IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-2544
[2025] NZHC 1909

BETWEEN	LINDEMAN INVESTMENT LIMITED Plaintiff
AND	FINANCIAL MARKETS AUTHORITY Defendant

Hearing: 3 July 2025

Appearances: S Elliott for the plaintiff
B Dickey and A Gormack for the defendant

Judgment: 11 July 2025

JUDGMENT OF BLANCHARD J

This judgment was delivered by me on 11 July 2025 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Hunwick Law Ltd, Hamilton
Augusta Chambers, Auckland
Financial Markets Authority, Auckland
Bankside Chambers, Auckland

[1] Lindeman Investment Ltd (**Lindeman**) is a shareholder in Du Val Property Group Ltd (in receivership and statutory management) (**Property Group**). Lindeman was originally a debt investor holding units in Du Val Mortgage Fund Limited Partnership (**Mortgage Fund**) but, as a result of what Lindeman refers to as the "Equity Swap", its units in the Mortgage Fund were converted into shares in the Property Group.

[2] Lindeman asserts that the Financial Markets Authority (**FMA**) owed investors in the Mortgage Fund (**MF Investors**) common law and/or implied statutory duties of care in carrying out its regulatory functions under the Financial Markets Authority Act 2011 (**FMAA**) and the Financial Markets Conduct Act 2013 (**FMCA**) in relation to the Du Val group of companies. It asserts that the FMA breached those duties, causing it loss by "effectively approving" the Equity Swap and/or failing to warn MF Investors that:

(a) the marketing of the Equity Swap was misleading and/or otherwise illegal; and

(b) Du Val was insolvent.

[3] Lindeman purports to make the claims not only on its own behalf, but on behalf of certain MF Investors in a representative capacity, pursuant to r 4.24 of the High Court Rules 2016.

[4] The FMA applies to strike out Lindeman's claims on the basis no such duties exist.

The Mortgage Fund

[5] Du Val, which was in the business of real estate acquisition, development and asset management, set up the Mortgage Fund in 2020.

[6] In 2020/2021, the Mortgage Fund sought to raise $100 million to fund the acquisition and development of Du Val projects. Investors who obtained units in the

Mortgage Fund were entitled to receive a fixed return of 10 per cent per annum, paid quarterly.

[7] The Mortgage Fund was open only to "wholesale investors" as defined in the FMCA. The definition of "wholesale investor" requires that the minimum amount invested is at least $750,000. Because they are considered to be sophisticated investors, offers to "wholesale investors" are not subject to key protections under the FMCA that are provided to "retail investors". Key provisions that were not available to MF Investors include:

(a) Part 3 disclosure requirements, including the obligation to provide a product disclosure statement under s 41;

(b) Part 4 governance obligations, including the requirement for a licensed supervisor for debt and managed investment products under s 103; and

(c) Part 7 financial reporting, including audited financial statements under s 461D.

[8] No product disclosure statement was required for the offer. Instead, Du Val issued an information memorandum.

[9] Du Val promoted the Mortgage Fund through various channels, including news websites and social media.

The Mortgage Fund direction order

[10] The FMA considered that Du Val's promotion of the Mortgage Fund contravened the fair dealing provisions in the FMCA.

[11] On 4 October 2021, the FMA issued a direction order under s 468 of the FMCA stating that it considered Du Val's promotional material was likely to mislead or deceive potential investors in breach of s 19 of the FMCA.

[12] Du Val challenged the direction order in the High Court. The direction order was upheld in a judgment dated 30 June 2022.[1]

Lindeman's investment

[13] In February 2022, Lindeman made an initial investment of $1 million into the Mortgage Fund for a fixed term of 12 months. In May 2022, Lindeman made a second investment of $1 million.

The Equity Swap

[14] In December 2022, Du Val contacted MF Investors informing them of plans to restructure the Mortgage Fund. The Mortgage Fund was to be wound up and the investors' units converted into shares in a new Du Val company (which ultimately turned out to be the Property Group), which Du Val would then look to list on the NZX. This is what Lindeman refers to as the "Equity Swap".

[15] Du Val also advised investors that the board of the general partner of the Mortgage Fund, Du Val Capital Partners Ltd, had resolved to suspend all interest distributions on their units. In future, interest distributions would be capitalised and added to investors' unit holdings up until the date their units were converted to shares.

