IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2007-100-000032
[2010] NZWHT AUCKLAND 22

	BETWEEN	**BODY CORPORATE 199883 & OTHERS (RIDGEVIEW APARTMENTS)** Claimants
	AND	**PETER LAURENCE CLARKE** (Being the only remaining respondent) Fourth Respondent

Hearing: 17 and 21 June 2010

Appearances: Mr C Leishman for the Claimants
Fourth Respondent, Mr Peter Clarke, in person

Decision: 25 August 2010

FINAL DETERMINATION
Adjudicator: P J Andrew

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INTRODUCTION

[1] In 1997, Mr Peter Clarke, the fourth respondent, decided to develop a commercial building on Onewa Road, Birkenhead, owned by his company, Clarke Family Associates Limited (CFA) and to convert it into residential and commercial apartments. Construction of the 17 unit complex (Ridgeview Apartments) was completed in 2000 for a total cost of approximately $2.2 million.

[2] The first claimant is the Body Corporate of Ridgeview Apartments. The second claimants are three individual unit title holders in the complex.

[3] The design and construction on the apartment complex was undertaken by experts engaged by Mr Clarke and CFA. Mr Gordon Martinsen of Martinsen Architectural Design, the second respondent,

was the architectural designer and Mr Roy Andrews, of Chelsea Developments Limited, the sixth respondent, the project manager.

[4] Mr Clarke was the sole director and shareholder of CFA. He was involved in the sale and marketing of the units. He maintained tight and close control over costs during the construction process and attended regular monthly meetings on site, when key decisions were made about methods of construction.

[5] The documentation in relation to the design and construction process refers variously to different entities associated with Mr Peter Clarke. This included the company, CFA, an entity described as "the Clarke Family Trust" and Mr Peter Clarke himself.

[6] In 2003 the Body Corporate discovered that the apartment complex was a leaky building. It issued proceedings in the High Court for the cost of repairs. Repairs were commenced within 5 years of the original construction at a total cost of $1.1 million. The defendants in the High Court proceedings included CFA, and Martinsen Architectural Design. Following the liquidation of CFA in 2006, the High Court proceedings were transferred to this Tribunal.

[7] Mr Clarke was not a defendant in the High Court proceedings but was named as the fourth respondent when the claim for adjudication was filed with the Tribunal. Following a partial settlement of the proceedings in September 2009, concluded between the claimants and a number of the other respondents, including Martinsen Architectural Design and Mr Roy Andrews, Mr Clarke is now the sole remaining respondent.

[8] The claimants seek damages from Mr Clarke for the sum of $163,943.59 together with general damages. It is alleged that Mr Clarke and CFA were co-developers of the Ridgeview Apartments and liable for the costs of repairs.

[9] Mr Clarke accepts that CFA was a developer but denies that he is in any way personally responsible to the claimants. The principal issue is whether Mr Clarke was a co-developer of the apartment complex and liable to the claimants for breaches of duties of care to ensure the construction of a weathertight building. The answer to this issue depends on identifying the actual role performed by Mr Clarke in the development and interpreting and assessing the relevance of the documentation referring to different entities associated with him.

THE CLAIM AGAINST MR CLARKE

[10] The claim against Mr Clarke is set out in the second amended statement of claim dated 17 May 2010. The second claimants are:

a) Mr and Mrs Beckingham (unit 3);
b) Ms Fung-Yee Tseung (unit 9); and
c) Mr David Beasley (unit 11).

[11] The Body Corporate, the first claimant, accepts that the extent of its claim is limited to the extent of the interest in the common property held by the second claimants.

[12] Following the partial settlement reached with the second, sixth and seventh respondents in September 2009, the second claimants, after crediting the settlement monies already received, claim from Mr Clarke the balance of their share of the cost of repairs, as follows:

Unit 3	$45,221.43
Unit 9	$59,361.08
Unit 11	$59,391.08
Total cost of Repairs claimed	**$163,973.59**

[13] General damages of $25,000 are sought in relation to each of the three units. The total amount claimed against Mr Clarke is thus $238,943.59.

ISSUES

[14] In addition to the principal issue of Mr Clarke's liability (i.e. whether he is a co-developer) the following subsidiary issues arise:

a) Is the claim against Mr Clarke statute-barred by virtue of section 4 of the Limitation Act 1950? Mr Clarke contends that the claim, which the claimants knew about in 2000, was not brought against him until 2007, outside the six year limitation period.

b) Should the Tribunal refer the claim back to the High Court, or dismiss the claim for abuse of process, on the grounds (as alleged by Mr Clarke) that the claimants misled the High Court by subsequently joining Mr Clarke as a party, contrary to the express indication that they would not do so?

c) Was there contributory negligence by the claimants justifying a reduction in the quantum to be awarded, as a result of one or more of the following acts or omissions:

   i. Delay in having the repairs completed;
   ii. Failing to join all relevant parties;
   iii. Settling with the other respondents for a minimal sum; and
   iv. Placing CFA in liquidation.

d) Should the Tribunal reduce any damages to be awarded because of the relative contribution by Mr Martinsen and Mr Andrews to the claimants' loss?

THE FACTS

[15] CFA purchased the property at Onewa Road, Birkenhead in 1993 and became the registered proprietor. From 1993 to 1997 the property was leased to various small businesses. The property was managed by Mr Clarke who was at the time running his own family printing business.

[16] In 1997 one of the principal tenants moved out of the property. At that time, Mr Clarke who had contemplated selling the property, formed the idea that he should develop the building and turn it into residential apartments. Mr Clarke approached Mr Jack Gibb, a real estate agent and colleague, and asked for his advice on the development proposal. Mr Gibb, who had considerable sales experience, supported the proposal, believing that the location was a very good one for residential apartments. Mr Gibb then approached Mr Gordon Martinsen, an architectural designer and introduced him to Mr Clarke. Mr Martinsen knew the building, having previously attempted to purchase it.

[17] In November 1997 Mr Martinsen wrote to Mr Clarke (document 1) proposing that he carry out a feasibility study for the proposed development at Onewa Road. The feasibility study was approved by Mr Clarke and Mr Martinsen was then subsequently engaged to be the principal designer. Mr Martinsen played a major role in the development project at the design stage.

