

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2011-100-000043  
[2012] NZWHT AUCKLAND 45**

BETWEEN	BARRY FREDRICK THOMAS AND PAULINE JOAN THOMAS Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	TERRY BROWN Second Respondent
AND	ROHINEET SHARMA Third Respondent
AND	THUSHANI SURANGI SHARMA Fourth Respondent

Hearing: 24 and 26 April 2012

Appearances: D Barr and K Tidbury for the claimants and first respondent  
D Carden and L Sabo for the third and fourth respondents

Decision: 28 September 2012

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**FINAL DETERMINATION**  
**Adjudicator: P R Cogswell**

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## INTRODUCTION

[1] In this claim there is a single issue for determination.

[2] The issue is whether the third and fourth respondents are developers and therefore liable to contribute as concurrent tortfeasors to the amount paid by the first respondent, Auckland Council, when it settled the claims against it by Mr and Mrs Thomas, the claimants.

[3] The claimants settled their claims against the Council and accepted the sum of \$392,500. The claimants subrogated their rights to the Council as part of that settlement.

[4] At the commencement of the hearing, the Council confirmed that they intended to proceed with a claim for contribution under s 17(1)(c) of the Law Reform Act 1936. Accordingly, there are no issues arising from the settlement agreement and I do not need to further address the claims the Council advance under their rights of subrogation.

[5] The existence and effect of the alleged defects are not contested by the third and fourth respondents. As a result of that, the evidence of the assessor and Mr Summers (the claimants/Council's expert), was admitted without contest.

[6] Finally, the third and fourth respondents admitted in their opening that they accept that the claimants would have been entitled to at least the amount paid by the Council under the settlement agreement of \$392,500.

[7] That leaves for determination in this hearing the sole question of whether the third and fourth respondents owed a duty of care to the claimants because they were developers of the dwelling at 86 Picasso Drive, West Harbour, Auckland.

[8] I add for completeness reference to the second respondent, Terry Brown. Mr Brown appears to have been a pivotal person involved in the construction of this home. It is alleged that he was the designer, project manager and builder. He is said to have dealt with the Council and to have made all decisions concerning design and construction work, including the engagement of all subcontractors.

[9] Mr Brown has never been located. I refer to the memorandum filed by the Council dated 15 February 2012 which confirms that Mr Brown was never served. Accordingly, no orders can be made against him.

## **BACKGROUND**

[10] The third and fourth respondents, who I refer to as Mr and Mrs Sharma, purchased the property at 86 Picasso Drive, West Harbour in late 1998. It was then a bare section.

[11] In August 1999, plans and specifications were prepared by Mr Brown for Mr and Mrs Sharma.

[12] A building consent was issued by Waitakere City Council on 6 January 2000. Construction of the dwelling commenced sometime after that and a code compliance certificate was issued for the dwelling on 27 September 2000.

[13] 86 Picasso Drive was sold by Mr and Mrs Sharma by auction in October 2000 to Choonsik Moon and Yeonjun Cho for \$487,000. They subsequently sold the property to the claimants.

[14] Following their ownership of the property, the claimants discovered signs of water entry to the dwelling and made an application for an assessor's report on 4 June 2009.

[15] The remedial works are yet to be undertaken.

## **THE HISTORY OF PROPERTY OWNERSHIP BY MR AND MRS SHARMA**

[16] To a large extent the Council's claim against Mr and Mrs Sharma proceeds on the basis that, viewed overall on a "common sense" basis, the history of property ownership by Mr and Mrs Sharma can only lead to a conclusion that they were in the business of property development. Much of the hearing was devoted to testing that proposition.

[17] Attached to this determination as Schedule 1 is a timeline I have prepared of the various properties owned by Mr and Mrs Sharma.