[16] As a result of the decision to suspend interest distributions, Lindeman only received three interest payments.

[17] Ultimately, Lindeman decided to convert its investment into shares. Lindeman's submissions for the strike-out hearing said that the conversion occurred on 30 November 2022. But information from the Companies Office website provided to me during the hearing suggests that Lindeman did not become a shareholder in Property Group until 2 April 2024.

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1 *Du Val Capital Partners Ltd v Financial Market Authority* [2022] NZHC 1529, [2022] NZCCLR 17.

The warning

[18] On 9 March 2023, the FMA issued a formal warning to Du Val in respect of its marketing of the Equity Swap. The warning said that the statements made to MF Investors were likely to mislead or deceive them as:

(a) Du Val did not inform MF Investors of the underlying reason for the resolution to suspend and capitalise distributions. They were not told that the Mortgage Fund did not have adequate cash flow and cash distributions could not be approved as that would render the fund unable to meet its obligations. This omission meant the investors were left with a misleading impression as to the reason for the suspended cash distribution and capitalisation.

(b) Du Val also did not inform MF Investors that the proposed capitalisation of distributions into units was not permitted under the terms of the limited partnership agreement of the Mortgage Fund and that the investors were not obliged to accept the offer. This omission meant the investors were likely to have been misled as to their rights under the limited partnership agreement.

[19] The warning was published on the FMA's website. On 10 March 2023, the FMA also issued a media release regarding the warning. The media release discussed the warning and provided a link to it. The media reported on the warning, including in articles in the New Zealand Herald, RNZ and the Business Desk.

The information memorandum

[20] Although Du Val began informing MF Investors about the Equity Swap in December 2022, it did not issue an information memorandum in relation to it until around a year later, on 1 December 2023. The Equity Swap offer in the information memorandum was made to MF Investors, as well as investors in two other Du Val funds.

The notice of intention to issue a direction order

[21] The information memorandum came to the attention of FMA. By a letter dated 2 April 2024, the FMA gave notice to Du Val that it was considering issuing a direction order under s 468 of the FMCA because it considered that the information memorandum was likely misleading and deceptive. The letter also gave notice that the FMA intended publishing the direction order on its website and making a media statement about the direction order and/or its concerns.

[22] The FMA considered that the information memorandum was likely to mislead and deceive because it omitted the following information:

(a) the reasons why Du Val was offering the Equity Swap;

(b) supporting financial statements for the Property Group and the Mortgage Fund (and the two other funds);

(c) a comparison of the rights and obligations of units in the Mortgage Fund (and the two other funds) versus shares in the Property Group;

(d) a comparison of the risks of taking up the Equity Swap and ending an investment under the Mortgage Fund (or the two other funds), including if the Property Group was unable to list on a regulated exchange;

(e) a complete explanation as to how the Equity Swap would take place, including as to timeframes and a closing date for the offer;

(f) an explanation as to what would happen if an investor elected not to take up the offer; and

(g) an explanation as to how the value of the share price for the offer ($2 per share) had been calculated.

[23] By a letter dated 23 April 2024, Du Val responded acknowledging the FMA's concerns and saying it would voluntarily address them. The letter attached two documents to be sent to investors: a draft circular and a document entitled "Supplementary Disclosure to the Information Memorandum dated 1 December 2023". Du Val considered that sending these documents to the investors would address the FMA's concerns.

[24] By a letter dated 16 May 2024, the FMA advised Du Val that the draft circular and supplementary disclosure document covered the areas of its concerns. However, it also provided comments on the draft supplementary disclosure document which were intended to ensure that the information provided to the investors was presented "in a clearer and more balanced way" and with "more detail" in some areas. The FMA gave Du Val until 6 June 2024 to comply with its requirements.

[25] On that date, Du Val informed the FMA by letter that it had complied with its requirements. Du Val had circulated the required information to investors by two circulars dated 22 May 2024. One was sent to investors who had advised that they wished to participate in the Equity Swap. This gave those investors the option to no longer participate in the Equity Swap. The other circular was sent to investors who had advised that they did not want to participate in the Equity Swap. It gave them the option to do so. Both circulars attached a revised version of the supplementary disclosure document. Investors were required to respond to both circulars by 6 June 2024.

