

Wayne Young v Robert Trevor Holden (1); Leuschke Group Architects Ltd (2); Brian Hughes (3) Auckland City Council (4) Timothy Heathcote Fynes Garland (5) Alistair Peter Bell (6) Nicolette Faye Sheridan (7) Body Corporate 197217 (8)

**JUDGEMENT OF ASSOCIATE JUDGE D.I. GENDALL** High Court New Zealand Auckland Registry 9<sup>th</sup> November 2007

### Introduction

- [1] The plaintiff as the owner of Unit IA/10 Ruskin Street, Parnell, Auckland ("the apartment"), one of a number of apartments in a development known as the Waterford Apartments ("Waterford"), sues several parties including the first defendant in respect of water ingress and related defects to the apartment. In this proceeding, he seeks various remedies including unquantified damages. The apartments comprising Waterford generally suffer from major defects associated with what has now become known as the "Leaky Homes Syndrome".
- [2] On 21 March 2007, the first defendant brought the present application seeking summary judgment against the plaintiff. This application is opposed by the plaintiff.

### Background Facts

- [3] The plaintiff purchased the apartment from Conrad Properties 1998 Limited ("Conrad") pursuant to an agreement for sale and purchase dated 31 August 1998. The first defendant was one of the two directors of Conrad and a shareholder in that company. Conrad is now in liquidation.
- [4] The first defendant contends that Conrad was the developer of the Waterford apartment project.
- [5] At paragraph 28 of the statement of claim in this proceeding, the plaintiff attempts to particularise the design and construction defects that he alleges have occurred in the Waterford apartment building and his apartment. At least a number of those defects have required significant remedial works to be undertaken.
- [6] There are two causes of action alleged against the first defendant. These are:
- Negligence pursuant to which the plaintiff maintains that the first defendant was the developer - paragraph 31 of the statement of claim; and
  - Misleading and deceptive conduct pursuant to S.9 of the Fair Trading Act 1986.
- [7] In his statement of defence and notice of opposition to the present application, the first defendant contends that neither cause of action can succeed because:
- The first defendant was not the developer and at no time acted otherwise than as one of the two directors of Conrad the development company and in any event there has been a release of the first defendant by virtue of a settlement made with Conrad; and
  - The Fair Trading Act 1986 cause of action pleaded is untenable as a question of law because nothing that could amount to misleading or deceptive conduct or that is likely to be so is alleged and, in any event, it is statute barred.

### Counsel's Arguments and My Decision

- [8] The defendant's summary judgment application is made here in reliance on Rule 136(2) High Court Rules which states:
- "136 Judgment Where There is No Defence or Where No Course of Action Can Succeed*  
*(2) The Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. "*
- [9] Generally summary judgment is to be granted on a defendant's application where:
- The defendant has clear evidence which is a complete defence to the plaintiff's entire claim; and
  - There is no material dispute of fact
- Westpac Banking Corporation v M M Kembla (NZ) Limited* [2001] 2NZLR298 at paras. 61 and 62 approved by the Privy Council in *Jones v Attorney General* [2004] 2NZLR433 (PC) at para. 40.
- [10] It is clear that a defendant's summary judgment application is similar to a striking-out application in that the defendant has to show that the plaintiff's claim cannot succeed. Whilst a plaintiff may obtain summary judgment against a defendant on one of several causes of action, a defendant must be able to knock out the plaintiff's entire claim however in order to be able to succeed in a defendant's summary judgment application -McGechan on Procedure para. HR136.07.
- [11] I turn now to consider the defence to the plaintiff's first cause of action where the plaintiff contends that the first defendant was the developer and, as such, is negligent.

