IN THE COURT OF APPEAL OF NEW ZEALAND

CA205/06
[2008] NZCA 317

BETWEEN	BODY CORPORATE 202254 First Appellant
AND	CITY RENTAL TRUSTEES LIMITED & ORS Second Appellant
AND	STEPHEN FREDERICK TAYLOR Respondent

Hearing: 20 November 2007

Court: William Young P, Glazebrook, Chambers, Arnold and Ellen France JJ

Counsel: T J Rainey for Appellants
P H Thorp, T J Thorp and A J Hales for Respondent

Judgment: 22 August 2008 at 11.30 am

JUDGMENT OF THE COURT

A **The appeal is allowed and the claim in negligence (other than the claim based on a non-delegable duty) is reinstated.**

B **The cross-appeal is allowed but only to the extent that the Fair Trading Act 1986 claim associated with alleged representations as to the identity and substance of the developer is struck out.**

C **Mr Taylor is to pay to the owners costs of $6,000 together with usual disbursements.**

See para 6 for "stigma"

REASONS

WILLIAM YOUNG P AND ARNOLD J

(Given by William Young P)

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Introduction

[1] These proceedings concern a residential development which is affected by leaky building syndrome. Mr Stephen Taylor was the principal behind the companies responsible for the development. The owners of the units have sued Mr Taylor (along with a number of other defendants) to recover their losses. As against Mr Taylor, they have pleaded causes of action under s 9 of the Fair Trading Act 1986 and in negligence. In the High Court, Keane J struck out the negligence claims but refused to strike out the Fair Trading Act claims (HC AK CIV-2003-404-3116 13 April 2005 and 29 August 2006). Both sides appeal.

[2] The case gives rise to issues which are intrinsically difficult and are further complicated because the law as it has developed in relation to the Fair Trading Act is not entirely congruent with the relevant leading negligence cases. It will be necessary to explore this underlying tension.

Factual background

[3] Siena Villas is a 37 unit residential development which was designed and built between September 1999 and August 2001. The development is on land which was acquired by Strata Residential Ltd (a company controlled by Mr Taylor) and transferred to another of Mr Taylor's companies, Strata Grey Lynn Ltd. Strata Grey Lynn agreed with Strata Buildings Ltd (another company associated with Mr Taylor) for the latter company to "engage the necessary sub-contractors" to construct the development.

[4] The villas were sold through the agency of Barfoot & Thompson Ltd which produced a promotional brochure. This asserted:

> **THE DEVELOPER**
>
> As is vital in all good decisions, you must be comfortable with the **strength and experience** of the person you are dealing with. The Developer of **Siena Villas** is Strata Residential Limited, whose principal has had over 25 years of experience in the property field. Recent successful developments include St Lukes Park (59 terrace houses) and Siena Terraces (60 apartments). We

> are certain that you will be delighted with the **standard of workmanship** of your apartment and the **professionalism** of the developer.
>
> **WHAT IS THE MAIN APPEAL?**
>
> Apart from the excellent property fundamentals of position, quality of design, proximity to strong rental markets, etc that **Siena Villas** exhibits, perhaps the best features are the …
>
> (Emphasis as in original)

In this judgment, we will refer to this as the "first passage". As well, in what we will refer to as the "second passage", the brochure described the exterior in this way:

> Plaster system on breathable membrane and substrate.

[5] Within two years of completion, the development began to exhibit the now characteristic signs of leaky building syndrome.

[6] The owners commenced proceedings seeking damages for their losses associated with the costs of repair and stigma in relation to the development. Some of the owners (the "initial purchasers") purchased units off the plans. Others are subsequent purchasers. There are many defendants to these proceedings but the owners face the problem that those who might be thought to be most vulnerable have either been struck off the register of companies (particularly Strata Residential, Strata Grey Lynn and Strata Builders) or are insolvent (as is the case with the primary sub-contractor and the building certifier). In this judgment we propose to address only the claims made against Mr Taylor.

The claims against Mr Taylor as pleaded

[7] The owners have amended their claim many times and we were invited to address the issues between them and Mr Taylor on the basis of a document styled sixth amended statement of claim, a statement of claim which is broadly similar to the fifth amended statement of claim, which was in issue when the case was before Keane J.

[8] These claims are that Mr Taylor:

(a) Is liable under the Fair Trading Act either on the basis that he was in trade or was a party to the actions of his companies and, associated with this, is liable under s 9 for what are said to be misleading and deceptive statements made in the Barfoot & Thompson brochure. This claim is advanced on behalf of only some of the owners who, we assume, were all the initial purchasers who are parties to the proceedings.

(b) Was negligent in his conduct and management of the Siena Villas development.

Judgments in the High Court

[9] In a judgment delivered on 22 December 2004 Associate Judge Sargisson struck out some of the claims then pleaded against Mr Taylor and required other claims to be repleaded.

[10] After the application to review the judgment of the Associate Judge had been filed, Mr Taylor applied for summary judgment. Mr Taylor's concern was that the restricted nature of the strike-out jurisdiction has the consequence that an apparently plausibly pleaded claim can withstand a strike-out application despite the factual assertions made in the pleading being untrue. This concern was enhanced by the evolving nature of the allegations made by the owners against Mr Taylor through the many statements of claim which have been filed.

[11] While we have some sympathy for the reasons which lead to Mr Taylor's summary judgment application, we have reservations about the affidavit evidence which he relied on in support. That affidavit evidence did not include anything approaching a narrative account of his personal role in the development. Leaving aside a reasonably full answer to complaints about the second passage and a partial response to complaints about the first passage, Mr Taylor's affidavits largely amount to denials of the allegations against him. This is a complex multi-defendant case. Much may depend not only on the evidence which the owners can produce, but also the evidence which may be adduced by other defendants. Obviously the person best

placed to give a comprehensive account of what happened was Mr Taylor. In this context, his economical approach was inadequate for the occasion. For the moment, all that we need to note about the affidavits is that he denies having a hands on involvement with the development. Rather, it is his position that he left everything to others. Not addressed in his affidavits is whether this hands off approach to the development was necessarily consistent with the claims made in the first passage in the Barfoot & Thompson brochure.

[12] The two applications (ie for review and summary judgment) produced two judgments from Keane J, the first one on 13 April 2005 and the second on 29 August 2006. In the result, the Judge declined to strike out the causes of action based on the Fair Trading Act but did strike out the negligence claim. The summary judgment application was dismissed.

Overview – general

[13] The case presents two reasonably familiar problems.

[14] The subsequent purchasers acquired residential units which were defectively designed and/or built. On the approach upheld in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC), the inauspicious contractual framework (under which the owners have no contractual claims) would not prevent them recovering their losses from the developer, the builder and the building certifier. But this of no assistance to the owners as those parties either no longer exist or are not in a position to meet damages awards. In suing Mr Taylor, they are thus seeking to get around the problems associated with the non-existence or impecuniosity of more logical defendants as well as the separate personality assigned by law to Mr Taylor's companies.

[15] Similar, but not identical, considerations apply to the claims of the initial purchasers. They contracted with Strata Grey Lynn to acquire residential units. They did not receive what they expected (namely weather-tight homes) but their understandable disappointment gives rise to no viable contractual claim against Strata Grey Lynn because it no longer exists. In any event, they contracted with

Strata Grey Lynn on a standard form of contract which incorporated an extensive exclusion of liability clause. So the claims of the initial purchasers involve policy considerations which are similar to those of the subsequent purchasers but with the overlay that their claims are contrary to the tenor of the agreements for sale and purchase which they signed.

[16] Where bargains have gone wrong, but the law of contracts offers no effective remedy, those who are disappointed often resort to the law of negligence. The resulting litigation is usually, although not always, resolved against the plaintiffs. Two leading judgments which exemplify this tendency are *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA) and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL). Spectacular exceptions are the much doubted (and Scottish) decision in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 (HL) and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL). For a recent survey of the English jurisprudence, see O'Sullivan "Suing in Tort Where No Contractual Claim Will Lie – a Bird's Eye View" (2007) 23 PN 165. These and related issues are also addressed in the judgment of this Court in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324. The courts have been very reluctant to confer rights to sue in negligence which are inconsistent with (perhaps just in the sense of going beyond) the rights for which plaintiffs have bargained. As well, to be successful a plaintiff will usually have to show an assumption of personal responsibility by the defendant to the plaintiff which is akin to acceptance of a contractual obligation. While the relevant cases are not altogether coherent in either results or reasoning, their overall drift suggests that the claims in negligence against Mr Taylor are marginal at best. This is because the legal structure he created for the development was plainly intended to distance him from any later claims by disappointed owners.

[17] A rather different approach has been adopted by legislatures and the courts in relation to fair trading legislation in Australia and New Zealand.

[18] Section 52 of the Trade Practices Act 1974 (Cth) provides:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The background to s 52 is discussed by Harland "The Statutory Prohibition of Misleading or Deceptive Conduct in Australia and its Impact on the Law of Contract" (1995) 111 LQR 100. Section 52, as expressed, is confined in its direct effect to corporations; this for reasons associated with the legislative competence of the Federal Parliament. But s 6 has the consequence that s 52 also applies to natural persons who are the subject of other heads of federal jurisdiction (eg because they are engaged in interstate trade or commerce). Importantly, s 52 has provided a model for s 9 of our Fair Trading Act which is in similar terms to section 52 but is not restricted in its operations to corporate entities. The same is true of the equivalent provisions in fair trading legislation enacted by state legislatures in Australia. In broad terms, the legislation to which we have referred makes it a statutory tort to engage in trade in misleading and deceptive conduct.

[19] Section 52 appears in a division of the Trade Practice Act which addresses consumer protection and there can be no doubt that consumer protection considerations underpin both that section and s 9 of the Fair Trading Act. Unsurprisingly, therefore, the courts have not paid much heed to attempts by those in trade to distance themselves from liability to disappointed consumers. For instance, exclusion of liability clauses are not effective to limit liability under the Fair Trading Act. As well, there is nothing in the legislation which confines liability to cases where there is a contractual or quasi-contractual assumption of responsibility by the defendant to the plaintiff. Further, and at least to date, the courts have not regarded corporate form (and particularly the separate legal identity of companies) as precluding personal liability on the part of senior employees who engage in misleading and deceptive conduct.

[20] Just as the drift of the negligence cases rather favours Mr Taylor, the drift of the Fair Trading Act cases favours the initial purchasers. Assertions were made in the brochure and presumably they either originated with or were at least approved by Mr Taylor. On the case advanced by the initial purchasers, they were misleading and deceptive. Neither the disclaimer nor the exclusion clause is of controlling significance. Nor is the corporate form through which Mr Taylor chose to conduct business.

[21] It is true that the common law tort of negligence and the statutory tort of engaging in misleading and deceptive conduct do not completely overlap. There can be negligence which does not involve misleading and deceptive conduct and likewise there can be misleading and deceptive conduct where there is no negligence. Indeed, in this case, the claims in negligence and under the Fair Trading Act focus on different and only partly overlapping facets of the conduct of Mr Taylor. But that said, there is plainly considerable tension between the current approaches of the courts in relation to negligence claims and those under the Fair Trading Act, a tension which becomes manifest in this case.

