Body Corporate No. 188273 (1) ; Ian Stanton Maddox (2) v Leuschke Group Architects Ltd (1) ; C H L Leuschke (2) ; Ellerslie Park Holdings Ltd (formerly called MaCrenne Construction Ltd) (3); Auckland City Council (4); M A Cooper (5)

JUDGMENT : Rhys Harrison J : High Court New Zealand Auckland Registry 28th September 2007

Introduction

[1] The 18 apartments comprised in two residential blocks in Rendall Terrace, Auckland, suffer from major defects associated with what has become known as the leaky homes syndrome. The owners allege the defects were caused by poor design and construction and inadequacies in the approval process. They have sued five parties whom they say are responsible for the damage and concurrently liable for the remedial costs - the architect, the builder, the Auckland City Council, and Messrs Colin Leuschke and Mark Cooper. The latter two were the equal shareholders in and directors of Colmark Developments Ltd, now in liquidation, the original owner and apparent developer of the apartment blocks.

[2] The owners' claim for $1.9m was set down for trial for four weeks. On its eve, Council settled for a payment of $1.4m, taking in exchange an assignment of the owners' rights. It has since secured a contribution from Mr Leuschke personally for $100,010 and accepts that two of the other defendants, the architect and the builder, are insolvent. The remaining defendant, Mr Cooper, is solvent but has refused to contribute, and Council now seeks judgment against him for the full claim of $1.9m.

[3] These events significantly truncated both the scope of the issues and the evidence for determination at trial. The dispute now focuses on the novel question of whether or not Mr Cooper, in his personal capacity, acted as a developer (Council has abandoned the owners' alternative claim that he was the project manager).

History

[4] It is now unnecessary to traverse the facts in detail. The development was Mr Leuschke's brainchild. He is and was then in practice as an architect in Auckland. Through his company, Bouffant Holdings Ltd, he entered into a contract in 1996 to purchase two sites in Rendall Terrace. He had participated in an earlier development project with Mr Cooper. They decided to develop the sites jointly through the vehicle of a specially formed limited liability company and entered into a joint venture agreement in November 1996.

[5] Mr Leuschke agreed to assume responsibility for preparing architectural drawings; Mr Cooper agreed to manage the development, including `oversee[ing] and monitor[ing] the construction process'. Bouffant applied to Council for a resource consent in December 1996. Colmark, which was incorporated shortly afterwards, settled the purchase of the property and became the registered owner. In the interim Council granted the application for resource consent, and later granted Colmark a building consent in June 1997.

[6] Colmark entered into an agreement with MacRennie Construction Ltd in July 1997 to build the apartments for $1.776m plus GST. While MacRennie carried out the building work, Mr Leuschke through his company, Leuschke Group Architects Ltd, provided further architectural services to Colmark. Council's officers conducted inspections as required by the building consent.

[7] MacRennie issued a producer statement, certifying that the building works were carried out between August 1997 and March 1998 in accordance with the plans and specifications and the building consent. Colmark deposited a unit plan in April 1998 under the provisions of the Unit Titles Act 1972. Body Corporate 188273 was created and titles were issued for the 18 principal units in the development.

[8] Mr Leuschke and MacRennie issued certificates of practical completion. Council issued a code compliance certificate. Colmark then sold all 18 units to members of the general public. Some of the original buyers remain owners of the units. Others have on-sold. All the current owners are plaintiffs suing for the cost of rectifying particular units.

[9] Colmark was wound up in April 2000. MacRennie later changed its name to Ellershe Park Holdings Ltd. The owners' claim against the company was stayed when the company was placed in liquidation in 2006.

Development

[10] The development comprises two blocks of townhouses. They have been constructed on either side of a central driveway with access onto Rendall Terrace. There are 11 units in Block A, on the northern side of the driveway; and seven units in Block B, on the southern side. Each unit contains three levels - a garage and entry floor on the ground level and living areas, bedrooms and bathrooms on the first and second levels.

[11] The two blocks are built on a poured concrete floor slab foundation. The construction is by timber frame (except for some concrete block retaining walls on the ground floor of the smaller block). The roofs are pitched coloursteel profile sheets, discharging into external copper gutters and downpipes.

[12] The owners engaged Mr Stuart Wilson, an experienced building surveyor, to carry out a detailed investigation into the extent and cause of moisture ingress which became progressively evident in both blocks from about 2001; to provide recommendations for remedial work necessary to rectify defects; and to provide an assessment on the likely cost of remedial work. Mr Wilson conducted moisture tests, concluding that the moisture levels were so extensive and widespread that rot is likely to exist throughout the development, along with deterioration of the fire rated linings and bracing elements.

