IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-4824

BETWEEN	BODY CORPORATE 183523 First Plaintiff
AND	GRACE LEE & ORS Second Plaintiff
AND	TONY TAY & ASSOCIATES LIMITED First Defendant
AND	ROBIN FRANK SEARS TRADING AS ALL TRADES Second Defendant
AND	TONY MENG HIANG TAY Third Defendant
AND	GRAHAM TAYLOR Fourth Defendant (Discontinued)

Hearing: 9-12, 16-18, 24-26 February 2009

Appearances: M C Josephson, H Chung, and G J Beresford for the Plaintiffs
A M Swan for the Third Defendant

Judgment: 30 March 2009

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on 30 March 2009 at 12.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

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The Issues

[1] The first and second plaintiffs are the Body Corporate and individual apartment owners respectively of an apartment block which was shoddily constructed. It leaks. The plaintiffs seek damages, being the estimated costs of putting the building to right.

[2] At the conclusion of the trial three issues remain. They are:

- Is the third defendant, who was the director of both the company which developed the apartment building and of the first defendant, personally liable for the plaintiffs' claims?

- If so are limitation defences available to him?

- Are the first defendant (which designed and built the apartment building) and the second defendant (who contracted with the first defendant to conduct the building work on a labour only basis) liable to the plaintiffs?

The Building

[3] Ellerslie Gardens is a complex of 26 town houses at 1A Harrison Road, Ellerslie, adjacent to the intersection of that road and the Ellerslie-Panmure Highway.

[4] Ten of the 26 units are contained in a terraced block of two or three storey town houses with adjacent single storey garages. The other 16 units, larger in size, are contained in three terraces sitting around a courtyard. Those 16 units have double garages at ground level with the accommodation storeys above.

[5] All units are multi-level units. All have balconies, whether Juliet balconies or balconies partly contained in a decorative portico. All have separate fenced backyard areas.

[6] The initial owner of the site on which Ellerslie Gardens was constructed was Heritage International Group Limited (Heritage), a company in which the third defendant (Mr Tay) was a 25% shareholder and a director. A resource consent application was lodged with the Auckland City Council in June 1996. Construction proceeded in two stages with a building consent for the first stage being issued by the Auckland City Council to Heritage on 28 November 1996. Building consent for the second stage construction of 16 units was issued on 14 January 1997.

[7] On 6 September 1996 Heritage as owner entered into a contract with the first defendant (TTA) to construct the Ellerslie Garden complex for $3,250,766 (GST inclusive). TTA, on the evidence, was also responsible for producing the plans and specifications for Ellerslie Gardens.

[8] The contract, to which I shall return, was a standard New Zealand Master Builder's Federation (Inc) contract. At that time Mr Tay was a director of TTA and one of its three shareholders.

[9] Construction appears to have got under way in late 1996. It proceeded throughout 1997. Approved Building Certifiers Limited (ABC), now in liquidation, which at that time was performing the Auckland City Council's supervisory and regulatory functions in the building area, issued a Code Compliance Certificate under s 56 of the Building Act 1991 on 30 October 1997. That certificate extended to all 26 units.

[10] TTA and various of its employees were responsible for the overall monitoring and supervision of the construction phase. The labour force or building teams employed in its construction, however, were supplied by the second defendant (Mr Sears) who entered into two subcontracts with the TTA to carry out labour only work in respect of the construction of the Ellerslie Garden units.

[11] Unfortunately the construction of the Ellerslie Gardens units was defective. As a result, by late 2002 various units were experiencing leaks. In common with other New Zealand buildings suffering from "leaky building syndrome" the leaks have led to rotting timber, health hazards and a clear need to reconstruct parts of the building to make the units reasonably habitable.

The Defects

[12] I have no difficulty in finding the plaintiffs have proved the existence of a number of defects in the Ellerslie Gardens complex. There was unchallenged evidence from a chartered building surveyor, Mr T A Jones about the defects, many of which he pointed out to counsel and me during a site visit on 9 February 2009. Mr Tay has admitted these defects by a r 291 admission of facts on 3 December 2008.

[13] The defects thus proved to my satisfaction are:

a) Cracking of fibre cement and add-on decorative polystyrene cladding. Mr Jones's evidence was this cracking was attributable to a number of different reasons including poor workmanship, failed stopping to board joints, moisture in the timber frame, or cladding and frame movement.

b) Poor installation of horizontal movement control joints.

c) Inadequate separation at ground level resulting in fibre cement cladding being buried or in close proximity to paving and the ground. This applies mainly to units K – Z but also occurs in some parts of units A – J.

d) Inadequate difference between interior and external levels at some locations.

e) Lack of sill or jamb flashings to window frames.

f) Poor apron flashings to both tiled and steel roofs without diverter flashings above spoutings or at corner junctions to units A – J.

g) No head flashings above the garage doors of all units.

h) Inadequate flashings to the small cantilever decks (Juliet balconies) in units A – J at the joist penetrations.

i) No sealing where fence panels penetrate the cladding.

j) Poor sealing of waste and other pipes penetrating the cladding.

k) Poor detailing of the decks of various units including buried fibre cement cladding without provision for drainage at floor to wall junction and poor membrane detailing; balustrades of flat tops and timber capping with open joints; no installation of overflow outlets; poor falls and ponding against wall cladding; tiles with no provision for perimeter edge movement; no allowances for weather proofing or flashings at the junctions of solid fibre cement clad balustrade walls; corrosion of fixing to timber balustrade structures.

l) Insufficient or no eaves overhang to deflect rain water to assist weather protection at the tops of walls.

m) A cracked garage floor slab to unit W.

n) Harditex installed over fire-rated plaster board to the porch entry party walls.

o) Generally, and from a number of causes, moisture entry into the timber frames.

[14] Mr Jones's evidence was that these defects would all have been evident to an expert with the necessary design and building expertise when ABC inspected the works and provided the Code Compliance certificate in late October 1997. Some,

but not all of the defects would have existed and been evident when pre-line inspections were carried out for various units in mid 1997.

[15] The cladding used for the exterior walls of Ellerslie Gardens was a James Hardie Building Products light weight cladding, giving the appearance of a monolithic finish, known as Harditex. James Hardie provided a technical information catalogue with its product. The relevant catalogue produced in evidence, was published in February 1996. It contains detailed illustrated information as to how the product is to be installed and fixed to other structural components such as timber joists, concrete floors, and so forth.

[16] Mr Jones was satisfied that, although the Harditex cladding was not a specific "acceptable solution" so far as the E2 External Moisture Approved Document under s 49 of the Building Act 1991 was concerned, if it were correctly installed as per Hardie's technical information it would be a perfectly acceptable alternative solution.

[17] Mr Jones's evidence that Harditex was an alternative solution coincides with an appraisal certificate (No.243) issued by the Building Research Association of New Zealand. That body had appraised Harditex and concluded that if the product was installed in accordance with the February 1996 technical information it would comply with B1, B2, E2, and F2 of the Building Code.

[18] Mr Jones's unchallenged evidence was that the installation of the Harditex cladding did not comply with the technical information. This non-compliance included failure to conform with the provision for vertical movement control; inadequate separation of the cladding at ground level; failure to ensure the horizontal PVC control joints of units A – J complied; installing texture coated polystyrene bands over the PVC horizontal control joints of units K – Z not in accordance with the technical information resulting in compression and cracks; insufficient fixings resulting in buckling of the Harditex sheeting in unit D; failure to follow the technical information with regard to the face fixing of windows or to comply with installation details relating to sill and jamb flashings; burying the Harditex sheeting in the ground; failure to cut the sheeting around window and door openings to ensure

the joints did not occur directly above or below jambs; and installing Harditex over fire-rated plaster board. These installation deficiencies of Harditex are also proved to my satisfaction.

[19] Failure to install correctly the Harditex product has been causative of leaks not only in the Ellerslie Gardens complex but also in other leaking buildings cases in the High Court. (See *Body Corporate 189855 v North Shore City Council* (HC AK CIV 2005-404-5561, 25 July 2008, Venning J [107] – [111]; *Body Corporate 188529 and Ors v North Shore City Council* [2008] 3 NZLR 479, Heath J [69] – [72]; *Body Corporate 185960 v North Shore City Council* (HC AK CIV 2006-004-3535, 22 December 2008, Duffy J [26] – [27].)

[20] Because these (and other) High Court authorities will be referred to subsequently in this judgment, and since body corporate numbers and identical local bodies will ring no bells in the mind of a reader, I propose to refer to the previous three authorities as "*Byron Ave*", "*Sunset Terraces*", and "*Kilham Mews*" respectively.

[21] Mr Jones gave evidence, again unchallenged, about the effects of the defects he identified. I accept his evidence. Some destructive testing was carried out. High moisture readings, mould contamination, and timber decay were observed. In timber framed buildings where leaks (which the experts refer to as "moisture ingress") occur, the structural timber frame will be subjected to fungal decay. This will cause rot, which in turn will reduce the strength of the timber over time, and can also encourage the growth of toxic moulds which can be harmful to humans.

[22] Moulds were discovered in Ellerslie Gardens and were subject to analysis. Moulds on linings harboured the presence of Stachybotrys Atra which, on the evidence, can release toxic spores into the atmosphere. Stachybotrys Atra is capable of producing many toxins including some which are carcinogenic and immunosuppressive. Stachybotrys Atra thrives on water damaged cellulose-rich material such as ceiling tiles, cardboard, gib board liner, damp filters, wallpaper, cardboard, and jute carpet backing. Knowledge of the presence of rot and this particular bacteria will clearly cause anxiety and justifiable stress to occupants.

Remedial Work

[23] Mr Jones's evidence was that the appropriate remedy for Ellerslie Gardens was extensive. This would include:

- Recladding all 26 units which would include stripping the external cladding back to the original framing and ensuring that the fibre cement cladding was drained at its base and finished short of the surrounding grouted paving.

- Reconstructing all deck/balcony structures which would include substantial remedial repairs and the installation of new flashings at abutments and hand rails.

- Installing a new cavity designed to conform with building code requirements.

- Identifying and replacing all wet and decayed framing.

