) or that untreated timber should not be used in conjunction with it;

c) With actual knowledge of all the scientific evidence from 1953 to 1996 and having received the Prendos material, Branz was aware untreated timber was being used behind the monolithic system, and, accordingly, Branz ought to have amended or revoked all the relevant appraisals ... by December 1998 and issued warnings in respect of existing work using the appraised systems and materials;

d) Approving untreated timber:

i) at all; and/or

ii) for use in conjunction with all types of cladding timber; and/or

iii) without drying cavities; and/or

iv) with penetrations; and/or

v) in a harsh environment;

without first testing the viability of the same.

[98] Branz endorsed and adopted the position taken by the BIA concerning the negligence claim but said that it has an even stronger case against the imposition of a duty.

[99] Mr Miles submitted that, contrary to the plaintiffs' claims:

- Branz has no relationship with individual homeowners and does not cater for them.
- It is a private company with no control over the building industry under the Act or any other legislation. Although it acts in an advisory and consultative capacity, it cannot compel the industry to accept or implement its recommendations or proposals. What the industry does with them is entirely voluntary.
- Like the BIA, it had no supervisory or enforcement powers to monitor or require builders, designers, territorial authorities or building certifiers to comply with the Act and/or the building code.
- It had none of the functions that either territorial authorities had under s 24 of the Act or that the BIA had under ss 12, 49, or 59.

[100] He pointed out that apart from the reference in s 58(4), neither the Act nor any other relevant legislation defined the content or purpose of an appraisal. Nor did the Act state in what other context an appraisal could or should be used.

[101] Furthermore, there was no statutory requirement that a proprietor have its product or system appraised. Branz did not initiate the process. It only tested and certified products or processes after being asked to do so by a proprietor, at its expense and in accordance with the terms of the contract between the parties.

[102] While acknowledging that Branz' appraisal certificates have some significance because of its expertise, Mr Miles emphasised that ultimately it was up to the territorial authority to decide whether or not to accept the certificate and whether a building to which it related was code compliant.

[103] He argued that Branz had a similar lack of control over the review process. Whether it could review, suspend or withdraw an appraisal certificate was governed by the terms of the agreement entered into with the manufacturer. Before it could take such action it needed to have clear and sufficient evidence of identified problems or defective performance and, in the absence of any prior approach, had first to consult with the manufacturers. But, as Dr Sharman deposed, in fact none of the companies whose products are in issue here advised Branz or its parent company of any significant changes to the quality of the products covered by the certificates and neither Branz nor Building Research received or became aware of any information which would have caused Branz to seek to amend or revoke the certificates.

[104] As to the law, Branz' case was that, in the absence of any cases where product assessors have been held liable to the end users of the product, the Court of Appeal's decision in Sacramento is determinative, especially in relation to proximity.

[105] Finally, Mr Miles submitted that if a duty of care were imposed on Branz, the effect would be to elevate the status of its appraisal certificates to that of a certificate of accreditation, which was proof of compliance with the code and had to be accepted as such. But to do so would be contrary to the scheme of the Act, he said.

[106] I accept these submissions and reject Mr O'Callahan's arguments in response.

[107] He argued that Sacramento, particularly in relation to public body and policy considerations, does not apply to this application as Branz is a private company.

[108] Instead he focused on the ***Rolls-Royce*** test, repeating many of the points he had already made (and I have rejected) in relation to the BIA.

[109] He also placed reliance upon the determination of the Weathertight Homes Resolution Service in the ***Ellerslie Oaks*** case (***Webster & Ors v Collins Paper Haulage Limited & Ors Claim No 00141 & Ors*** 1 December 2006 (WHRS)) where the adjudicator refused Branz' strike out application, saying, with regard to proximity:
In the context of the New Zealand building industry, it was entirely foreseeable that the industry and building owners would rely on BRANZ to properly carry out its privately contracted appraisal and certification services (BRANZ also receives a levy from each building consent for the purpose of research and testing building and construction products and systems and is a recognised and respected authority in New Zealand) and that failure on the part of BRANZ to

identify failings in the ... product[s] or cladding system at the time of its assessment could cause damage and loss of amenity to building owners that used the ... cladding system. I am satisfied therefore that BRANZ, by its conduct, has brought itself into a sufficiently proximate relationship with the Claimants. (para [188]).