### The Developer?

- [12] In the present case the plaintiff maintains initially that the first defendant was the developer of the Waterford apartments. This is denied by the first defendant. The issue of who might be a "developer" was addressed in *Body Corporate 188273 & Ors v Leuschke Group Architects Ltd & Ors* (High Court Auckland CIV 2003/04 28 September 2007). There, Harrison J. held that a "developer" is the entity that, by virtue of its ownership of the property and control of the development qualifies for the imposition of liability if the development turns out to be error ridden and defective.
- [13] At paragraph 32 of his judgment, Harrison J. said:
- "The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefits. It is the entity which decides on and engages the builder and any*

*professional advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops. "*

- [14] In that case Harrison J. rejected the argument that the directors of the development company were in fact and law "the developers" because they had agreed to carry out the development before incorporating the development company. Instead he found that the development company was the entity that assumed legal responsibility for and controlled all aspects of the development.
- [15] In *Body Corporate 187820 v Auckland City Council* [2005] 6NZCPR536 at 544-545, Associate Judge Doogue in this Court again addressed the question of who is a "developer". There, he concluded that a "developer" is the person:
- a) Who has direct control of and involvement in the building process; and
  - b) Who is in the business of constructing dwellings for other people for profits.
- [16] Turning now to the present case, the evidence before the Court including that provided by the first defendant appears to show that:
- a) The first defendant as he deposes is "neither an architect nor a builder so (his) involvement with the development was more from a "policy" or "conceptual" point of view. "
  - b) Conrad purchased the land, became registered proprietor and entered into agreements for the sale of the completed apartments.
  - c) Conrad obtained both the resource consent for the development and the building permits.
  - d) Conrad contracted with both the architects for the design of the development and the builder Huge Building Limited for completion of the development.
  - e) The contract the plaintiff had to purchase the apartment was also made with Conrad as Vendor and this contract was signed on behalf of Conrad by both the first defendant and his co-director Alastair Brown.
- [17] On these matters, the plaintiff in contrast, in his initial statement of claim appears to suggest that it was the first defendant who was the owner of the property on which the Waterford apartment development was constructed and it was he who applied for the building consent from the Council. From the evidence, there is no doubt that these contentions are wrong. Conrad was always the owner of the land in question and it was Conrad who obtained the resource consent and building permits.
- [18] For all these reasons, there can be little doubt therefore that it was Conrad and not the first defendant who was the developer of the Waterfront apartments. As such any non-delegable duties of care would have fallen upon it.

#### **Assumption of Responsibility**

- [19] In his 16 October 2007 amended statement of claim, the plaintiff, however, goes on at paragraph 3 to allege that the first defendant, as a director of Conrad, personally exercised control over the Waterford apartment project. Although he does not expand this to allege in what respects the first defendant assumed personal control this raises the issue of a possible assumption of personal liability to the plaintiff on the part of the first defendant.
- [20] At the outset, it needs to be remembered that the first defendant was not the sole director of Conrad. He was one of two directors.
- [21] In the Court of Appeal decision in *Trevor Ivory v Anderson* [1992] 2NZLR517 at 524 Cooke P. indicated quite clearly that there must be something special to find an assumption of personal responsibility on the part of a director. The mere fact of directorship does not impose personal liability upon directors.
- [22] Similarly, in *Morton v Douglas Homes Limited* [1984] 2NZLR548 Hardie Boys J. at 593 made it clear that it is not the fact of directorship that is relevant but rather the assumption of personal responsibility for certain tasks or decisions that creates proximity with the plaintiff.
- [23] And in his recent decision in *Body Corporate 188273 v Leuschke Group Architects Limited*, Harrison J. held that while the director there had agreed to perform certain services he did not in fact carry them out. The development company had engaged third parties to do so. The director, did not engage those third parties personally, nor did he attend on site and give directions relating to the design and construction process for the development. The director in that case was found not to be liable.
- [24] In the present case, counsel for the first defendant argued that the facts in *Body Corporate 188273 v Leuschke Group Architects Limited* are strikingly similar to those which prevail here. He noted that the first defendant here is neither architect nor builder and the evidence before the Court is that he took no active part in the design or construction processes for the Waterford apartment development.
- [25] Counsel drew attention to the fact that in the present case, the plaintiff has not particularised in any way what it is said that the first defendant exercised a degree of personal control over which would mean that he assumed a personal liability. Significantly the causes of the alleged damage here as pleaded at paragraph 28 of the plaintiff's statement of claim appear to be simply construction and/or design issues. The evidence before the Court is clear that it was Conrad who contracted with the third party architect and builder to attend to these issues. There can be little doubt here that the first defendant did not design or build the apartments nor is there any evidence before the Court that he had any control over the process or gave specific directions as to how they should be designed or built. There is little evidence before the Court of his attending on the site during the

