

**IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-101-74, 103, 104, 105, 112 and 113**

BETWEEN **SHYH JYE CHEN**
First Claimant

**STEPHANIE KAREN DAPHNE
HERBISON and CATHARINE ANNE
HERBISON as TRUSTEES OF THE
HERBISON FAMILY TRUST**
Second, Third & Fourth Claimants

BODY CORPORATE 7822
Fifth Claimant

INTERCITY COMMERCIAL LIMITED
Sixth Claimant

AND **CHRISTCHURCH CITY COUNCIL**
First Respondent

AND **PETER BEAVEN ARCHITECT LIMITED**
Second Respondent
(Removed)

AND **WILLIAM TREVOR BEDFORD**
Third Respondent
(Removed)

AND **TYNDALL & HANHAM LIMITED**
Fourth Respondent
(Removed)

AND **ROBERT ANDREW DALZIEL**
Fifth Respondent

AND **RODNEY ALLAN WITHELL**
Sixth Respondent

Hearing: Wednesday 8 April 2009

Appearances: Mr Withers, counsel for the first claimant;
Mr Herbison, counsel for the second, third and fourth
claimants;
Mr Robert Dalziel, fifth respondent;
Mr Withell, sixth respondent.

**Determination: 8 MAY 2009
Adjudicator: C Ruthe**

Preliminary matters- partial settlement

1. These six claims were set down for hearing in Christchurch on 8 and 9 April 2009. Before the hearing took place, all the claimants entered into a settlement arrangement with the first respondent, the Christchurch City Council resulting in the discontinuance of the claims against it. The claimants have declined to disclose the settlement sum as the first respondent has indicated it would treat this as voiding the agreement due to a breach of the confidentiality clause. (The Tribunal addresses the matter under quantum). There remain for determination the claims against Mr Dalziel, the fifth respondent, and Mr Withell, the sixth respondent.
2. Throughout the progress of these claims the fifth respondents proved to be evasive and when this matter was being set down for hearing, Mr Dalziel said he would not be able to make it to Christchurch as he did not have a vehicle to get to the city. He stated he is residing in an undisclosed part of the South Island. The sixth respondent, Mr Withell, the victim of a serious motor accident, arranged to participate in the hearing by telephone. The hearing took place by teleconference.

Development background

3. A block of ten units was constructed in two three story blocks on a flat building site situated at 32 Cranmer Square, Christchurch. The construction period of this development was between October 1997 and November 1998. The units were designed by Peter Bevan Architect Limited. The companies behind this development were Sonic Properties Limited (struck off) and Cranmer Square Development Limited (struck off). Mr Dalziel was the sole director of both these limited life companies. Mr Dalziel said he used the companies interchangeably as he deemed appropriate. Mr Dalziel

did not distinguish the companies in any way though it appears Cranmer Square Development Limited was the original land owner.

Remediation/causation

4. Remedial work has been completed in all six claims. All the apartments subject to these claims had suffered damage in the same areas and for the same reasons as outlined in the various assessors' reports. No issue has been taken with the assessors' reports and their contents need not be set out in detail here.
5. The areas of damage in each of the units included lack of header flashings around windows and doors, lack of apron flashings on fire ledges resulting in water penetration by diffusion and gravity through cracking between the exterior insulation finishing system (EIFS) and the abutting materials and lack of movement control joints.
6. There was no issue taken with the costs of remediation. The work appears to have been done for relatively moderate sums (detailed below).

Issues for determination

- Liability of Mr Withell;
- Liability of Mr Dalziel;
- Quantum and apportionment.

Liability of Mr Withell

7. Mr Herbison on behalf of the second, third and fourth claimants withdrew their claims against Mr Withell before the end of the hearing. Ms Chen continued to pursue her claim against Mr Withell.

8. The Tribunal accepts Mr Withell's evidence that he was employed as a labour-only carpenter. He said his own building company had gone into liquidation and he himself was bankrupt at the time he was engaged to undertake building on this project. At the hearing, Mr Withell was questioned by Mr Herbison about the terms of his bankruptcy. Mr Withell did not have any exemption to trade as a project manager. Such a position would have required him to authorise and make payments, engage subcontractors and the like.
9. Mr Dalziel admitted in his evidence that he knew Mr Withell was bankrupt when he engaged him on the project. He described the arrangements he came to with Mr Withell's accountant for a creditor's preference by way of payment of a debt of \$16,000.00 allegedly owed to Mr Dalziel. This evidence was not credible. If there had been such arrangements, they would have required the consent of the official assignee. No such evidence was adduced.
10. Mr Dalziel says Mr Withell was in charge of the project. The Tribunal finds this to be a self-serving statement and not an accurate description of what occurred. Mr Withell, on the other hand, is credible. He said he was responsible for the interior fit-out and for its quality, but he had no supervisory role in relation to any of the subcontractors. The Tribunal finds that he was not the project manager and nor did he have any supervisory role to play. The Tribunal finds that Mr Withell's duty of care to the claimant, Ms Chen, was not breached and therefore he has no liability.