[18] The Council produced a series of certificates of title and "Zoodle" property reports which track the ownership of properties by Mr and Mrs Sharma. Those documents demonstrate the history of their ownership of property as follows:

- a) 17 Arodella Crescent, Ranui - this property was purchased in 1996 by Mr Sharma who paid \$146,500 for that property. It was sold in May 1999 for \$163,000.
- b) 86 Picasso Drive, West Harbour - this property was purchased by Mr and Mrs Sharma on 10 November 1998 for the sum of \$109,000. It was sold with settlement occurring on 2 February 2001 for the sum of \$487,000.
- c) 12 Ginders Drive, Massey - this property was purchased by Mr and Mrs Sharma on 24 June 1999 for \$75,500. It was sold on 15 August 2005 for an amount that was unknown.
- d) 25A Comins Crescent, Mission Bay - this property was purchased by Mr and Mrs Sharma on 23 January 2001 for \$470,000 and sold on 13 October 2003 for \$640,000.
- e) 63 Nihill Crescent, Mission Bay - this property was purchased by Mr and Mrs Sharma on 23 April 2003 for the

sum of \$590,000. It was subsequently sold on 27 November 2009 for \$1.4 million.

- f) 124B Shackleton Road, Mount Eden - this property was purchased by Mr and Mrs Sharma on 31 March 2004 for the sum of \$308,000. It was sold on 10 July 2006 for \$690,000.
- g) 23 Castlefinn Drive, Weymouth - this property was purchased by Mr and Mrs Sharma on 22 August 2006 for \$317,000 and sold on 8 November 2006 for \$338,000.
- h) 52 Malaspina Place, Papatoetoe - this property was purchased by Mr and Mrs Sharma on 3 February 2007 and is still owned by them.
- i) 3/195 Buckland Road, Mangere East - this property was purchased by Mr and Mrs Sharma in June 2007 and is still owned by them.
- j) 49 Codrington Crescent, Mission Bay - this property was purchased by Mr and Mrs Sharma on 3 June 2008 for a sum of \$1.46 million and is now valued at \$2.4 million and is still owned by Mr and Mrs Sharma and it is their family home.
- k) 9 Coolaghy Drive, Flatbush - this property was purchased by Mr and Mrs Sharma on 31 May 2011 for \$376,000 and sold on 22 July 2011 for \$304,400.

[19] In relation to the properties just listed:

- a) Arodella Crescent - Mr Sharma improved that property by having a garage built on the site.
- b) Ginders Drive – this was a bare section when purchased by Mr and Mrs Sharma and they arranged to have Mr Brown design and build a house on that site.
- c) Picasso Drive - also an undeveloped site when purchased and Mr Brown designed and built a house on that site.
- d) Comins Crescent - not developed or improved by the third and fourth respondents.

- e) Nihill Crescent - this property had an existing dwelling that was removed by Mr and Mrs Sharma and a new house was built using a contractor on a labour and material basis.
- f) Shackleton Road - an undeveloped section on which Mr and Mrs Sharma had constructed a new house.
- g) Castlefinn Drive - only held by Mr and Mrs Sharma for a brief period and it is not apparent that any development was undertaken.
- h) Malaspina Place and Buckland Road - both properties were purchased and held as investments and there is no evidence that any development work was carried out in relation to them.
- i) Codrington Crescent – this property had an existing dwelling that was removed to enable the construction of a new house.

## **WHAT IS A RESIDENTIAL PROPERTY DEVELOPER?**

[20] The Council's position in this hearing is that on any objective analysis, Mr and Mrs Sharma were property developers at all relevant times. The question for the Tribunal is, therefore, how is the expression "residential property developer" defined?

[21] The starting point in the authorities is *Mount Albert Borough Council v Johnson*.<sup>1</sup> The case is authority for the proposition that a developer owes a non-delegable duty of care to homeowners in relation to defective dwellings.<sup>2</sup>

[22] I am assisted by a recent decision of Miller J in *Brichris Holdings Limited v Auckland Council*.<sup>3</sup> In that decision, the Court considered the meaning of the expression "residential property developer."

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<sup>1</sup> *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

<sup>2</sup> Above n 1 at page 240.

<sup>3</sup> *Brichris Holdings Limited v Auckland Council* [2012] NZHC 2089.

[23] Miller J observed that it is necessary to define the term “residential property developer” with some care. It is a term that is easily alleged but difficult to define. He started with the following analysis:

[24] A developer, in ordinary usage, develops land to realise its potential, usually by having something built on it.<sup>4</sup> This definition captures anyone who has a home built, whether or not for sale. A narrower concept is needed if courts are to distinguish persons who may be excluded [as residential property developers] as a class from any duty of care that territorial authorities owe to homeowners.