[22] Both parties seek to resolve the tension, but in different ways: the owners by expanding the approach taken in negligence cases; and Mr Taylor by narrowing the approach taken under the Fair Trading Act. At this point, a note of caution is appropriate. A strike out application (and an associated summary judgment application) do not provide the most auspicious context for such an exercise, a point made clear in *Couch v Attorney-General* [2008] NZSC 45.

The claim in negligence – an overview

The Trevor Ivory *case*

[23] The plaintiffs owned an orchard which included a raspberry plantation. They contracted Trevor Ivory Ltd as a consultant to provide advice about the control of couch grass. Trevor Ivory Ltd was a one man company owned and controlled by Mr Trevor Ivory. He, acting on behalf of his company, advised the plaintiffs to use "Roundup" but he did not advise the plaintiffs to protect their raspberry canes (on which there remained some foliage) from the effects of its application. The plaintiffs sprayed their plantation as advised with disastrous results for the raspberry plants. The plaintiffs sued both the company and Mr Ivory. They alleged breaches of an implied term of their contract with the company and of a duty owed by the company and Mr Ivory to exercise all reasonable care, skill, diligence and competence in advising on the application of chemical sprays. The trial Judge held that the company was liable in both contract and tort and that Mr Ivory owed the plaintiffs a

duty of care and gave them negligent advice. He awarded damages against both the company and Mr Ivory. They both appealed, with the result that the appeal of the company was dismissed but that of Mr Ivory was allowed.

[24] Cooke P found in favour of Mr Ivory primarily because he saw the claim in tort as an attempt to avoid the principles of limited liability, a point which emerges from the following passages of his judgment (at 520 and 524):

> It is elementary that an incorporated company and any shareholder are separate legal entities, no matter that the shareholder may have absolute control. For New Zealand the leading authority on the point is the decision of the Privy Council in *Lee v Lee's Air Farming Ltd* [1961] NZLR 325. Both Lord Reid and Lord Morris of Borth-y-Gest, who were members of the Board in *Lee's* case (Lord Morris of Borth-y-Gest in fact gave the judgment), later joined in affirming in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170-171, 180, that a person may be identified with a corporation so as to be its embodiment or directing mind and will, not merely its servant, representative, agent or delegate. For applications of that doctrine, see *Nordik Industries Ltd v Regional Controller of Inland Revenue* [1976] 1 NZLR 194; *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 576. The reconciliation must be that the *Lee* case looks at questions between the shareholder and his company, whereas the *Tesco* case is concerned with questions between third parties or the outside world and the company, arising for instance, as in *Tesco* itself, under statutory provisions creating offences. The present is a question of the third party type, and it seems to me that the *Tesco* doctrine assists in deciding it. If a person is identified with a company vis-à-vis third parties, it is reasonable that prima facie the company should be the only party liable.
>
> ...
>
> Without venturing further into what some would see as unduly theoretical, if not heterodox, I commit myself to the opinion that, when he formed his company, Mr Ivory made it plain to all the world that limited liability was intended. Possibly the plaintiffs gave little thought to that in entering into the consultancy contract; but such a limitation is a common fact of business and, in relation to economic loss and duties of care, the consequences should in my view be accepted in the absence of special circumstances. It is not to be doubted that, in relation to an obligation to give careful and skilful advice, the owner of a one-man company may assume personal responsibility. *Fairline* is an analogy. But it seems to me that something special is required to justify putting a case in that class. To attempt to define in advance what might be sufficiently special would be a contradiction in terms. What can be said is that there is nothing out of the ordinary here.

[25] Hardie Boys J took this approach (at 526-528):

> An agent is in general personally liable for his own tortious acts: *Bowstead on Agency* (15th ed, 1985) at p 490. But one cannot from that conclude that whenever a company's liability in tort arises through the act or omission of a

director, he, because he must be either an agent or an employee, will be primarily liable, and the company liable only vicariously. In the area of negligence, what must always first be determined is the existence of a duty of care. As is always so in such an inquiry, it is a matter of fact and degree, and a balancing of policy considerations. In the policy area, I find no difficulty in the imposition of personal liability on a director in appropriate circumstances. To make a director liable for his personal negligence does not in my opinion run counter to the purposes and effect of incorporation. Those purposes relevantly include protection of shareholders from the company's liabilities, but that affords no reason to protect directors from the consequences of their own acts and omissions. What does run counter to the purposes and effect of incorporation is a failure to recognise the two capacities in which directors may act; that in appropriate circumstances they are to be identified with the company itself, so that their acts are in truth the company's acts. Indeed I consider that the nature of corporate personality requires that this identification normally be the basic premise and that clear evidence be needed to displace it with a finding that a director is acting not as the company but as the company's agent or servant in a way that renders him personally liable. …

Essentially, I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for the personal liability of both a director and an employee. It was the basis upon which the director was held liable in *Fairline Shipping Corporation v Adamson* [1975] QB 180, (see p 189), where the assumption of responsibility was virtually express. It may lie behind the finding of liability in *Centrepac Partnership v Foreign Currency Consultants Ltd* (1989) 4 NZCLC 64,940. Assumption of responsibility may well arise or be imputed where the director or employee exercises particular control or control over a particular operation or activity, as in *Adler v Dickson* [1955] 1 QB 158 (although there the issue did not arise, as it was a pretrial decision on a different point of law). *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep 596 is another illustration. This is perhaps more likely to arise within a large company where there are clear allocations of responsibility, than in a small one. It arose however in the case of a small company in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, 593ff; but not in a case to which I made some reference in my judgment in *Morton*, namely *Callaghan v Robert Ronayne Ltd* (Auckland, A 1112/76, 17 September 1979), a judgment of Speight J. It may be that in the present case there would have been a sufficient assumption of responsibility had Mr Ivory undertaken to do the spraying himself, but it is not necessary to consider that possibility.

… That this was a one-man company is of course by no means conclusive, but it made it necessary for the respondents to adduce clear evidence that in his dealings with them Mr Ivory was not simply acting as the company performing its contractual obligations towards them. … Although I regard the case as approaching the borderline, I am satisfied on balance that the evidence does not demonstrate an assumption of personal responsibility. I therefore agree that Mr Ivory's appeal must succeed.

[26] The third Judge was McGechan J. He approached the issue in this way (at 532):

> When it comes to assumption of responsibility, I do not accept a company director of a one-man company is to be regarded as automatically accepting tort responsibility for advice given on behalf of the company by himself. There may be situations where such liability tends to arise, particularly perhaps where the director as a person is highly prominent and his company is barely visible, resulting in a focus predominantly on the man himself. All will depend upon the facts of individual cases, and the degree of implicit assumption of personal responsibility, with no doubt some policy elements also applying. I do not think this is such a case, although it approaches the line. While the respondents looked to his personal expertise, Mr Ivory made it clear that he traded through a company, which was to be the legal contracting party entitled to charge. That structure was negotiated and known. … There was no representation, express or implicit, of personal involvement, as distinct from routine involvement for and through his company. There was no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation. If anything, the intrinsic high risk nature of spray advice, and his deliberate adoption of an intervening company structure would have pointed to the contrary likelihood. On the present facts, I see no policy justification for imposing an additional duty of care. In this particular one-man company situation, and against the established trading understandings, I would not view such as just and reasonable.
>
> I regret to differ from the learned trial Judge on this point, but for my part am unable to accept that in law a duty of care existed on the part of Mr Trevor Ivory personally.

The Williams *case*

[27] *Williams* concerned a franchise dispute. The appellant, Mr Richard Mistlin, had worked for some years in the health food trade. He then decided to set up a franchising operation and to do so established Natural Life Health Foods Ltd. This company provided potential franchisees with a brochure that made extensive reference to the experience of Mr Mistlin in the industry. Later the company (through another employee) provided the potential franchisees with financial projections which Mr Mistlin had largely produced, projections which the trial Judge held were prepared negligently. But the potential franchisees never met or dealt with Mr Mistlin and the projections supplied by the company were on company notepaper. Encouraged by the information provided by the company, the potential franchisees entered into a franchise agreement and, as a result, lost money. They sued the company (which went into liquidation) and Mr Mistlin.

[28] The House of Lords, reversing the decisions to the contrary of the trial Judge and the Court of Appeal, held that Mr Mistlin did not owe a duty of care to the

potential franchisees. The principal speech was delivered by Lord Steyn. His reasons for finding against a duty of care were expressed in this way (at 837-838):

> Mr. Mistlin owned and controlled the company. The company held itself out as having the expertise to provide reliable advice to franchisees. The brochure made clear that this expertise derived from Mr. Mistlin's experience in the operation of the Salisbury shop. In my view these circumstances were insufficient to make Mr. Mistlin personally liable to the plaintiffs. Stripped to essentials the reasons of Langley J., the reasons of the majority in the Court of Appeal and the arguments of counsel for the plaintiffs can be considered under two headings. First, it is said that the terms of the brochure, and in particular its description of the role of Mr. Mistlin, are sufficient to amount to an assumption of responsibility by Mr. Mistlin. In his dissenting judgment [1997] 1 B.C.L.C. 131, 156 Sir Patrick Russell rightly pointed out that in a small one-man company "the managing director will almost inevitably be the one possessed of qualities essential to the functioning of the company." By itself this factor does not convey that the managing director is willing to be personally answerable to the customers of the company. Secondly, great emphasis was placed on the fact that it was made clear to the franchisees that Mr. Mislin's expertise derived from his experience in running the Salisbury shop for his own account. Hirst L.J., at p. 153, summarised the point by saying that "the relevant knowledge and experience was entirely his qua Mr. Mistlin, and not his qua director." The point will simply not bear the weight put on it. Postulate a food expert who over ten years gains experience in advising customers on his own account. Then he incorporates his business as a company and he so advises his customers. Surely, it cannot be right to say that in the new situation his earlier experience on his own account is indicative of an assumption of personal responsibility towards his customers. In the present case there were no personal dealings between Mr. Mistlin and the plaintiffs. There were no exchanges or conduct crossing the line which could have conveyed to the plaintiffs that Mr. Mistlin was willing to assume personal responsibility to them. Contrary to the submissions of counsel for the respondents, I am also satisfied that there was not even evidence that the plaintiffs believed that Mr. Mistlin was undertaking personal responsibility to them. Certainly, there was nothing in the circumstances to show that the plaintiffs could reasonably have looked to Mr. Mistlin for indemnification of any loss.

Analysis of the reasoning in Trevor Ivory *and* Williams

[29] There are thus four overlapping rationales for the approaches taken in *Trevor Ivory* and *Williams*:

(a) The idea of "disattribution"; that is, if the actions of the employee defendant can be attributed to the company, they are necessarily not the actions of the employee. The concept of "disattribution" is present in the judgments of both Cooke P and Hardie Boys J in *Trevor*

Ivory. The label "disattribution" comes from the expression "disattribution heresy" used by Neil Campbell, see for instance "Claims Against Directors and Agents" [2003] NZLJ 109.

(b) The concern that allowing a claim against an employee in these circumstances (where the relevant actions involve the performance by the company of its contractual obligations) is erosive of the concept of limited liability.

(c) A sense that allowing a claim in tort against the employee would be inconsistent with the pattern of contractual relationships between the parties.

(d) An "elements of the tort" approach which requires as a precondition for liability a conclusion that the employee assumed personal responsibility for the relevant conduct associated with a presumption against such an assumption where the employee was simply acting on behalf of the company. We have borrowed the phrase "elements of the tort" from Turner "Searching For a Principled Approach – Directors' Personal Liability in Tort" [2006] NZ Lawyer 14.