[18] In 1998 Mr Martinsen introduced Mr Clarke to Mr Roy Andrews, director of Chelsea Developments Limited. Mr Andrews was subsequently engaged as the project manager, responsible for the construction phase of the development. Mr Clarke had no direct involvement in the actual design or physical construction of the apartment complex and relied on the expertise provided by Mr Martinsen and Mr Andrews.

[19] In April 1998 Mr Martinsen applied to the North Shore City Council for a resource consent. The application was made in the name of "P Clarke". At about that time Mr Clarke began contemplating the setting up of a family trust to which his shares in CFA, the owner of the property, would be transferred. Mr Clarke sought legal advice from his solicitor on this matter. A formal deed of trust was apparently established in November 2001 but it has never been operative or had any assets transferred to it.

[20] In December 1998, Mr Martinsen made an application to the North Shore City Council in the name of the "Clarke Family Trust" for a Project Information Memorandum. The Project Information Memorandum was subsequently issued in the name of the "Clarke Family Trust" and dated 13 January 1999. In January 1999 Compass Building Certification Limited, a private building certifier and a company now struck off, made application to the North Shore City Council for a building consent in the name of the "Clarke Family Trust". A building consent in the name of the "Clarke Family Trust" was issued by North Shore City Council in June 1999. The estimated value of the building work was $1.6 million. Construction of the apartments began in 1999.

[21] During construction, Mr Clarke would meet on site with Mr Martinsen and Mr Andrews on a monthly basis. Mr Clarke kept a close eye on the cost of the overall process. Mr Clarke participated in a number of key decisions taken about methods of construction. This included decisions: to change from treated timber to untreated timber; to change from Eterpan cladding to harditex cladding; to apply a new product, being a liquid waterproofing membrane rather than a traditional butynol type membrane; and to install glass blocks without a frame and flashings. Mr Clarke's principal concern was time and cost.

[22] Throughout 1999 and 2000 Chelsea Developments Limited issued invoices for construction services and materials to the "Clarke Family Trust" c/o Mr Peter Clarke's personal address. Each of these invoices were paid by CFA.

[23] Most of the apartments were sold off the plan – i.e. prior to completion of construction. Mr Jack Gibb was the real estate agent but Mr Clarke was also actively involved (in both sales and marketing) and would ultimately approve any proposed sale price. Mr Clarke kept a very detailed set of accounts on all aspects of costs throughout the process.

[24] From 2000 there were ongoing issues and disputes between Mr Clarke on the one hand, and Mr Martinsen and Mr Andrews on the other, about the installation and operation of the lift at the Ridgeview Apartments.

[25] In March 2001 a Code Compliance Certificate was issued by Compass Certification Limited. A record of the minutes of the Body Corporate in March 2001 records problems with the development as a result of "impasse" between Mr Clarke of CFA and Mr Andrews. Mr Andrews had at that time arranged for re-tiling in areas where water was pooling.

[26] In late 2001, Mr Gordon Martinsen issued a claim against Mr Clarke in the Disputes Tribunal for payment of outstanding fees. When the complex was about 80% complete, Mr Clarke stopped paying Mr Martinsen's invoices. At the hearing Mr Clarke claimed that there had been a cost overrun for the project of about $682,000 and he holds Mr Martinsen accountable for that. It is not entirely clear whether the figure Mr Clarke used is accurate ($400,000 is the figure used in closing submissions) but what is certain is that Mr Clarke, at the time, clearly believed the cost of overrun to be

substantial and on that basis refused to continue to pay Mr Martinsen's invoices.

[27] Mr Martinsen issued invoices to Mr Clarke personally (not the company, CFA) and also issued the Disputes Tribunal claim against Mr Clarke himself. The dispute was ultimately settled. It was originally intended that Mr Martinsen would purchase one of the units in the complex but this did not occur because of the various disputes.

[28] In September 2003 applications were made by various individual unit owners, including the second claimants, for assessor's reports under the Weathertight Homes Resolution Services Act 2002. The assessor concluded that there were weathertight defects requiring repairs.

[29] The Body Corporate also commissioned their own report from Babbage Consultants to report on moisture content and recommendations for remedial work. The first Babbage Report dated 1 December 2003 identified three main moisture ingress defects.

[30] At that time some of the individual unit title holders decided to sue CFA as the developer of the building, for the costs of repairs for the weathertight defects. However, there were complications arising from Rule 35 of the Body Corporate Rules which provided that the consent of the company, CFA, (owner of 3-4 units in the complex) was required before any resolution of the Body Corporate was passed. The Body Corporate then issued High Court proceedings against CFA and was successful in obtaining an order that Rule 35 was ultra vires (see *Body Corporate No 199883 v Clarke Family Associates Ltd*).[1]

[31] That decision then paved the way for the Body Corporate, together with unit title holders, to issue separate High Court

[1] HC Auckland, CIV-2004-404-2859, 21 October 2004, Ronald Young J.

proceedings against CFA seeking to recover the cost of repairs. Those proceedings were filed in 2005 and included amongst the defendants, was Compass Building Certification Limited, as the private building certifier.

[32] In 2005 CFA was in arrears with payments of its share of the Body Corporate levies. The Body Corporate then filed further proceedings in the High Court resulting in an order dated 2 February 2006 placing CFA in liquidation.

[33] The High Court proceedings against CFA for the costs of repairs to remedy weathertight defects, was the subject of a case management conference before Associate Judge Abbott on 4 September 2006. In a written minute, Judge Abbott recorded:

> "Mr Rainey [counsel for the plaintiffs] advises today that the plaintiffs have come to the view that there are no viable parties to pursue, other than the second defendants [Martinsen Architectural Design]. The plaintiffs are currently in negotiations with the second defendant and Mr Rainey expects the proceeding either to be completely settled, or settled but for a small residual claims against subcontractors. If the latter is to be the case, the plaintiffs must seek to have the matter referred to the Weathertight Homes Resolution Service...
> **I record that it is no longer the plaintiffs' intention either to apply for leave to proceed against the first defendant [CFA], or to join as additional defendants Clarke Family interests associated with it**" (emphasis added)

[34] Mr Clarke relies on that minute for the purposes of a defence based on the doctrine of abuse of process.