[26] In the 6 June 2024 letter, Du Val advised the FMA that one investor who had taken up the Equity Swap had requested the transaction be reversed and one investor who had not taken up the Equity Swap had requested to do so. It said the other 82 investors had not changed their positions. (Lindeman disputes that this information that Du Val provided to the FMA was accurate but nothing turns on this for present purposes.)

[27] By a letter dated 2 July 2024, the FMA advised that it had decided not to issue a direction order as a result of the further information that Du Val had provided to the investors. The FMA considered that the voluntary action Du Val had taken had

addressed its concerns. The letter also advised it had decided not to make a media statement in relation to the concerns.

Receivership and statutory management

[28] Just under a month later, on 1 August 2024, the FMA obtained an order from the High Court placing the entire Du Val group of companies (including the Property Group) into receivership.

[29] On 16 August 2024, the receivers provided a report to the High Court advising on the state of the companies. The receivers recommended they all be placed in statutory management.

[30] The following day, the FMA wrote to the Minister of Commerce formally recommending the Du Val group be placed in statutory management. The letter summarised the FMA's concerns about the solvency of Du Val. The letter said that in April 2024, the FMA began an enquiry into the current financial position of Du Val. The relevant part of the letter is redacted so it is unclear what the FMA's enquiries involved.

[31] The letter went on to say that concerns about Du Val's solvency were also apparent to the FMA from public sources. One particular matter of concern was the Mortgage Fund, which appeared to be experiencing financial challenges. This was apparent from the fact the Mortgage Fund had lent out all investor money and had ceased interest distributions to investors in 2022, then offered investors the opportunity to swap their debt for equity.

[32] On 21 August 2024, all the Du Val companies were placed under statutory management.

Lindeman's claims

[33] Lindeman's claims are set out in an amended statement of claim dated 3 December 2024. The amended statement of claim was filed in response to a notice

served by the FMA requiring Lindeman to file and serve a more explicit statement of claim.

[34] Lindeman says that the FMA owed duties to investors in the Mortgage Fund, in common law and impliedly under statute, to exercise reasonable skill and care in carrying out its functions and powers under the FMAA and the FMCA. The amended statement of claim alleges that the FMA breached its duties in numerous ways. But in its submissions for the strike-out application, Lindeman considerably narrowed the scope of its allegations:

> The FMA breached [the] duties by effectively approving the Equity Swap and/or failing to warn MF Investors, in circumstances where:
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> (a) the FMA had reasonable basis to remain concerned about the misleading nature and/or legality of the Equity Swap; and
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> (b) the FMA was actively investigating the financial position of the Du Val group, and was sufficiently concerned about their solvency, that it applied to have the entire group placed in receivership less than a month later.

[35] Lindeman's submissions do not expressly say how or when the FMA "effectively approved" the Equity Swap. But the words "less than a month later" in the passage quoted above indicate that Lindeman alleges the FMA "effectively approved" the Equity Swap by deciding not to issue a direction order following Du Val's voluntary compliance. It made this decision on 2 July 2024 and, as I have said, it obtained the order placing all Du Val companies into receivership less than a month later, on 1 August 2024.

[36] The submissions also do not say when the FMA should have warned the investors. But the allegation appears to be that the FMA should have warned investors on 2 July 2024, instead of deciding not to issue a direction order.

[37] The submissions are also unclear as to exactly what the FMA should have warned investors about. But it appears from the passage quoted above that Lindeman's claim is the FMA should have warned investors that:

(a) despite the material Du Val sent to investors on 22 May 2024, it continued to be the case that the Equity Swap had been marketed in a way that was misleading and/or otherwise illegal; and

(b) the Du Val group was insolvent.

[38] There is no information before me regarding the level of knowledge that the FMA had about Du Val's insolvency. But for the purposes of the strike-out application, I will assume that the FMA knew it was insolvent.

[39] The amended statement of claim also does not plead how the various breaches pleaded result in loss to Lindeman. It simply asserts that Lindeman has or will suffer loss, "in particular loss of share value or loss of original investment sum". Lindeman's submissions elaborate a little by saying that, as a result of the alleged breaches, "the MF Investors have suffered harm in having their units converted to shares, which are now essentially worthless."