development, or of any monitoring or control on his part of the quality of the building contractor's performance. And unlike the situation in *Morton v Douglas Homes Limited* there is nothing to suggest he had any express knowledge of any development building problems and omitted to rectify these.

- [26] In *Body Corporate 188273 v Leuschke Group Architects Limited* at paragraph 44 Harrison J. also acknowledged that in some cases a director might be said to have ultimate control of the project if he is the one for example who is authorised to sign cheques. He went on, however, to indicate that this generally confuses the functions and powers of the relevant entities. A signatory to a bank account must act according to the account holder's mandate so that it is all directors acting in their capacity as such who make the relevant financial decisions. The execution of those decisions, therefore, although authorised in a director's personal capacity is simply something which is giving effect to those directions of the directors as a group.
- [27] For all these reasons, I conclude, therefore, that there is no evidence before the Court that the first defendant had any involvement in the building or design work which is alleged to have given rise to the plaintiff's loss here and, therefore, the plaintiff is unable to establish any assumption of personal responsibility on the part of the first defendant.

#### Settlement with Conrad and Release of the First Defendant

- [28] On 31 October 2003, all the owners of apartments within Waterford accepted an offer from Conrad that was in full and final settlement of all claims those owners or the Body Corporate of Waterford might have against Conrad.
- [29] It seems that the plaintiff was aware of the Conrad offer and agreed to the acceptance of it. Indeed in a letter dated 30 October 2003 from the plaintiff's then solicitors to Cairns Slane it was confirmed that:  
*"Our client (the plaintiff) agrees to accept the sum of \$150,000.00 in full and final settlement of any claim the Body Corporate has against Conrad Properties (1998) Limited."*
- [30] As a result, the first defendant contends that even if he did have any tortious liability to the plaintiff here, this has been discharged as a result of the settlement agreement because:
- If the first defendant did assume personal responsibility to the plaintiff (and as noted above I have found otherwise) then he ceased acting as a director or controlling mind of Conrad and, as a result, acted only as its agent or servant - Trevor Ivory at page 527.
  - Conrad, as principal is vicariously liable for the tortious acts of its agent (the first defendant) - Trevor Ivory at page 527.
  - A principal vicariously liable for the tortious conduct of its agent is a joint tortfeasor with that agent - Todd - Law of Torts in New Zealand (4<sup>th</sup> Edition) at 889.
  - The settlement agreement between the owners, including the plaintiff and Conrad, released Conrad.
  - The release of one joint tortfeasor discharges all joint tortfeasors because the cause of action is joint and indivisible - *Robinson v Tait* [2002] 2NZLR30 at page 40 (CA).
- [31] Although given my findings with respect to the issue of liability of the first defendant to the plaintiff outlined above, strictly speaking I do not need to address this release issue, in my view there is substance in the contentions I have outlined above advanced on behalf of the first defendant.
- [32] Although the settlement agreement was made between Conrad the Body Corporate and the Waterford apartment owners (and not the first defendant specifically), in my view there is a reasonable argument here that it would similarly release the first defendant from any possible liability to the plaintiff.