- Installing diverter flashings to roof open flashings.

- Installing flashings to all pipe and other external penetrations.

- Improving the jointing and movement control cladding and insuring all cladding control joints complied with manufacturers requirements.

- Re-installing aluminium joinery and checking the integrity of window frame drainage.

- Repairing and renewing roof flashings and assessing, if need be, rainwater gutters.

- Various miscellaneous items.

[24] Mr Jones organised tenders for this detailed remedial work which have been updated since they were originally called in September 2004. The successful tenderer, Reconstruct Ltd, updated its tender in October 2008. Together with contingencies and fees, none of which were subject to challenge, the total cost of

remedial work, inclusive of GST, was $4,507,759. That sum is the basis and quantum of the plaintiffs' damages claim.

[25] There is no challenge to the $4,507,759 quantum figure so far as Mr Tay is concerned. His counsel acknowledged the figure was undisputed.

The Parties

[26] Against that background of the construction of Ellerslie Gardens and the defects identified, it is convenient to set out the parties' respective interests and involvement.

The Plaintiffs

[27] The first plaintiff, Body Corporate 183523, is established under the provisions of the Unit Titles Act 1972 for the Ellerslie Gardens apartment complex.

[28] The second plaintiffs are the owners and registered proprietors of the 26 units which comprise the Ellerslie Gardens complex as well as being the owners of all accessory units and, as tenants in common, of the common property.

[29] Unchallenged evidence from Mr N C Faulkner, a surveyor who considered the unit plan relating to Ellerslie Gardens was that, based on the various unit boundaries and other surveying data, approximately 65% of the Ellerslie Gardens unit title development was unit property, with the remaining 35% being common property.

[30] It is unnecessary for me to examine the litigation rights of the Body Corporate as first plaintiff. There was some analysis of this by Venning J in *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron Ave*) at [50] – [69]. Suffice to say the second plaintiffs, as owners of the 26 units, are suing in their individual capacities as unit owners. The first plaintiff, the Body Corporate, is suing for damage to the common property effectively as the agent of the unit owners who own that common property as tenants in common.

First Defendant

[31] TTA, as I shall later detail, was in 1996-1997 involved in a number of developments in Auckland. It was a registered master builder. It employed an architectural team and a construction team. It appears to have been involved in developments in a substantial way. TTA is, of course, a limited liability company. It was incorporated in 1991. It had three directors, being Mr Tay, his wife, and a Mr Roger Yeomen who resigned as a director in 2007.

[32] There is unchallenged evidence that TTA has, since its 1991 incorporation, undertaken over 600 developments. Around the time of the Ellerslie Gardens project it had 50 employees subdivided into various "divisions" of which the design division and construction divisions were two.

[33] The first defendant was debarred from further defence of the plaintiffs' proceeding because of its failure to arrange for discovery and inspection of certain critical documents. The order debarring TTA was made by Associate Judge Faire on 14 August 2008.

[34] TTA's last statement of defence filed in October 2007 admits that it entered into a written contract dated 19 August 1996 (supra [7]) with Heritage to design and build the Ellerslie Gardens development for $3,061,072.18. (This is a GST exclusive figure subsequently incorporated into a formal written contract (supra [7]). It also admits that TTA owed the plaintiffs "such duties as imposed by law".

[35] Evidence from Mr Tay, although not detailed on the point, was to the effect that TTA now has little left in the way of assets and that impecuniosity led to it being debarred.

Second Defendant

[36] Mr Sears subcontracted with TTA to carry out the building work for Ellerslie Gardens development on a labour only basis. Mr Sears was at the time trading as All Trades.

[37] Although solicitors acted for Mr Sears at an early stage and filed a brief statement of defence on his behalf, in more recent times Mr Sears has been unrepresented and has not appeared.

[38] In response to the directions contained in my 11 December 2008 minute Mr Sears provided the Court with a letter. That letter is consistent with earlier letters which he sent to the assigned Associate Judge.

[39] In broad outline the points or themes conveyed by Mr Sears were:

- After the contract between him and TTA was signed his wife was diagnosed with cancer which proved to be a terminal illness. Because of the distress which this discovery caused him and his desire to be with his wife and support her, Mr Sears approached TTA seeking to be released from the contract. It was suggested to him that he should be "honourable".

- As a result Mr Sears provided the work force for the construction work. With assistance from another person he administered the payroll of his employees until towards the very end when, so he says, that responsibility was taken over by TTA.

- Mr Sears never visited the site and had nothing to do with the organisation and supervision of his workforce employees which was the responsibility of various TTA personnel and Mr Taylor, the fourth defendant.

- Mr Sears had no say in the materials used or the work methods applied to Ellerslie Garden's construction. Nor did he have any direction over the tradesmen he supplied.

- Both the personal circumstances surrounding the contract and the arrival of the plaintiffs' claim in 2004 have been upsetting, distressful, and have brought him close to financial ruin.

- At some stage, so he asserts, some arrangement was reached with the plaintiffs' solicitors whereby, in return for Mr Sears co-operation and providing information, the plaintiffs would not proceed against him.

[40] When Mr Sears did not appear on the first day of the trial I directed the Registrar to courier him a letter asking him to appear in Court. My purpose in so doing was to explain to him the need to give evidence if he wished to advance the various assertions contained in his January 2009 letter. Nothing further was heard from him.

Third Defendant

[41] Although the plaintiffs filed their original proceeding in September 2004 Mr Tay was not joined until 31 July 2007. An earlier joinder order had been made by Potter J on 11 July 2007.

[42] Mr Swan, with certain wry humour, described Mr Tay as being the last man standing. There is some truth in the observation. TTA appears to be of limited financial worth. The correspondence from Mr Sears suggests that he is a man of modest, if any, means. ABC, who had provided the Code Compliance Certificate in October 1997 had gone into liquidation. The Auckland City Council was not involved. The plaintiff during the course of the trial discontinued against the fourth defendant, Mr Taylor, whom it alleged had been a site manager.

[43] Mr Tay has been sued in his personal capacity. Against the above background there is presumably a perception he is a defendant of greater substance than others available. There is no criticism of the plaintiffs in that.

[44] Mr Tay, as we have seen, was with three others a director and shareholder of Heritage; one of three directors of TTA; and, of some importance to the plaintiffs' case discussed later, signed with Mr Taylor on TTA letterhead a Practical Completion Certificate for the 26 units on 31 October 1997. That certificate triggered, under their respective agreements for sale and purchase, the obligations of purchasers of units from Heritage to settle their transactions.

Fourth Defendant

[45] At the conclusion of the evidence, but before submissions were presented, the plaintiffs discontinued the proceeding against the fourth defendant Mr Taylor. There were no outstanding issues as to costs.

[46] Up to that point Mr Taylor faced a claim against him by the plaintiffs for negligent misstatement based on his signature of the 31 October 1997 Practical Completion Certificate, a claim for negligence as the alleged project manager, and a further claim of negligence arising out of the 31 October Practical Completion Certificate.

[47] Mr Taylor had, at an earlier stage, engaged solicitors who filed a brief pro forma statement of defence. At trial he appeared, acted for himself, cross-examined various of the plaintiffs' witnesses, presented an opening, and gave evidence. He was cross-examined by both Mr Swan and Mr Josephson.

[48] The plaintiffs' decision to discontinue against Mr Taylor seemed, in the circumstances, understandable.

Cross-claims

[49] Unusually perhaps in this type of proceeding, there are no extant cross-claims by any of the three remaining defendants against the other and no claims seeking contribution or indemnity inter se. Nor are there any remaining claims against third parties.

The Causes of Action

[50] The plaintiffs claim TTA owed them a duty of care to ensure that Ellerslie Gardens was constructed in a proper and tradesman like manner so as to comply with the requirements of the Building Code. They plead the various defects (supra [13] and [18]) which I am satisfied have been proved.

[51] The second cause of action against TTA alleges negligence in its capacity as the architect and designer of Ellerslie Gardens in its preparation of plans, designs and drawings.

[52] The quantum to rectify Ellerslie Gardens, $4,507,759, is claimed as between the plaintiffs in the appropriate 65%/35% ratio.

[53] The second plaintiffs also claim individually general damages of $25,000 to compensate them for the depression, anxiety, stress, inconvenience, and loss of enjoyment of life which TTA's alleged negligence has caused them.

[54] The plaintiffs make a single claim against Mr Sears. They allege that Mr Sears was contracted by TTA to supply labour and carpentry services relating to the framing, joists, floor, garage roof, deck, cladding, stairs, windows, doors, hardware, and furnishing of the Ellerslie Gardens development. They allege negligence by Mr Sears in failing to perform his duty of care to the plaintiffs to ensure that Ellerslie Gardens developments was constructed in a proper and tradesman-like manner so as to comply with the Building Code.

[55] The plaintiffs again plead the defects detailed elsewhere (supra [13]). The plaintiffs further allege that, as a builder, Mr Sears ought to have been aware of gaps in the design information and should have sought that information from the designer. It is further alleged that poor workmanship resulted in breaches of the E2 External Moisture Approved Document under the Building Code. The same damages sums are claimed by the plaintiffs against Mr Sears.

[56] The plaintiffs' claims against Mr Tay personally rely on the same pleaded background and proved defects. The plaintiffs allege that Mr Tay was a developer inasmuch as he was a qualified architect; was directly involved in the planning, financing, designing, and construction of Ellerslie Gardens; had financial control of the design and building processes; controlled and was responsible for the design and construction processes; intended the Ellerslie Gardens units to be sold to the general public for profit; and himself profited from the Ellerslie Gardens development. It is alleged that Mr Tay was negligent as a developer.

[57] The plaintiffs' second cause of action against Mr Tay pleads negligence in his signature on 31 October 1997 of the Practical Completion Certificate. In that regard the plaintiffs allege that Mr Tay owed the plaintiffs a duty to exercise reasonable care and skill in both the planning and construction of Ellerslie Gardens and in its inspection, it being further alleged that the plaintiffs relied on the Practical Completion Certificate to establish that their units were capable of being used for residential housing purposes without material inconvenience.