[110] And on the issue of indeterminacy: "*In (leaky) building claims involving dwellings clad using the ... cladding system (somewhat less than all recorded building starts in any 10 year period), the risk in any particular case is limited to a claim by the owners of those dwelling houses from time to time and the cost of repair or replacement of the cladding system together with foreseeable consequential loss. A further factor pointing strongly away from an `indeterminate risk' is the longstop limitation period of 10 years for bringing civil proceedings against any person relating to any building work (section 91(2) Building Act 1991) ... It would appear therefore, that any risk is well circumscribed in this jurisdiction and I am satisfied that the duty satisfies the `indeterminacy' test.*" *(para [189])*.

[111] That case does not assist the plaintiffs. The adjudicator's purported analysis of legal issues is regrettably simplistic and wrong: he applied, without more, a foreseeability test to determine proximity. However, a conclusion that harm is foreseeable does not itself warrant the conclusion that there is sufficient proximity to justify the imposition of a duty of care: ***Sacramento*** at [37].

[112] Even Lord Atkin, in his seminal judgment in ***Donoghue v Stevenson*** [1932] AC 562 (HL), required more than mere foreseeability. At 599 His Lordship remarked: "*... by Scots and English law alike a manufacturer or products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an inquiry to the consumer's life or property, owes a duty to the consumer to take that reasonable care.*" (Emphasis added).

[113] While, as subsequent cases have shown, the fact of intermediary inspection will not necessarily render an alleged tortfeasor immune from the imposition of a duty of care towards the ultimate plaintiff, it can have a bearing on the determination of the nexus between the alleged tortfeasor and the plaintiff: see ***Dutton v Bogner Regis Urban District Council*** [1972] 1 QB 373, where Lord Denning said at 396: "*... This intermediate inspection, or opportunity of inspection, may break the proximity. It would certainly do so when it ought to disclose the damage ...*"

[114] See also ***Stieller v Porirua City Council*** [1986] 1 NZLR 84 at 95 where the New Zealand Court of Appeal stated the test thus: "*... as a matter of law, a person who creates a dangerous situation cannot escape liability on the ground of expectation of intermediate examination unless the expectation is strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm ...*"

[115] In this case the Act makes it clear that ultimate responsibility for ensuring that the code was complied with lay with the territorial authorities and building certifiers. They acted as an authoritative intermediary between homeowners and Branz. They, along with the builders and designers, had the closest connection or nexus to the homeowners. It is significant that the territorial authorities were not obliged to rely on Branz' appraisal certificates; they had to satisfy themselves whether a building would be code compliant. As Mr Miles said, Branz could not compel the industry to accept or implement the products or building systems it had appraised, and it had no supervisory or enforcement powers to monitor or require those with a closer relationship to homeowners to comply with the Act and the code.

[116] I also accept Mr Miles' further submission that, as with the BIA, inaction on Branz' part could not fairly be taken as amounting to a warranty that the building system would produce code compliant outcomes. As the Court of Appeal noted in Sacramento at [61](c), the Act provided specific statutory processes for giving such warranties.

[117] Iam not persuaded that the plaintiffs were especially vulnerable to any action or inaction by Branz. They had a much closer relationship with their architects and builders. They had no contractual relationship with Branz. The only claimed direct link was their receipt of the Hardibacker and Duraplast brochures allegedly including the Branz appraisals and the use of materials or products appraised by Branz in the construction of the house. But neither that nor general reliance can be enough.

[118] Nor do I accept Mr O'Callahan's submission with regard to the determinacy of the class to whom the alleged duty was owed. As I noted in relation to the BIA at [90] above and he was forced to concede, the class can not be restricted to owners of dwelling-houses; it must necessarily extend to all participants in the building industry who relied on the certificates - bringing with it the unpalatable prospect of unlimited liability to an unlimited class.

