

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2006-044-1703**

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| BETWEEN | BODY CORPORATE 200835<br>First Plaintiff |
| AND     | NORMAN FEAST & ORS<br>Second Plaintiffs  |
| AND     | 372 ROSEDALE LIMITED<br>First Defendant  |
| AND     | ISHIMARU LIMITED<br>Second Defendant     |
| AND     | GEORGE CLARKE<br>Third Defendant         |
| AND     | GRANT ANDREW GREEN<br>Fourth Defendant   |
| AND     | STEPHEN WILLIAM QUINE<br>Fifth Defendant |

Hearing: 6 April 2009

Appearances: P J McDonald for Fourth and Fifth Defendants in support  
A J Thorn/B M Easton for Plaintiffs

Judgment: 5 November 2009

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**JUDGMENT OF ASSOCIATE JUDGE ROBINSON**

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This judgment was delivered by me on November 5 2009 at 5 pm,  
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors: Grimshaw & Co, PO Box 6646, Auckland  
LeeSalmonLong, PO Box 2026 Shortland St, Auckland  
AND COLIN GREEN

Sixth Defendant

AND

ALISTAIR JOHN COUPER

Seventh Defendant

AND

MAURICE HERBERT HINTON

Eighth Defendant

[1] The first plaintiff is the Body Corporate of 28 units at 372 Rosedale Road, Auckland. The second plaintiffs are the current and former proprietors of a number of units in the Rosedale Road development who claim to have suffered loss as a result of the defendants' negligence. They bring proceedings against the developers, the architect, the directors of the construction company, the site foreman and the director of the company that undertook inspections of the development.

[2] Federal Construction Limited (now struck off) was the company engaged to construct the Rosedale development. The fourth defendant, Grant Green and the fifth defendant Stephen Quine apply for summary judgment in their favour claiming that none of the causes of action against them pleaded by the plaintiffs can succeed.

[3] The plaintiffs claim that as a result of defects in construction the Rosedale development suffered from moisture ingress for which they have suffered economic loss amounting to \$2,073,220.88 together with further consequential loss resulting from repairs to the units comprising lost rental income, costs of alternative accommodation together with moving and storage costs.

[4] The defects in construction are claimed by the plaintiffs to include defects in construction of the roof and parapets, walls and cladding, decks and surrounding, external stairs and balustrades and inter-tenancy fire walls. The plaintiffs bring these proceedings against both Grant Green and Stephen Quine as directors and employees of Federal Construction Limited. The plaintiffs claim that Grant Green owed them a duty to exercise reasonable care and skill in supervising and directing the building work for the Rosedale development. At paragraph 69 of the third amended statement of claim they claim such duty of care arose from the following facts and circumstances:

- a) Under the terms of the Construction Contract Federal was the head contractor responsible for the construction and design of the Rosedale Development;
- b) Under the terms of its contract with the first and/or second defendants Federal was required to build and design the Rosedale Development in accordance with the Building Consent, the Building Act 1991 and the Building Code;
- c) Federal built and designed the Rosedale Development either:

- i) Through its employees or agents, including the fourth defendant; or
  - ii) Through independent contractors engaged by Federal who at all times acted under the supervision of the fourth defendant;
- d) The fourth defendant was at all material times an employee and/or agent of Federal;
- e) The fourth defendant, together with the fifth defendant and sixth defendants, were the natural persons who performed Federal's obligations under the construction contract and in particular:
  - i) Undertook quality control measures of the building work;
  - ii) Co-ordinated subcontractors engaged by Federal to build the Rosedale Development;
  - iii) Directed the construction of the Rosedale Development;
  - iv) Acted as Project Manager for the construction of the Rosedale Development and was Federal's representative at site meetings;
  - v) Signed practical completion certificates as Federal's representative particulars are listed in schedule;
  - vi) Submitted some progress payment claims for the construction of the development to Rider Hunter quantity surveyors for payment including:
    - (i) Claim Number 8 dated 31 March 2000.

[5] The plaintiffs further claim Grant Green failed to exercise skill and care in supervising and directing construction of the Rosedale development. The following are the particulars of the breach of skill and care of Grant Green.