[30] "Disattribution" has its academic supporters (see for instance Grantham and Rickett, "Directors' 'Tortious' Liabilities: Contract Tort or Company Law?" (1999) 62 MLR 133 and "Company Directors' Liability for Torts" [2003] NZLJ 155). It also received the imprimatur of the English Court of Appeal in *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* [2000] 1 Lloyd's Rep 218 in which Evans LJ particularly referred to and adopted (at 230) the first of the Grantham and Rickett articles just cited. But it is not a convincing rationale. The reasons why are explained by Campbell in the article to which we have referred and also by Watts in his trenchantly titled article, "*Trevor Ivory v Anderson*: Reasoning from Outer Space" [2007] NZLJ 25. The principles enunciated by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) provide an appropriate basis for attributing the actions (or state of mind) of a natural person to a company. But attribution of conduct or a state of mind to a company for

liability purposes does not mean that such actions (or state of mind) were not committed (or held) by the relevant individual. To put this another way, attribution provides a basis for imposing liability on a company, not conferring an immunity on an individual. Further, such an approach would necessarily only apply in relation to directors or senior employees (ie those whose actions and states of mind can be attributed directly to the company) resulting in the perverse result that junior employees might be liable in circumstances where senior employees would enjoy immunity. And, in any event, the "disattribution" theory was firmly laid to rest in *Standard Chartered Bank v Pakistan National Shipping Corpn* [2003] 1 AC 959 where the House of Lords reversed the Court of Appeal decision to which we referred earlier in this paragraph.

[31] Although the concept of limited liability is relevant, it too is not a decisive consideration, a point made clearly by Lord Steyn in *Williams* at 834-835. Limited liability limits the financial risk of shareholders to the capital they introduce to the relevant company; it is not intended to provide company directors (or senior employees) with a general immunity from tortious liability. And, as cases such as *Standard Chartered Bank* and *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 (CA) indicate, there is no such immunity. The critical feature in both *Trevor Ivory* and *Williams* is not that companies were involved but rather that the advice (in *Trevor Ivory*) and the representations (in *Williams*) were provided on behalf of a principal.

[32] This leads naturally on to the next point, that allowing claims in negligence against employees may be inconsistent with the pattern of contractual relationships which the parties have chosen. This consideration is addressed in the speech of Lord Steyn in *Williams* at 835-837. In determining whether there is a duty of care, regard must be had to "the relevant contextual scene". In these circumstances, the courts look for not just reliance on the particular expertise of the employee, but also "reasonable reliance on the employee's pocket-book", cf the comments of La Forest J in his dissenting judgment in *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 at 387, adopted by Lord Steyn at 836. On Lord Steyn's approach, the law of tort "has to fulfil a gap-filling role". This, however, only applies strictly in the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964]

AC 465 (HL) situation. Someone carrying out activities which are potentially dangerous to life plainly owes a duty of care to all who may be adversely affected; and this is irrespective of whether the activities are carried out by that person to fulfil the contractual obligations of his or her employer. The *London Drugs* case illustrates that the same principle applies to activities which may cause property damage. In *London Drugs*, the employees of a warehouse operator which was storing the appellant's goods negligently damaged those goods in the course of moving them within the warehouse. That they were doing so in the performance of their employer's contractual duties to the appellant did not, in the opinion of the majority, serve to immunise them from liability, although they were able to take advantage of limitation of liability provisions in the contract between their employer and the appellant.

[33] This in turn leads to the last of the considerations mentioned in [30], the "elements of the tort" approach. This was the rationale primarily adopted by McGechan J in *Trevor Ivory* and treated by Lord Steyn in *Williams* as the ratio of the case, see 836. In a situation where assumption of responsibility is an element of tortious liability, an employee who is acting on behalf of a principal can only be liable if there is a personal assumption of responsibility by that employee. Further, picking up points already made, to preserve the existing framework of the law of contracts and the idea that a corporation has a legal identity which is separate from those of the individuals involved in it, considerable caution is required before concluding that an employee has assumed personal responsibility.

[34] To put all of this in context, three further points need to be made:

(a) So restricted an approach to employee responsibility is not taken in other cases which involve the provision of services of a professional or skilled kind, for instance social services provided by education authorities, a point illustrated by two House of Lords decisions, *Barrett v Enfield London Borough Council* [2001] 2 AC 550 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619. These cases largely turn on the principle that the trained staff of such an agency dealing with a child are under a direct duty of care to that

child with the agency being vicariously responsible for their actions. Leaving aside the presumed intention of Mr Ivory in incorporating his company, his position vis-à-vis the his company's clients was very similar to that of the trained staff vis-à-vis the children in the two House of Lords cases.

(b) The *Trevor Ivory* and *Williams* cases have no application at all to cases in which assumption of responsibility is not an element of the tort, as *Standard Chartered Bank* demonstrates.

(c) Damage to property typically involves liability which is independent of any assumption of responsibility (beyond what is implicitly accepted by anyone who carries out a potentially dangerous activity). So if Mr Ivory had himself sprayed the Andersons' plants, he would probably have been personally liable. He could certainly have been liable if, in the course of spraying the Andersons' plants, he had damaged a neighbour's plants. The hesitation we have as to the first of the examples just given illustrates that the distinction between "purely" economic loss associated with bargain disappointment and property damage is not always clear, cf the difference of opinion between the majority and La Forest J in *London Drugs*.

The negligence claims in this case

[35] The owners put their claims in negligence on the basis of two arguments: first, that Mr Taylor was the project manager (or person who exercised control over the development) and that he owed an associated and non-delegable duty of care; and secondly, that in his role as sole director and employee of the Strata companies he owed a duty of care.

[36] On the first of these arguments, the owners sought to invoke *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA). In that case the developer (referred to in the judgment as "Sydney") had contracted with builders ("Fry and Hayter") to construct a block of flats. In issue was whether Sydney was liable for

the negligence of Fry and Hayter. The owners rely on the following passage of Cooke J's judgment (with whom Somers J joined) at 240-241:

> Mr Pidgeon placed much weight on the fact that Fry & Hayter were not servants of Sydney. He developed several submissions from that starting point..... If his arguments are right, it would follow that a development company such as Sydney could deprive purchasers of an effective remedy in damages by not carrying out the physical work themselves and employing contractors who might turn out to be not worth suing.
>
> In our opinion the arguments should not be accepted. One reason against them is the close relationship between Sydney and Fry & Hayter. The evidence is that Sydney, describing itself in its application as builder as well as owner, obtained the building permit and that Mr Huljich was constantly involved in discussions with the partners about details of the work. It was not a case of a landowner engaging a firm of builders and leaving everything to them. While not quite such a co-operative project as the one between the development company and the building company in *Batty*, it is sufficiently analogous to warrant treating the parties as jointly liable for the purposes of this case.
>
> A second reason, as we see it, is that the duty of Sydney to purchasers of the flats was non-delegable. It is not easy to state clear principles about when an employer will be held liable in tort for the negligence of an independent contractor, as witness the difference of judicial opinion in the progress through Australian Courts of *Stoneman v Lyons* (1975) 8 ALR 173. Lord Reid's observations in *Davie v New Merton Board Mills Ltd* [1959] AC 604, 646; [1959] 1 All ER 346, 367-368, in a cognate field testify to the difficulty of evolving hard-and-fast rules. In *Clerk and Lindsell on Torts* (14th ed, 1975) para 262, Professor Jolowicz says, after reviewing the authorities, that in the result it seems that no general principle can be stated and that the various types of case must be dealt with individually.
>
> In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially – as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in *Anns* may prove of guidance on questions of non-delegable duty also. There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.
>
> On one or both of those grounds the arguments for Sydney are unacceptable.

Mr Rainey, for the owners, maintained that the second of the grounds covers the situation in this case.

[37] We disagree. In this case, the developer was Strata Grey Lynn and not Mr Taylor. There is no authority which supports the proposition that Mr Taylor, as director of the development company, owed a personal and non-delegable duty of care to those who might acquire the units in the Siena Villas development. To impose such a duty on him would be flatly inconsistent with *Trevor Ivory* and *Williams*.

[38] The second argument is rather more difficult.

[39] There are two interconnected bases upon which Mr Taylor might be held to have assumed a personal responsibility to eventual purchasers of the units:

(a) By reason of the representations made in the brochure; and

(b) By adopting a hands-on role in the development exercise.

[40] It will be recalled that the Barfoot & Thompson brochure stated:

> **THE DEVELOPER**
>
> As is vital in all good decisions, you must be comfortable with the **strength and experience** of the person you are dealing with. The Developer of **Siena Villas** is Strata Residential Limited, whose principal has had over 25 years experience in the property field. Recent successful developments include St Lukes Park (59 terrace houses) and Siena Terraces (60 apartments). We are certain that you will be delighted with the **standard of workmanship** of your apartment and the **professionalism** of the developer.

The brochure could be construed as identifying the developer with the developer's "principal", ie Mr Taylor. Such "professionalism" as the developer was likely to exhibit could only emanate from Mr Taylor and the brochure links that professionalism to absolute confidence in future purchaser delight "with the standard of workmanship". It is likely that Mr Taylor was a party to the brochure being issued in that form. Assuming he was a party to the issuing of the brochure, it might be thought arguable that he put himself forward as someone upon whom purchasers could rely. On this point the remarks of McGechan J in *Trevor Ivory* cited above at [26] are apposite.

[41] On the second of the two arguments referred to at [35] above, Mr Rainey invoked the judgment of Hardie Boys J in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC). This case certainly provides some authority for the view that the directors of a building company with actual control of particular building operations owe a duty of care, associated with that control, see particularly what was said at 595. Indeed, it has been suggested that this case may be of particular contemporary relevance in leaky building cases, see Campbell "Leaking Homes, Leaking Companies" [2002] CSLB 101. It is necessary to recall, however, that in *Trevor Ivory*, Cooke P distinguished *Morton* on the basis that there had been an assumption of responsibility by the directors, albeit one not mentioned by Hardie Boys J in his judgment. In his judgment in *Trevor Ivory*, Hardie Boys J explained *Morton* on the same basis, as the passage cited at [25] indicates. Broadly he took the view that in some circumstances, control over particular operations might justify the imputation of an assumption of responsibility.

[42] Strata Builders was, nominally anyway, the building contractor. So on the basis of the approach taken in *Morton*, as qualified in *Trevor Ivory*, there might, depending on the facts, have been such involvement by Mr Taylor in the building operations as to give rise to an imputed assumption of responsibility as recognised by Cooke P and Hardie Boys J in *Trevor Ivory*. It is fair to say, however, that proceeding along these lines is unlikely to be of much assistance to the owners. The legal structures associated with the development indicate a clear attempt by Mr Taylor to distance himself from liability and, even without Mr Taylor's affidavit denials of a direct role in what happened, what we know about the development indicates that Mr Taylor's participation was very different from that of the directors in *Morton*.

[43] The most plausible basis upon which a claim in negligence might be brought is that:

(a) Mr Taylor's promotion of himself and his professionalism (assuming that this is the right way to construe the brochure) implied an assumption of responsibility to supervise the development.