Liability of Mr Dalziel

11. As noted above there were two development companies that were used as vehicles in the process of this development namely Cranmer Square Developments Limited and Sonic Properties Limited. Mr Dalziel accepts that he was responsible for closing the two

development companies into liquidation in 2001 shortly after the units had been sold.

12. Mr Dalziel spoke to the witness brief he filed dated 16 March 2009. Mr Dalziel said he was the owner and director of a company that purchased land at 32 Cranmer Square, Christchurch. He was not a property developer “as the company was formed for business reasons and was merely the client.” (The Tribunal accepted he was referring to both companies but will refer to them in the singular where appropriate). The Tribunal understood Mr Dalziel to mean that he was the client of the company and the company was responsible for the project. He said his occupation was as a high country shepherd hence he knew absolutely nothing about building.
13. He said he commissioned a group of professionals to design and build units for him. He said these units were not intended for sale but were to be a city investment. But circumstances changed and, as there was demand, he sold most of them.
14. Mr Dalziel’s position is that he commissioned and paid Mr Beaven to design the units and draw up the plans and specifications, which were to be followed through to completion and “sign off”. Mr Dalziel said he also commissioned the engineers to do the same. He said he employed Mr Withell to construct the units, and oversee and coordinate the subcontractors, checking their workmanship. He said he paid Christchurch City Council to inspect all aspects of the construction from the start right through to the final inspections and code compliance sign off. They were responsible for oversight and were effectively a clerk of works.
15. Mr Dalziel said he would not take any personal responsibility. His involvement was simply going to the site once a week to clear away rubbish with his wife and daughters. If there were a determination against him, he would fight it to the highest courts in the land.

16. When questioned, Mr Dalziel admitted that in the five years preceding the development at Cranmer Square he had undertaken the development of seven townhouses. His protestations of naïve innocence were contradicted by the facts of his experience. (His subsequent involvement in a large multi-unit development elsewhere in Christchurch has been disregarded as having no bearing on this case, though it does indicate that Mr Dalziel felt competent by that stage to undertake a very large property development).

17. The Tribunal previously dealt with the role of Mr Beaven as designer in Procedural Order No. 1. However Mr Dalziel wished to reaffirm his dissent from that finding and as a self-represented party he was granted this indulgence.

18. Mr Dalziel engaged Mr Beaven to design the units. However his assertion that Mr Beaven was to “follow that through to completion and sign off”, is inconsistent with other statements of Mr Dalziel including his admission that the contract with Mr Beaven was for design only. This admission was consistent with the compelling evidence given by Mr Peter Beaven at the removal hearing to the effect he was expressly forbidden from doing more than the drawings.

19. Mr Dalziel accepted that in New Zealand where an architect is engaged to supervise the contract the architect would normally be paid a fee in the region of 8% to 10% of the tendered building contract price. Mr Dalziel agreed that this was not what happened here. Mr Dalziel apparently wanted Mr Beaven to be held responsible for work which he was not contracted to do.

Role as company director

20. Mr Dalziel in his evidence referred to the role of a director. He quoted from a transcript of advice he had received from an unnamed “legal expert” which stated (*inter alia*):

“5. However, you were the Director of the company and therefore have duties as a director.

When reading case law, you have duty to ensure the construction is managed properly. You employed professionals to carry out those duties. I find that you took all necessary steps to ensure duty was upheld and that you were not irresponsible in any way and nor were you reckless company directorship.”

The advice then went on to say Mr Dalziel was not personally liable.

21. Before considering the legal issues, the Tribunal wishes to correct the misunderstanding Mr Dalziel has as to the function of the Tribunal. Mr Dalziel said the Tribunal needed “to establish beyond reasonable doubt” he was reckless as a director before he can be held to owe a personal duty of care. It is not the Tribunal's function to prove any matter of evidence. Its function is to make a determination, having considered the evidence.

The law

22.

In *Body Corporate 183523 & Ors v Tony Tay & Assoc Ltd & Ors* (20 March 2009) HC, Auckland, CIV 2004-404-004824, Priestley J reviewed a number of recent decisions that had considered the potential liability of a company director in the fraught leaky homes arena including *Drillien v Tubberty* (2005) 6 NZCPR 470, *Hartley v Balemi, Ors* (29 March 2007) HC Auckland, CIV 2006-404-002589, Stevens J at [80] – [94], *Body Corporate No 199348 & Ors v Nielsen* (3 December 2008) HC, Auckland, CIV 2004-404-003989, *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914.

23. His Honour went on to observe

[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”

24. The extent of a director’s liability in claims such as this has also been traversed in the following decisions:

- *Dicks v Hobson Swan Construction Ltd* (In Liq) 7 (2006) 7 NZCPR 881;
- *Trevor Ivory Ltd v Anderson* [1992] NZLR 517 (CA);
- *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1NZLR 324 (CA);
- *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548.