- a) Federal built the Rosedale Development:
  - i) Directly by its directors, employees or agents, including the fourth defendant. The particulars of which include:
  - ii) Through sub-contractors engaged by Federal;
- b) The Construction Work was not completed in accordance with the Building Consent;
- c) The Construction Work does not comply with the Building Act 1991, the Building Code or other relevant standards and in particular:
  - i) Clauses B1.2, B1.3.3, B2.2, B2.31, E2.2, E2.3.1, E2.3.2, E2.3.3, and E2.3.5;

- ii) Acceptable Solution NZS 3604: 1990;
- iii) Acceptable Solution NZS: 3602 1995 for timber framed buildings;
- d) The Rosedale Development was built with the Defects which have caused the Damage less than six years after construction of the Rosedale Development;
- e) The Defects and the Damage are of a kind that do not arise in a building without negligence on the part of the builder or project manager.

[6] The plaintiffs claim that Stephen Quine owed them a duty of care similar to the duty of care owed by Grant Green. The breach of duty of care of Stephen Quine is claimed by the plaintiffs as the same as the breach of duty of care by Grant Green.

**Case for Grant Green and Stephen Quine in support of their applications for summary judgment**

[7] The defects in construction set forth in paragraph 34 of the third amended statement of claim are all allegations of defective detailing, principally of workmanship but also in some aspects of design. There is no suggestion Grant Green actually did any of the building work that was defective nor is it alleged Grant Green gave any direction specifically in connection with any of the defects specified in paragraph 34 of the third amended statement of claim. There is no allegation Grant Green failed to properly supervise the site manager or anyone else.

[8] There is no specific allegation of a negligent act or omission by either Grant Green or Stephen Quine. What is alleged is that the defects and the damage pleaded are “of a kind that do not arise in a building without negligence on the part of the builder or project manager”. Counsel for Grant Green and Stephen Quine describe this as the “res ipsa liquotor” approach. Namely the defects would not have arisen unless Grant Green and Stephen Quine had been negligent.

[9] Grant Green acknowledges signing practical completion certificates on behalf of the contractor. According to the plaintiffs’ evidence a skilled and competent project manager carrying out the necessary inspections before issuing a practical completion certificate would have required the sub-trades to correct their defective

work. It is submitted on behalf of the fourth defendant relying on *Keating on Construction Contracts* (2006) 8<sup>th</sup> Edition, pages 774-775 practical completion is certified by the architect or engineer and not by the contractor.

[10] Counsel for Grant Green points out the contractor is asked to sign the practical completion certificate as an acknowledgment that the minor defects mentioned in the certificate are accepted and will be remedied. In this case it was the architect not the contractor who was required to inspect and certify practical completion.

[11] There is evidence Grant Green attended site meetings. However, it is submitted the plaintiffs must show not only attendance at site meetings but also discussion at those meetings of defects in construction and Grant Green giving directions to sub-contractors about works leading to the defects in construction.

[12] Relying on decisions such as *Body Corporate No. 188273 v Leuschke Group Architects Limited* Harrison J, High Court Auckland, CIV 2004-404-002003, 28 September 2007 and *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 it is submitted that before Grant Green and Stephen Quine can be liable there must be evidence they assumed a degree of personal responsibility for an item of work which was subsequently proved to be defective.

[13] Counsel for Grant Green and Stephen Quine emphasised that in general a person is not liable in tort for the negligence of an independent sub-contractor. (See Todd *The Law of Torts in New Zealand*, 4<sup>th</sup> Edition, paragraph 23.5.) This general proposition is subject to an exception in the case of developers. (See *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.) Federal Construction Limited was not the developer but was the contractor. It is therefore submitted that Federal Construction Limited together with Grant Green and Stephen Quine can discharge any duty of care to the plaintiffs by instructing reputable and competent sub-contractors.

[14] So far as Stephen Quine is concerned it is submitted there is no evidence linking him to any of the defects in construction. Stephen Quine did not have

exclusive control over the construction. All the defects are of detail in contrast to the situation in *Mt Albert Borough Council v Johnson* and *Morton v Douglas Homes Limited* which involved construction on sites with obvious and serious problems.