[35] On 20 July 2007 the High Court proceedings were transferred to this Tribunal pursuant to section 120(2) of the Weathertight Homes Resolution Services Act 2006.

[36] On 27 July 2007 an application for adjudication was filed with the Tribunal and named Mr Clarke as the fourth respondent.

[37] In Procedural Order No 8 dated 12 September 2008 the Chair of the Tribunal noted that despite some difficulties serving Mr Clarke with the proceedings, service appeared to have been successful. The Tribunal at that time also made an order for substituted service on Mr Clarke via Mr Turnbull at a post office box address at Whangaparaoa. It also issued a summons, requiring him to attend before the Tribunal on 13 October 2008 to answer questions. The summons hearing did not take place.

[38] In Procedural Order No 9 dated 5 March 2009 the Chair recorded that she was satisfied that Mr Clarke had been served with the proceedings and that the adjudication against him could proceed.

[39] Mr Philip Grigg, of Babbage Consultants prepared a further report in April 2009 identifying the remedial works that had been carried out to the Ridgeview Apartments and their causes. The report concluded that the weathertight defects repaired were the result of:

a) Poor design and documentation;
b) Poor review of consent documents and a lack of vigorous inspections;
c) Lack of understanding of the weathertightness issues by the builder, who took shortcuts in the construction such as:
    i. No slopes to balustrade tops;
    ii. No flashings around glass block windows;
    iii. No proper capillary gaps at the base of cladding;
    iv. Inadequate fall to decks and walkways to the outlets provided;

v. Poor installation of windows and doors with no jamb or sill flashings, relying on the texture coating overspray to provide a waterproof junction.

[40] In September 2009 there was a mediation involving the first and second claimants and Mr Martinsen, Mr Andrews and the seventh respondents. Mr Clarke did not attend or participate in the mediation, having elected to take no role at all in the proceedings up until that time.

[41] The mediation was successful resulting in the partial settlement of the claim. Following notification of the settlement, the Tribunal removed Mr Martinsen, Mr Andrews and the seventh respondents as parties to the proceedings (see Procedural Order No 12 dated 25 September 2009). Mr Clarke did not oppose the removal and he did not file a cross-claim against those parties, nor was there any indication that a cross-claim would be forthcoming.

PRIMARY ISSUE – THE LIABILITY OF MR CLARKE

[42] In support of their principal contention that Mr Clarke was jointly liable with CFA as a co-developer, the claimants submit that Mr Clarke was the "brain" of CFA and the overall development and that he exercised considerable control over critical aspects of the process. This included "intimate" involvement with all financial aspects, engaging a designer and construction experts and making decisions on sales and marketing. The claimants submit that the evidence suggests that Mr Clarke had overall responsibility for a lack of quality control and that he "evinced an unfortunately cavalier concern for the long-term future of the owners of the complex".

[43] The claimants further argue that however one interprets the documentation referring to different Clarke entities, Mr Clarke is at the centre of the development and personally liable. They say that

whether a family trust was established or not is immaterial; Mr Clarke only ever intended that he would be the sole party to benefit from the intended profit.

[44] Mr Clarke's primary defence is that at all times he acted solely in his capacity as director of CFA and never assumed any personal responsibility to the claimants. In short, he says that he did not owe them a duty of care.

[45] Mr Clarke submits that it was CFA that owned the property, raised the necessary finance, engaged the design, construction and project managers and paid all the relevant invoices – and that it was the company, CFA alone, that was the developer. He contends that he had no previous experience with property development and was wholly reliant on the expertise of others, principally Mr Martinsen and Mr Andrews. Mr Clarke further argues there never was a Clarke Family Trust and that any reference to a trust in the various design and construction documentation, was the result of a mistake by other parties.

(a) The Liability of a Developer

[46] The developer of a residential property owes a non-delegable duty of care to an intended homeowner to ensure the construction of a structurally sound house. The starting point for analysis of the scope of a duty of care is the Court of Appeal decision *Mount Albert Borough Council v Johnson,*[2] where it was held at page [241]:

> "We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independant contractor.

[2] [1979] 2 NZLR 234 (CA).

[47] The policy rationale for the imposition of a non-delegable duty of care, is made clear in the following extract from Stephen Todd (ed) *The Law of Torts in New Zealand*:[3]

> "... A person who participates in the construction of a large and permenant structure which, if negligently constructed, has the capacity to cause serious damage to other persons and property in the community, should be held to a reasonble standard of care... Maintaining a bar against recoverability for the cost of repair of dangerous defects provides no incentive for plaintiffs to mitigate potential losses. On the contrary, it tends to encourage economically inefficient and socially irresponsible behaviour.

[48] The Building Act 2004, although not definitive, gives some useful guidance as to the definition of "a residential property developer". For the purposes of that Act, a residential property developer is defined at section 7 as:

> "A person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
> (a) Builds the household unit; or
> (b) Arranges for the household unit to be built; or
> (c) Acquires the household unit from a person who built it or arranged for it to be built."

[49] A helpful definition of a developer can also be found in *Body Corporate 188273 v Leuschke Group Architects Ltd:*[4]

> "[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 advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands

[3] 5th ed, Brookers, Wellington, 2009 at p273. The extract is in fact a reference to the Canadian Supreme Court decision *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85 where La Forest J drew upon the words of Sir Robin Cooke in [1991] 107 LQR 46, 70.

[4] (2007) 8 NZCPR 914 (HC), Harrison J; see also *Body Corporate 199348 v Nielsen HC Auckland* CIV-2004-404-3989, 3 December 2008, Heath J at para [67].

> that the developer owes actionable duties to owners of the buildings it develops." (emphasis added)

[50] In *Leuschke Group* Harrison J further held that a director of a corporate entity might assume a personal responsibility to third parties irrespective of whether he or she was acting as a director or pursuant to any other form of agency. Many of the relevant cases emphasise the fact and degree of control as critical factors in determining personal liability, not the fact that a person is a director of the company.[5] In *Hartley v Balemi*[6] Stevens J articulated the test as follows at para [92]:

> "**However, personal involvement does not necessarily have to mean that physical work needs to have been undertaken by the director** – that is just one potential manifestation of actual control over the building process. Personal involvement and the degree of control may also include, as in *Morton* itself, administering the construction of the building. Therefore, the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the director has taken actual control over the process or any particular part thereof. Direct personal involvement may lead to the existence of a duty of care and hence liability, should that duty of care be breached."