[40] There are problems with Lindeman's claims. First, the FMA cannot be said to have "effectively approved" the Equity Swap when it did not say anything publicly about its decision not to issue a direction order. The only thing it said publicly about the Equity Swap was in its warning of 9 March 2023 and in the press release of the following day. Clearly, those public statements cannot be said to constitute approval of the Equity Swap.

[41] Lindeman's submissions say that the Equity Swap was marketed to MF Investors on the basis the transaction had been endorsed by the FMA. Lindeman says that "no doubt this gave MF Investors comfort". But there is nothing in any of the material before me that suggests this was the case. Further, if this did occur, it must have been without the FMA's knowledge or authority.

[42] Second, Lindeman asserts that, despite the material Du Val sent to investors on 22 May 2024, the FMA should have warned investors that the marketing of the Equity Swap continued to be misleading and/or otherwise illegal. But nowhere in its submissions does Lindeman say how the material provided on 22 May 2024 failed to

correct the position so that the marketing of the Equity Swap continued to be misleading and/or otherwise illegal. The FMA was satisfied that its concerns had been addressed. Lindeman does not explain why the FMA was wrong to reach that conclusion.

[43] Third, there are real doubts whether any breach by the FMA caused Lindeman's loss. As I have said, Lindeman seems to allege that the FMA's "effective approval" and failure to warn occurred on 2 July 2024. This was after Lindeman had already become a shareholder of the Property Group on 2 April 2024.

[44] It is true that Du Val had, on 22 May 2024, offered the investors the option to no longer participate in the Equity Swap. Thus, if the FMA had warned investors, Lindeman might have sought to reverse the Equity Swap. Of course, had it not been for the FMA's actions, the option to reverse would not have been available to Lindeman. But more importantly, if the FMA had warned investors, any indication that Du Val was insolvent would have caused a panic which would have made it highly unlikely that Lindeman could have taken advantage of the option.

[45] The FMA makes a further point. It says that Lindeman would have lost its investment even if the Equity Swap had not occurred. This is because Lindeman would have been an unsecured creditor. It would have ranked behind secured creditors and there would have been insufficient funds to pay anything to unsecured creditors. But there is no evidence before me to show whether this is correct.

Strike-out principles

[46] The established criteria for strike-out are as follows:

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without a foundation.

(b) The cause of action or defence must be clearly untenable. It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed.

(c) The jurisdiction is to be exercised sparingly, and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

(e) The court should be slow to strike out a claim in any developing area of the law, including where a breach of duty of care is alleged in a new situation.[2]

Common law duty of care (negligence)

The two-stage approach

[47] When deciding whether a common law duty of care exists in novel cases like this one, New Zealand courts usually take a two-stage approach. The first stage involves looking at the relationship between the parties. This is when issues of foreseeability and proximity are considered.[3]

[48] Where the person who has suffered an injury or loss asserts that the defendant owed a duty of care, it is necessary to satisfy the court that it was a reasonably foreseeable consequence of the plaintiff's act or omission. But that will rarely, if ever, be determinative. Foreseeability is at best a screening mechanism. It is used to exclude claims which must obviously fail because no reasonable person in the shoes of the defendant would have foreseen the loss.[4]

[49] Assuming foreseeability is established, the court must then address the more difficult question of whether the foreseeable loss occurred within a relationship that was sufficiently proximate. This is usually the hardest part of the inquiry.[5]

[50] The concept of proximity is an artificial one that depends more on the court's perception of what is a reasonable area for the imposition of liability than on any

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2 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
3 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [156].
4 At [157].
5 At [158].

logical process of analogical deduction. The court is required to consider the closeness of the connection between the parties, and whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff.[6]

[51] The concept of proximity enables the balancing of the moral claims of the parties. The court must balance the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected from an undue burden of legal responsibility. A particular concern is whether a finding of liability will create disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff.[7]

[52] The second stage involves looking at matters external to the parties. At this point, the court has regard to any wider effects on society and on the law generally. The second stage comes into play if the court has found that the loss was foreseeable and sufficiently proximate. The court must decide whether, nevertheless, no duty exists because factors external to the relationship mean that it is not fair, just and reasonable to impose the claimed duty of care on the defendant.[8]

[53] It may do so due to a range of factors, including whether a duty of care would expose the defendant and others in the defendant's position to indeterminate liability. Other potentially relevant factors are the capacity of each party to insure against the liability, the likely behaviour of other potential defendants in relation to the decision, and the consistency of imposition of liability within the legal system more generally.[9]

The first stage — foreseeability and proximity

[54] The first issue I must consider is whether Lindeman's loss was reasonably foreseeable to the FMA.