[58] The plaintiffs further allege that Mr Tay possessed "special skill and knowledge" when he signed the Certificate because he was an architect, which skill gave rise to the special relationship between the plaintiffs and Mr Tay. In similar vein the plaintiffs allege that Mr Tay's signature on the Practical Completion Certificate amounted to negligent misstatement, this being the third cause of action.

[59] Interestingly the negligent misstatement cause of action is directed against Mr Tay alone. It is not pleaded against TTA.

[60] The plaintiffs' allegations are denied by Mr Tay in his 29 January 2009 statement of defence. Mr Tay pleads by way of affirmative defences that the claims are statute barred by s 4(1) of the Limitation Act 1950 and alternatively are statute barred by s 393(2) of the Building Act 2004. The respective limitation periods are six years and ten years.

Claims Against First Defendant

[61] The 6 September 1996 contract between Heritage and TTA (supra [7]) describes TTA as a registered master builder which indeed it was.

[62] The works which TTA contracted to carry out for Heritage were to be carried out in "a thorough and workmanlike manner and in conformity with the Building Act and Building Regulations".

[63] In addition to carrying out the building construction of Ellerslie Gardens TTA also contracted with Heritage to perform prior design and planning work. Counsel

did not point me to any specific contract document covering TTA's architectural role. However, there was unchallenged evidence from Mr Tay himself that TTA indeed performed that role for Heritage. Furthermore TTA's statement of defence of 3 October 2007 to the plaintiffs' second amended statement of claim admits the allegation that Heritage entered into a written contract with TTA "to design and build the Ellerslie Gardens development".

[64] It is clear from the unchallenged evidence of Mr Jones that the plaintiffs have proved, on the balance of probabilities, that some of the design details of Ellerslie Gardens were defective and that in many critical areas (supra [13] and [18]) the construction work was not carried out in a thorough and workmanlike manner. Nor was it in conformity with the Building Act and Building Code. These various proven defects have been causative of loss to the plaintiffs.

[65] It is clear law in New Zealand that, regardless of the specific terms of a building contract, builders and architects (there being no difference in principle) owe a duty of care to people whom they should reasonably expect to be affected by their work. Building contractors, architects, and engineers can thus be liable under the tort of negligence at the suit of owners of buildings which have been constructed in a negligent, defective, or unworkmanlike manner. *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394, 406, 417-418 (CA). (See generally *A C Billings & Sons Limited v Riden* [1958] AC 240; *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373, 392-394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234, 240-242 (CA); *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and [1996] 1 NZLR 513 (PC); and *Dicks v Hobson Swan Construction Limited (In Liquidation)* (2006) 7 NZCPR 881 at [32].)

[66] Chambers J succinctly summarised the law in *Body Corporate 202254 v Taylor* (2008) 12 TCLR 245; [2008] NZCA 317 as being clear that if a builder carelessly constructed a residential building, thereby causing damage, the owners of the building could sue the building in negligence (at [125]).

[67] *Bowen* is authority for the proposition that builders and architects cannot defend a negligence action against them by a third person on the ground that there

has been compliance with the contract with the owner. But the nature of the contractual duties can have some relevance in deciding whether or not there has been negligence (at pp 407 and 419). Here there is no doubt there was an express contractual term that the building works were to be carried out in a thorough and workmanlike manner and in conformity with relevant legislation (supra [62]). Additionally clause 16 of the contract permitted TTA to sublet any portion of the work to subcontractors. The clause stated that TTA (the registered master builder) "… shall be responsible for all work of all sub-contractors engaged by him in the works…."

[68] I am thus satisfied that the first defendant, TTA, has been negligent in its performance of contractual obligations to Heritage. That negligence has been the cause of the proven defects. Had TTA properly performed that contract so far as construction was concerned and, in relevant areas, had it provided proper plans and designs, then the proved defects would not have occurred. Those defects, as I have stated, have caused the plaintiffs loss. In both the design and the construction phase of its contract with Heritage, TTA has been negligent.

[69] Thus the plaintiffs are entitled to judgment against the first defendant. Quantum and apportionment are dealt with in a subsequent section of this judgment (infra [187]).

Claim Against the Second Defendant

[70] A combination of the pleadings, the facts, and Mr Sears's failure to take any appropriate steps or indeed to appear and call evidence, leave the second defendant exposed and vulnerable.

[71] Had Mr Sears given evidence, or had he or his former legal advisers taken some steps to seek contribution from other defendants, then the position might have been different. As it is, Mr Sears, trading as All Trades, is clearly a joint tortfeasor along with TTA (in the latter's construction capacity) and thus must be jointly and severally liable.

[72] The principles of the duty of care owed by a builder in the performance of a building contract and of potential negligence claims to subsequent owners discussed in the previous section of this judgment obviously apply to Mr Sears.

[73] There are two undated handwritten letters from Mr Sears to "Peter" of TTA. One was a submitted quotation for a labour only foundation and floor contract. The other is for labour only construction of 10 town houses at Ellerslie Gardens for $108,000 plus GST.

[74] In the event, two sub-contracts, one dated 13 November 1996 and the other dated 7 January 1997, both on Master Builders Federation forms, were signed by Mr Sears on behalf of "All Trade Builders". The earlier in time is for stage one foundation and slab work (units A-J). The second is for "labour only construction of Ellerslie Gardens for the sum of $200,000 exclusive of GST".

[75] Clause 2 of both contracts (the later in time is clearly the one relating to the bulk of the building work carried out by Mr Sears) provides in clause 2a under the heading "Head Contract Conditions":

> The sub-contractor is deemed to have perused and to have full knowledge of all the terms of the Head Contract, and agrees to be bound by, observe, perform, and comply with all the provisions of the Head Contract in so far as they can relate and rely to the Sub-contract Works mutatis mutandis …. In respect of the Sub-contract Works the Sub-contractor undertakes to the Contractor the like obligations and liabilities as are imposed on the Contractor towards the employer by the terms of the Head Contract and will save harmless and indemnify the contractor from and against the same….

[76] In short, the obligations contained in the September 1996 contract between Heritage and TTA to carry out the building works in a thorough and workmanlike manner and in conformity with relevant legislation are incorporated into the sub-contracts between TTA and the second defendant.

[77] Mr Taylor, the fourth defendant, gave evidence in cross-examination by the plaintiffs' counsel that Mr Sears and his crew built everything on the site.

> … starting from the ground floor they supervised all the digging of the excavations, tied all the reinforcing steel, placed the reinforced steel, concrete slabs, wall framing, roof framing, exterior cladding, exterior

> balconies, framings, and all the inside work, linings, doors, architraves, skirtings, you name it.

[78] Mr Taylor in evidence stated he had met Mr Sears twice at an early stage of the contract. It was Mr Taylor's understanding that Mr Sears was going to be in full control of the labour force. According to Mr Taylor Mr Sears had a project foreman, Mr Kevin Lockley, who was on the site directing all Mr Sears's site staff.

[79] In fairness to Mr Sears I asked Mr Tay when he was giving evidence whether Mr Sears had approached him to ask whether he could withdraw from the contract because of his personal difficulties, and whether such approach was met by the response that Mr Tay hoped that Mr Sears would act honourably. Mr Tay has no recollection of that conversation. He has no clear idea of what Mr Sears looks like. He does not discount that such a conversation may have taken place between Mr Sears and Mr McCullough, one of TTA's employees. He certainly was unable to confirm that any such conversation had taken place between Mr Sears and him.

[80] There may well have been available evidence to Mr Sears that the supervision and direction of his labour only work force had been delegated entirely to TTA's supervisors and staff. Such evidence, if it was available, would have been inconsistent with Mr Taylor's evidence on the role of Mr Lockley (supra [78]). However, there was no such evidence. The possibility was open to Mr Sears, assuming there was an element of direct control and supervision by TTA personnel despite the clear terms of the sub-contracts, to seek some form of contribution from the first defendant to offset any negligence proved against Mr Sears. However, no such contribution was sought.

[81] The inevitable result therefore is that Mr Sears's workforce were the principal actors or tortfeasors who created the defective construction aspects of Ellerslie Gardens. As Mr Josephson submitted, a defective building does not construct itself. The standard of construction fell below the standards expressly incorporated into the sub-contracts from the Head Contract (supra [75]). The performance of Mr Sears's labour only work force was negligent. That negligence created the defects which are causative of the plaintiffs' loss. In terms of the law the second defendant as well as the first defendant owed a duty of care to the plaintiff.

[82] Accordingly there must be judgment against the second defendant. The quantum and apportionment of that judgment between the plaintiffs is dealt with later (infra [187]).

Claims Against Third Defendant

[83] Mr Tay did not, in his individual capacity, acquire the Ellerslie Gardens site, contract for the design and construction of the apartment complex, or sell units. Those things were done by Heritage, a company struck off the companies' register in 2002. Mr Tay was at all relevant times a director of Heritage.

[84] Nor did Mr Tay, in his individual capacity, personally attend to the designs and plans of the Ellerslie Gardens complex. Mr Tay holds an architectural degree from Melbourne University but he is not registered in New Zealand as an architect. There is no evidence at all that he performed any architectural design role for Ellerslie Gardens. Nor did Mr Tay, in his individual capacity, construct the Ellerslie Gardens complex. He was not the principal builder. Nor was he involved on site in any construction capacity.

[85] Those architectural design and building aspects were, on the evidence, performed by the first defendant, TTA. Mr Tay was a director of TTA at all relevant times.

[86] The central involvement of two corporate entities presents obvious problems for the plaintiffs. The units they purchased have serious construction defects. They were not units of the type the plaintiffs had contracted to buy (either from Heritage or from previous owners). In that situation Mr Tay (as has been the case in other leaky building proceedings) presents a tempting target. The dynamic was correctly identified by William Young P in his judgment (in which Arnold J joined) in *Body Corporate 202254 and City Rental Trustees Limited v Taylor* (2008) 12 TCLR 245, [2008] NZCA 317:

> [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.

[87] Mr Josephson, for the plaintiffs, has constructed a careful argument which leads to the broad conclusion that, as a matter of policy, the facts of this case justify the Court imposing on Mr Tay a duty of care to the owners of the Ellerslie Gardens units.