[24] The Court<sup>5</sup> then turned to consider the legislative background to the issue and, while noting that the Building Act 2004 did not govern the instant case (as it does not here either), it did nonetheless inform judicial policy choices.

[25] In the 2004 Act, the legislature identifies residential property developers as a class to whom certain obligations are attached. For the Act’s purposes, a residential property developer is a person who, in trade, builds a home or has it built, for the purposes of sale.

[26] In *Body Corporate 187820 v Auckland City Council*<sup>6</sup> (known as the “Trimac” case), Doogue A J reviewed the authorities on the meaning of the expression “developer” and held that a developer may owe a duty of care if it was directly involved in, or controlled the building process, and was in the business of developing dwellings for other people for profit.

[27] In *Body Corporate 188273 v Leuschke Group Architects*<sup>7</sup> the owners sued two individuals who were shareholders and directors of the development company which had gone into liquidation. The question

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<sup>4</sup> Lesley Brown (ed) *The New Shorter Oxford English Dictionary* (4<sup>th</sup> ed, Oxford University Press, Oxford, 1993) at [654].

<sup>5</sup> Above n 3.

<sup>6</sup> *Body Corporate 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC).

<sup>7</sup> *Body Corporate 188273 v Leuschke Group Architects* (2007) 8 NZCPR 194 (HC) at [31]-[32].



was whether one of them could be held liable in his personal capacity as the developer. Harrison J rejected that argument stating that:

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

The developer and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.

[28] The case focused on the developer's role in directing the development, a necessary ingredient to pierce the corporate veil (in that case) but it also referred to the developer's commercial purpose.

[29] Finally in this voyage through the authorities, there is the recent decision of Woodhouse J in *Keven Investments v Montgomery*.<sup>8</sup> In that case a couple built a home intending to live there, but later sold the property. They were sued as developers.

[30] The Tribunal held that they had done no more than build a home for themselves. The Court in *Keven* discounted the notion that liability depended on whether the developer was directly involved in the planning and construction, and identified one essential requirement for liability as a developer; the person concerned must be in the business of having buildings erected for the primary purpose of sale to other people.

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<sup>8</sup> *Keven Investments Limited v Montgomery* [2012] NZHC 1596.

[31] As Miller J concluded in *Brichris* following the *Sunset Terraces*<sup>9</sup> decision, the term “residential property developer” does not include those who build a home, or have one built hoping to profit from rent or capital appreciation over time. It does include those who build homes, having built them in trade, and for the purpose of sale to the public.

[32] As Cooke J stated in *Mount Albert Borough Council v Johnson*:<sup>10</sup>

In the instant type of case, a development company [or in this context Mr and Mrs Sharma] acquires land, subdivides it and has homes built on the lots for sale to members of the general public. The company’s interest is primarily a business one. For that purpose, it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes to the landscape. It is not a case of a landowner having a house built for his own occupation initially.....

[33] The question that I must answer is, did Mr and Mrs Sharma develop the property at 86 Picasso Drive, in trade for the purposes of selling it as part of a business endeavour or did they, as was the case in *Keven Investments*, build a home themselves that they hoped would one day return some capital appreciation? Did their original intention of building their family home change?

## **DISCUSSION**

[34] The Council asks me to consider the entire history of Mr and Mrs Sharma’s ownership of the numerous properties owned.

[35] Mr Carden points out, the subsequent dealings, if proven to be property development, are largely irrelevant. It is the intention at the time of the construction that is more relevant.

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<sup>9</sup> *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 279.

<sup>10</sup> Above n 1.

[36] Mr Carden argues that, each property must be considered separately and I cannot infer a general conclusion that all properties were constructed with a view to selling to members of the public for profit. Rather, they say that in relation to Picasso Drive, this was always constructed with the intention of becoming Mr and Mrs Sharma's family home.

[37] I refer to the timeline of the various properties owned by Mr and Mrs Sharma in the period 1996 to date. What that timeline makes clear is that certainly in relation to the later properties, there may be strong arguments that one or more of them have been built with the intention of almost immediate sale of them to the public at a profit. Some of the explanations given for the immediate sale of the later properties by them I find lacking in credibility. That does not determine the issue for Picasso Drive however.