[51] The courts have repeatedly emphasised the importance of examining the factual matrix in each case before determining whether a director is personally responsible.[7] The factual matrix is critical in assessing whether the "elements of the tort" of negligence have been established.[8]

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[5] Ibid 53. See also *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J and *Chapman v Western Bay of Plenty District Council* DC Hamilton, CIV-2009-070-1237, 11 June 2010, Judge Maze at para [67].
[6] See n5 above.
[7] See *Chee v Stareast Investment Ltd* HC Auckland, CIV-2009-404-5255, 1 April 2010, Wylie J.
[8] See *Body Corporate No 202254 v Taylor* [2009] 2 NZLR 17.

(b) Analysis – Was Mr Clarke a Co-Developer?

[52] In considering and evaluating the evidence overall, I conclude that Mr Clarke was personally involved in the development of the Ridgeview Apartments in a significant way and exercised considerable overall control. In my view he was a co-developer with CFA, and owed a duty of care to the claimants. My reasons for this finding are as follows.

[53] Mr Clarke was one of the key figures at the centre of the project for the construction of the Ridgeview Apartments. While he relied on the design and construction expertise of both Mr Martinsen and Mr Andrews, Mr Clarke played an influential role, as the ultimate decision-maker and an active participant for whom the apartments were being built. Crucially, Mr Clarke kept a very close and tight control on all financial aspects of the overall process, and participated in critical meetings about construction when cost and time were key factors. As discussed below there is a nexus between decisions made by Mr Clarke and the weathertight defects.

[54] I accept Mr Clarke was not directly involved in either the design or the actual construction work (he physically performed neither) but he was the principal party who arranged for the units to be built and played an integral role in the administration of the overall process.

[55] The idea to build the apartment was ultimately that of Mr Clarke, albeit that he was influenced by the advice and suggestions of Mr Gibb and possibly others. Without Mr Clarke there would have been no development. It was Mr Clarke who engaged Mr Martinsen and Mr Andrews. Mr Andrews understood Mr Martinsen to be the agent for Mr Clarke. It was Mr Clarke who took steps to raise the finance for the development and, as Mr Martinsen noted, all key decisions relating to design and the construction processes, especially if cost was a factor (as it often was) were made with his

approval. It was Mr Clarke who approved the feasibility study carried out by Mr Martinsen. It was Mr Clarke who authorised Mr Martinsen to go ahead with the resource and building consent process. It was Mr Clarke who agreed to use a private certifier rather than the territorial authority.

[56] In his evidence Mr Clarke sought to down play his role in the project. I found his evidence on this issue and more generally, to be unreliable and at times evasive. Generally, where there was some conflict in the evidence, I prefer the evidence of Messrs Andrews and Martinsen to that of Mr Clarke. While there was some discrepancy between the evidence of Mr Martinsen and Mr Andrews, I ultimately attribute this to problems of recollection, the events in question now at least ten years ago.

[57] As Messrs Martinsen and Andrews stated, Mr Clarke would attend monthly meetings on site. It was at these meetings that key decisions were made about important issues of construction. This included the decision to change the cladding from Eterpan to Harditex, to change the timber from treated to untreated, to apply a new type of water-proofing membrane and to decide on the method for the installation of the glass blocks. Mr Clarke actively participated in these decisions; they involved issues of time and cost which he was vitally interested in and which he closely monitored. A number of these decisions, including the decision to change the cladding, resulted in significant cost savings.

[58] The detailed accounts and financial information Mr Clarke produced in evidence (many in his handwriting) demonstrates the close interest he took in all financial issues. The evidence also establishes that he was increasingly concerned with cost overrun as the project progressed. His personal financial interest in the project

provided a strong motivation for him to assume personal control and responsibility.[9]

[59] Consistent with his control over financial matters, Mr Clarke was also actively involved in the sales and marketing of the units. He was the one who agreed the ultimate sales price for each unit. Many of the units were of course pre-sold, again a matter that Mr Clarke was vitally interested in and which he oversaw. I accept that Mr Jack Gibb was also a player in the sales and marketing but again Mr Clarke has sought to down play the actual role that he played.

[60] I acknowledge that it was the company, CFA that owned the land and actually paid most of the invoices of Martinsen Design and Chelsea Developments Limited. I also accept that it was the company that borrowed the funds to finance the project. However, it is important to consider the cumulative effect and extent of Mr Clarke's involvement in the project overall. He was always the face of the development and the person intended to profit from it, whether as a shareholder of CFA or otherwise. He was a one-man band (sole director and shareholder) and as the High Court held in *Body Corporate 183523 v Tony Tay & Associates Ltd,*[10] where directors are one person or single venture companies they "will be exposed" to a finding of personal liability. CFA had no business other than the ownership and development of the land at Onewa Road.

[61] Some of the functions identified above (e.g. raising development finance and engaging the contractors) may ordinarily be considered to be performed by someone in their capacity as a director. However, in this case, Mr Clarke deliberately held out to others (key parties) that an entity or party other than the company, CFA, was at the centre of the project and its intended primary beneficiary. It was not co-incidental or simply a mistake, as Mr

[9] See *Auckland Christian Mandarin Church Trust Board v Canam Construction (1955) Ltd* HC Auckland, CIV-2008-404-8526, 25 June 2010, Priestley J at para [98].
[10] HC Auckland, CIV-2004-404-4824, 30 March 2009, Priestley J at para [156].

Clarke tried to suggest, that a significant number of key documents issued during construction refer expressly to a “Clarke Family Trust”. These documents include the building consent application, the building consent itself and invoices from Chelsea Developments Limited (x12).