[13] Mr Wilson identified 13 principal defects in most of the units which were caused by moisture ingress. In summary, plaster cladding has been taken down to or below ground level at the base of the building, and does not have control joints effective to shed moisture away from the building and allow for movement, properly applied reinforcement at the corners of the buildings, and drip edges to direct moisture away from the cladding; the timber pergolas for decks have been fixed using metal brackets attached to the window framing and penetrating the cladding without being made weathertight; the balustrades for the decks have been built with flat tops without suitable over flashing or waterproofing, allowing water to penetrate; the junction between the wing walls to the decks and the adjoining walls has not been fixed with a flashing or any other type of weatherproofing; the aluminium joinery (the windows and doors) are recessed without a flashing to prevent water ingress; sill flashings for the aluminium joinery finish short of the windows and doors; the timber frames to the garage doors and main entrance doors have no flashings to prevent water entry; there is no cladding to prevent moisture entering the junctions of fascia boards at the end elevations of the two blocks; there are a number of minor penetrations through the cladding to fixed items such as downpipes and external lights which have not been sealed or made weathertight; and the designs for the surface water outlets from the decks are inappropriate.

[14] Mr Wilson has recommended extensive remedial works. His advice provides for 40 items of demolition, repair and reinstatement. In essence, he proposes removal of the entire exterior cladding, repairing the damaged building elements (including all of the fire rated gypsum plasterboard) and reinstating the cladding. The owners have accepted Mr Wilson's advice. He has obtained a tender for the work at $1.879 million including repair costs, design and project management fees, and Council building consent fees. This amount constitutes the owners' claim which Council has compromised.

Council's Liability

[15] As noted, the owners sued five parties. Ms Catherine Murphy, Mr Cooper's counsel, does not dispute that the four defendants other than Mr Cooper were jointly liable to the owners as tortfeasors. It is thus unnecessary to consider the nature of each separate cause of action or claim except to recite briefly the nature of Council's liability.

[16] Council was sued in its capacity as the local territorial authority responsible for exercising statutory functions; principally, issuing a building consent for the necessary building work, inspecting that work, and issuing a code compliance certificate. The nature and extent of its duty of care to the owners is settled: ***Invercargill City Council v Hamlin*** [1994] 3 NZLR 513 (CA); affirmed [1996] 1 NZLR 513 (PC). Mr David Heaney accepts that Council was negligent, both when issuing the building consent and in failing to ensure that the proposed work would comply with structure, durability, surface water and external moisture requirements of the Building Code. Council also failed to ensure inspections were undertaken with sufficient thoroughness and to identify the relevant defects.

[17] A finding of negligence at trial would have exposed Council to liability for the full amount of the owners' claims plus substantial costs. While its culpability relative to other joint tortfeasors such as the architect, builder and developer may have been low, this factor would not have protected the local authority from a judgment for $1.9m. Apart from Mr Cooper, Council was effectively the only solvent defendant. It is a victim of the rigour of the principle which imposes liability for all proven losses on a defendant whose responsibility might be as low as 10% when measured against the wrongdoing of other defendants, against whom its only remedy is to seek to recover a contribution on a cross-claim.

[18] Council was in an invidious position; it had no choice but to attempt to settle the owners' claim for the lowest possible amount, and then pursue any other solvent tortfeasors. Ms Murphy abandoned her original argument that Council acted unreasonably in agreeing to pay the owners $1.4m. Without doubt, settlement at this figure was in Council's best interests, given the inevitability of an adverse judgment at trial for $1.9m plus costs.

Liability

[19] Council seeks to recover from Mr Cooper on two discrete but cumulative grounds. One is by way of a contribution from a current tortfeasor towards the sum of $1.4 million which it has agreed to pay the owners. The other is by way of direct liability to the owners in tort for the balance of their claim, which has been assigned to Council, of about $500,000.

[20] Ms Georgina Grant, who presented closing argument for Council, advances its case on two alternative bases. She submits that Mr Cooper is either the developer or a developer. Alternatively, she says, he assumed personal responsibility to the owners. Her original synopsis of submissions appeared to merge these two discrete arguments, and I gave leave to file a supplementary synopsis on the first ground.

[21] Each of Ms Grant's two arguments start from the articulated premise that owners of leaky buildings should not be left without a remedy where one might exist. Ms Murphy accepts the general appeal of that proposition but rightly says that more is required. A void in avenues of relief does not justify imposing liability on an entity without a principled foundation. And, of course, in this case the owners did have a remedy, which they pursued successfully against Council.