[38] My view is that I must consider this property on an individual basis and I am not entitled to draw a general conclusion that a particular property was constructed by Mr and Mrs Sharma as developers based simply on an "accumulated inferences" basis. This is particularly the case on the Picasso Drive property, which was one of the first built by the Sharmas.

[39] Mr and Mrs Sharma called three witnesses in support of their argument that they did not develop Picasso Drive with a view to selling it for profit and were therefore not developers. I accept Mr Barr's objection to the last paragraph of each of those witnesses' evidence as the conclusion that they state in their evidence is one for me to make.

[40] I found their evidence to be helpful and honest. However, overall, it did not assist me greatly.

[41] At the end of the day, it is for the Council to demonstrate the subjective intention held by Mr and Mrs Sharma at the time they

constructed this home. What third parties say they understood Mr and Mrs Sharma's objective to be, is at the end of the day simply an observation that may or may not be correct.

[42] Mr and Mrs Sharma had no actual control over the construction of this dwelling, other than engaging Mr Brown under what is commonly described as a "turn-key" building contract. To the extent that they had any input into the construction itself, I find that input was limited to the usual sorts of steps a prospective homeowner may take for example, choosing interior finishings, colours and the like.

[43] Mr Sharma gave detailed evidence about the construction and sale of Picasso Drive. His evidence is that around April 1998 following his engagement to Mrs Sharma they began looking for a property on which to build their dream home. The intention was that the home would accommodate both Mr Sharma's parents as well.

[44] A suitable section was located in late 1998 and purchased. Mr Brown was eventually engaged to construct that home. In the meantime, Mr and Mrs Sharma had also purchased a section at 12 Ginders Drive, Massey. They proposed to build a home on that section as well. They intended to hold that property as an investment property. They did do that, until 2005.

[45] The construction of the Ginders Drive property was complete by October 1999 and Mr and Mrs Sharma and Mr Sharma's mother moved into that home at that time.

[46] Construction of Picasso Drive concluded around September/October 2000 and a code compliance certificate was issued dated 27 September 2000.

[47] In May 2000, Mr and Mrs Sharma separated. They reconciled around September 2000, but by that time they had decided that Picasso Drive no longer suited their purposes or needs. Mrs Sharma had

obtained work in Auckland City and Mr Sharma was planning to open his own law practice in the city.

[48] They decided to sell the property notwithstanding the fact that the market was not buoyant at that time. Mr Sharma gave evidence that the sale price achieved probably did not result in any profit to them. I do not consider whether or not a profit was ultimately achieved is determinative, rather, it is the intention of the project at the time it was undertaken.

[49] Mr Sharma's evidence in relation to their intention at the time the project was commenced is that they intended to build a house to accommodate him, his wife and his mother. Their evidence was that he intended to live in this home long term.

[50] Mrs Sharma's evidence to a large degree supports that of her husband's. She confirmed the role that she and Mr Sharma took in the construction and that it was limited to choosing paint colours, tile colours and other interior finishing decisions. There was nothing that they did that could possibly have led to any of the defects subsequently discovered in the property.

[51] Mrs Sharma also confirmed that she and her husband separated in May 2000 and reconciled around September of that year.

[52] The Council cross-examined both Mr and Mrs Sharma at some length about their intentions regarding Picasso Drive. The cross-examination made it clear that Mr Sharma was well aware of the different ownership/contractual structures available for the development of residential properties and an understanding of the taxation implications of that. He was and still is a practising lawyer.

[53] Mr Sharma was also challenged on his evidence about his intentions regarding Picasso Drive, with a particular emphasis on the proximity of the construction and sale of the Ginders Drive property

around the same time as the Picasso Drive property was also being constructed.

[54] Mr Sharma's evidence was that it was intended to hold Ginders Drive as an investment property. Some detailed examination of the profit derived from the project was also undertaken.

[55] There is no evidence that the funding, taxation or GST arrangements in relation to the construction of Picasso Drive were indicative of a commercial enterprise.