[62] The reason the name “Clarke Family Trust” was used was because Mr Clarke must have instructed Mr Martinsen and Mr Andrews to have used it. The explanation put forward by Mr Clarke that it was not his suggestion or responsibility that the name of a trust was used, is simply implausible. While a trust may never have been established at that time, Mr Clarke clearly contemplated doing so and ultimately sought legal advice on the issue. There are numerous invoices from Mr Andrews issued to the “Clarke Family Trust”. Mr Clarke relied on these invoices for a substantial GST refund claimed by the company, CFA. I reject Mr Clarke’s contention that on at least two occasions he told Mr Andrews that he, Andrews, had billed the wrong entity, but despite this, Mr Andrews continued to invoice the “Clarke Family Trust”.

[63] At my suggestion, Mr Cockcroft, solicitor for Mr Clarke, gave evidence on the issue of whether a trust was established (this was because there was conflicting documentary evidence, including solicitors’ correspondence dated 10 October 2007, on whether a trust had actually been established). Mr Clarke agreed to waive solicitor – client privilege. Mr Cockcroft’s evidence, which was measured and credible, confirmed (to the best of his recollection) that while a trust was formed in 2001 it was a “bare shell” that never operated in any meaningful way. No assets were ever transferred to it. Mr Cockroft also confirmed that he did not expressly advise Mr Clarke about the relevant legal structure for the development nor did he review or advise on any of the contractual documentation relating to the engaging of Martinsen Design and/or Chelsea Developments Limited.

[64] In the circumstances, it is difficult to see how Mr Clarke can credibly claim that he was acting solely as the company or its agent when he instructed Mr Martinsen and Mr Andrews (and prior to 2001) that it was the "Clarke Family Trust" that was the party for whom the apartments were being built. It was surely not open to Mr Clarke in his capacity as director of the company to refer to a trust in this manner when it was the company that owned the land, raised the finances, and was paying the invoices – and when there was no trust in existence. I am not suggesting that Mr Clarke was necessarily dishonest in referring at the time to a trust; it seems clear that he genuinely contemplated setting one up and a formal deed of trust ("a bare shell") was apparently executed in 2001. However, he is the one that is responsible for instructing that it was the "Clarke Family Trust" that should be invoiced and for the references in other documentation to this so called trust. He obviously saw some advantage in doing so.

[65] While many documents refer to the "Clarke Family Trust", a number of other documents also refer to Mr Clarke personally. This included the invoices issued by Martinsen Design, and the application for a resource consent, which was made by Mr Martinsen and named the applicant as "P Clarke". The Disputes Tribunal proceedings taken by Mr Martinsen against Mr Clarke were taken against Mr Clarke personally.

[66] It is perhaps not surprising or unusual that at least some of the documentation refers interchangeably to Mr Clarke and CFA as if they were one and the same. I agree with the submission that this may well be common place when one-man companies are involved. However, the overall impact of the various documentation and most particularly, the references to the non-existent "Clarke Family Trust" creates a somewhat confused and muddled picture. From a legal point of view, I acknowledge that the company, CFA, always

remained the landowner, the borrower of the finance raised and the payer of most of the invoices. On the other hand, Mr Clarke, as a director of CFA had no authority to instruct that a fictional trust be invoiced for construction work or be named as the party to whom building consent should be issued. It might also be noted that if there was in fact a trust and Mr Clarke a trustee, he would in principle be personally liable.

[67] The common factor amongst this somewhat confused picture, including the repeated references to the "Clarke Family Trust", is of course Mr Clarke himself. He is clearly the source of the repeated references to a trust. In my view this evidence overall confirms that it was Mr Clarke who was at the heart of the project, making crucial decisions and the party intended to benefit from it. He exercised considerable control and together with others assumed responsibility for key decisions in the process. He was not the sole developer, but together with CFA, was one of the developers.

(c) Breach of Non-delegable Duties

[68] In reviewing the evidence overall I also conclude that Mr Clarke breached duties of care that he owed to the claimants. The Babbage Reports (both of which were taken as read and not challenged by way of cross-examination) support this finding. It is no answer for Mr Clarke to claim, as he does, that he had no experience of property development and relied on the expertise of others. The duties of care owed by a developer are non-delegable.

[69] In any event, the decisions Mr Clarke participated in relating to construction, and in particular the installation of the glass blocks, were a contributory cause of at least some of the defects.[11] The Babbage Report concluded that "shortcuts" were taken in construction and in my view the critical influence of Mr Clarke on

[11] *Chapman v Western Bay of Plenty District Council* DC Hamilton, CIV-2009-070-1237, 11 June 2010, Judge Maze.

matters of cost, had an impact on this outcome. I am satisfied that there was a nexus between Mr Clarke's acts and omissions and the defects that caused the damage to the apartments.

[70] In emphasising his lack of experience and reliance on others, Mr Clarke also claimed in his defence, that this development was "like an old lady in Birkenhead who decides to do up her house", engages experts to do it for her and then sells it for a profit. In my view, however, this is a false analogy.

[71] In this case, Mr Clarke, with no experience in property development (albeit that he had some general business experience as a printer), embarked upon a multi-million dollar development of some 17 apartments intended for residential occupation. Despite his lack of experience, he chose to be actively involved in the project; he was not a passive instructing client.

[72] While he made some enquiries as to the background of the experts engaged Mr Clarke did not know until the hearing in this matter, that Mr Martinsen was not a registered architect but an architectural draftsman. Likewise, he made no enquiry at the time, as to whether Mr Martinsen had professional indemnity insurance. The Babbage Report did of course identify poor design as a cause of some of the weathertight defects and the benefits of professional indemnity insurance in these circumstances are obvious. While these shortcomings may have been of little moment and/or acceptable practice for the development for a single dwelling house, the scale of this project, in both cost and the number of apartments, was quite different.

[73] Furthermore, and despite both his lack of experience and the scale of the project, Mr Clarke engaged the relevant contractors (i.e. key parties performing substantial contracts) without the benefit of legal advice. Mr Clarke did have a solicitor acting for him at the time

but the legal advice on this development was confined to conveyancing issues relating to the sale of the units.