[55] I have serious doubts whether Lindeman's loss was reasonably foreseeable to the FMA. As I have said, it is unlikely that, following any suggestions of Du Val's

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6 At [158].
7 At [159].
8 At [156].
9 At [160].

insolvency, Lindeman could have taken advantage of the option to reverse the Equity Swap due to the panic that this would have caused. This is how the situation appears to me now and how it would have reasonably appeared to the FMA at the time.

[56] However, as this is a strike-out application, despite my doubts whether Lindeman's loss was reasonably foreseeable, I will proceed on the basis that it was and go on to consider proximity.

[57] In support of its position that there was the requisite level of proximity, Lindeman relies on both the statutory context under the FMAA and the FMCA and on what it refers to as the FMA's "direct involvement" in the affairs of the MF Investors.

[58] In terms of the statutory context, s 8 of the FMAA says that the FMA's main objective is "to promote and facilitate the development of fair, efficient, and transparent financial markets".

[59] Section 9 of the FMAA sets out the FMA's core functions. These include:

(a) promoting the confident and informed participation of businesses, investors and consumers in the financial markets, including by issuing warnings, reports, or guidelines, or making comments, about any matter relating to those markets, financial participants, or other persons engaged in conduct relating to those markets and stating whether or not, or in what circumstances, the FMA intends to take or not take action over a particular state of affairs or particular conduct;

(b) performing and exercising the functions, powers, and duties conferred or imposed on it by or under the financial markets legislation and any other enactments;

(c) monitoring compliance with, investigating conduct that constitutes or may constitute a contravention or an involvement in a contravention of, and enforcing the FMAA, the FMCA and other legislation; and

(d) monitoring, and conducting inquiries and investigations into any matter relating to, financial markets or the activities of financial markets participants or of other persons engaged in conduct relating to those markets.

[60] Lindeman emphasises the core functions of the FMA set out above. But there is nothing about these core functions that particularly advances its position that the FMA owed the specific duty it alleges. A distinction must be made between what the FMA is empowered to do and what it must owe a duty of care to investors to do.[10]

[61] Lindeman also relies strongly on s 22(1) of the FMAA:

> The FMA is not liable for anything it may do or fail to do in the course of performance or exercise or intended performance or exercise of its functions, powers, or duties**, unless it is shown that it acted in bad faith or without reasonable care**.
>
> (emphasis added).

[62] Lindeman says that the inescapable inference from s 22 is that the FMA has a common law duty to exercise reasonable care in the performance of its functions and powers under the FMAA and the FMCA.

[63] But again, I do not think this provision adds much to the picture. It shows that Parliament contemplated that the FMA *could* have a liability in negligence. But what is at issue here is not whether it is possible for the FMA to be liable in negligence. It is whether the FMA owed the specific duty alleged by Lindeman. There is nothing in this provision that points to that being the case.[11]

[64] As I have said, Lindeman also relies on what it refers to as the FMA's "direct involvement" in the affairs of MF Investors. Specifically, Lindeman refers to the fact that:

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10 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 531.
11 At 519 and 529.

(a) the FMA was engaged with Du Val regarding its concerns about the marketing of the Equity Swap from at least 9 March 2023, when it issued the warning;

(b) on 23 April 2024, the FMA then issued the notice of intention to make a direction order;

(c) Du Val sent to the FMA the information it proposed to provide to the MF Investors to address its concerns and the FMA conducted a detailed review; and

(d) on 2 July 2024, the FMA advised that it had decided not to issue a direction order as a result of the further information Du Val had provided to the investors.

[65] I do not accept that the FMA's engagement with Du Val resulted in a relationship between the FMA and the MF Investors that was sufficiently proximate to give rise to a duty on the FMA. I say this for two reasons.