Outline of the Plaintiffs' Submissions

[88] Mr Josephson first itemised the various facts he contended assisted his argument. These were:

a) Mr Tay was a director and shareholder of Heritage and the managing director and majority shareholder of TTA.

b) He personally profited from the Ellerslie Gardens development.

c) The intended units were to be offered to the general public for sale for profit.

d) He liaised with the Auckland City Council and approved the Resource Consent conditions.

e) He procured the contract between Heritage and TTA and set the budget for the development which included no provision for contingencies.

f) He engaged on TTA's behalf the various sub-contractors.

g) ABC's invoices were directed to him personally.

h) He liaised with one Grace Lee who clearly, on the evidence, was instrumental not only in purchasing a unit herself (she is the first named of the second plaintiffs) but was also instrumental in introducing a number of her Hong Kong compatriots to the units as investment possibility.

i) He reported (wearing his TTA hat) to Heritage about the progress of the construction programme.

j) He was the "main point of contact" with Heritage's solicitors and discussed sales and cash flow matters with him, including giving instructions over the settlement process.

k) He signed the application to deposit the Unit Plan and the notice of the Registered Office for the Body Corporate.

l) He was the contact point with the Master Build and signed the application both as builder and for Heritage for the Master Build guarantee. He also signed, as owner, a document designed to transfer the Master Build guarantee from Heritage to various purchasers.

m) He held himself out as a registered Master Builder by virtue of TTA's letterhead which (correctly) referred to the fact the company was a member of the Master Builders Association and by (incorrectly) using the letters "RMB" as his normal sign off on various letters which he signed on TTA letterhead.

n) He held himself out as a "developer, builder, and architect" being his stated profession in a "Personal Profile" which is undated but clearly on TTA letterhead.

o) He relied (on his evidence) on the subtrades to control quality.

p) He failed to ensure any system of quality control was in place choosing to rely on others.

q) He had authority and control over TTA operations including financial control and control over the design of Ellerslie Gardens.

r) He, together with Mr Taylor and on TTA letterhead, signed the Practical Completion Certificate for all units on 31 October 1997 in his capacity as the vendor's architect.

s) He acknowledged in evidence he had the authority to direct changes to the construction work if he was dissatisfied in the manner they had been carried out.

[89] Mr Tay's signature on the Practical Completion Certificate is a central plank of Mr Josephson's argument. It lies at the heart of the negligent misstatement cause of action. It is also alleged his signature on the certificate is indicative of negligence. Mr Josephson accepted in argument that Mr Tay's signing the certificate was central to the plaintiffs' tort claim. It was Mr Tay's primary act of negligence and was of great significance in the light of his ability to control both the development and the site.

[90] Placing reliance on the above factual matters Mr Josephson submitted that Mr Tay was a developer who owned a non-delegable duty to ensure that due care and skill was exercised in carrying out the construction work. This was the plaintiffs' first cause of action (supra [56]).

[91] There is clear authority that this responsibility of a developer is non-delegable (*Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA)). The

principles of *Mt Albert Borough Council* and indeed of *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA) have been accepted in all recent High Court leaky building judgments including *Dicks v Hobson Swan Construction Limited (In Liquidation)* (2006) 7 NZCPR 881); *Body Corporate 188529 & Ors v North Shore City Council ("Sunset Terraces")* [2008] 3 NZLR 479; *Body Corporate 188273 v Leuschke Group Architects Limited* (2007) 8 NZCPR 914; *Body Corporate 185960 v North Shore City Council ("Kilham Mews")* (HC AK CIV 2006-404-3535, 22 December 2008, Duffy J); *Body Corporate 199348 v Nielsen* (HC AK CIV 2004-404-3989, 3 December 2008, Heath J); *Hartley v Balemi* (HC AK CIV 2006-404-2589, 29 March 2007, Stevens J); *Body Corporate 189855 v North Shore City Council ("Byron Ave")* (HC AK CIV 2005-404-005561, 25 July 2008, Venning J). I have, of course, read and considered all these judgments.

[92] Counsel adopted the observations of Harrison J in *Leuschke* which suggested a certain elasticity over the definition of a developer and which also suggested there could be more than one developer.

> [31] The word 'developer' is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.
>
> [32] 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 benefit. It is the entity which decides on and engages the builder and any professional advisors. 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.

[93] Mr Josephson pointed to certain facts which, in his submission, justified a conclusion that Mr Tay was a developer in his personal capacity. He, through his directorships, effectively controlled the two critical entities, Heritage and TTA, which in turn controlled the development. It was Mr Tay who called the shots. There was a close relationship between Heritage and TTA, Mr Tay being the common element. He effectively had control of the site "in terms of decision making". He had the ability as the vendor's architect to decide when the

construction work was practically complete. There was no disputing the fact that the development of the 26 units was a substantial one in terms of *Mt Albert Borough Council*. And he profited from the development.

[94] Mr Josephson also called into aid the fact that TTA was unlikely to be able to meet any judgment. In that regard he pointed to the observation of Cooke J in *Mt Albert Borough Council* (*ibid* 240) who dealt with the submissions of counsel to the effect that the development company, Sydney Construction Co Ltd had deliberately kept its distance from the builder.

> 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.

[95] Mr Josephson next submitted that the categories of non-delegable duties were not closed but should be dealt with on a case by case basis (*Clerk and Lindsell on Torts* (19th ed 2006) 355). In his submission, even if I were to find that Mr Tay was not a developer in his personal capacity, I should nonetheless impose on him a non-delegable duty of care. The justification for so doing was that, on the facts, his involvement at all relevant stages was so great and his control so central.

[96] In short, as Mr Josephson accepted, he wanted me to expand the range of the tort of negligence for policy reasons.

[97] These policy reasons were evident from the facts. The purchasers and subsequent owners of the Ellerslie Gardens units were vulnerable as a class and had little protection. This was similar to the policy reason which led to negligence being imposed on developers in *Mt Albert Borough Council*. The negligence of Mr Tay, submitted counsel, was self-evident in this case. He had allowed others to carry out the construction work with minimal supervision. He had negligently certified the work as being practically completed when in fact it was defective and posed a potential and substantial risk. The situation was similar to the duty of care imposed on Mr Nielsen by Heath J in the *Nielsen* case (*op cit* supra [91]).

> [76] In my view, on the principles established in *Morton, Balemi* and *Leuschke Group Architects Ltd*, Mr Greg Nielsen was in control of the site

> and assumed personal responsibility for its oversight. He is liable under the *Mt Albert Borough Council v Johnson* principle, as a joint tortfeasor with the relevant development company.

[98] Closing this limb of his argument with a further policy submission, Mr Josephson observed that in a situation where deregulation had resulted in a number of debacles in the building industry, courts should not be slow to impose non-delegable duties in appropriate circumstances.

[99] Mr Josephson's submissions then moved to the tortious liability of individuals employed by a company. Running through these submissions, which included a helpful review of the authorities, especially in the leaky buildings area, was the concept of "assumption of responsibility" adopted by McGechan J in *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA) at 532.

[100] *Trevor Ivory* is a rock against which claims against individuals who are directors of tortfeasor companies frequently brush. One detects in *Body Corporate 202254 v Taylor* (*op cit* [81]) a willingness on the part of the Court of Appeal to re-examine the authority in the "right" case. Until such time as the Court of Appeal, or ultimately the Supreme Court, alters the principles, the authority remains binding on the High Court. The authority has been the subject of much academic criticism (See *Taylor* at [30] and *Byron Ave* at [189] – [200]). Like Venning J in the latter case (at [196]) the argument advanced by Todd and Isac in "Director's Torts" in Rowe and Hawes (eds) *Commercial Law Essays: a New Zealand Collection* (2003) p 39 is compelling.

[101] In any event the entire concept of "assumption of responsibility" is little short of a fiction. The phrase seems to me to represent a duty imposed by courts on a person in tort rather than some conscious decision of a party to assume legal responsibility to another.

[102] The following observation of Venning J in *Byron Ave* is pertinent and with it I respectfully agree:

> [197] The company structure provides limited liability to investors (shareholders). Directors can be liable to the shareholders because of their role in the governance of the company. Generally directors of a company

> will not owe a duty to parties dealing with the company merely because of their position as directors (apart from a duty to creditors in certain situations provided for in the Companies Act 1993). But there is no reason in principle for there to be a rule of law providing for a "director's immunity" for operational acts carried out by directors actually or effectively as employees of the company.

[103] A similar approach was adopted by Young P and Arnold J a month later in *Taylor*:

> [31] … 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….

[104] In general terms Mr Josephson accepted what he called the "conventional wisdom" that a company would be vicariously liable for the tortious actions of its employees carried out during the normal course of their work. But the fact that a company director committed a tort, thereby making the company vicariously liable, did not absolve the primary tortfeasor (the director) from a concurrent liability.

[105] In that regard counsel referred to the dicta of Chambers J in *Taylor*.

> [132] The law of torts is different [from contract]. 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.

[106] *Taylor* was a case involving an appeal from the striking out of a negligence claim against Mr Taylor who was the director and controller of companies which constructed defective villas on land also owned by one of Mr Taylor's companies. The Court of Appeal judgments also focussed on a parallel claim under the Fair

Trading Act 1986 and whether, critically, the strike-out threshold had been reached. As Chambers J observed:

> [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.

[107] Against that backdrop of cases, Mr Josephson submitted that in determining whether there was tortious liability or an assumption of responsibility by Mr Tay his conduct had to be scrutinised. The factors (supra [93]) which were relevant to labelling him as a developer should be the focus. Echoing perhaps Chambers J in *Taylor* (who made no mention of, and perhaps saw no need to mention in the context of his analysis, the non-delegable duty of a developer) counsel submitted it would be illogical for courts to impose such a non-delegable duty on developers yet "strain to afford these same developers protection under the corporate umbrella".

[108] I turn now to expand on specific issues raised by Mr Josephson and also, where necessary, make findings of fact.

Practical Completion Certificate

[109] Mr Tay's signature of this document on 31 October 1997 is, as I have stated, (supra [89]) a central plank of the plaintiffs' case. It is particularly germane to the plaintiffs' negligent misstatement cause of action.