The facts

25. Mr Dalziel set up two inter-related single venture companies for the development of the block of units at 32 Cranmer Square, which went into voluntary liquidation upon completion of the project according to Mr Dalziel’s own evidence. Mr Dalziel was the sole director/managing director of the companies as well as being the sole employee. Mr Dalziel was the person who commissioned the architect and the engineers. He personally engaged a labour-only carpenter. He clearly played a key role both as director and as an employee. This was the archetypal “one man band company”. He failed to properly manage the project himself, or alternatively, to appoint a site supervisor.

26. He personally chose persons whom he considered competent to carry out various tasks in the development. The tribunal follows the above decisions and in applying the principles contained in *Body Corporate 183523 & Ors v Tony Tay & Assoc Ltd & Ors* (supra) to the facts Mr Dalziel was personally liable in tort. The question is what is the extent of his liability?

Extent of liability

27. Unfortunately the company appointed liquidator no longer has the files which may have contained information identifying the plasterer and the roofer who were responsible for a number of the leak faults in this building and against whom Mr Dalziel may have been able to have sought contribution pursuant to section 72(2) of the Act.
28. The claims against all other parties have either been dismissed or settled. As noted in [1] (supra) the claimants have not disclosed the settlement sum. I am approaching apportionment on the notional basis that the first respondent is still a party. However the claimants will be unable to seek enforcement of any sum in excess of the amounts the Tribunal considers proven as set out in [30].
29. The Tribunal considers Mr Dalziel was the orchestrator and conductor of the entire project. He assumed the supervising responsibility of the architect when he directed the architect to confine himself to doing the drawings. When he employed the carpenter on a labour-only basis. Mr Dalziel assumed the risks and responsibilities a builder/project manager would have otherwise had under a full building assumed the risks which otherwise may have been carried by such a contractor. The Tribunal concludes he is liable to the extent of 50% of the claim.

Quantum of claims

30. There was no challenge to the quantum of the claims. Each of the claimants arranged for the cost effective remediation of their units. The claims in respect of the units (which were the agreed figures upon which settlement was achieved, without general damages) can be quantified as follows:

<u>Unit 3:</u>	Cost of remedial work	\$7,974.91
	Loss of rents	\$520.00
	Interest costs	<u>\$1,120.63</u>
	TOTAL	<u>\$9,615.54</u>
<u>Unit 4:</u>	Cost of Remedial work	\$2,852.22
	Loss of rents	\$250.00
	Carpet Cleaning	\$80.00
	Interest costs	<u>\$641.89</u>
	TOTAL	<u>\$3,824.11</u>
<u>Unit 5:</u>	Cost of Remedial work	\$9,842.55
	Loss of rents	\$1,785.71
	Interest costs	<u>\$1,310.15</u>
	TOTAL	<u>\$12,938.41</u>
<u>Unit 6:</u>	Carpentry - replacing damaged structure	\$5,754.34
	Plaster - damaged areas	\$965.25
	Associated Electrical work	\$118.35
	Scaffolding – External	\$3,500.00
	Reinstating of EIFS and expenses	\$7,693.50
	Costs (not claimable)	00.00
	TOTAL	<u>\$18,031.44</u>
<u>Unit 7:</u>	Cost of Remedial work	<u>\$12,000.00</u>
	TOTAL	<u>\$12,000.00</u>
<u>Body Corporate:</u>		
	Consultants and Project Management	\$5,629.18
	Costs of repairs	<u>\$3,708.90</u>
	TOTAL	<u>\$9,338.08</u>
	<u>Total of 6 Claims:</u>	<u>\$67,747.58</u>

31. Mr Dalziel's 50% liability in respect of each claim is as follows

(figures rounded):

Unit 3 (WHT TRI –2008-101-103)	\$ 3,800.00
Unit 4 (WHT TRI –2008-101-104)	\$1,900.00
Unit 5 (WHT TRI –2008-101-105)	\$6,500.00
Unit 6 (WHT TRI –2008-101-74)	\$8,000.00
Unit 7 (WHT TRI –2008-101-113)	\$6,000.00
Body Corporate (WHT TRI –2008-101-112)	\$4,850.00
<u>Total amount of liability</u>	<u>\$31,050.00</u>

Conclusion and Orders

32. The claimants' claims are appropriate to the extent set out in paragraph [30] above. For the reasons set out in this determination the Tribunal orders the sixth respondent, Mr Dalziel, to make payments to the claimants as follows-

Unit3 (WHT TRI –2008-101-103) Herbison Family Trust	\$3,800.00
Unit4 (WHT TRI –2008-101-104) Herbison Family Trust	\$1,900.00
Unit5 (WHT TRI –2008-101-105) Herbison Family Trust	\$6,500.00
Unit6 (WHT TRI –2008-101-74) Ms Chen	\$8,000.00
Unit7 (WHT TRI –2008-101-113) Intercity Commercial Limited	\$6,000.00
Body Corporate (WHT TRI –2008-101-112)	\$4,850.00
Total amount of this determination	\$31,050.00

DATED at Wellington this 8th day of May 2009

C Ruthe

Tribunal Member