#### Summary Judgment in Negligence Cases

- [33] For the sake of completeness I now address one further argument raised before me. This relates to the point that in some negligence cases, the Court has found that the case before it may not be generally amenable to the early disposal process provided for when a summary judgment application is brought.
- [34] By way of example, in *Body Corporate 187947 & Ors v EP Maddren & Sons Limited* (High Court Auckland, 13 May 2005, CIV1149/04, Rodney Hansen J.) the third defendant director of the liquidated development company applied to strike out claims against him and/or for summary judgment. In his judgment at paras. 10-12 Rodney Hansen J. indicated that, given each case turns upon its own facts, a cautious approach to striking out was warranted and the applications there were dismissed.
- [35] There can be no doubt, that each case must be determined on its own merits. On the material before the Court, in the present case, I am satisfied that:
- There are no material disputes of fact between the parties.
  - The plaintiff in his pleadings and in the material he has provided has not alleged any facts that impose a duty of care upon the first defendant either as a developer or otherwise.
  - In any event, there is a reasonable argument that the discharge of the first defendant by the release of Conrad under the settlement agreement constitutes what could be described as a "king hit".
- [36] On these matters, a useful comparison might be made here with the case of *Drillien v Tuberty* (2005) 6NZCPR470. As I see it, there are a number of similarities between the present case and *Drillien*.
- [37] In *Drillien*, Associate Judge Faire entered judgment in favour of a director defendant where:

- a) The land on which the house in question was built was at all material times owned by the development company.
- b) It was the company that applied for and obtained the building consent.
- c) The company ordered and paid for all materials required for the erection of the house.
- d) The company alone contracted with all trades personnel, that is plumbers, painters, electricians etc in respect of the building of the house.
- e) Most importantly the defendant director was not directly involved in the erection of those parts of the building that were the subject of the complaint.

[38] In *Drillien* Associate Judge Faire at para.45 stated:

*"No allegation is made anywhere of direct personal involvement by the first defendant in the specific areas where complaint is made ... even if one ignored the issue of assumption of responsibility, what is evident on the facts before me is that, viewed as action taken by an agent, the first defendant has not, in fact, carried out the specific tasks which are said to have caused the loss. Further, I can find no foundation which would suggest that the first defendant was, in reality, himself the builder or developer in this case. The facts that I have listed above simply disclose that that is not the case. "*

[39] As Associate Judge noted in *Drillien*, the position of the director in that case must be contrasted with the position of the directors in *Morton v Douglas Homes Limited* [1984] 2NZLR548 where personal liability was found. In *Morton* the directors were the sole individuals who were armed with knowledge of important engineering requirements, they assumed control of the process of constructing the foundations which later caused the problem in question and this situation was found in that case to create an assumption of personal responsibility and was the basis upon which liability was founded.

[40] In my view, the situation in the present case is very much aligned to that which confronted Associate Judge Faire in *Drillien v Tuberty*. And for this reason also I am satisfied that the evidence before the Court indicates that the plaintiff's first cause of action against the first defendant could not succeed in terms of R.136.

#### **Second Cause of Action - Fair Trading Act 1986**

[41] In the second cause of action, the plaintiff appears to rely upon the alleged carelessness which caused the defects in the plaintiff's apartment as "misleading or deceptive" conduct in terms of S.9 of the Fair Trading Act 1986.

[42] Negligence, however, does not fall within the statutory concept of misleading or deceptive conduct or conduct likely to mislead or deceive. Misrepresentation by words or conduct or in some cases by silence underpins this statutory concept - *Taylor Brothers Ltd v Taylors Group Limited* [1988] 2NZLR1 at 28 and *Levi Strauss & Co v Kimbyr Investments Limited* [1994] INZLR332 at 381-382.

[43] In the present case the first defendant either had a duty to take those steps the plaintiff alleges the first defendant failed to take - and did not and is liable - or he did not. In the absence of any conduct that might have misled or deceived the plaintiff into believing the first defendant had taken those steps, there can be no action under the Fair Trading Act 1986 I accept that the present case as pleaded by the plaintiff is a matter which simply involves a question of negligence on the part of the first defendant.