[110] The document is on TTA letterhead. It is headed in bolded capitals "Practical Completion Certificate". Next, beside the word processing document code, is the

date, "31 Oct 1997". Beneath is a box. It has four headings with a recital beside each. They are:

Project/site address	Ellerslie Gardens – unit A-Z Unit 1-26/1A Harrison Road Ellerslie.
Extent of completion	Full contract work.
General contractor	Tony Tay & Associates Limited (registered master builder).
Owner	Heritage International Group Limited.

[111] The operative part of the document reads:

> This is to certify that the above named Contract Works have been inspected and qualify for Practical Completion Certificate on 30 October 1997.

[112] Mr Tay has signed as "managing director". Mr Taylor has signed as "project manager".

[113] The qualification date of 30 October is undoubtedly linked, and on the evidence I so find, to the Code Compliance Certificate of 30 October issued on that date by Mr R N Bowler, an approved and registered building certifier, on behalf of ABC. That document stated that it was a "final code compliance certificate issued in respect of all the building work under the above building consent". The building consent refers back to the Auckland City Council building consent. The document was addressed to the Auckland City Council.

[114] Both Mr Tay and Mr Taylor gave evidence that they had seen the Code Compliance Certificate before they signed the practical completion certificate.

[115] Mr Taylor's evidence was that he signed the document at Mr Tay's request, who had already signed it, on a visit to TTA's offices for some purpose. Mr Taylor's unchallenged evidence was that he asked Mr Tay if ABC had signed off all the units as completed and also whether Ronald (a TTA site manager who had been working on the site since March 1997) had finished. Mr Taylor's evidence was Mr Tay assured him ABC had done the final inspections, had found nothing, and that Ronald was working for the owners.

[116] Mr Tay's evidence was that he signed the Practical Completion Certificate as managing director of TTA and in reliance on ABC's Code Compliance Certificate. He also says he relied (there being some conflict here) on the advice of Mr Taylor. He stated that before signing the certificate he "randomly inspected" some three or four units to satisfy himself they were substantially complete and ready for occupation. He was satisfied in that regard.

[117] In cross-examination Mr Tay stated that he normally relied on project managers or members of his company teams to carry out the inspections. He did not attend to this personally, nor was he a practising architect in New Zealand or allowed to practice, although TTA itself had architectural expertise.

[118] I have no difficulty with the proposition that architects or other professionals owe a duty of care when preparing certificates which are an integral part of building and construction work. (See generally *Morton v Douglas Homes Limited* [1984] 2 NZLR 548; *Rowlands v Collow* [1992] 1 NZLR 178.)

[119] The principles of a negligent misstatement, properly seen as a sub-branch of the tort of negligence, are well known. The classic statement of Lord Reid in *Hedley Byrne & Co v Heller & Partners* [1964] AC 465, 486 is relevant.

> A reasonable man knowing that he was being trusted or that his skill and judgment were being relied on would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require; or he could simply answer without such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

[120] In *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL), it was considered that choosing or undertaking to speak was tantamount to an assumption of responsibility. The required focus was whether the circumstances in which the words were used were such as to give rise to a duty of care.

[121] The clear ingredients of the tort articulated in *Caparo* (at 638) are:

a) The advice is required for a purpose, particularly or generally described, which purpose is made known, either actually or inferentially, to the advisor at the time the advice is given.

b) The advisor knows that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose.

c) It is known, actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and

d) The advice is so acted upon by the advisee to his detriment.

[122] Significantly from a New Zealand jurisprudence standpoint the House of Lords in *Caparo* approved a passage from the judgment of Richmond P in *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553, 556 to the effect that the nature of a relationship was central to whether there had been an assumption of responsibility, and that such a relationship would not exist unless

> … at least, the maker of the statement was, or ought to have been, aware that his advice or information would in fact be made available to and be relied on by a particular person or class of persons for the purposes of a particular transaction or type of transaction.

Richmond P did not consider it reasonable to attribute such an assumption of responsibility unless the maker of the statement ought to have directed his mind before making the statement to "… some particular and specific purpose for which he was aware that his advice or information would be relied on".

[123] That focus is, in my judgment of importance when considering the purpose for which the Practical Completion Certificate was being put and the purpose for which it was signed.

[124] Interestingly, the negligent misstatement cause of action was run unsuccessfully in both the *Byron Ave* and the *Sunset Terraces* proceedings. Without going into details both foundered on the rock of there being no evidence of reliance**.**

[125] Heath J in *Sunset Terraces*, in a slightly different context, considered that the negligent issue of a Code Compliance Certificate might constitute negligence but not negligent representation (at [471]). In *Byron Ave*, where Venning J was similarly dealing with the negligent issuing of certificates by the North Shore City Council, negligent misstatement was pleaded. The Judge was of the view, however, that the issue of Practical Completion Certificates did not give rise to any liability ([278] – [294]).

[126] There appears to be no current authority which deals decisively with the liability in tort (if any) on the issue of a Practical Completion Certificate. Had it been pleaded I might have held that TTA, as the vendor's architect had been negligent in issuing the certificate. Although the plaintiffs' second cause of action against TTA gives various particulars of alleged negligence in its capacity as an architect, there is no particular relating to the Practical Completion Certificate. This omission, I suspect, was deliberate so as not to undercut or prejudice the plaintiffs' chosen negligent misstatement cause of action against Mr Tay personally.

[127] It is important to view the Practical Completion Certificate in the context of its use. The plaintiffs' submissions suggest, particularly in the context of the negligent misrepresentation cause of action, that the certificate was tantamount to an unqualified statement by the vendor's architect that the Ellerslie Gardens complex was defect free. I do not see the certificate in that light. The certificate does not serve the purpose of some unqualified warranty on the builder's behalf or, in this case, on the vendor's behalf, that the construction of the building has complied with the conditions and warranties of the building contract or conforms with statutory requirements. The issue of the Practical Completion Certificate neither augments nor does it negate the obligations of developers and builders in either contract or tort. Nor does it augment specific clauses dealing with construction standards in sale agreements between Heritage and various purchasers. Furthermore it is impossible

to construct such an all embracing intention from the face (supra [110]) of the certificate.

[128] This approach is consistent with the observation of Venning J in *Byron Ave* (at [282]) that the principal effect of issuing a Practical Completion Certificate was to release retention monies to the builder. The Judge did not consider the certificate was a warranty that the building was free from defects.

[129] In general terms, and particularly in the context of Ellerslie Gardens, I see the Practical Completion Certificate as an important stage in the relationship of the purchaser of a building being constructed and its vendor.

[130] There was unchallenged evidence about the contractual importance of the certificate from Mr J R Holmes, a solicitor of some 40 years standing and with conveyancing expertise, whom the plaintiffs called. Mr Holmes had acted for 24 of the initial purchasers of the 26 Ellerslie Gardens units.

[131] Although not all agreements for sale and purchase are extant it seems to be accepted by counsel that the agreement for sale and purchase relating to unit O would have mirrored other agreements for sale and purchase. Certain special conditions clauses are of relevance.

> Clause 1.14 "The settlement date" means:
>
> (a) The date of Practical Completion: or
>
> (b) The 7th working day after the date that a search copy as defined by s 172(A) of the Land Transfer Act 1952 of the new unit titles available for the unit,
>
> whichever is the later.
>
> Clause 1.12 "Date of Practical Completion" means the date of (sic) which the unit is at a stage of practical completion as certified by the vendor's architect.
>
> Clause 1.11 "Practical Completion" means the stage of construction of the development when the unit is substantially complete so that it is capable of being used by the purchaser for the purposes for which it was intended without material inconvenience notwithstanding that there may be items of a comparatively minor nature which may require finishing,

> alteration or remedial action and notwithstanding the fact that any other unit may not have achieved practical completion at that time.

[132] There is clear evidence that the vendor's architect, for the purposes of the agreement for sale and purchase, was TTA. It was not Mr Tay personally. It is also apparent that the relevant unit titles for Ellerslie Gardens had issued approximately two weeks earlier in October 1997. Thus, the effect of the 31 October 1997 Practical Completion Certificate would be to trigger the settlement date, its issue being later than the date of the issue of the unit titles (Clause 1.14).

[133] Mr A A Shanahan, an architect and expert called by the plaintiffs, also gave unchallenged evidence in this area. "Practical completion" was defined in r 68 of the Architects' Standard Conditions of Contract 1996. Relevantly the rule provides:

> Everything has been done except for minor omissions and minor defects the architect and the contractor agree which:
>
> (i) the contractor has reasonable grounds for not promptly correcting;
>
> (ii) do not prevent the contract works … from being used for their intended purpose;
>
> (iii) can be corrected without prejudicing the convenient use of the contract works
>
> and also everything has been done except the work which the architect and the contractor have agreed to defer.

[134] Mr Shanahan's evidence was that practical completion is typically ascertained by inspecting the works when the certificate is issued, together with previous inspections by the architect during construction. It was his expectation that the person signing that Practical Completion Certificate would have relevant qualifications, experience, and knowledge to make the required judgment. Such experience and knowledge would include an understanding of the technical requirements of the Building Code and standards of trade practices which would achieve compliance with the Building Code, of the relevant skills, workmanship and trade practices applied during construction, and an awareness of the progress of inspections carried out by the building certifier, together with such works which

require completion or remedying so that a Code Compliance Certificate can be issued. Mr Tay lacked such experience and knowledge.

[135] Mr Shanahan's evidence, again unchallenged, was that whilst a Practical Completion Certificate does not certify compliance with the Building Code, such a certificate does certify the state of completeness of work that is required to comply with the Building Code. In other words if more than minor omissions and defects remain outstanding, so that the work is not ready for inspection to ensure code compliance, then a Practical Completion Certificate should not be issued.

[136] There is evidence that Martelli McKegg, the solicitors acting for Heritage as vendors, forwarded the copies of the Practical Completion Certificate to Mr Holmes as solicitor for various of the purchasers. Mr Holmes's evidence, on which Mr Josephson placed some emphasis, was that his usual advice to his clients who had entered into an agreement in terms of which settlement was triggered by the issuing of a certificate, was to await the issue of such a certificate before settling their purchase. However, nothing in my judgment hangs on that since, clearly, the obligation of a purchaser to settle did not arise until both the unit title and the certificate were available.