[15] Stephen Quine's involvement in the design of the building was to co-ordinate and arrange for the design professionals to design the building. He was not involved in the actual design. Furthermore, the plaintiffs have not identified any defects caused by Stephen Quine.

[16] The plaintiffs it is submitted are unable to produce any evidence to challenge Stephen Quine's evidence that he was not involved in the physical building work. It is also pointed out there is no evidence linking Grant Green to the defects pleaded by the plaintiffs. Grant Green did not have exclusive control of the construction. A site manager was employed. Grant Green was to supervise the site manager not do the site manager's job. There is no evidence that Grant Green failed to supervise the site manager.

[17] Counsel for Grant Green and Stephen Quine point out the plaintiffs cannot dispute the evidence of Grant Green and Stephen Quine as to the extent of their involvement in the project. On the basis of that evidence they can have no liability to the plaintiffs for the loss they suffered. Consequently, Grant Green and Stephen Quine are entitled to summary judgment in their favour.

#### **Case for the Plaintiffs in opposition to the application for summary judgment**

[18] Relying on *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 it is pointed out on behalf of the plaintiffs that both Grant Green and Stephen Quine were subject to a duty to exercise reasonable skill and care in carrying out the various functions they in fact carried out on behalf of Federal Construction Ltd during construction of the Rosedale development.

[19] Grant Green has acknowledged being Federal's contract and project manager with responsibility for:

- a) Appointment of sub-contractors.
- b) Financial management of the project.
- c) Client liaison.
- d) Programme management.
- e) Supervision of site manager.

[20] However, there is evidence from Mr Richard John Martin, a director of 372 Rosedale Ltd the first defendant that:

- a) Grant Green was personally responsible for locating, contracting with, instructing, supervising and paying sub-contractors on behalf of Federal.
- b) Grant Green and Stephen Quine were responsible for selecting suppliers of materials.

[21] Grant Green attended all site meetings as Federal's representative. He co-certified the practical completion certificate as "the contractors' representative". The plaintiffs rely on the evidence of Gregory Laurence O'Sullivan, a registered building surveyor and quantity surveyor who has been involved in the building industry since 1968 and has an extensive practical, administrative and consultancy background dealing with simple residential buildings through to large scale commercial and industrial construction. Mr O'Sullivan inspected the Rosedale development and prepared a comprehensive report of the defects which is the basis of the plaintiffs' claim. Mr O'Sullivan is of the opinion that most of the defects he observed in the construction of the Rosedale development would have been obvious to a skilled and competent project manager completing a practical completion certificate.

[22] On the basis of that evidence counsel for the plaintiffs submit that Grant Green cannot succeed in establishing that none of the plaintiffs' causes of action



against him can succeed. Consequently, Grant Green's application for summary judgment must be dismissed.

[23] Stephen Quine limits his involvement in the Rosedale development to "liaise with the architect, the engineer, the geo-technical engineer, fire safety engineers and similar design personnel to ensure that all the elements of the design necessary for building consent were compiled to the satisfaction of the council's requirements". (paragraph 6 affidavit Stephen Quine, sworn 27 November 2008). He also says "once the building permit was issued my role in respect of the construction was limited to relationship management at a high level".

[24] However, counsel for the plaintiffs points out that that the evidence of Mr Richard John Martin in answer to interrogatories establishes a much more extensive involvement by Stephen Quine in the Rosedale developments. Mr Martin says:

Stephen Quine was personally responsible for selecting materials to be used at the development.

He also says the following in answer to an interrogatory relating to building materials:

372 Rosedale Limited instructed Federal to build the development to a specified size and to a good quality standard, in accordance with the building code, the sale brochures that had been supplied to them and the specification document. No materials, sub-contractors or suppliers were chosen by 372 Rosedale or Ishimaru Limited, as under the contract, all of these decisions were undertaken by Federal (Mr Green and Mr Quine) in conjunction with George Clark Architects (see first and second defendants discovery document number 3236).

[25] Stephen Quine acknowledges making site visits once a month. He appears to have received copies of all site meeting minutes. According to Mr O'Sullivan as Managing Director of the building company the only reason Stephen Quine was on site would be to satisfy himself that the design and construction was satisfactory.