[74] As Messrs Martinsen and Andrews confirmed, there was no clerk of works for the project overall, albeit, according to them, this was not at all unusual for this scale of project (which they described as mid-range). The documents recording the contracts entered into between Mr Clarke and CFA on the one-hand, and Martinsen Architectural Design and Chelsea Developments Limited on the other, were cursory and there was virtually no reference to issues of quality control or accountability. As already noted, "shortcuts" were taken in construction.

[75] I accept that other parties have responsibility for the defects in construction and the apparently relaxed attitude to quality control, but in my view Mr Clarke should share in this responsibility also. My finding that he is liable to the claimants is consistent with the policy rationale for the imposition of non-delegable duties of care on developers.

CAUSATION AND QUANTUM

[76] It is clear from the assessor's reports and the Babbage reports that the defects in construction identified (and for which Mr Clarke as a co-developer is responsible) caused the damage to the apartments requiring costly repairs.

[77] I am also satisfied on the basis of the evidence of Mr Leishman that the claimants have proven the quantum of the cost of repairs claimed in the sum of $163,943.59. This sum is of course the claimants' share of the cost of repairs, after crediting the settlement monies already received, following the mediated settlement in September 2007.

[78] Mr Leishman, whose company, Boutique Body Corporate Limited, is the Body Corporate secretary of the first claimant, gave evidence carefully explaining how the quantum had been calculated. This included details of the settlement figure in which the second claimants have shared. There was no challenge to this particular aspect of evidence during cross-examination.

[79] As to general damages, which in accordance with the recent supplementary judgment in *Byron Avenue*[12] are to be awarded on a per unit basis, my findings are as follows:

a) Mr and Mrs Beckingham (unit 3) are to be awarded $15,000 general damages. I accept their evidence that they have suffered considerable stress and inconvenience as a result of their apartment being damaged and having to be repaired. However, because their unit was not their principal place of residence (but rather their City flat - they live in Whitianga and travel to Auckland relatively frequently), the award of general damages should in my view be reduced.

b) Ms Fung-Yee Tsung (unit 9) is to be awarded $20,000 general damages. Her unchallenged evidence (she did not appear as the witness) was that she has experienced considerable financial hardship as a result of the need to contribute to the cost of repairs. She had to move out of her unit for three months and has now moved or relocated to Australia in order to meet her financial commitments.

c) I am not prepared to make an award of general damages to Mr David Beasley (unit 11). No evidence was given by or on behalf of Mr Beasley (he apparently now lives in the UK) about his own experiences as a result of discovering and having to repair his leaky apartment. I cannot speculate as to what his experience might have been.

LIMITATION DEFENCE – Is the Claim against Mr Clarke statute-barred by virtue of Section 4 of the Limitation Act 1950

[80] Mr Clarke claims that the claimants first became aware of weathertight issues in November 2000. He submits that because he was not sued until 2007 when he was named as a party in the claim filed with the Tribunal, following transfer from the High Court, the claim against him is out of time – i.e. it was filed after the 6 year limitation period under section 4 of the Limitation Act 1950.

[81] The leading decision on when time limits start to run is of course the Privy Council decision in *Invercargill City Council v Hamlin.*[13] The cause of action accrues when the cracks become so bad or the defects so obvious that any reasonable homeowner would call in an expert.

[82] On the evidence I conclude that the cause of action in this case accrued at some stage in 2003 when the claimants filed the claim to the WHRS having become sufficiently concerned that there may by that time have been substantial weathertight problems. I do not accept that the level of awareness by the claimants was such in 2000 that limitation should run from that time.

[83] In 2000 the reasonable understanding of all parties seems to have been that the weathertight issues were minor and capable of being fixed by Mr Clarke and/or Chelsea Developments Limited. The defects were not so bad or so obvious in 2000 that it would be reasonable to conclude the limitation period ran as from then.

[84] Because the claim against Mr Clarke was filed within 6 years of 2003, namely in 2007, I reject the limitation defence raised.

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[12] *Byron Avenue* [2010] NZCA 65; *Byron* also sets out principles relevant to the assessment of general damages.
[13] [1996] 1 NZLR 513 (PC).

REFERRAL TO THE HIGH COURT AND THE ABUSE OF PROCESS DEFENCE

[85] In his closing written submissions Mr Clarke has submitted that there are significant procedural issues relating to his being joined as a party, including the fact that the claimants misled the High Court. He contends that:

a) The Tribunal should refer the question of his joinder back to the High Court; or
b) Dismiss the claim against him on the grounds of abuse of process.

[86] In support of the argument of an abuse of process, Mr Clarke also claimed that the claimants knowingly and deliberately placed CFA in liquidation (because of unpaid levies) and in doing so they deprived themselves of a potential respondent. It is argued that the only possible conclusion to be reached from this course of action is:

a) They did not consider that they had any right of action against CFA in respect of the leaky building claim; or
b) They considered any such claim would be unsuccessful.

[87] In my view these arguments are misplaced. I do not accept that the only possible conclusions are those recorded above. The claimants in this case, knowing that CFA was impecunious, were obviously faced with a difficult decision to make; it is one quite often faced by claimants in this jurisdiction. They were at the time represented by competent counsel and on the evidence available to me it seems clear that the overall conclusion the claimants reached was that it was simply no longer viable to continue to pursue CFA for the cost of repairs. That of course is precisely what counsel for the claimants told the High Court (as recorded in the minutes of Associate Judge Abbott set out at paragraph 33 above).

[88] Given the express indication given to the High Court, that they would not seek to join any additional defendants associated with Clarke Family interests, it is entirely understandable that Mr Clarke should feel aggrieved that he is now the subject of this claim. This is particularly so given the very long time this claim has taken to come to a substantive hearing. Mr Clarke obviously thought in September 2006 that all litigation had come to an end.

[89] However, this Tribunal is not in a position to make any assessment as to whether the High Court was misled in the manner alleged. Mr Clarke expressly acknowledged that this is not an issue that the Tribunal can determine. The key question I must determine is whether I should refer this issue to the High Court and/or dismiss the claim on the grounds of abuse of process. After careful consideration, however, I do not see that there is a proper basis for me to do so and I accordingly decline the request.