[44] Irrespective of these matters, however, in my view the plaintiff's Fair Trading Act 1986 cause of action is statute barred. I reach this conclusion for reasons which I now set out:

[45] S.43(5) Fair Trading Act 1986 provides:

*"An application under sub-section (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered. "*

[46] In the plaintiff's statement of claim at paragraphs 13 and 18 he alleges that, at the latest, the various defects of which he now complains had been discovered by 2002. The plaintiff's application under the Fair Trading Act 1986, however, was commenced in this Court by the filing of the plaintiff's original statement of claim on 21 February 2007.

[47] In terms of S.43(5) Fair Trading Act 1986, the limitation period for the plaintiff expired not later than 2005. His present Fair Trading Act 1986 claim is therefore out of time.

[48] The first defendant's summary judgment application with respect to this Fair Trading Act 1986 course of action must therefore succeed.

#### **Conclusion**

[49] For all these reasons it will be apparent that the first defendant's summary judgment application succeeds.

[50] An order is now made pursuant to r. 136(2) entering judgment in favour of the first defendant in respect of the plaintiff's claim against the first defendant.

#### **Costs**

[51] As to costs, normally costs would simply follow the event here. Before me, however, counsel for the first defendant made no submissions with respect to the issue of costs.

[52] The plaintiff is self-represented and throughout the hearing of this matter I formed the clear view that he is genuine in his attempts to hold the first defendant responsible in any way possible for the actions of the

developer Conrad which is now in liquidation and in which, as a 50% shareholder/director, he presumably obtained some financial benefit.

- [53] That said, if counsel for the first defendant and the plaintiff are unable to agree on the issue of costs then memoranda in support, opposition and reply may be filed and served at 7 day intervals. In this event, when all memoranda have been filed the Registrar is to refer these to me for decision if required.

**Post Script**

- [54] In dismissing the plaintiff's claim against the defendant director in **Body Corporate 188273 v Leuschke Architects Limited & Ors**, Harrison J. in his conclusion at paras. 75 and 76 commented:

*"75. This result may seem unjust or unfair. There is an apparent anomaly in visiting the financial consequences for the failure of these apartments on a local authority which played a limited role, when the shareholder of the now extinct development company who derived a financial benefit is absolved. But it is the necessary consequence of applying established legal principles.*

*76. Unless and until Parliament radically reforms the Companies Act 1993, to ensure among other things that all companies are capitalised to a level consistent with the financial obligations they assume, similar decisions will be reached. Mr Cooper, (the defendant director) acted in accordance with his legal rights in forming Colmark along with Mr Leuschke to obtain the personal protection available from incorporation. In my judgment, Mr Cooper did not lose that benefit by assuming a personal responsibility to the owners. However, the time may be appropriate to carefully examine whether a corporate model designed in the United Kingdom a long time ago is apt to meet the commercial and moral demands of and standards set by modern society. "*

- [55] In my view these comments are entirely apposite here. As so often occurs in cases such as the present, a purchaser (often elderly) invests his or her assets in what is intended to be a secure and comfortable home or apartment. The home is built and subsequently, the consequences of negligence or incompetence in design or construction of the house or apartment are then visited upon what is often an innocent purchaser. This can only seem in many cases rather cruel. On this the words of Hardie Boys J. in **Morton v Douglas Homes Limited** at page 619 spoken some fourteen years ago apply with equal force today.

- [56] In the present case, it may well be that, whereas the first defendant, as a fifty per cent shareholder in the development company Conrad, could have derived a financial benefit from the Waterford development, it turns out that he is ultimately absolved from responsibility for the financial consequences of that part of the development which has effectively failed. Conrad too has been in liquidation since 2003 and effectively is unavailable as a "target". Notwithstanding this, as Harrison J. noted in the passages I have quoted at paragraph [54] above, these are the necessary consequences of applying established legal principles here. In my view, however, his remarks noted at paragraph [54] above are timely. I fully endorse them.

W. Young - plaintiff in person

S. McAnally - First Defendant instructed by Keegan, Alexander, Solicitors, PO Box 999, Auckland