(b) Errors in the way in which the project proceeded, which would not have occurred had there been such supervision or competent supervision, are evidence of negligence.

This approach necessarily puts much – and arguably too much – weight on the brochure. An individual carrying on business through a company is likely to stress his or her competence and experience. This factor was expressly present in *Williams* and may have been implicitly so in *Trevor Ivory*. It must be commonplace in the way in which small companies operate. To use that factor as automatically justifying the imputation of an assumption of responsibility might be destructive of the policy which is articulated in *Trevor Ivory* (in which the case was recognised as close to the line) and perhaps more vigorously in *Williams*.

[44] It is right to remember, however, that in both *Trevor Ivory* and *Williams* the cases had gone to trial, a situation which is in obvious contradistinction to the circumstances which confront us. We simply do not have a good feel for the facts. Further, given the nuanced and not entirely easy issues involved, and some of the academic criticism of the reasoning in *Trevor Ivory*, we should not assume too readily that *Trevor Ivory* necessarily represents the last word on this topic in New Zealand. This is particularly so given what we are about to say as to the application and implications of the Fair Trading Act on the approach taken in *Trevor Ivory*. So, before expressing a final view as to whether the negligence claim should be struck out, it is appropriate to turn to consider the Fair Trading Act claims.

The Fair Trading Act claims – an overview

Section 9

[45] Section 9 of the Fair Trading Act provides:

> **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.

[46] Only conduct which involves the making of assertions (or representations) can come within the section, because only conduct of that type can result in another person being misled or deceived (although such representations can, of course, be implicit as well as explicit).

[47] Considerable care is required in identifying what is said to be the representation. For instance, where A makes a particular statement, the underlying representation may be that the statement is true as a matter of objective fact or alternatively the underlying representation may simply be that the statement represents A's honest opinion based on information provided by other people. In the latter case, the making of the statement will not amount to misleading and deceptive conduct by A merely because it is wrong; but instead would only be misleading and deceptive if it did not represent A's honest opinion based on the information provided by others. In some circumstances, a statement as to future events or as to the opinion of the maker of the statement may be taken to imply that there is a reasonable basis for the statement. All of this is discussed in *Premium Real Estate Ltd v Stevens* [2008] NZCA 82. So a prediction about the likely turnover of a company may well imply that there exists a reasonable basis in fact for the prediction, cf *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC), a case involving the Contractual Remedies Act 1979.

[48] Difficult issues can arise in marginal cases particularly with representations which are ambiguous, confusing or even literally true but which have resulted in someone being misled. In *AMP Finance Ltd v Heaven* (1998) 6 NZBLC 102,414 (CA) the impugned conduct was ambiguous (in the sense that it gave conflicting signals). The three step test adopted in that case (at 102,420) – was the conduct capable of being misleading, were the affected parties misled and was it reasonable for them to have been misled – was addressed to the particular problems which that case presented. While this approach is generally applicable, the result of its application will be unproblematic where there is a straight-out misrepresentation which is credible and was acted on by the person to whom it was made.

[49] Against that background, and with the qualification that the Fair Trading Act claim is made only on behalf of the initial purchasers, we consider that this aspect of the case raises five questions:

(a) Do the owners have a reasonable prospect of establishing at trial that the first passage was false (and thus misleading and deceptive)?

(b) Do the owners have a reasonable prospect of establishing at trial that the second passage was false (and thus misleading and deceptive)?

(c) Are a disclaimer in the brochure and exclusion clauses in the agreements for sale and purchase conclusive against the owners?

(d) Do the owners have a reasonable prospect of establishing at trial that Mr Taylor is responsible under the Fair Trading Act for any deceptive and misleading statements in the brochure?

(e) Do the owners have a reasonable prospect of establishing at trial that loss was caused by any deceptive and misleading statements in the brochure?

Do the owners have a reasonable prospect of establishing at trial that the first passage was false (and thus misleading and deceptive)?

[50] The key words in the first passage are those which we have emphasised with italics in the following extract:

> *We are certain that you will be delighted with the standard of workmanship of your apartment and the professionalism of the developer.*
>
> *Apart from the excellent property fundamentals of position, quality of design*, proximity to strong rental markets, etc that Siena Villas exhibits, perhaps the best features are the …
>
> (Our emphasis)

The workmanship representation is, in substance, an expression of opinion as to how the purchasers would regard the workmanship after the units were completed. This

representation necessarily implies that there was a proper basis for asserting certainty on that score. If there was not such a proper basis, the assertion was misleading and deceptive. The representation as to the "quality of design" being excellent could fairly be taken as a representation of existing fact and thus misleading and deceptive if, in truth, the quality of the design was not "excellent". The representations as to workmanship and design are linked to the representations about the developer and its principal, implying that the certainty as to the purchasers being delighted with the standard of workmanship and the unqualified assertion as to the excellence of the design are associated with that professionalism and track record.

[51] Given the pleadings as a whole, it is clear that the owners assert that there were substantial defects in workmanship to an extent which might suggest that at the time the brochure was issued there was not a proper basis for the workmanship representation and as well that the design was far from excellent. On the latter point, it seems reasonably obvious (although no doubt with hindsight) that the design would have been better had it provided for a cavity between the framing and the cladding. On this basis, it would have been relatively straight-forward to plead that workmanship and standard of design representations were misleading and deceptive. Such a pleading would not be implausible and would raise issues which could not be the subject of a strike out application.

[52] Although the owners' argument to some extent picked up this line of thinking, they also, and less plausibly, treated the first passage as implying that the developer was a company of financial substance with a lengthy history. For instance, the owners complained that the developer of Siena Villas was not Strata Residential but rather Strata Grey Lynn which had been specifically formed by Mr Taylor for the Siena Villas development and was to be liquidated on its completion. We see no materiality in the difference between Strata Residential and Strata Grey Lynn. Further, and contrary to the contention of the owners, the first passage does not assert that Strata Residential (or Strata Grey Lynn for that matter) had had over 25 years of experience in the property field. Rather it is the principal (obviously Mr Taylor) who was said to have had that experience. In this context, we construe the brochure as asserting that the "recent successful developments" which were mentioned were associated with the principal (ie Mr Taylor) rather than any

particular company. It is not suggested by the owners that, so construed, the relevant assertions are untrue. We conclude therefore that the owners' complaints about the assertions about the identity and substance of the developer are without merit. The brochure simply does not say what they contend it means.

[53] More to the point, however, and more credibly, the owners maintain that the first passage "implies":

> that the development will be built with a high level of workmanship.

Although that is not quite the meaning we would relevantly place on the first passage (given that it catches the prediction rather than the implied assertion that there was a proper basis for the prediction), this is, in the present context, close enough. Reading the first passage as a whole, the workmanship representation is emphatic – indeed so emphatic that it is arguable that it was misleading and deceptive unless there were going to be the sort of quality control mechanisms and involvement on the part of Mr Taylor which made it inevitable that purchasers would be delighted with quality of workmanship. We say this because if there was no such inevitability about their response, it is distinctly arguable that the brochure should not have used the word "certain".

[54] The owners' pleading as to why the first passage was, in this respect, misleading and deceptive, is very limited but the pleading defects seem to us to be readily capable of amendment. Indeed, given the emphatic nature of the representation and what we know about the development, including Mr Taylor's denial of any direct involvement in what happened, we are of the view that the owners have a reasonable prospect of showing that the first passage was misleading and deceptive.

[55] We note in passing that we are not sure why the owners have chosen not to focus on the quality of design representation. This representation has the advantage (from their point of view) of being a direct representation of a state of existing fact and it certainly is the owners' general contention that the design was not excellent. We refrain from comment as to whether the owners could further amend their claim to pick up the quality of design representation as a discrete issue. Nonetheless, in

construing the particular words in the first passage on which the owners rely, including those that relate to the professionalism of the developer, it is appropriate to look at the context – a context which includes an absolute assertion as to the excellence of the "quality of design".

Do the owners have a reasonable prospect of establishing at trial that the second passage was false (and thus misleading and deceptive)?

[56] The owners maintain that the description of the exterior:

> Plaster system and breathable membrane and substrate

suggests the use of a solid plaster cladding system which is materially superior to the face-sealed Harditex cladding system which was actually used in the development. Further they contend that the reference to a breathable membrane implies that water ingress could be managed.

[57] We consider that there are some difficulties with this aspect of the claim.

[58] In the first place, it is not clear to us that the face-sealed Harditex cladding system was not properly described as a "plaster system on breathable membrane and substrate". Mr Taylor has produced trade literature to show that this language is appropriate to describe the system which was employed. Further, if successful in establishing liability under the Fair Trading Act, the owners will be entitled only to reliance (and not expectation) damages. They would thus have to show that they would have regarded as material the difference between the face-sealed Harditex system which was used and the solid plaster system which they say should have been used. This may be very difficult to establish, particularly as it seems likely that a purchaser who was sufficiently technically aware to regard the difference as material would have recognised from the appearance of the villas that a face-sealed Harditex cladding (or an equivalent) system had been employed rather than a solid plaster system. As well, one of the owners used an architect to supervise construction and this owner may face particular difficulties in relation to this aspect of the claim. Importantly, there is no indication in any of the material we have of any contemporaneous complaint from any purchaser about the exterior.

[59] Although the owners might be thought to have at best limited prospects of success on this issue, we do not see how we could strike out the claim. The owners maintain that the assertion as to the exterior was false. We are not in a position to say that the owners' contention as to this is hopeless. Nor can we rule out the possibility that some of the owners at least may be able to establish a claim to reliance damages based on this representation.

Are a disclaimer in the brochure and exclusion clauses in the agreements for sale and purchase conclusive against the owners?

[60] The brochure contained a disclaimer in these terms:

> DISCLAIMER: The vendor has used its best endeavours to ensure that the information contained in the documents provided with the Form of Agreement for Sale and Purchase of units as Siena Terrace Villas, is correct however neither the Vendor nor the Vendor's agent warrant the correctness of such information and further such information shall not constitute a representation or representations inducing the Purchaser to enter into the Agreement for Sale and Purchase.

As well, special condition 34 of the standard form agreement for sale and purchase was in these terms:

> This Agreement for Sale and Purchase contains all of the agreements between the Vendor and the Purchaser to the end and intent that other than as contained herein no representation or warranty on the part of the Vendor will be implied in this Agreement.

[61] We accept that an appropriately worded disclaimer may be material to the nature of the alleged misleading and deceptive conduct, see for instance *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592. For instance, if all the information in the brochure had been supplied by Mr Taylor, and Barfoot & Thompson had said as much in the brochure and made it clear that they were simply passing that information on, a court would be likely to conclude that the conduct of Barfoot & Thompson was not itself misleading and deceptive. This is illustrated by *Butcher v Lachlan Elder Realty*. To a like effect, in *Goldsbro v Walker* [1993] 1 NZLR 394 at 398 (CA), Cooke P referred to the "fairly obvious proposition" that:

> an innocent agent who acts merely as a conduit and *purports to* do no more than pass on instructions from his principal does not thereby become responsible for anything misleading in the information so passed on.
>
> (Emphasis in original)

[62] The present case is, however, well removed from the conduit line of cases. In particular, it seems likely that most if not all of the information in the brochure came from Mr Taylor. So he cannot sensibly be regarded as a conduit.