[137] Only one of the second plaintiffs who gave evidence, Mr Joe, the purchaser of Unit I (along with his wife) stated that he had relied on the Practical Completion Certificate to complete the purchase. However, there was some doubt about this since, during cross-examination, Mr Joe was not really clear whether he had seen the document at the time it had been forwarded by Martelli McKegg to his own solicitors. In any event, Mr Joe's evidence falls far short of establishing that he relied on the certificate for any specific purpose. His use of the word "relied" in his brief is a mere formula.

[138] There is no doubt in my mind that, in its discharge of its responsibilities as the vendor's architect, the first defendant TTA was negligent. Previous inspections, if there were any, of the Ellerslie Gardens construction by the architectural personnel should have revealed construction defects (all of which were on Mr Jones's evidence visible to the naked eye) long before 31 October 1997. The inspections, both final

and intermediate, clearly fell short of the normal standards expected of an architect as deposed to by Mr Shanahan. But I see the issue of the certificate by TTA not so much as an individual act of negligence causing loss to the plaintiffs on which they can rely. Rather, I see it as the culmination of ongoing negligence by the vendor's architect over most of the period of Ellerslie Gardens' construction. The damage caused to the plaintiffs was not occasioned by the issue of the 31 October 1997 certificate. Rather, it was caused by the derelict performance of TTA's architectural and supervisory responsibilities throughout the construction phase. I so find. Yes, the issue of the Practical Completion Certificate by TTA was negligent. But there is no such pleaded claim against TTA.

[139] My approach is consistent with that of Venning J in *Byron Ave* (at [288]) that the plaintiffs' loss was primarily caused by defective design. The issue of a Practical Completion Certificate by the architect was not causative of loss.

[140] Consistent with that finding, I additionally find:

- Mr Tay signed the Practical Completion Certificate not in his capacity as an architect or inspector but solely in his capacity as managing director of TTA.

- The signing of the certificate was an administrative action on behalf of TTA and not an action of Mr Tay in his personal capacity.

- The bases on which Mr Tay signed the Practical Completion Certificate were, first, his knowledge of and reliance upon the arrival of the ABC Code Compliance Certificate the previous day, secondly, on the basis of his own inexpert assessment of the units and his impression that construction was completed, bar some minor maintenance items, and, thirdly, on the basis of information conveyed to him by employees involved in the construction phase that construction was progressing without mishap and nothing was amiss.

- The contractual place of the Practical Completion Certificate and the intention of the vendor and the purchasers under the relevant agreements for

sale and purchase was not an assurance about the quality of the construction, but one of two triggers for the settlement date.

- None of the plaintiffs or their predecessors relied on the Practical Completion Certificate at all as a pointer to the quality of construction or an assurance that construction was defect-free.

- No solicitor acting for any of the plaintiffs on a purchase (and I accept Mr Josephson's submission that the solicitors on a purchase transaction were acting as agents for their client) relied on the certificate for any purpose other than an indication that the settlement date was triggered. Certainly there was no reliance by a solicitor on the certificate as a pointer to construction quality or freedom from defects. (To some extent the issue of reliance is part and parcel of the obligation in tort, or assumption of responsibility. Heath J in *Sunset Terraces* (at [553]) considered there was no "community expectation that a designer certifying practical completion was assuming a local authority's inspection and certification obligations. In any event it was necessary to prove "actual reliance" before causative loss flowing from an architect's negligence could be sheeted home.)

- The certificate, in any event, was not causative of loss.

Is Mr Tay, in his individual capacity, a tortfeasor?

[141] In this section of my judgment I endeavour to draw together the relevant legal policy themes discussed earlier (supra [89]-[107]) and apply them to the facts.

[142] There were some aspects of Mr Tay's evidence which I found unsatisfactory. He endeavoured to explain away his use of the letters "RMB" in the sign off of his correspondence (which I suggested conveyed the impression that he as well as TTA was a registered master builder) as "a mistake". Although his evidence was that TTA had gone into a decline in recent years as a result of adverse economic conditions, I consider it fair to draw the inference that decisions were made to allow the company, which had clearly been involved in a number of substantial property

developments since 1991, to run down as a result of the threat posed by this proceeding. Consistent with that inference was Mr Tay's concession that a month after he was personally joined as a party to this proceeding there was a transfer of a substantial commercial building which he owned (which apparently housed TTA) from his name to a family trust.

[143] These actions do not necessarily indicate any legal or moral culpability. They are standard reactions by business people involved in enterprises which collapse bringing the threat of some form of contingent liability. No doubt the dynamic I have described justifies careful scrutiny of Mr Tay's evidence. And scrutinise it I have.

[144] That said I am satisfied that Mr Tay has been truthful and has painted an accurate picture in three areas which are critical to the plaintiffs' claims against him. The first is that TTA, of which company he was managing director, had been actively involved in the property development and construction business for five or six years before the Ellerslie Gardens project got under way. It is clear from discovered minutes, and also from the evidence of Messrs Tay and Taylor, that throughout 1997 when Ellerslie Gardens was being constructed, TTA was involved in other development projects. Ellerslie Gardens was by no means the only active development in which TTA was involved or with which Mr Tay was occupied at the time. In contrast to some other High Court cases in the leaky building area, TTA was not a corporate entity created for the sole or major purpose of progressing a particular development.

[145] The second area in which I accept Mr Tay's evidence is that TTA, at the relevant time was an organisation of some depth. Unlike the *Trevor Ivory* situation it was far from being a one man band. It had, so far as Ellerslie Gardens was concerned, designated employees attending to design and the preparation of plans. Although it was the master builder or head contractor in terms of the 6 September 1996 contract with Heritage, it subcontracted out the construction work to Mr Sears. It maintained, however, overall control and supervision of the Ellerslie Gardens site through various designated employees such as Mr Tham, Mr McCullough, the person referred to by Mr Taylor in evidence as Ronald, Mr Taylor himself as an

independent contractor, and importantly Mr Roger Yeoman who was a director of TTA at the time and who had engineering expertise.

[146] Clearly the teams, the personnel, the systems of control, supervision and quality checks which TTA had in place with the Ellerslie Gardens project, were inadequate. Clear construction defects, errors and design defects, particularly as they related to the Harditex cladding and to the balcony, window, and weather proofing aspects resulted. TTA failed to detect the defects which should have been evident at the time. But in none of these Ellerslie Gardens functions involving TTA is there any evidence that Mr Tay personally was actively engaged or directly involved.

[147] The third area arises out of the previous sentence. Mr Tay in a generalised way stated that he had no active role in the Ellerslie Gardens development and played only a "minor administrative role". I accept that description as it applies to his Ellerslie Gardens involvement, on the evidence, as being accurate. Certainly so far as TTA, its governance, its operations and its corporate activities were concerned Mr Tay's role, as managing director, was major and decisive. But in terms of the Ellerslie Gardens development his direct role was indeed minor. He had no part to play in TTA's production of designs, plans and drawings. He was not involved in the detail or the minutiae of the construction. His visits to the site during 1997 were limited to four or five. Such visits, I believe, were probably qualitatively similar to those of a property owner on whose property a residence or holiday home is being built, who pops in from time to time to see how things are getting on. He had no day to day involvement, oversight, or indeed corporate responsibilities during the Ellerslie Gardens construction phase.

[148] So in these three stipulated areas, critical to the plaintiffs' claim, the above four paragraphs constitute my findings.

[149] Mr Josephson relied on a number of matters (itemised above at [88]) which he submitted pointed to Mr Tay's involvement and which would render him a tortfeasor in respect of the Ellerslie Gardens development. (Some of the factors also pointed to Mr Tay being a developer in counsel's submission). Mr Tay was cross-examined on these aspects and particularly the documents establishing them.

[150] But in my judgment none of these matters weaken my findings or justify a finding that Mr Tay was a tortfeasor in respect of the Ellerslie Gardens development. He was indeed TTA's managing director and majority shareholder. He indeed liased with Heritage and negotiated the development contract. He was indeed responsible for the filing of documents with the Auckland City Council and the development budget. He indeed organised subcontracts, master build guarantees and liased with Heritage's solicitors on sale. He was indeed responsible for raising the finance and, from an organisational stand point, was able, if he so chose, to control what happened on the site. But these were all actions by Mr Tay in his capacity as a director. Other projects in which TTA was involved before, during and after the Ellerslie Gardens phase, would have required similar actions on his part. These are the actions and mechanisms whereby a limited liability company makes decisions, commitments, and enters into legal relationships. None of the actions of Mr Tay to which Mr Josephson points are, in my judgment sufficient in themselves, on the facts of this case, to render Mr Tay a tortfeasor.

[151] I test this conclusion against other leaky buildings High Court judgments where a director has been sued in his personal capacity. In *Drillien v Tubberty* (2005) 6 NZCPR 470, Associate Judge Faire found no personal involvement (which he considered on the authorities critical) by a director whose involvement in the building process had been limited to organise what was necessary for specific subcontractors and who had left those subcontractors to get on with the actual building themselves. In *Hartley v Balemi* (*op cit* [91]) Stevens J upheld an adjudicator's finding (which led to liability) against a director who was personally involved in the day to day decisions which led to the defects causing loss.

[152] Similarly Heath J in *Nielsen* (*op cit* [91]) held that a director was personally exposed in a situation where he had primary responsibility for supervising construction work, which supervision extended to co-ordinating subtrades and ensuring work was carried out in accordance with the plans and specifications. The director would attend the site for at least one or two hours per day in builder's clothes and gave daily instructions to the site manager. He would also attend the site or speak by telephone when any significant problems on the site arose. This direct involvement of the director was in contrast to his brother and co-director who played

no role at all other than identifying suitable land for the development and who was certainly not involved in site supervision.

[153] Duffy J in *Kilham Mews* on significantly different facts, found that a director was exposed in a situation where there was clearly a joint venture between a company and the director, the company's involvement was limited to being a bare trustee of the land.