[119] The only binding analogous case is ***Sacramento***. ***Holtslag,*** while not binding, is of some persuasive authority. In Sacramento the Court of Appeal struck out the type of duty to warn argument expounded by the plaintiffs. Nothing Mr O'Callahan said persuaded me that the reasoning of the Court of Appeal in Sacramento is not equally applicable to the circumstances of this case, both in relation to the initial issue of the certificates, and their later amendment or revocation.

[120] In my view, the plaintiffs' claim must fail at the initial hurdle. I find it unnecessary to address policy considerations. The proximity arguments are overwhelmingly against the plaintiffs. The nexus between them and Branz is so tenuous that a duty of care should not be imposed. Accordingly, the strike out application must be allowed in respect of this claim also.

Fair Trading Act 1986

[121] The remaining claim is that Branz breached the provisions of ss 9 and 11 of the FTA.

[122] The strike out application only mentions the claim under s 9 of that Act. The plaintiffs accepted that that was an oversight. It should have included the s 11 claim also. Therefore, at the conclusion of the hearing I granted leave, by consent, for the application to be amended accordingly.

[123] The factual allegations underpinning this claim are essentially the same as those relied upon for the negligence claim. Mr O'Callahan summarised them as follows:

- *That Branz, in trade, issued Appraisal Certificates which represented that the building products or systems would meet the building code.*
- *The representations were in fact false at the time in that the building products or systems did not meet the building code, either at all, or in use with, cladding systems, including, but not limited to monolithic cladding systems.*
- *The failure by Branz to revoke their Certificates meant that the misrepresentation and thus breach of the FTA was a continuing one.*

[124] Sections 9 and 11 of the FTA provide:

9 Misleading and deceptive conduct generally
No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

11 Misleading conduct in relation to services
No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, characteristics, suitability for a purpose, or quantity of services.

[125] "Engaging in conduct" is defined in s 2(2), which states:
In this Act, a reference to engaging in conduct shall be read as a reference to doing or refusing to do an act, and includes,
(a) omitting to do an act; or
(b) making it known that an act will or, as the case may be, will not be done.

[126] "Services" are defined in s 2(1) as follows:
Services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges, or facilities that are or are to be provided, granted, or conferred and, without limiting the generality of the foregoing, also includes the rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred under any of the following classes of contract:
(a) contract for, or in relation to,
(i) the performance of work (including work of a professional nature), whether with or without the supply of goods ...

[127] In ***AMP Finance NZ Limited v Heaven*** (1997) 8 TCLR 144 (CA) at 152, the Court of Appeal said that the question of whether there had been an actionable breach of s 9 should be addressed in the following three steps:
The first step, which focuses on the conduct in question, is to ask whether that conduct was capable of being misleading. The second step is to consider whether [the plaintiffs] were in fact misled by the relevant conduct. This step focuses on the effect of the relevant conduct on the [plaintiffs'] minds. The third step requires consideration of whether it was, in all the circumstances, reasonable for [the plaintiffs] to have been misled. This is where, as with the first step, the objective dimension comes in. It is not enough for the [plaintiffs] to show they were misled if reasonable people in their shoes would not have been mislead.

[128] Regrettably, the plaintiffs' fourth amended statement of claim does not address those points directly. The second cause of action against Branz consists of a statement that Branz "*was in trade*", followed by an allegation that its

29.2 ... conduct as detailed in Sections 18-18A and Paragraph 28 [of the fourth amended statement of claim] was misleading and in breach of ss 9 and 11 of the Fair Trading Act in that, having reviewed the Prendos material, Branz failed or omitted to revoke its certificate as a result of which it suffered loss.

[129] Further particulars of the FTA claim are given by way of cross-reference to other passages in the pleading, particularly Paragraph 28. However, the point being relied upon in the passages cited is not always obvious, with the unhappy result that the reader is often left to guess.

[130] Paragraph 28.3, which is referred to in relation to the alleged misconduct, states:

28.3 At the time the building consent was issued on or about 23 December 1997 the plaintiff John Struthers was aware that Hardibacker was to be used as the cladding for a solid plaster system and that his architects had recommended it as an approved material. When the first and/or second defendants promoted the idea of using a Duraplast system rather than the solid plaster system the plaintiff John Struthers was provided by the architects with the Hardibacker and Duraplast brochures which included the Branz appraisals. These were supplied to the plaintiff John Struthers in August 1998.