[63] It is clear that the prohibition on engaging in misleading and deceptive conduct provided for in s 9 cannot be the subject of contracting out, see for instance *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454 (HC) and *Phyllis Gale Ltd v Ellicott* (1998) 6 NZBLC 102,445 (HC). In any event, neither the disclaimer nor special condition 34 of the agreement for sale and purchase could have direct contractual effect in favour of Mr Taylor. This is because he was not in contract with the purchasers and neither the disclaimer nor special condition 34 are drafted so as to engage the Contracts (Privity) Act 1982.

[64] We are therefore satisfied that the disclaimer and special condition 34 do not provide an absolute bar to the claims of the owners. We will discuss later in this judgment their materiality to causation issues.

Do the owners have a reasonable prospect of establishing at trial that Mr Taylor is responsible under the Fair Trading Act for any deceptive and misleading statements in the brochure?

[65] It seems reasonable to proceed on the basis that Mr Taylor was ultimately responsible for the material which appears in the brochure. The owners have pleaded that Mr Taylor himself thereby breached s 9 or that, in the alternative, he was party to Barfoot & Thompson breaching s 9 and is thus personally liable under s 43, which provides:

> **43 Other orders**
>
> (1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss

> or damage by conduct of any other person that constitutes or would constitute—
>
> > (a) A contravention of any of the provisions of Parts 1 to 4 of this Act; or
> >
> > (b) Aiding, abetting, counselling, or procuring the contravention of such a provision; or
> >
> > (c) Inducing by threats, promises, or otherwise the contravention of such a provision; or
> >
> > (d) Being in any way directly or indirectly knowingly concerned in, or party to, the contravention of such a provision; or
> >
> > (e) Conspiring with any other person in the contravention of such a provision—
>
> the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.
>
> (2) For the purposes of subsection (1) of this section, the Court may make the following orders—
>
> > ...
> >
> > (d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage the amount of the loss or damage:...
>
> ...

[66] Although s 43 addresses civil relief, it is significant that the subsection which directly provides for party liability uses the language of the criminal law, namely "aiding, abetting, counselling, or procuring", cf s 66 of the Crimes Act 1961. And it is perfectly clear that the criminal tests for party liability apply, cf *Yorke v Lucas* (1985) 158 CLR 661 and *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 5 NZBLC 103,834 (HC). It follows that Mr Taylor could not be liable to the owners under s 43(1)(b) unless he knew that the representations in the brochure were untrue. In the course of argument, Mr Rainey acknowledged that the owners would have some difficulty establishing that state of mind against Mr Taylor. For this reason we will focus on the question whether the owners have an arguable case against Mr Taylor on the basis that he was a principal.

[67] Mr Taylor's possible liability as a principal turns on the answers to two overlapping questions:

(a) Is it arguable that the "in trade" requirement is met given that he was acting only as an agent and director of his companies?

(b) Is it arguable that Mr Taylor's conduct associated with the publication of the brochure was misleading or deceptive?

[68] The phrase "in trade" operates grammatically as an adverb, directly applying to the verb "engage". But in practical terms the first question identified comes down to whether the phrase in substance applies to the impugned conduct or rather to both the defendant and the conduct. The argument for the owners on the first question is that s 9 is not confined to the conduct of a person who is trading on his or her own account. We will refer to this as "the broad approach". In contradistinction, counsel for Mr Taylor maintains that as Mr Taylor was not trading on his own account, he cannot have been engaged in trade. In this, he was espousing what we will refer to as "the narrow approach".

[69] Even on the narrow approach, liability under s 9 depends on the impugned conduct having been "in trade". For instance it is self-evident that the driver of a vehicle who signals left but turns right and thereby causes an accident is not liable under s 9 despite being a trader, driving a business vehicle and being on business at the time of the accident, see the comments in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603.

[70] On the other hand, where a person's conduct is "in trade", it could accurately be said that that person is "in trade" engaging in the relevant conduct. This suggests that the requirement that the conduct be "in trade" is not only a necessary precondition, but is also a sufficient basis, for concluding that the defendant "in trade" engaged in that conduct.

[71] "Trade" is defined in s 2 of the Fair Trading Act is in these terms:

> **trade** means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

While this definition is not, in itself, conclusive, it is at least consistent with the broad approach contended for by the owners. The words "profession" and "occupation" can easily encompass a person who is not trading on his or her own account. For instance it could be said of Mr Taylor that his relevant conduct was "in trade" as it occurred in the context of his "occupation" as a senior employee of a property development company.

[72] So the narrow approach rests on the assumption that there is an ellipsis in the drafting of s 9 and that the section should be construed as if it read:

> No person *who is in trade on his or her own account* shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

As to this, reference can be made to two articles written by Professor Watts (the principal academic proponent of the narrow approach), see "Directors' and Employees' Liability under the Fair Trading Act 1986 – The Scope of 'Trading'" [2002] CSLB 77 and "Employee Liability under the Fair Trading Regime: A Lost Opportunity in the High Court of Australia" (2007) 13 NZBLQ 152.

[73] It is also necessary to refer to s 45(2), which relevantly provides:

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

Section 45(3), which addresses related issues in the case of a principal who is not a body corporate, is in similar terms. In some of the cases, the word "also", which we have emphasised, has been taken as presupposing that where a body corporate incurs

liability by reason of the conduct of its agent or director, both the body corporate and the agent and director are responsible, see for instance the comments of Tipping J in *Megavitamins* at 103,838. On the other hand, as proponents of the narrow view have pointed out, the provenance of s 45(2) rather detracts from the significance which can be placed on the use of the word "also". The Fair Trading Act is largely based on provisions which first appeared in Trade Practices Act 1974 enacted by the Commonwealth of Australia. These provisions apply directly only to corporations and thus cannot impose direct liability (ie as a principal) on someone who is a director or employee. As to this, see the two articles by Professor Watts already referred to and also Wilson and Trotman "Personal Liability of Directors under the Fair Trading Act" (2006) 12 NZBLQ 201. It is right to recognise, however, that the force of this argument is somewhat diminished by the reality that by reason of s 6 of the Trade Practices Act, s 52 sometimes applies to natural persons (being natural persons who are otherwise subject to federal jurisdiction).

[74] So far the courts in New Zealand have held that liability under s 9 (or its equivalents) can extend to a defendant who was not trading directly on his or her own account, but rather was acting as a director or senior employee, see for instance *Megavitamins* at 103,844-103,845, *Gloken Holdings Ltd v The CDE Ltd* (1997) 8 TCLR 278 (HC), *Kinsman v Cornfields Ltd* (2001) 10 TCLR 342 at [27] (CA) and *Specialised Livestock Imports Ltd v Borrie* CA72/01 28 March 2002 at [27] (CA) although cf the comments in *Newport v Coburn* (2006) 8 NZBLC 101,717 at [56]. Reference can also be made to the judgment of this Court in *Giltrap City Ltd v Commerce Commission* (2003) 10 TCLR 831 at [51] – [56], a case which concerned similar provisions in the Commerce Act 1986. Significantly, the same approach has been taken by the High Court of Australia, see *Houghton v Arms* (2006) 225 CLR 553. If *Kinsman*, *Borrie* and *Houghton v Arms* were correctly decided, the first of the questions identified in [67] above must be answered adversely to Mr Taylor.

[75] The broad approach has been criticised by both Professor Watts and Wilson and Trotman in the articles which we have already cited and also by Beck "Misleading Business Sales: Who Foots the Bill?" [2002] CSLB 81. This Court in *Newport v Coburn* indicated (at 101,725) that the views of Professor Watts "may

have some validity". It is therefore appropriate that we review the arguments expressed by those who favour the narrow approach.

[76] Broadly (and to the extent that they are material to the New Zealand legislation), these arguments are along the following lines:

(a) For reasons already given, the word "also" in s 45(2) is not of controlling significance in favour of the broad approach.

(b) The provisions as to accessory liability either indicate a legislative intention to specify the circumstances in which employees and directors are liable (effectively only where they act dishonestly) or at least provide a basis upon which unmeritorious employees/directors can be held to be liable. The broad approach cuts across these provisions.

(c) Given the absolute nature of liability under s 9, the broad approach favoured by the owners has the potential to render employees (perhaps quite junior) sureties for the accuracy of representations that they make on behalf of their employers. While some amelioration may be possible in circumstances in which the employee is a mere conduit for representations which originate elsewhere, it will not protect an employee who was responsible for the error. Nor will the sort of responsibility for an error which would be inconsistent with the conduit defence necessarily mean that the employee was careless as the employee's error may have been reasonable. The broad approach cuts across accepted concepts of limited liability and has the tendency to expose employees to unexpected liabilities which are unlikely to be covered by insurance.

(d) A narrow approach which excludes employees from liability would be consistent with the usual rule, already discussed, that an employee cannot generally be sued for negligent representations made on behalf of his or her employer. The relevant line of authority was not

addressed in *Houghton v Arms* where the Court cited *Standard Chartered Bank* but not *Williams* or *Trevor Ivory*.

(e) The imposition of direct liability on employees is not justified by consumer protection considerations to cover the contingency that the employer may have no resources. As to this, Professor Watts observed (2007) 13 NZBLQ 152 at 158:

> There is something to be said for the view that the privileges of incorporation and limited liability are too freely available. But that problem should not be cured with a solution that imposes strict liability on employees, and that makes victims of the staff of companies that were adequately capitalised but have fallen unexpectedly on hard times.

(f) The discretionary nature of relief under the Fair Trading Act does not justify the rough edges associated with a broad approach to s 9. In the first place, s 9 is based on Australian statutes under which damages are available as of right and the section presumably was intended to have the same meaning as the corresponding provisions in the equivalent Australian legislation. Secondly, it is not right to leave the "exculpation" of employees to judicial discretion.

[77] These arguments are plainly cogent but they are not of compelling significance:

(a) The narrow approach is not consistent with the words which actually appear in s 9. The definition of "trade" might be thought to favour the broad approach. And s 45(2), although not a decisive consideration, is at least consistent with the broad approach. On the broad approach the accessory liability provisions still have a role to play in circumstances where the impugned conduct cannot be attributed directly to the defendant. Indeed, where the conduct of the director/employee infringes s 9, the language of s 43(1)(b) ("aiding, abetting, counselling, or procuring") is far from apt, see for instance the comments of Lord Rodger of Earlsferry in *Standard Chartered Bank* at 971. There is thus nothing in the wording or scheme of the

statute which dictates the conclusion that there was a drafting flaw in s 9 as contended for by Professor Watts and other proponents of the narrow approach.

(b) The risk of unexpected and unacceptable liabilities being imposed if the broad approach is adopted has been over-stated. The only cases in which the broad approach has been applied have involved senior employees. In *Gloken*, for instance, the defendant was described as the "alter ego" of the company. Senior employees are likely to be able to arrange insurance to cover the risk of litigation under the Fair Trading Act. In contradistinction, plaintiffs may not have been in a position to obtain insurance in relation to their losses. Further, the broad approach does not mandate the conclusion that particular misleading or deceptive conduct in which a director or employee participated necessarily amounts to conduct on the part of that director or employee which was misleading and deceptive. We will revert to this point when we discuss the second of the two questions referred to in [67] above. If the courts keep steadily in mind the requirement that a plaintiff must point to conduct of the defendant which is, in itself, misleading and deceptive, the scope for unexpected and unacceptable outcomes is much diminished. As well, the discretionary nature of relief provides a further safeguard.