[154] Harrison J in *Leuschke* observed (at [66]), similar to my own analysis (supra [150]), that a director who prepares budgets, arranges bank facilities and invites tenders is exerting a degree of control when performing those functions. But such control was created by the office of director and agent and was unrelated to the actual building process or more particularly to any construction defects. The director being sued in that case was successful in his defence since there was no evidence of his involvement in the actual building process nor any evidence of knowledge of defects of design or construction leading to the damage. There was no nexus between the director's general powers of control and the particular defects. That conclusion on its facts is identical to my own conclusion here.

[155] In *Byron Ave* (relevantly at [202] – [210]) Venning J was satisfied the plaintiffs had made out the claim against a director who had assumed personal responsibility for architectural and project management services and who additionally had "a direct and personal involvement in the day to day construction". There was evidence the director in question was the architect on site with a clear involvement in relevant design detail and quality control.

[156] Although all those cases revolve around their individual facts, as a general rule directors facing claims in respect of leaky buildings will be exposed in situations where the companies involved are one person or single venture companies or in situations where there are factual findings that the director was personally involved in site and building supervision or architectural and design detail. The plaintiffs have failed to prove that Mr Tay personally was involved to that degree in any of these areas.

[157] I thus conclude that Mr Tay was not, in respect of the Ellerslie Gardens development or its design or construction, a tortfeasor. There is not, on the facts, an assumption by him of responsibility towards the plaintiffs. The facts do not justify the Court imposing on him a duty of care (in his individual capacity) to the plaintiffs. None of his actions are causative of the plaintiffs' loss.

[158] I turn finally to the plaintiffs' submission that Mr Tay was a developer. I accept the concept advanced by Harrison J in *Leuschke* (at [32]) that there can be more than one developer. And because of the close relationship between Heritage, which clearly was a developer, and TTA I would have been prepared to find that both Heritage and TTA were developers. However, I was not asked to make such a finding.

[159] I reject the submission that Mr Tay in his individual capacity was a developer. Much more would be needed to sheet home that status to him than his shareholdings and directorships in Heritage and TTA and the fact that his interests in those companies resulted in him sharing personally in the profit generated by the Ellerslie Gardens development. The developer was Heritage, not Mr Tay.

[160] The Court of Appeal (per Young P and Arnold J) in *Taylor* (*op cit*) summarily rejected (at [37]) a similar submission based on *Mt Albert Borough Council v Johnson* that the director of the development company was a developer.

> [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*.

Jones v Dunkel

[161] In submissions on Mr Tay's evidence Mr Josephson invited me to draw adverse inferences because Mr Tay had failed to call other witnesses who might have supported his evidence relating to his degree of involvement. Mr Josephson called into aid an Australian rule of evidence being the Rule in *Jones v Dunkel* (1959) 101 CLR 298. "The Rule" in general terms (at 321) applies, submitted counsel, when a

party who is capable of testifying fails to give evidence as in a case where any other available witness is not called. Unless a party's failure to give evidence can be explained it may lead rationally to an inference that his evidence will not help his case.

[162] I doubt whether the status of the Evidence Act 2006 as a code would permit me to apply this approach as a rule of evidence. In any event what Mr Josephson is inviting me to do is to read down or even ignore Mr Tay's evidence on the basis that his alleged failure to call supporting witnesses justifies an inference that such witnesses, if called, would not have helped Mr Tay's case or would perhaps have contradicted it. Such an inference would be based on mere speculation. Neither I nor counsel have any idea what other putative witnesses might have said.

[163] The "Rule" has been referred to in New Zealand cases. An example is *Innes v Ewing* [1989] 1 NZLR 598 where Eichelbaum J held (at 607) that the natural inference from a failure to call a pertinent witness was that he or she would have exposed facts unfavourable to the party having the choice to call.

[164] A thorough discussion of the "Rule" is found in the Court of Appeal judgment *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731, ([144] – [161].) The Court of Appeal did not consider it helpful to refer to a "rule":

> [153] In our view, it is not helpful to analyse the position in terms of broad and narrow views. Neither is it helpful to refer to the "rule" in *Jones v Dunkel*. There is no rule. Rather, there is a principle of the law of evidence authorising (but not mandating) a particular form of reasoning. The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:
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> (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
>
> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
>
> (c) the absence of the witness is unexplained.

> [154] Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it. The result of such an inference, however, is not to prove the opposite party's case but to strengthen the weight of evidence of the opposite party or reduce the weight of evidence of the party who failed to call the witness.

[165] The issue gives rise not to a principle of evidence but rather to a reasoning process. Mr Josephson does not refer to any particular witness or indeed a broad class of witness. Rather he is pointing to Mr Tay's failure to call any other supporting witnesses. But the submission, with respect, is based on the assumption that had Mr Tay called (for instance) members of TTA's design team or construction team such hypothetical witnesses would have contradicted his own evidence about the role he played. As I have said, such an inference on my part would be pure speculation. On the evidence I have heard, particularly as it relates to Mr Tay's involvement with the Ellerslie Gardens project and its site, there would be no justification for me to draw an inference of the type Mr Josephson urges on me. I decline to do so. Nor is this a case, on its facts, where "an explanation or elucidation is required".

[166] In any event, such witnesses as Mr Than, Mr McCullough, and Mr Yeoman would, as a result of preparation, be known to the plaintiffs. They could have been briefed or called if need be on subpoena. The "Rule" as postulated by counsel is a double-edged sword. Its application could equally lead to drawing an inference that these uncalled witnesses might have been unhelpful to the plaintiffs.

Conclusion

[167] It thus follows that all the plaintiffs' causes of action against the third defendant must fail. He was not a developer. He has not, in the light of my findings, breached a duty of care towards the plaintiffs or committed acts of negligence which have been causative of their loss. And on the third cause of action, being negligent, misstatement in issuing the Practical Completion Certificate, I am satisfied the certificate was signed by Mr Tay in his administrative capacity as managing director of the vendors' architects (TTA) for the prime purpose of triggering the settlement of sales. Additionally there is no evidence that any of the plaintiffs relied on the

Practical Completion Certificate or that such reliance was causative of loss. Thus the basic ingredients of the tort of negligent misstatement set out in *Hedley Byrne & Co v Heller & Partners* [1964] AC 465 and *Caparo Industries plc v Dickman* [1990] 2 AC 605 are lacking.

[168] The three causes of action against the third defendant accordingly have not been made out.

Limitation Defences

[169] Limitation defences are not available to either the first defendant TTA or the second defendant Mr Sears because they were never raised or pleaded.

[170] The third defendant, Mr Tay's statement of defence (dated 23 February 2009) specifically pleads s 4(1) of the Limitation Act 1950 and s 393(2) of the Building Act 2004 as affirmative defences raising the respective statutory periods of six and ten years. Some of Mr Swan's cross-examination of various plaintiffs was clearly exploring the limitation issue.

[171] My finding that the plaintiffs' three causes of action in negligence against Mr Tay have failed would normally justify me in not having to deal with the limitation defence. The defence is in the nature of a backstop defence if the plaintiffs were otherwise able to sheet home liability.

[172] Counsel's preference was that if the plaintiffs' claims against the third defendant were to fail I should nonetheless deal with the limitation defence to guard against the possibility of my judgment being wrong and upset on appeal. I am happy to acquiesce. A number of High Court judgments arising out of leaky building proceedings are currently pending in the Court of Appeal. I am also conscious of the fact that the issue of a director's personal liability in tort raises important policy issues which are more properly the prerogative of the Court of Appeal and the Supreme Court than mine.

[173] Mr Taylor was joined as a defendant on 31 July 2007. Mr Swan's overall submission is that any causes of action which accrued before 31 July 2001 would be barred by s 4(1) of the Limitation Act 1950. Any defences to which s 393(2) of the Building Act 2004 applied would be similarly barred if the related building and construction had been completed prior to 31 July 1997.

[174] In general terms s 4(1)(a) of the Limitation Act prevents actions founded on tort being brought six years after the cause of action has accrued. Section 393(2) of the Building Act 2004 prohibits civil proceedings relating to building work ten years after the date of an act or omission. Again, in general terms a cause of action for Limitation Act purposes appears to accrue once a building defect is reasonably discoverable. The longer ten year period under the Building Act, however, is a blanket prohibition in respect of which awareness of a defect appears to be irrelevant.

[175] Mr Swan, relying on the evidence of Mr Jones, submitted that the various defects in Ellerslie Gardens were apparent on 31 October 1997. Because they were apparent the defects could not be described as latent defects. They were manifest.

[176] So far as the cause of action based on negligent misstatement was concerned this was grounded on the 31 October 1997 Practical Completion Certificate. The cause of action would run either from that date or alternatively from the later dates (around December 1997) when the various purchasers or their solicitors purportedly relied on the certificate. Thus limitation periods began to run between late October 1997 (the date on which ABC issued its certificate of Code Compliance but when, on Mr Jones's evidence, the defects would have been apparent) and December 1997. Thus, by the end of 2003 the six year period would have expired some years before Mr Tay was joined as a party.

[177] Dealing with s 393(2) of the Building Act Mr Swan noted that civil proceedings relating to building work were prohibited after ten years from the date of the act or omission on which the proceedings were based. On the authority of *Johnson v Watson* [2003] 1 NZLR 626 (CA) (dealing with s 91(2) of the Building Act 1991 in similar terms) the section was concerned not with the accrual of the

cause of action but with the act or omission upon which the proceedings were based. Claims of building work carried out ten years prior to issue of a proceeding were barred. However, an action could still lie in respect of subsequent remedial work.

[178] Mr Swan submitted, on the basis of ABC records of preline inspections, that all preline inspections had been completed by 31 July 1997. The evidence from Mr Jones was that essentially a preline inspection indicated that units were 99% complete on the exterior and weatherproof. Thus the Building Act barred proceeding. I reject that submission. Construction of Ellerslie Gardens, defective as it was, did not finish until October 1999. Mr Tay's joinder is inside the ten year period.