[56] Mr Carden, counsel for Mr and Mrs Sharma submitted that the Sharmas were a young couple starting out their life together. They made plans for the construction of a home once they were married in which they intended to live in, but that circumstances intervened with the untimely death of Mr Sharma's father and the separation that they suffered around the time the house was being built.

[57] He argued that there was no evidence at all to suggest that they built the home as a development or for any other reason other than that which they state, a home for themselves, their family in due course, and the wider family where applicable.

[58] I do not accept that the construction of the garage on the Arodella Crescent property could in any way be viewed as a development project, much less the beginning or commencement of a long term process of development of properties. Many hundreds or thousands of New Zealand homeowners erect garages on their properties or effect other improvements to them. That does not make them developers. Such conduct falls squarely within the statement of Miller J in *Brichris* that a developer is not a person who hopes to profit from capital appreciation of their own homes over time.

[59] In addition, the construction of the Ginders Drive property does not support the developer argument. That was built for the purpose of

holding as an investment. The Sharmas did that, at least until 2005. It was not built and immediately sold to the public.

[60] If this and the Picasso Drive property were to be taken as the commencement of the Sharmas residential property undertaking, then I would have expected the Ginders Drive property to be sold too, to make available the capital realised from both properties to facilitate the purchase and development of other property. That did not happen.

[61] The Council argues that any sensible reading of the facts show that the Sharmas undertook the development of six properties in the Auckland region over the course of ten years. However, the evidence in relation to Picasso Drive is simply not there. The ownership of Malaspina Place and Buckland Road is no more than the holding of investment properties and does not make them developers in relation to Picasso Drive, built and sold some ten years earlier.

[62] As a fallback position, the Council submits that as a matter of policy, I should hold the Sharmas liable because they have undertaken and changed the various landscapes to an extent and erected a number of houses that were intended to house people for many years and that they must have owed a duty of care to those subsequent purchasers. I do not accept that this makes Mr and Mrs Sharma developers.

[63] The Council also submitted the definition of developer in s 8 of the Building Act 2004 as recognition by Parliament that property developers typically do not provide building services themselves. I accept the Council's arguments in relation to the degree and control required to be held as a developer. I accept, for example, the Council's arguments about the effect of the *Mount Albert Borough Council v Johnson*<sup>11</sup> decision.

[64] However, the s 8 definition also gives support to the Sharma's defence of the claim. In order for them to be held as residential property

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<sup>11</sup> Above n 3.

developers under this definition, I would have to conclude that they “in trade” arranged for Picasso Drive to be built for the purpose of selling it. There is no definition of “in trade” in the Building Act 2004. I interpret that expression to require some commercial objective or imperative held by the party said to be “in trade”.

[65] As I said earlier, I do not consider that the Council has satisfied me on the balance of probabilities that is the case in relation to Mr & Mrs Sharma’s construction of Picasso Drive.

[66] The only evidence in support of an argument that Mr and Mrs Sharma were developers at Picasso Drive is that:

- a) They were the owners of the property for a short period.
- b) They sold the home without having lived in it.
- c) There was other property ownership at the time and subsequently.

[67] However Mr and Mrs Sharma had little direct involvement or control in the building process, for example by way of planning, supervising or directing the work. They were not at the time in the business of constructing dwellings for other people for profit.

[68] A distinction should be drawn between property developments and property dealings. A person can invest in property, buy a home to live in and then sell it and can become a property speculator. This does not make them a property developer.

## **CONCLUSION**

[69] I find that the Council has not proven the converse argument, namely, that they embarked upon the construction project with the sole view of deriving a profit from the sale of that property to members of the public. Having heard the evidence of the witnesses, I cannot conclude that Council has discharged its onus to demonstrate that was their objective.



[70] Having considered all the evidence and the relevant authorities, I conclude that the Council has failed to prove that Mr and Mrs Sharma were residential property developers. Therefore, they do not owe a duty of care to Mr and Mrs Thomas nor are they liable to contribute to the amount paid by the Council to Mr and Mrs Thomas under the settlement agreement.

[71] Accordingly, the claim against the third and fourth respondents is dismissed.

**DATED** this 28<sup>th</sup> day of September 2012

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P R Cogswell  
Tribunal Member