[90] The Tribunal has jurisdiction under section 113 to refer questions of law to the High Court. Pursuant to section 119 it also has the power to transfer a claim to the High Court. Here, however, the Tribunal has now heard all the evidence at the end of what has been a very lengthy process. In my view it would be contrary to the clear statutory purpose of the Tribunal as set out in section 3 of the 2006 Act to now transfer the claim back to the High Court. Furthermore, in terms of section 119, I do not see the issues in this case as being sufficiently novel or complex to justify referral to the High Court, particularly at this late stage.

[91] As to the claim of abuse of process, the starting point is that this Tribunal is a creature of statute; it has no inherent jurisdiction.[14] I am prepared for present purposes, however, to accept that the Tribunal does have an implied power to dismiss a claim on the grounds of abuse of process although the threshold is a high one and

[14] *Russell (Department of Social Welfare DSW) v Stewart* [1990] 1 NZLR 697.

it may well be that where a proper factual foundation exists that such an issue should be referred to the High Court. However, in my view there has been no abuse of the processes of this Tribunal. I accept that Mr Clarke genuinely believes that he has been treated unfairly. Nevertheless, that is not the test.

[92] In the Court of Appeal decision *Auckland Regional Services Trust v Lark,*[15] a defendant party was struck out by consent on the grounds that it had been mistakenly joined. An application to rejoin that party was subsequently made and granted by the Employment Court. The Court of Appeal, noting the wide jurisdiction of the Employment Court to direct joinder (the Tribunal's jurisdiction is similarly wide) held that the Employment Court was entitled to rejoin the defendant in question. While that decision is not directly on point it does tend to suggest that the naming of Mr Clarke for the first time in this Tribunal and contrary to the indication given in the High Court does not constitute an abuse of process of this Tribunal or is otherwise somehow not legitimate. The abuse of process defence is rejected.

CONTRIBUTORY NEGLIGENCE

[93] Mr Clarke submits that the claimants have committed the following acts of contributory negligence, which have contributed to the losses they have suffered. It is contended that any damages award (should that be justified) should include an appropriate deduction for such contributory negligence:

a) The claimants' delay in carrying out remedial works;
b) The claimants' failure to join all potential respondents, including James Hardie Limited and the territorial authority, North Shore City Council;

[15] CA296/93, 6 May 1994.

c) Failure by the claimants to involve and to advise Mr Clarke of a mediation in 2009 (which led to a partial settlement) and to settle with Martinsen Design and Chelsea Developments Limited for an "exceptionally low payment";
d) By issuing proceedings against CFA and putting that company into liquidation, the claimants acted contrary to their own interests by respectively depriving themselves of the "logical party" to sue for the costs of repairs.

[94] The fundamental problem Mr Clarke has with many of the claims of contributory negligence raised, is that he has failed to establish the necessary evidential foundation and thus to meet the burden on him to satisfy the Tribunal of such claims.

[95] Judge Maze held in *Chapman v Western Bay of Plenty District Council*[16] that to find contributory negligence the Tribunal must:

a) Identify the claimants' acts or omissions at issue proven by the respondents to have occurred;
b) Identify how the claimants have failed to take reasonable care to protect their interests objectively;
c) Find the operative cause of loss attributable to the respondents and identify how the claimants contributed to that loss by their own negligence; and
d) Assess the degree of the claimants' causation, relative blameworthiness of the parties and the extent to which it is just and equitable to reduce damages.

(i) Delay

[96] While the Babbage Report of 2003 (a preliminary report) may have concluded that the remedial works, as then assessed, were

[16] See n5 above at para 40 and *Sunset Terraces* [2010] NZCA 64.

relatively minor, there is no real evidence before me that any delay in commencing the remedial works was either the fault of the claimants and/or gave rise to a much greater extent of deterioration.

[97] Given the fact that CFA was a unit owner in the complex and directly involved in decisions made about repairing the building, Mr Clarke was well placed to provide evidence of delay and to attribute fault to the claimants for it, should such evidence have been available.

[98] In any event, it seems inevitable that within a Body Corporate with a significant number of individual unit title holders that time would be required to make a decision about repairing the whole complex and/or to raise finance for the cost of repairs involved.

[99] I would also note that the action taken in the High Court to overturn the veto power of CFA under the Body Corporate rules would have delayed matters. That problem was not the fault of the claimants.

[100] The claim of delay is rejected.

(ii) Failure to Join Respondents

[101] The contention that the claimants were contributory negligent in failing to join North Shore City Council, as the territorial authority, is misguided.

[102] In this case, a private certifier, namely Compass Certification Limited, was engaged to carry out inspections and it was that company (now in liquidation) that issued the Code Compliance Certificate. As the Court of Appeal has recently confirmed in *Auckland City Council v McNamara & Ors as Trustees of the PH*

McNamara Family Trust[17] a territorial authority is bound in cases such as this to accept the issue of the Code Compliance Certificate by the private certifier and cannot be liable as some "long-stop guarantor". There never was a proper legal basis to join North Shore City Council to this claim.

[103] In relation to the alleged failure to join James Hardie Limited, there is again a lack of evidence to establish any contributory negligence on behalf of the claimants. In any event, it might be claimed that rather than the primary responsibility of the claimants, it was really for Mr Clarke and all the other respondents to join James Hardie and to seek a contribution from them. Mr Clarke as someone directly involved during the construction process was better placed than the claimants to know of the exact role that James Hardie had played.

[104] Mr Clarke has correctly pointed out that at the hearing, the claimants appeared to have learnt for the first time that a representative of James Hardie Limited attended the construction site and recommended the change in cladding to a James Hardie product. The James Hardie product was ultimately used in construction.

[105] Mr Leishman on behalf of the claimants has indicated in his closing submissions that the claimants seek the right, within 21 days of the issue of this final determination, to make an application to join James Hardie Limited as a party to the proceedings.

[106] However, I am not prepared to accede to Mr Leishman's request. It is now far too late in the piece to add additional parties to these proceedings which have been under way for many years.[18] This claim is now long overdue for resolution. Furthermore, it is far

[17] [2010] NZCA 345.
[18] See *Barber v Smith* HC Auckland CIV-2008-404-7067, 26 May 2010, Miller J.

from clear that there is a proper evidential basis to join James Hardie Limited in any event.