(c) While it is right that the judgment in *Houghton v Arms* did not substantially address the general rule that employees are not liable for negligent misrepresentations, the *Trevor Ivory* line of cases was referred to in *Kinsman*. So it is not a situation where the New Zealand courts have overlooked the tension between the *Trevor Ivory* approach to negligence and a broad approach to liability under s 9. Indeed, and in defence of the judgment of the High Court of Australia in *Houghton v Arms*, that Court presumably cited the *Standard Chartered Bank* case and not *Williams* because an assumption of responsibility was not an element of the statutory tort under consideration.

(d) Obviously the Fair Trading Act cannot be applied in a legal vacuum. The policy reasons which have resulted in the common law developing in particular ways may well have a bearing on its proper interpretation. But equally obviously the Fair Trading Act changed pre-existing legal principles. There is nothing in the Act to suggest that in relation to representations made by employees and directors, s 9 is confined to circumstances in which the common law would impose liability in negligence or fraud. Further, given the extraordinarily broad and untechnical language of s 9, there is no reason to suppose that a person who engages in misleading or deceptive conduct in trade is exempt from liability if that person was acting on behalf of another legal entity.

[78] At this point, the issue comes down to competing policy considerations: on the one hand, consumer protection considerations which are best served by a broad approach to liability; and on the other, the undesirability of imposing unexpected liabilities on employees (along with an associated weakening of the usual protection afforded by limited liability status). Although both the broad and narrow approaches are tenable, we see no reason why we should depart from the broad approach given its congruity with the words of the statute, the most recent and authoritative Australian decision on similar legislation and, most significantly, the pattern of New Zealand authority, including judgments of this Court.

[79] The second of the questions we posed in [67] above is whether it is arguable that Mr Taylor's conduct associated with the publication of the brochure was misleading or deceptive.

[80] The brochure was ostensibly issued by the vendor (Strata Grey Lynn) and Barfoot & Thompson. But it seems reasonable to assume (albeit only for the purposes of this appeal) that Mr Taylor provided the information which formed the basis of the brochure and approved its contents before it was released.

[81] In the *Megavitamins* case, Tipping J looked for actions on the part of the director which involved, in substance, the making of a representation by the director

personally. So labels on products produced and marketed by the company which did not mention the director at all did not relevantly involve representations made by the director. On the other hand, the release of a company brochure which had on it a photograph of the director and noted that the brochure had been "researched and compiled by" by the director could be regarded as involving conduct on the part of the director. In *Megavitamins*, there was no face to face contact between the director and the consumers of the company's products and no direct evidence as to the role of the director in the preparation of the labels. Further, the individual labels were not intrinsically false. What made them false was that they were attached to containers of product which did not meet the label claims as to content. So the case against the director in relation to the label claims was far from compelling.

[82] In *Kinsman*, this Court observed (at [27]):

> It will be a rare case where a director who participates directly in negotiations as to his or her company's business will be able to avoid s 9 liability simply on the basis that he was acting only on the company's behalf.

In that case, of course, as the passage we have cited suggests, the director had been involved in face to face negotiations with the parties to whom the key representations had been made, a situation which was quite different from that in *Megavitamins*. Where a case concerns pre-contractual representations (as *Kinsman* did), the director/senior employee making the representations might be thought, by implication at least, to be inviting the other party to believe him or her, albeit not necessarily inviting reliance on his or her "pocket-book", cf the comments of La Forest J in *London Drugs* at 387.

[83] In *Specialised Livestock Imports Ltd v Borrie* CA72/01 20 September 2002, this Court reviewed very carefully the particular representations made by each of the directors to each of the plaintiffs. The directors were held to be liable for the representations each made or adopted and the Court did not accept that the two directors who were less involved in the business than the third were mere conduits. The drift of the judgment perhaps suggests that a director who was actually responsible for written representations made by the company (eg wrote a letter or brochure) would have been liable even if those representations did not involve a

personal endorsement by that director. This, however, is not spelt out explicitly in the decision and thus possible difficulties with this approach are not discussed.

[84] The present case is similar to *Megavitamins* in the sense that there are references to the director in the brochure. The "principal" of the developer is Mr Taylor. The brochure emphasises the importance of "the strength and experience of the person you are dealing with". That person is plainly Mr Taylor. The workmanship representation is closely linked to the proclaimed "professionalism" of the developer. In this context it is arguable that the reference to "developer" should be taken to be a reference to Mr Taylor given that the references to prior successful developments refer to projects in which he, but not Strata Grey Lynn, had been involved. Although the element of personal endorsement is not as strong as in *Megavitamins*, it is still there. And therefore, on the *Megavitamins* approach, it is at least arguable that the issue of the brochure (and thus any misleading or deceptive statements it contained) can fairly be regarded as conduct on the part of Mr Taylor.

[85] On the perhaps less strict approach which is at least implicit in *Borrie*, it would probably be sufficient to establish liability if Mr Taylor was directly and causally involved in the issuing of the brochure, as he would have been if he supplied all the information which went into it and had approved it being made available to prospective purchasers. We accept that it may be arguable that conduct of this sort ought not to be attributed to Mr Taylor personally, at least vis-à-vis him and the purchasers. But given the conclusion just reached as to personal endorsement and what we are about to say in relation to the position as between Mr Taylor and Barfoot & Thompson, we see no need to express a definitive conclusion on this point.

[86] As just suggested, there is a further but closely associated basis on which Mr Taylor might be liable. Assuming he supplied the relevant information to Barfoot & Thompson, his actions in doing so could themselves be treated as the relevant conduct for the purposes of s 9. Because of the likely face to face or direct involvement of Mr Taylor in what happened, it would arguably be legitimate to attribute this conduct to him. If so, and if the information was misleading and deceptive, Mr Taylor would thus have engaged in conduct which was misleading and

deceptive in breach of s 9. Given that Barfoot & Thompson then passed that information on to the prospective purchasers, there would arguably be a sufficient causative link between his actions vis-à-vis Barfoot & Thompson and the alleged misleading of the prospective purchasers to enable them to seek compensation under s 41. This indeed is the primary focus of the owners' case as pleaded, albeit not as argued.

[87] We conclude that the second question identified in [67] must also be answered against Mr Taylor.

Do the owners have a reasonable prospect of establishing at trial that loss was caused by any deceptive and misleading statements in the brochure?

[88] The brochure was clearly prepared for the purpose of encouraging potential purchasers to buy units in the development. The statements in the brochure on which we have focused (but particularly the workmanship representation) were part and parcel of that purpose and it is likely that they either did or may have played a part in the decision-making processes of those who, in the end, purchased units. There is thus nothing inherently implausible in the causation element of the owners' case.

[89] Mr Taylor, however, relies on two interlocking considerations as showing that causation cannot be established. The first is that the representations were just sales puffery and could not reasonably be relied on. The second is that the disclaimer and special condition 34, set out at [60], show that it would have been unreasonable for potential purchasers to rely on them.

[90] Sales puffery is not, in itself, exempt from the operation of the Fair Trading Act. Obviously some language used in marketing is not intended to, and could not sensibly, be taken literally. For instance, the phrase "peerless views" when used of a house is not rendered false merely because the same views are available from the adjoining property. It is all a matter of substance. In this case, the key language as to the "standard of workmanship" refers to a concept which is not the usual stuff of puffery but rather could perhaps fairly be taken literally. Language which is

intended to influence decision-making (as that used in the brochure plainly was) may be properly regarded as being subject to the Fair Trading Act.

[91] While disclaimers may be relevant to reliance and thus causation, the primary focus must be on the substance of the conduct at issue. In *Butcher v Lachlan Elder Realty* a brochure prepared by a real estate agent contained a survey plan on which the mean high water mark was incorrectly located. The disclaimer in that case reinforced what might be thought to have been obvious, namely that all the real estate agent was doing was reproducing material which the vendor had supplied. For that reason the actions of the real estate agent were not misleading. But in this case, the key information must have originated with either Barfoot & Thompson or Mr Taylor. The reality is that the brochure did make representations and that reality is not necessarily undone by a broadly expressed disclaimer of the kind which appears in the brochure or special condition 34. Whether the key representations were misleading and deceptive and, if so, whether they were causative in terms of the losses suffered by the owners must be determined at trial.

[92] We note in passing that the owners may need to give some thought to the way in which relief is sought in relation to the Fair Trading Act claims, as any damages will have to be assessed on a reliance and not an expectation basis.

Drawing the threads together

[93] We are of the view that the claim under the Fair Trading Act (except in respect of the alleged representations as to the identity and substance of the developer) is tenable and not susceptible to strike out. We are also of the view that the claim based on the asserted non-delegable duty is untenable and must be struck out. But we have rather more difficulty with the claim based on a general duty associated with Mr Taylor's control of the development and what was said in the brochure.

[94] On this point it is right to refer first to the judgment of this Court in *Attorney-General v Prince* [1998] 1 NZLR 262 at 267-268:

> 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 Geotherm 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*).
>
> Mr Chambers QC for the respondents submitted that the Courts should be very slow to rule on novel categories of duty at the striking-out stage. Where the hypothetical facts cover a range of factual possibilities, deciding wide public policy questions may lead to an unfocused approach because the inquiry is then set against too broad a factual canvas. And empirical evidence and other expert evidence properly tested may help the Court in making the right public policy choices.
>
> There is force in these submissions, highlighted by the application by the Solicitor-General to admit evidence as to the current resources and responsibilities of the department and present social work practices and accountabilities. It is only where, on the facts alleged in the statement of claim, and however broadly they are stated, no private law claim of the kind or kinds advanced can succeed that it is appropriate to strike out the proceedings at a preliminary stage. And in that assessment the public policy considerations must be solidly founded in the relevant legislation, other relevant material, or the experience of the Courts. In some cases aspects of policy may require the kind of analysis and testing of expert evidence, including evidence of economic and social analysis, that is available only at trial. In other cases, policy considerations are patent. They may be explicit or implicit in the relevant legislation. They may be reflected in other areas of the law. Or the Courts may feel the considerations are readily identifiable and capable of evaluation and need not be the subject of evidence to be tested at trial.

We take the view that these considerations (or at least closely allied considerations) are relevant here. Similar points can be made in relation to the judgment of the Supreme Court in *Couch*.

[95] The events which gave rise to the *Trevor Ivory* case occurred in 1985, prior to the enactment of the Fair Trading Act. Had they occurred after the Act came into effect, the plaintiffs would have had a very respectable case against Mr Ivory to the effect that he had engaged in misleading and deceptive conduct by representing that "Roundup" could be safely applied to their raspberry canes and was thus liable under s 9. Under the authorities which we have discussed, it would not have been an

answer to such a claim that he had been trading through the limited liability company with which the plaintiffs contracted for advice. Similar comments can be made about *Williams*.