[66] First, the necessary close connection between the FMA and the MF Investors is absent. Contrary to Lindeman's submissions, there was no "direct involvement" by the FMA in affairs of MF Investors. The FMA's dealings were all with Du Val or, in the case of the 9 March 2023 warning, with the public at large.

[67] Second, the FMA is required to exercise its functions in the general public interest. Consequently, it could not just consider the position of the MF Investors. It needed to consider the position of all the investors and creditors of Du Val, and even the effect that the collapse of the group might have on the market more generally. In the words of the Privy Council in *Davis v Radcliff*, this required "the exercise of a judgment of a delicate nature".[12] The Privy Council further commented:[13]

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12 *Davis v Radcliff* [1990] WLR 821 (PC) at 827. See also *Yuen Kun-yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC) at 195–196; *Fleming v Securities Commission,* above n 10, at 519; *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562 at [60]; *Cooper v Hobart* [2001] SCC 79, [2001] 3 SCR 537 at [49]–[50]; and *Lock v Australian Securities and Investment Commission* [2016] FCA 31, (2016) 334 ALR 250 at [205], [221]–[222] and [230]–[231].

13 *Davis v Radcliff*, above n 12, at 827.

> In circumstances such as these, competing considerations have to be carefully weighted and balanced in the public interest. … [T]he very nature of the task, with its emphasis on the broader public interest, is one which militates strongly against the imposition of a duty of care being imposed on such an agency in favour of any particular section of the public.

The second stage — external factors

[68] I have concluded that Lindeman's claim does not pass the first stage. But for completeness, I will briefly consider the relevant external factors under the second stage.

[69] These too strongly point against the imposition of a duty. I say this for three reasons. First, Lindeman's position is that the duty arose because the FMA became involved in Du Val's affairs. If the FMA became subject to a duty of care whenever it became involved in the affairs of issuers, it would create a perverse incentive on the FMA to avoid getting involved if at all possible. And when the FMA did become involved, this would similarly incentivise it to act in risk-averse manner. Thus, the prospect of claims would have "a seriously inhibiting effect" on the work of the FMA.[14] This would be contrary to the FMA properly carrying out its functions.

[70] Second, as mentioned above, a factor that the court may consider at the second stage is whether a duty of care would expose the defendant and others in the defendant's position to indeterminate liability. If the FMA became subject to a duty of care whenever it became involved in the affairs of issuers, it would be exposed to the risk of claims from a very large number of investors. Accordingly, "the spectre of indeterminate liability would loom large if a duty was recognised", pointing strongly against the recognition of such a duty.[15]

[71] Finally, to impose a duty of care in the circumstances would be to effectively create an insurance scheme for investors at great cost to the taxpaying public. There is no indication that Parliament intended that result.[16] An insurance scheme of this

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14 *Yuen Kun-yeu v Attorney-General of Hong Kong*, above n 12, at 198; *Lock v Australian Securities and Investment Commission*, above n 12, at [223].

15 *Cooper v Hobart,* above n 12, at [54]. See also *Davis v Radcliffe*, above n 12, at 541; *Fleming v Securities Commission*, above n 10, at 520 and 534; *Wellington District Law Society v Price Waterhouse* [2002] 2 NZLR 767 (CA) at [64].

16 See *Cooper v Hobart*, above n 12, at [55].

kind seems particularly inappropriate in a case involving sophisticated "wholesale investors" like Lindeman.

Implied statutory duty of care

[72] Lindeman says that an implied statutory duty of care arises from s 22 of the FMAA and from the "statutory context as a whole". In relation to the latter, Lindeman relies in particular on the provisions discussed above regarding the FMA's main objective and functions. For the same reasons I do not accept these provisions support the imposition of a common law duty of care, I do not accept that they provide a basis for implication of a statutory duty of care.

Result

[73] I grant the application to strike out. I make an order striking out the amended statement of claim.

Costs

[74] If the parties cannot agree on costs:

(a) the FMA should file a memorandum of no more than two pages within 20 working days;

(b) Lindeman should file a memorandum in response of no more than two pages within a further 10 working days; and

(c) I will then resolve costs on the papers.

Blanchard J