[26] Mr O'Sullivan is of the view that most of the defects he has identified which form the basis of the plaintiffs' claim would have been easily identified from a visual

inspection especially by someone with Stephen Quine's expertise in building and design.

[27] The plaintiffs claim that the evidence they rely on establishes a degree of control of the construction of the Rosedale development by both Grant Green and Stephen Quine to create a duty of care, that there is evidence to justify a conclusion that they were negligent in the exercise of their control over the construction and therefore their application for summary judgment should be dismissed.

### **Decision**

[28] In *Body Corporate 202254 v City Rental Trustees Limited & Ors & Taylor* [2008] NZCA 317, dated 22 August 2008 the Court of Appeal dealt with an appeal from decisions striking out claims against Mr Taylor including a claim he was negligent in his conduct and management of the development. The claims against Mr Taylor in negligence were based on two arguments. The first was that as project manager Mr Taylor owed an associated and non-delegable duty of care and the second was that in his role as sole director and employee of the development company he owed the plaintiffs a duty of care.

[29] The Court of Appeal concluded that the company and not Mr Taylor was the developer. Williams Young P and Arnold J in their joint judgment at paragraph 37 stated:

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*.

[30] Consequently, the appeal against the dismissal of the plaintiff's claim based on breach of Mr Taylor's duty as a developer was dismissed.

[31] However, the appeal against the dismissal of the plaintiff's claim against Mr Taylor as the builder was allowed. In coming to this conclusion Chambers J at paragraphs 125 to 128 of his judgment stated:

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

[126] All of this was stated with admirable clarity by Hardie Boys J in *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 (HC). In that case, four flats suffered damage due to the subsidence of the foundations. The flat owners sued the building company, two of its directors, the local authority, and the engineer. Hardie Boys J made it clear that, if the company directors had personal control over the building operation, they could be personally liable. His Honour said at 595:

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

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

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

[32] In the present case the plaintiffs claim the first and second defendants were the property developers. The plaintiffs' claims against both Grant Green and Stephen Quine are based on their roles as directors and employees of

Federal Construction Limited being the company engaged to construct the Rosedale development. On the basis of the Court of Appeal's decision in *Body Corporate 202254 v City Rental Trustees Limited & Taylor* applying the dicta of Hardie Boys J in *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 at 595 whether Grant Green or Stephen Quine were General Managers, Directors or "indeed a more humble employee" they are under a duty of care both to those whom they deal on the company's behalf and those with whom the company deals in so far as that dealing is subject to their control.

[33] The test to be applied by the Court in determining whether a defendant's application for summary judgment should be granted was stated by the Privy Council in *Attorney-General v Jones* 16 PRNZ 715 at 720 in the following way:

But it is clear applying the guidance given by the Court of Appeal in *Westpac (Westpac Banking Corp v M M Kembla NZ Limited* [2001] 2 NZLR 298), that summary judgment should not be given for the defendant unless he shows on the balance of probabilities that none of the plaintiff's claims can succeed. That is an exacting test, and rightly so since it is a serious thing to stop a plaintiff bringing his claim to trial unless it is quite clearly hopeless.

In the opinion of the Board, this exacting test is not satisfied in this case. The appellant may, or may not, succeed in establishing his version of events at trial. It cannot help, however, be said at this stage that he cannot do so, and if the outcome of the action is potentially dependant on the facts found it is inappropriate to give summary judgment for the defendant.

[34] In the circumstances of this case there are disputed facts as to the personal involvement of both Grant Green and Stephen Quine in the development.

[35] Grant Green maintains his roles as the Contracts/Projects Manager were limited to appointment of sub-contractors, financial management of the project, client liaison, programme management and supervision of the site manager. He says it was the role of the site manager who was Colin Green to liaise with sub-contractors, in some instances to order materials and to ensure the sub-contractors had amenities such as water, electricity and scaffolding. He denies he had any part in supervising the work undertaken by sub-contractors. He points out Federal Construction Limited was not a traditional construction company in that it did not

carry out any construction work but relied on appropriately qualified sub-contractors to carry out the work and for that work to be inspected and if necessary to be re-inspected to reach the standard required for a code compliance certificate. He denies giving any directions to sub-contractors in respect to any of the defects listed in the plaintiffs' statement of claim.