[96] It would be open to the courts to hold the line in relation to the *Trevor Ivory* approach. This might be associated with a retreat from the way in which the Fair Trading Act has been applied. Alternatively, the courts might in the end simply conclude that anomalous differences between the operation of s 9 and the principles which apply to negligence cases are unavoidable. But it would likewise be open to the courts to take the view that the broad approach to s 9 has undercut the policy premises underpinning *Trevor Ivory*. For instance, the width of the jurisdiction under s 9 may result (or may already have resulted) in changed insurance practices – something which may warrant reconsideration of what is required to justify imputation of an assumption of responsibility. At this point it is worth harking back to the phrase used by La Forest J in *London Drugs*, "reasonable reliance on the employee's pocket-book". Given that an employee who engages in misleading and deceptive conduct in trade is putting his or her pocket-book on the line (at least on the broad approach which we have discussed), that sort of "reasonable reliance" may be much easier to establish than it was in the past.

[97] In the end, the answer to the questions associated with the negligence claim will have to be very fact-specific. Because we do not know the exact detail of the role and conduct of Mr Taylor, we are required to deal with this case in a frustratingly abstract context. Further, an analysis of the relevant policy considerations will necessarily be more complete if it occurs in the context of factual findings which the trial Judge will be in a position to make. And, as foreshadowed in the passage we have cited from *Prince*, there is also more scope at trial than there is in this Court on a strike-out appeal for evaluation of the competing policy considerations.

[98] In those circumstances, we are of the view that the negligence claim against Mr Taylor should not be struck out.

Disposition

[99] Accordingly:

(a) The appeal is allowed and the claim in negligence (other than the claim based on a non-delegable duty) is reinstated.

(b) The cross-appeal is allowed but only to the extent that the Fair Trading Act 1986 claim associated with alleged representations as to the identity and substance of the developer is struck out.

(c) Mr Taylor is to pay to the owners costs of $6,000 together with usual disbursements.

GLAZEBROOK AND ELLEN FRANCE JJ

(Given by Ellen France J)

Introduction

[100] We have had the advantage of reading in draft the judgments of William Young P and Chambers J. For the reasons given by William Young P, we agree that the appeal should be allowed.

Fair Trading Act 1986

[101] We also agree that the cross-appeal should be allowed to the extent set out in the judgment of William Young P. However, we take a different view on the approach to the meaning of "in trade" in s 9 of the Fair Trading Act 1986. We prefer the narrow approach, which confines s 9 to the conduct of a person trading on his or her own account. We do not agree that this approach requires the words "on his or her own account" or similar to be read into s 9 (see [72] above). Rather, we consider the narrow approach follows as a matter of interpretation of the relevant definitions

taking into account the scheme and purpose of the Act. We expand on our reasons below.

The relevant definitions

[102] "Trade" is defined in s 2(1) as meaning "any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services". We consider that this definition, taken as a whole, favours the narrow approach. First, we suggest that the inclusion of a range of terms is designed to ensure that there is no room to argue that particular types of undertaking were excluded. For example, the inclusion of "profession" avoids any argument that some professionals are not "in trade".

[103] Second, we see it as of some significance that the term "employment" is omitted given the range of activities covered. Professor Watts makes this point in "Employee Liability under the Fair Trading Regime: A Lost Opportunity in the High Court of Australia" (2007) 13 NZBLQ 152 at 156 and see also Watts "Directors' and Employees' Liability under the Fair Trading Act 1986 – The Scope of 'Trading'" [2002] CSLB 77 at 79.

[104] Third, the narrow approach better accords with the definition of "business". That term is further defined in s 2(1) as meaning any undertaking:

> (a) that is carried on whether for gain or reward or not; or
>
> (b) in the course of which–
>
> (i) goods or services are acquired or supplied; or
>
> (ii) any interest in land is acquired or disposed of–
>
> whether free of charge or not.

[105] Finally, we consider that, on either the broad or the narrow approach, the use of the word "trade" means both that the person must be in trade and acting in the course of it. The broad approach conflates the two concepts, that is, being "engaged in trade" and being "in trade".

The scheme of the Act

[106] In our view, the scheme of the Act also suggests that the narrow approach be adopted. That is apparent from the fact that provision is made for secondary liability. The secondary liability provisions would cover a very narrow range of activities if anyone within the business at issue came within the principal liability provisions such as s 9.

[107] Section 43(1)(b) empowers the Court to make orders where the Court finds a person has suffered loss or damage through the conduct of another which constitutes "aiding, abetting, counselling or procuring" the breach of s 9 (for example). One commentator (Pengilley "The New Zealand Fair Trading Act: The Likely Impact of the Law and Commercial Conduct in Light of Australian Experience" [1987] NZLJ 59 at 61) describes this section as "particularly important" in at least two ways, namely:

> Firstly, an individual cannot hide behind corporate skirts. Secondly, so far as damages actions are concerned, directors and others, if they are appropriately involved, can be sued personally.

[108] Section 45 deals with "Conduct by servants or agents". Section 45(1) makes it plain that if it is necessary to establish the state of mind of the body corporate, it is sufficient to show that the director had that state of mind.

[109] Section 45(2) deals with the other side of the coin and makes it plain that conduct engaged in on behalf of the body corporate by a director, servant or agent acting within the scope of his or her authority is deemed "to have been engaged in also by the body corporate". The focus is on the attribution of the conduct of servants and agents to the body corporate rather than the creation of liability. It follows that we do not attach any particular significance to the use of the word "also" in s 45(2) (contrast: for example, *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 5 NZBLC 103,834 at 103,838 (HC) and *Kinsman v Cornfields Ltd* (2001) 10 TCLR 342 at [19] (CA) where the courts, in adopting the broad approach, have relied in part on the use of "also" in s 45(2)).

[110] Because, on our view, it is not necessary to read in any words to s 9, there is no question of inconsistency between the narrow approach and the use of the term "in trade" elsewhere in the Act.

[111] Finally, in terms of the statutory scheme overall, there is some material which suggests that the narrow approach is also consistent with the legislative history of the Act both here and in Australia.

[112] There are suggestions in the parliamentary debates that Parliament had the narrow view in mind when it enacted the Fair Trading Act. When introducing the Fair Trading Bill into the House, Hon Margaret Shields (Minister of Consumer Affairs) described the Bill as dealing with the "law relating to trading conduct" ((7 November 1985) 467 NZPD 7884):

> The Bill represents a significant step in the implementation of the Government's policy to consolidate and revise the *law relating to trading conduct* and to make provision for product safety.
>
> (Emphasis added)

Similarly, at 7885 the Minister said:

> [T]he Bill will also enhance the position of *ethical traders* in relation to the unfair competition that results from deceptive advertising and other conduct.
>
> (Emphasis added)

[113] See also the similar observations of Mr Peter Neilson when delivering the report of the Commerce and Marketing Committee ((1 July 1986) 472 NZPD 2499), Hon Margaret Shields in the second reading debate ((31 July 1986) 473 NZPD 3283) and again in the third reading debate ((11 December 1986) 476 NZPD 6087).

[114] When the Fair Trading Bill was introduced into Parliament an explanatory booklet was produced to explain the legislation: Department of Trade and Industry *Fair Trading Bill 1985: Explanatory Booklet* (1985). A focus on traders is apparent in the summary of s 9 at 12:

> The aim of the provision is to *set a new legal standard for trading conduct* in New Zealand. That standard requires that consumers and others affected by

> conduct in trade have the factual information they need to make an informed choice as to what goods, services and land they purchase.
>
> (Emphasis added)

[115] In terms of the Australian legislation, Professor Watts refers to what he describes as "[p]owerful" support for the view that it was to traders, not their employees, that the Australian Acts were directed from the Minister's second reading speech to the Victorian Parliament in introducing the Fair Trading Act (Vic): "Employee Liability for Misleading and Deceptive Conduct in Trade – *Houghton v Arms*" (2007) 29 Aust Bar Rev 105 at 107. The excerpt Professor Watts relies on is set out at 108 and is as follows:

> The reason for the introduction of the existing Fair Trading Act 1985 in Victoria was pursuant to an agreement between all states to extend the coverage of laws prohibiting a wide range of deceptive or misleading practices based on relevant provisions of the commonwealth's Trade Practices Act 1974 to non-corporate traders – that is, individuals and partnerships – trading within Victoria over which the Trade Practices Act has no jurisdiction.

Policy considerations

[116] Given the strict liability imposed by s 9, we consider the broad approach is undesirable in policy terms. Professor Watts makes this point at 154 of the NZBLQ article cited above ([103]). It cannot be the case that strict liability be imposed for innocent employees if acting merely in the course of trade whether on their own behalf or on behalf of another. It is true, as William Young P points out (at [77](b)), that the risk of unexpected liabilities has not yet been borne out. However, where strict liability is imposed, employees should not have to rely on a benevolent approach to avoid those risks.

[117] One possibility is that s 9 applies only to catch senior employees or directors. That was the approach adopted by McGechan J in the High Court in *Cornfields Ltd v Gourmet Burger Co Ltd* HC PMN CP1/99 1 December 2000. McGechan J said at [37] that he would follow the approach taken in *Gloken Holdings Limited v The CED Co Limited* (1997) 8 TCLR 278 at 286 (HC) and equate directors "who are the alter-ego of a company with the company itself so far as being 'in trade' is concerned": at [37].

[118] That approach would ameliorate some of our concerns about the broad approach. However, it does involve piercing the corporate veil in a situation where the need to do so is uncertain given that the same effect can be achieved under the secondary liability provisions for those who are knowingly misleading. Also, if the Act was intended to make such a distinction it seems likely that this would have been done explicitly. For these reasons, we do not favour this approach.

The current state of the law

[119] The authorities to date do not support the narrow view. The drift of the cases is explicable in part by the view taken of s 45(2) (*Megavitamin* and *Kinsman*). (For the reasons given at [109] above, we take a different view of the impact of s 45(2).) It is also relevant that, on their facts, the imposition of liability was not surprising, even on a narrower approach. In *Specialised Livestock Imports Ltd v Borrie* CA72/01 28 March 2002 the focus was primarily on the facts. Finally, in rejecting the narrow approach, the High Court of Australia in *Houghton v Arms* (2006) 225 CLR 553 was faced with a choice between liability for directors, agents and employees under the equivalent of s 9 or no liability at all. That is because at that time there was no equivalent to s 43(1) in the Victorian Act. Whether that rather stark choice influenced the High Court of Australia is unclear but it is certainly not the choice here.

[120] As to whether in terms of *R v Chilton* [2006] 2 NZLR 341 at [83]-[90] (CA) the Court now should depart from its earlier authority it is relevant that those cases are relatively recent and the matter has only now been considered fully by a bench of five. However, doubts had been expressed by this Court in *Newport v Coburn* (2006) 8 NZBLC 101,717 at [56] and those doubts reflect a considerable body of academic criticism. Further, the change we propose would not alter matters fundamentally because of the accessory liability under s 43. For these reasons, we would overrule the previous decisions. In our view, the narrow approach best accords with the relevant definitions, and with the scheme and the purpose of the Act as a whole especially given the provision for agents and accessory liability.

Conclusion

[121] In the present case, the appellant argues that on the facts Mr Taylor should be considered to be "in trade" regardless of whether the narrow or the broad approach to "in trade" is applied. Mr Rainey points to evidence which, the appellant says, suggests that Mr Taylor made it clear that he conducted his property development business through his companies and not the other way around. The matter is not pleaded in that way but we agree with the majority that these are issues to be determined at trial.