[179] Limitation defences in a building context have been the subject of higher authority. In *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, 526 their Lordships stated that the loss which the plaintiff there was suing for was economic loss "loss to his pocket" and not for physical damage to the house or its foundations:

> the plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.

[180] A plaintiff cannot, however, shut his eyes to the obvious and thus postpone the start of the limitation period.

[181] The principle (in a forestry investment case) was examined by a full Court of Appeal in *Murray v Morel & Co Limited* [2007] 3 NZLR 721. All five judges, on the basis of *Hamlin*, were of the view there was no general principle that a cause of action did not accrue for limitation purposes until the elements were reasonably discoverable.

[182] More recently the Supreme Court in *Davys Burton v Thom* [2009] 1 NZLR 437 has confirmed that the cause of action in negligence does not come into being until there is first an act or omission by a defendant breaching a duty of care, and secondly causative loss or injury suffered by the plaintiff. Until the latter occurs in time the limitation period does not begin to run.

> [38] A cause of action in negligence does not exist until there is, first, an act or omission of the defendant which breaches a duty of care owed by the defendant to the plaintiff and, secondly, loss or injury caused by that act or omission suffered by the plaintiff. The existence of loss or injury is an element without which the cause of action does not exist and accordingly until it occurs time does not run against the plaintiff for limitation purposes.
>
> …
>
> [46] In summary, a cause of action in tort for negligence does not exist and hence time does not start running for the purposes of the Limitation Act unless and until the plaintiff has suffered some actual and quantifiable loss, harm or damage as a result of the breach of duty involved. Damage will be contingent, and hence not actual for limitation purposes, if the plaintiff will suffer no damage at all unless and until a contingency is fulfilled. That will be so if the damage results from the plaintiff being exposed to a liability which is contingent on the occurrence of a future uncertain event. A good example is where the liability is that of a guarantor and is contingent on a default by the principal debtor, in contrast to the undertaking (as in *Gilbert*) of a direct and present liability which falls due in the future. The distinction may well be thought to be a fine one, but in any regime of limitation apparently similar cases may fall on opposite sides of the line which divides those which are barred from those which are not. A reduction in the value of an asset, whether tangible or intangible, constitutes actual damage and exists as soon as the asset becomes less valuable.

[183] Although Mr Swan put to various of the second plaintiffs in cross-examination that their units might have shown signs of leaking immediately after 1998 none of the plaintiffs agreed. I find there is no evidence that the leaks caused by the various defects began to manifest themselves until 2002, and even then not in all units. It was not until Property Solutions Inspections (NZ) Limited prepared a report in respect of one unit for the Body Corporate in December 2002 and the Body Corporate subsequently resolved to engage an engineering firm to investigate, that the extent of the defects and the problems became manifest.

[184] There is also clear authority that although defects (as with Mr Jones) may be observable to a building surveyor, that does not mean they are observable to a lay person (See *Byron Ave* at [26]; *Stieller v Porirua City Council* [1986] 1 NZLR 84, 95).

[185] Clearly (and there was some sales evidence to suggest this) the economic value of the units at Ellerslie Gardens was unaffected by the building defects before December 2002 because nobody knew about them. They had not caused any economic loss.

[186] Thus, on the basis of these broad principles and findings I hold that in the event of my judgment in respect of the three causes of action against Mr Tay being incorrect, then the limitation defences pleaded affirmatively by him are of no avail. He carries the onus of establishing such defences. The facts do not assist him in discharging that onus.

Quantum and Damages

[187] Unusually for leaky building proceedings to date all unit owners are parties as well as the Body Corporate. I have been assisted by Mr Josephson's careful tabulation of the claims involved which Mr Swan does not dispute.

[188] In respect of the 26 unit holders, the current owners of units A and M are not, as I understand it, second plaintiffs but the previous owners who have sold are. Each of the second plaintiffs calculated their loss in terms of the Body Corporate Rules as a unit title percentage. There is no challenge to that. There is no claim for the current owner of unit O who purchased with knowledge of the defects.

[189] It is unnecessary for me to expand further on the rationale over which there is no dispute. Accordingly, so far as the first plaintiff, the Body Corporate, is concerned suing on behalf of all unit owners in respect of common property there will be judgment in the sum of $1,456,704.86 against the first and second defendants. That figure, if its componentry is required in any sealed judgment, is as per paragraph 286 of Mr Josephson's closing submissions.

[190] So far as the claims for repair costs by the second plaintiffs are concerned, in broad terms one is looking at 65% of the total repair costs subdivided between individual unit owners in terms of their unit entitlement percentage. The unit owners of units A, M, and O, because of their purchase history, not included.

[191] Accordingly judgment is entered against the first and second defendants in the sum of $2,583,419.22 being all of the second plaintiffs except the owners of units A, M, and O. The componentry of that judgment sum is as per paragraph 287 of Mr Josephson's submissions.

Second Plaintiffs' Claims for Loss of Sale

[192] On the basis of the evidence produced I am satisfied that the following second plaintiffs, being the owners of units A, M, and O who sold their units prior to the issue of this proceeding are entitled to judgment for loss of value. Judgment is accordingly entered against the first and second defendants as follows.

Unit	Second Plaintiffs	Judgment Sum
A (1)	Rodney Sue Wing Chin and Sandra Chin as trustees of the Mana Trust	$ 65,000
M (13)	Qiang Fu and Ying Zhong	$ 14,200
O (15)	Ngai Hung Lee	$100,000

Consequential Loss

[193] Nineteen of the second plaintiff unit owners seek damages for consequential losses for loss of rents anticipated to occur during remedial work. The owners of three further units similarly claim consequential damages so that they can seek alternative accommodation which they expect they will need whilst remedial work takes place.

[194] After discussion with counsel I took the view that damages for loss of rentals, although awarded by Venning J in *Byron Ave*, were problematic. It is by no means certain what specific loss of rental (if any) will occur. It might well be that some unit tenants choose to work around builders whilst remedial work was taking place. Accordingly, in respect of all relevant plaintiffs (counsel to attend to their correct identification in the judgment) there is judgment for liability.

[195] Quantification of damages can be determined by me at a later stage through memorandum if necessary, if specific rent losses occur.

Further Consequential Loss

[196] The second plaintiff Koon Hung Chan, the owner of unit T has claimed a weekly rental reduction of $20 experienced since 16 October 2006 in respect of unit T. I am satisfied this claim has been validly made. Accordingly there is judgment against the first and second defendants for damages in the sum of $20 per week from 16 October 2006 to the date of this judgment.

[197] The second plaintiffs Kwan Qun Zhu, Hui Zhang, Ming Yin Lo, Masumi Hayashi, Mr and Mrs Podolanskis, being the unit owners of units C, D, and X seek claims for alternative accommodation whilst repairs are carried out. I am satisfied that these are legitimate. Accordingly judgment in the sum of $25,025 is entered in respect of those three groups of unit holders. The componentry is as per paragraph 303 of Mr Josephson's submissions.

General Damages

[198] All second plaintiffs claim second damages in respect of emotional harm, distress, and anxiety flowing from their discovery that they owned units which were subject to these dreadful defects. The knowledge that there are health risks would have been particularly distressing.

[199] The damages claimed by the second plaintiffs are $25,000 per unit with, in respect of one second plaintiff who owns two units, the sum increasing to $50,000.

[200] Counsel accepted that there was a distinction to be drawn between the compensable damage under this head to a unit owner who was an actual occupier and a unit owner who had purchased the unit for investment and as a consequence had seen the value of that investment diminish.

[201] This Court has awarded general damages under this head to previous plaintiffs in leaky building claims. In *Dicks* (*op cit* [65]) Baragwanath J awarded $22,500 to the owner/occupier plaintiff. In *Sunset Terraces* (Judgment (No.4) 30 September 2008 at [27]) Heath J, although stressing that the damages figure had no

precedent value (a City Council was the primary defendant) general damages were awarded of $25,000 to each individual plaintiff. In *Byron Ave* Venning J, observing the distinction between owner occupiers and investment owners which I regard as a valid distinction, awarded $20,000 jointly to owner/occupiers and $12,500 to owners who did not reside in the units. In *Kilham Mews* $25,000 was ordered to each owner/occupier and $15,000 to non-residential owners.

[202] I believe general damages are properly claimed. Particularly for owner/occupiers (the evidence of Mr and Mrs Podolanskis graphically describes the ensuing distress and anxiety) I consider an award is justified. In respect of owners holding the property as an investment there is clearly anxiety and distress but not occurring at a daily level. There is nonetheless the inconvenience of dealing with disgruntled tenants and the worry occasioned by a clear diminution of the value of investment. I reject the proposition, however, that an investment unit owner of two properties is entitled to double the figure of the owner of one. The distress and anxiety relates to an investment across the board and is not tied to any dollar figure. The distress caused to the owner of a leaking home worth $200,000 would be just as great in principle as the distress caused to the owner of a leaking home worth $2,000,000.

[203] Subject to Mr Josephson advising me by memorandum if the nomenclature is incorrect, in respect of all second plaintiffs who are owner/occupiers, (units C, D, and X) there is a general damages award of $25,000 for *each* plaintiff. In respect of the balance of claiming second plaintiffs there is a general damages award of $15,000 jointly. Judgment is accordingly entered against the first and second defendants.

[204] Counsel is directed, when sealing the judgment against the two relevant defendants, to file a short memorandum marked for my attention confirming that the judgment correctly reflects the arithmetic and componentry so far as all plaintiffs are concerned. I am not certain that the relevant components set out in counsel's closing submissions neatly total $4,507,759. If I have been led into arithmetical error I shall recall this judgment and correct relevant figures.

Costs

[205] The plaintiffs are entitled to costs against the first and second defendants. I invite written submissions on the figure involved and the computation. Clearly costs should be pitched at levels commensurate with other High Court leaky building proceedings.

[206] The plaintiffs have failed against the third defendant. *Prima facie* Mr Tay is entitled to costs against the plaintiffs. I invite counsel to attempt to negotiate a resolution of Mr Tay's costs claim (assuming of course that he wishes in the circumstances to pursue it). If counsel cannot agree arrangements will need to be made for me to resolve the issue for them.

.....…
Priestley J