[36] Although he acknowledges attending most site meetings he says his involvement was related to financial management, client liaison programme management and supervision of the site manager. He says he signed the practical completion certificates as the contractors' representative. However, he claims by signing the certificates he was not certifying practical completion as that was the role of the architect or engineer. In his affidavit of 23 February 2009 at paragraph 10 he gives the following evidence:

I did not know at the time why I was asked to sign the practical completion certificates. I was told that Federal had to sign the certificates before they would be issued by the architect. As I had no reason to refuse, and Federal's cashflow appeared to depend on it, I signed them. I now understand that the architect was probably asking Federal to sign the practical completion certificates to acknowledge the minor defects listed in each of them, and impliedly to promise to remedy all those minor defects. I will have signed the certificates after referring the defects lists to Colin Green, whose job it would have been to see that the defects were remedied by the relevant sub-contractors. It was not my role to make, and I did not make, any kind of detailed inspection at practical completion. That was the architect's role, and it is clear that he performed it.

[37] Grant Green's evidence as to Federal Construction Limited's role and consequently his role in the construction project conflicts with the evidence of Richard John Martin. Richard John Martin says that under the contract which cannot be located Federal Construction Limited agreed to locate, contract with, instruct, supervise and pay all sub-contractors and that Grant Green was the person responsible for those tasks. According to Gregory O'Sullivan the evidence establishes Grant Green exercised a great deal of control over the construction of the development. This conclusion is based on the evidence of Richard John Martin and the fact that Grant Green co-signed a large number of practical completion certificates and attended most site meetings. Mr O'Sullivan also states that most of the defects would be easily identified from a visual inspection and a reasonably

skilled and prudent project manager would have insured the defects were addressed before certifying practical completion under the construction contract.

[38] The evidence I have summarised would not exclude the possibility of a Court concluding Grant Green did exercise a degree of control over the construction to justify liability to the plaintiffs for their loss resulting from his personal carelessness. Consequently, it would not be appropriate to enter summary judgment against the plaintiffs in his favour and his application for summary judgment will accordingly be dismissed.

[39] Stephen Quine maintains that as Managing Director of Federal Construction Limited his main role was responsibility for liaising with existing and prospective clients to generate further work for the company and once work was obtained to liaise with the client and occasionally subcontractors throughout the construction period to resolve any issues that needed resolving at a high level. Sometimes he acknowledges taking responsibility for managing the design process. He says his role did not include appointing or managing sub-contractors or supervising their work. He says in respect of this contract Federal Construction Limited's role and therefore his role was to liaise with the architect, geotechnical engineer, fire safety engineers and similar design professionals to ensure that all elements of the design necessary for building consent were compiled to the satisfaction of the council. When the building permit was issued he says his role in respect of the construction was limited to relationship management at a higher level. He admits occasional site visits around once a fortnight to attend occasional site meetings, to liaise with the site manager in a general way, and sometimes to discuss specific issues.

[40] There is however correspondence which indicates Stephen Quine was actively involved in the design including correspondence establishing that Federal Construction Limited intended to enter into a design and build contract for the 372 Rosedale Road project and where Stephen Quine on behalf of Federal Construction Limited expresses to the architect "disappointment with, the progress and quality of the drawings you have produced for building consent, ie ten out of twenty-four drawings on your schedule and even those ten are not even close to being one hundred percent complete".

[41] According to the evidence of Richard John Martin, Stephen Quine was personally responsible for selecting the materials to be used. Mr O’Sullivan was of the view that most defects in the construction would be easily identified from a visual inspection by a person who had Stephen Quine’s expertise in building and design. As with Grant Green the evidence I have summarised would not exclude the possibility of a Court concluding that Stephen Quine did exercise a degree of control over the design and construction to justify liability to the plaintiffs for the loss resulting from his personal carelessness. It must therefore follow that the application by Stephen Quine for summary judgment must be dismissed.

[42] In summary therefore both applications by Grant Green and Stephen Quine for summary judgment are dismissed. In the circumstances of this case applying the principles set forth in *NZI Bank Limited v Philpott* [1990] 2 NZLR 403 costs will be reserved.

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**Associate Judge Robinson**