CHAMBERS J

Negligence

Introduction

[122] We sat as a court of five as the appellants advised they wished to challenge the decision of this court in *Trevor Ivory v Anderson* [1992] 2 NZLR 517. But to my mind the problems with which this court grappled in *Trevor Ivory* do not arise in the present case. I prefer not to deal with *Trevor Ivory* until we really have to. It raises much bigger questions, including the vexed problem of concurrent liability in contract and tort, a problem which does not arise in the present case. It is, in my view, unwise to grapple with these difficult legal issues when one does not have to, especially on a strike-out application. The Supreme Court has recently reinforced the undesirability of dealing with substantial legal questions on assumed facts: *Couch v Attorney-General* [2008] NZSC 45.

Why the claims against Mr Taylor must be allowed to proceed

[123] I see this case in very simple terms. The appellants are up to their sixth amended statement of claim. Those pleadings have been drafted in order to conform, if possible, with *Trevor Ivory*. In my view, that was unnecessary, but, in any event, I do not regard the present form of the pleadings as in any way an

inhibiting factor. Rather, what matters is the underlying factual assertions against Mr Taylor.

[124] In essence, the appellants allege that Mr Taylor was the person who made all the decisions as to how the villas were to be built. They allege he fixed the budget; he was personally involved in the preparation of the plans and specifications; he chose the exterior cladding system; he selected the sub-contractors and told them how to undertake their part of the overall construction; he inspected the villas during construction. The appellants say he did this work carelessly and that his negligence is the cause of the damage the appellants have sustained. At present, these allegations are spread across and largely repeated in two causes of actions. That has come about because of a perceived need to comply with *Trevor Ivory*. If my view were to prevail, only one cause of action in negligence would be required, a cause of action based simply on what Mr Taylor is alleged to have done as builder and developer.

[125] The law in New Zealand is clear that if a builder carelessly constructs a residential building and thereby causes damage, the owners of the residential building can sue the builder in negligence. (I ignore for the present what kinds of damage the builder can be liable for; in the present case, there is no dispute that the damage the appellants have sustained is damage of a kind for which the New Zealand law of negligence will provide compensation.) That is really the long and the short of it. If Mr Taylor were self-employed, no one would have a moment's doubt about the propriety of the appellants making the above allegations against him. It should make no difference whether or not he was employed at the time he allegedly did these careless things. The only relevance of his being employed is that his employer or employees may be vicariously liable for his tort committed in the course of employment: Isac and Todd "Directors' Torts" in Rowe and Hawes (eds) *Commercial Law Essays: A New Zealand Collection* (2003) 39 at 50 and the cases there cited. He and the employer would be joint tortfeasors.

[126] All of this was stated with admirable clarity by Hardie Boys J in *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 (HC). In that case, four flats suffered damage due to the subsidence of the foundations. The flat owners sued the building

company, two of its directors, the local authority, and the engineer. Hardie Boys J made it clear that, if the company directors had personal control over the building operation, they could be personally liable. His Honour said at 595:

> The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control.

[127] To similar effect is the Supreme Court of Canada's decision in *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 SCR 299 at 404-406. In that case, the Supreme Court had no difficulty in holding that employee warehousemen owed a duty of care to the appellant in their handling of its transformer.

[128] In short, there is nothing in principle preventing a builder owing a duty of care to subsequent owners of the building. Of course, in the present case, Mr Taylor did not "build" the villas on his own. Others will have helped. But that will not prevent Mr Taylor being liable in negligence. It is enough if *his* conduct "is a contributory cause; [it does not need to be] in some sense a main or primary cause": see Todd (gen ed) *The Law of Torts in New Zealand* (4ed 2005) at [21.2.02].

[129] It is on that simple basis that I would allow the case against Mr Taylor to proceed in negligence. In my view, Keane J was wrong to strike out the negligence claim. His error, however, was entirely understandable given the confusion in this area of the law.

Why does the law appear to be so complicated?

[130] Much of the confusion in this area of the law stems, I think, from a failure to appreciate the different functions of the law of contract and the law of torts. The confusion is heightened in cases where, at the relevant time, one or both of the parties are employed by a company.

[131] Where a person (A) enters into a contract with another (B) and makes it clear he or she is entering into that contract on behalf of a company, it is right that, generally speaking, only that company should be liable on the contract. B, after all, does not have to enter into the contract on that basis. If B wants A to be the other contracting party, B can raise that possibility with A. If A agrees, well and good. If A does not agree, then there is no contract. Alternatively, A may agree to guarantee the company's promises. Whatever is arranged, however, is consensual and everyone knows who is making the promises which form the contract.

[132] The law of torts is different. The victim of a tort often does not even know the identity of the tortfeasor prior to the tort's commission. That is almost certainly the case in the present dispute. One suspects that many, if not most, of the villa owners who have suffered (financial) harm did not know, prior to that harm's occurrence, who caused the harm. Once they discover, however, who caused the harm, they can sue that person and will recover against him or her if they can establish he or she was negligent. The primary tortfeasor is the *natural person* whose acts or omissions led to the harm in question. It is possible that the net of defendants might be widened to include others, such as employers or principals. The doctrine of vicarious liability is the means by which the law widens the net. But the primary focus is nonetheless on the individual or individuals whose acts or omissions caused the harm. It is right that the law of torts focuses on them, as a primary purpose of the law of torts, and in particular the tort of negligence, is to deter careless conduct. All of this is very elementary, but it is at the heart of the present appeal.

[133] Some of these elementary propositions get lost sight of in many tort proceedings. In most negligence cases, for instance, it is not normal to plead who owes the duty of care, why it is owed, and its scope. That is because it is so clear in most cases that the defendant owed a duty of care that no one ever bothers to plead it. For instance, in standard car crash litigation, the plaintiff generally pleads simply the other motorist's acts of negligence. It is taken as read that the defendant motorist owed a duty of care to other road users when driving his car. Almost always, there is no dispute about the duty of care (although it remains an element of the tort); the

entire focus is on the breach and whether the defendant's acts measured up to the standard of care demanded by the circumstances.

[134] The plaintiff in these cases does not care in what capacity the defendant was acting when he drove his car negligently into the plaintiff's car. It makes no difference to the plaintiff and his or her entitlement. Of course, if the defendant was acting in the course of his or her employment at the time of the crash, then it may be the plaintiff can look as well to the defendant's employer. But that does not disguise the fact it is still the defendant motorist's tort on which the plaintiff is suing. There will be times, of course, when the employer owes his or her own duty of care as well. See *Couch* at [30] and [74].

[135] Frequently too the plaintiff will often sue only the employer, even though the claim, if properly analysed, is a claim based on an employee's negligence. There may be any number of reasons why the plaintiff sues just the employer: the employer will usually be perceived to have deeper pockets; the employer may often be insured; the harm may be the result of several different employees' wrongful acts; the plaintiff may not know the specific employee or employees whose acts have caused the harm. Generally the employer takes no point about its alone being sued. Again, there are a number of reasons why that may be the case: the employer knows that, in the circumstances, it will be lumbered in any event with responsibility for an employee's wrongdoing (if proved) by virtue of the doctrine of vicarious liability; the employer may want to be seen in its workforce as standing behind its employees; the employer's insurance policy may cover liability for not only the company's own wrongdoing but also employees' wrongdoing. So the question of who precisely owed the duty of care and its scope is glossed over. Judges when writing reasons for judgment quite rightly gloss over details of this kind which are immaterial to the issues they are resolving. In the present case, however, we cannot gloss over this point, as it is the point on the appeal.

[136] Once these elementary propositions are brought into focus, it becomes clear as to why this is not a case of transferring responsibility from Mr Taylor's company to him; rather, it is a question of whether there is a means by which Mr Taylor can

not only share liability with his company but also remove liability for his alleged negligent acts from his own shoulders.

[137] This case therefore does not give rise to the difficult problem which arose in *Trevor Ivory*. There Mr Ivory gave the advice, which turned out to be negligent, only because the plaintiffs had contracted with Trevor Ivory Limited to provide horticultural advice. His acts were done entirely in fulfilment of the contractual promise made by his company. That is not the basis upon which the appellants are suing Mr Taylor. They are suing him as a negligent builder. Many of the appellants have no contractual relations with any of Mr Taylor's companies.

[138] But, I hear some readers say, some did buy from Strata Grey Lynn Limited: don't at least those appellants face an *Trevor Ivory* problem? I think not, for the following reasons.

[139] First, it was not that company whose hat Mr Taylor was wearing when he did his allegedly negligent acts.

[140] Secondly, we do not, at this stage, know the dates or terms of the respective agreements for sale and purchase. It may well be that, at least in some cases, Mr Taylor's assumed negligent work had already been done before the relevant agreement was entered into. In no way, therefore, was the work done pursuant to the particular agreement for sale and purchase. By the agreement, all Strata Grey Lynn was promising to do was convey land on which a villa had already been erected.

[141] Thirdly, even if at the date of a particular agreement the negligent work had yet to be done, Strata Grey Lynn presumably did not undertake to do the building work. It was never the builder in any sense. All it would have done was undertake to convey to the purchaser a particular estate of land on which there would be, by the time of settlement, a villa which would have certain attributes.

[142] Fourthly, in any event, Mr Taylor has not pointed to any contractual provision purporting to exclude his liability for negligence: see Todd at [22.5.03].

The disclaimer in the brochure (cited by the President at [60] above) does not purport to protect Mr Taylor from liability in negligence.

[143] Reference to the brochure leads me to my next point. The brochure appears to be a key element in the President's finding that Mr Taylor might be liable in negligence: see, for example, at [43] above. The brochure, and Mr Taylor's possible role in it, play no part in my reasoning. If Mr Taylor is liable in negligence, it will be because the owners can prove he did the things alleged (or some of them) and that those things caused the (financial) loss to the owners. Liability will not hinge in any way on the brochure or whether the particular owner saw it.

[144] I should also mention *Williams v Natural Life Health Foods Limited* [1998] 1 WLR 830 (HL), a decision to which the President refers at length. It, like *Trevor Ivory*, was a negligent misstatement case, not a case in pure negligence such as is pleaded here. Negligent misstatement cases have always been subject to special rules. The reasons for this are set out by Todd at [5.8.02]. In order to contain liability for negligent misstatements, the courts have used various devices not necessary in conventional negligence cases. Sometimes the courts have referred to the need for the plaintiff to show the defendant assumed responsibility for what he or she said. At other times, the courts have referred to the need for there to exist a "special relationship" between the parties: see Todd at [5.8.04]-[5.8.05]. In *Williams*, the House of Lords took the view that directors, employees and agents acting on behalf of a company were under no duty to take care in making statements to company clients unless they had assumed responsibility for their words. That is not relevant, however, to the present case, as a builder's liability in negligence does not turn on assumption of responsibility. Rather, the builder is liable, as Todd states, "on ordinary principles of negligence for physical damage to property caused by faulty work of construction": at [6.4]. This appears to be a difference between the majority and me.

Where to from here?

[145] If my view had prevailed, then it would be necessary for the owners to replead, essentially collapsing the two negligence causes of action against Mr Taylor

into one. They would simply plead what Mr Taylor is alleged to have done and the fact it was done carelessly.

[146] I would have allowed the appeal and reinstated the claim in negligence, though recognising it needs amendment. That is the course apparently endorsed by the Supreme Court in *Couch* at [123]-[125].

Fair Trading Act

[147] For the reasons given by the President, I would allow the cross-appeal to the extent specified by him.

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