Failure to involve Mr Clarke in the Partial Settlement

[107] There is again no evidence that the claimants were at fault in any way for failing to involve and/or advise Mr Clarke of the mediation leading to the partial settlement in September 2009. To the extent that there is evidence on this issue, it rather suggests that Mr Clarke chose not to become involved and must now live with the consequences.

[108] It is clear that Mr Clarke knew about the claim against him shortly after it was filed with the Tribunal in July 2007. This is apparent from the letter to the Tribunal from Mr Cockroft dated 10 October 2007 contending that the claim against Mr Clarke and some of the other respondents was untenable (exhibit 1). There was a further fax from Mr Cockcroft to the Tribunal dated 16 October 2007 making the same point. Mr Clarke himself sent a fax, in his own handwriting, to the Tribunal dated 8 October 2008 noting that he had been named as a party and objecting to the claim proceeding against him.

[109] In Procedural Order No 9 dated 5 March 2009 the Chair of the Tribunal was satisfied that Mr Clarke had been served with the proceedings and that the adjudication against him could proceed. In Procedural Order No 8 dated 12 September 2008 an order for substituted service had been made.

[110] On the evidence I have heard, it is clear to me that throughout 2007-2009, Mr Clarke deliberately sought to make it difficult for the Tribunal and the parties to serve documents on him. During this period Mr Clarke was served with documents at two different addresses namely at 3 North Road, Stanmore Bay, Whangaparaoa and also C/- of Mr John Turnbull at P O Box 407,

Whangaparaoa. In my view Mr Clarke cannot credibly claim that the claimants were somehow at fault in not involving him or advising him of the mediation leading to settlement. He chose not to be involved in the claim until it became apparent to him after the partial settlement that the claimants were intent on proceeding against him. The evidence Mr Clarke gave on this issue, and in particular, the claim that others were at fault in not informing him of what was happening, I found quite unconvincing and unreliable.

[111] Mr Clarke is correct to contend that the partial settlement concluded between the claimants and Messrs Martinsen and Andrews (the second and sixth respondents) was a modest one. However, in the absence of evidence such as for example, accurate information as to the financial position of Messrs Martinsen and/or Andrews, it would be speculative for me to conclude the claimants had been at fault in some way for settling for a relatively low figure.

[112] In any event, the share of the total sum paid by Messrs Martinsen and Andrews that the second claimants received, does not on its face suggest that the settlement sum was grossly disproportionate or inadequate. It is frequently the case that there are multiple factors at play when claimants decide to settle for a particular figure (e.g. the financial ability of respondents to pay); I cannot speculate on what took place here.

Putting CFA into Liquidation

[113] There is again an absence of any real evidence to support a finding that the claimants might have been at fault in some way in putting CFA into liquidation and thus depriving themselves of the "logical party" to sue for the cost of repairs. To the extent that there is evidence, it tends to suggest that the decision taken by the claimants to place the company into liquidation was entirely a reasonable one.

[114] In concluding that there is an absence of evidence to support many of the claims of contributory negligence, I am conscious of the fact that Mr Clarke was not formally represented by counsel at the hearing. However, it is clear that throughout the Tribunal process he has at times had access to and taken legal advice. It is also apparent that his written closing submissions (of a high standard) were prepared with the benefit of legal advice. Furthermore, and somewhat unusually, the cross-examination of Mr Clarke at the hearing was adjourned part-heard, to enable him to seek legal advice.

[115] Mr Cockcroft, solicitor for Mr Clarke at various times, gave evidence, as I have noted, and presumably was involved in the preparation of the written legal submissions. In the circumstances of this case there is no proper basis for criticising the role that Mr Cockcroft played. It is entirely understandable that Mr Clarke should have sought further assistance from Mr Cockcroft in defending the claim and reasonable for Mr Cockcroft to have done so.

CONTRIBUTION

[116] Mr Clarke submits that any damages award against him should take into account the relative contributions of other respondent parties (all now removed) including Martinsen Architectural Design, Mr Andrews and Compass Building Certification Limited (in liquidation). It is contended that in terms of causal potency, Mr Clarke's relative fault was negligible.

[117] I have of course found that Mr Clarke was liable to the claimants as a co-developer of the apartments having breached duties of care to them causing them loss. In accordance with conventional principle, Mr Clarke is a joint tortfeasor and jointly liable for the full amount of the damages awarded.

[118] There are no other respondent parties remaining in this claim for the Tribunal now to make any formal orders for contribution (as contemplated by section 72 of the 2006 Act). Martinsen Architectural Design Limited and Mr Andrews were removed following the partial settlement, a process which Mr Clarke chose not to be involved with. Compass Building Certification Limited was also removed; it has now been struck off.

[119] The scheme of the 2006 Act is very much directed at encouraging mediation and mediated settlement of claims. By choosing not to participate in the mediation Mr Clarke, has effectively waived any opportunity to seek any further contribution from other respondents.

[120] In principle, the partial settlement concluded between the claimants and Martinsen Architectural Design and Mr Andrews is not binding on Mr Clarke since he was not a party to it. However, given the fact that the total cost of repairs to the Ridgeview Apartments was approximately $1.1 million, the damages award made against Mr Clarke in the sum of $163,973.59, cannot properly be regarded as disproportionate. I reject the submission that in terms of fault, his relative contribution was negligible.

[121] In my view there is no principled basis for the Tribunal to reduce the damages awarded against Mr Clarke on the basis of relative contribution of other parties. The submissions made by him on this point are rejected.

CONCLUSION

[122] Mr Clarke was a co-developer of the Ridgeview Apartments and breached duties of care to the claimants resulting in their suffering loss.

[123] Mr Clarke, the fourth respondent, is ordered to pay to the claimants a total sum of $198,973.59. This is broken down as follows:

Unit	Cost of Repairs	General Damages	Total
Unit 3 – Mr and Mrs Beckenham	$45,221.43	$15,000.00	$60,221.43
Unit 9 – Ms Fung – Yee Tseung	$59,361.08	$20,000.00	$79,361.08
Unit 11 – Mr David Beazley	$59,391.08	-	$59,391.08
TOTAL			**$198,973.59**

DATED this 25th day of August 2010

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P J Andrew

Tribunal Member