[131] 28.4 states that Hardibacker and Duraplast do not comply with the provisions of the building code and 28.5 sets out the various ways in which Branz is alleged to have breached its duties.

[132] The nearest the plaintiffs get to explaining how Branz' conduct is supposed to have caused them loss is a cross-reference to paragraph 28.7 of the claim which says:

28.7 As a result of BRANZ's breach of duty, the plaintiffs have suffered the losses referred to in paragraphs 1.23 to 1.27 above in that, had BRANZ not provided the Certificates listed in 28.2 hereof, or had it amended or revoked the Certificates or had it issued the warnings the plaintiffs' new house would not have been designed and constructed the way it was.
Further Particulars

The plaintiffs say that if any certificates had been amended or revoked the plaintiffs' new house would have been designed, if untreated or HI timber framing was used, with special specifications to maintain the maximum moisture content, or preferably, by not using such timber at all e.g. reinforced concrete.

[133] It is fair to say that neither counsel focused much attention on this claim. Mr Miles relied in part upon the Crown's written submissions and both he and Mr O'Callahan addressed the issues globally. Neither sought to differentiate between the claims under s 9 and s 11.

[134] Mr Miles submitted that not only was Branz' conduct not misleading, it was apparent that the plaintiffs were not misled as not a single defect claimed by them arose out of the certificate; all arose out of the way the house was constructed.

[135] Mr O'Callahan's primary response was that the factual claims, particularly the claim that approving the timber framing "at all" involved a representation which was inherently wrong or false, can only be determined at trial.

[136] While it is apparent from a perusal of the certificates themselves that the plaintiffs will have an uphill battle persuading a Court that Branz made the simple, unqualified representations alleged, let alone that the representations actually made were misleading or misled anyone, I am not prepared to strike out this claim. I cannot say that with appropriate amendment the cause of action is so clearly untenable that it cannot possibly succeed.

[137] I accept that with the benefit of expert evidence the plaintiffs may be able to establish that the certificates contained a material omission which was misleading. That could have been in the form of a half-truth (where a positive representation omits crucial information and is thereby misleading) or because changed circumstances (such as the availability of the Prendos information) meant that a positive representation which was true when made became untrue.

[138] I also accept that it is not fatal to the plaintiffs' claim that they were not the immediate recipients of the certificates. In ***Darrell McGregor (Contractor) Limited v Mountain Lake Holdings Limited*** HC INV CIV-2006-425-000164 30 May 2006, Randerson J accepted that misleading or deceptive conduct under s 9 of the FTA does not need to be directed at the person who suffers loss or damage and that s 43 of the FTA was sufficiently wide to allow relief to be given in respect of loss suffered by a third party who relied on the conduct contravening the Act. However, there has to be a direct causal link between the conduct and the loss or damage suffered: ***Goldsbro v Walker*** [1993] 1 NZLR 394 at 398-399 (CA). That is a critical factual matter for the plaintiffs to establish. Whether they can do so may depend on the evidence of other defendants such as their architects and builders, and the extent to which they relied upon the certificates. But again, in my view, that is a matter which the plaintiffs should have the opportunity of addressing in a further amendment to their pleadings and, eventually, at trial.

Result

[139] In conclusion, I make the following orders:

i) Striking out all the plaintiffs' causes of action against the ninth defendant and that in negligence against the tenth defendant;

ii) Dismissing the tenth defendant's application to strike out the plaintiffs' cause of action under the Fair Trading Act 1986 against it.

iii) Granting the plaintiffs leave to further amend their statement of claim in respect of the claim under the Fair Trading Act against the tenth defendant within 28 days of the date of this judgment.

iv) As the ninth defendant's strike out application has been entirely successful, and the tenth defendant's substantially so, they are each entitled to orders of costs in their favour. Leave is reserved to counsel to file memoranda on this issue within 21 days if they are unable to reach a satisfactory resolution themselves.

v) Progress in this matter is to be reviewed by Associate Judge Doogue in a telephone conference to be convened on the first available date in July.

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