(1) Developer

(a) Colmark

[22] First, Ms Grant submits that Mr Cooper was personally the developer or a developer as evidenced by the terms of his joint venture agreement with Mr Leuschke in November 1996; and that Colmark was simply a vehicle used by the two individuals and separate from their agreed undertaking. She says Messrs Cooper and Leuschke set up

Colmark to be the next layer downstream in the development hierarchy, below them in the roles of primary or principal developers. She emphasises Colmark's incorporation two months after the two individuals conceived of and started the development, and relies on Mr Cooper's admission that he formed the company to isolate himself from personal liability.

[23] I agree with Ms Murphy's characterisation of the apparent essence of Ms Grant's argument as being that Messrs Cooper and Leuschke's status as developers was fixed, once and for all, upon their execution of a joint venture agreement; that they subsequently created Colmark as a `vehicle' or mechanism to act for and on their behalf to carry out the development obligations; and that this step was ineffectual because a developer's duties are non-delegable. This summary is confirmed by the terms of the fourth amended statement of claim filed jointly by the owners and Council on the day of trial: para 76. The source of the duty of care said to be owed by Mr Cooper is the joint venture agreement together with the steps allegedly taken by him, either solely or in partnership with Mr Leuschke.

[24] Ms Grant says a party is a developer owing a non-delegable duty of care to owners to use reasonable skill and care if it is established that (a) he has direct control of and involvement in the building process and (b) he is in the business of constructing dwellings for other people for profit: Body Corporate 187820 v Auckland City Council (2005) 6 NZCPR 536, Associate Judge Doogue at [25]-[27] (known as the Trimac case).

[25] Satisfaction of these two elements, Ms Grant says, will meet the test for liability enunciated by Cooke J (for himself and Somers J): **Mount Albert Borough Council v Johnson** [1979] 2 NZLR 234 at 240-241:

> *A second reason, as we see it, is that the duty of Sydney to purchasers of the flats was non-delegable. It is not easy to state clear principles about when an employer will be held liable in tort for the negligence of an independent contractor, as witness the difference of judicial opinion in the progress through Australian Courts of* ***Stoneman v Lyons*** *(1975) 8 ALR 173. Lord Reid's observations in* ***Davie v New Merton Board Mills Ltd*** *[1959] AC 604, 646; [1959] 1 All ER 346, 367-368, in a cognate field testify to the difficulty of evolving hard-and-fast rules. In Clerk and Lindsell on Torts (14th ed, 1975) para 262, Professor Jolowicz says, after reviewing the authorities, that in the result it seems that no general principle can be stated and that the various types of case must be dealt with individually.*
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> *In the instant type of case a development company 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 in the landscape. It is not a case of a landowner having a house built for his own occupation initially - as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in Anns may prove of guidance on questions of non-delegable duty also. There appears to be no authority directly in point on the duty of such a development company. 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 independent contractor.*
>
> [Emphasis added]

[26] The third member of the Court, Richardson J, expressly agreed with this statement. It was made in answer to a submission that the developer should be excused from liability by reason of its engagement of another party to carry out the physical building work: at 242.

[27] It was not in dispute in Mt Albert that Sydney was the developer.The company agreed to buy and settle the purchase of the land for the purpose of subdivision, put in roading and services and built home units for sale. It commissioned an architect to prepare plans and specifications. It applied for and was granted a permit. And it engaged building contractors, who had a close and informal relationship with and worked solely for the company, to build the units at a fixed price. One of those builders was responsible for the foundations, which were the source of physical subsidence and damage: at 236.

[28] In the High Court Mahon J found that Sydney breached the duty of care which it owed to owners. It was negligent in failing to ensure that the foundations were adequate or that the building was founded on secure land. The Judge was satisfied that Sydney should have undertaken a series of test bores in order to avoid the obvious risk that the foundations would rest upon unstable soil, given its knowledge of the extensive filling on the site. This finding was upheld on appeal: at 237.

[29] The source of Sydney's liability was the legal duty which it owed to owners of the units. It was, in the words of Cooke J, `... a duty to see that proper care and skill are exercised in the building of the houses . . .' in Mt Albert at 240-241: see [25] above. It was, of course, the tort standard, requiring proof of negligence, and not the strict duty imposed by contract.

[30] Against that background, I shall consider Ms Grant's argument that Mr Cooper fell within Cooke J's categorisation of a developer. It eschews an analysis of the director/company relationship which the Courts did not have to consider in MtAlbert Borough Council (where Sydney's status as developer was not in issue but its functions were almost identical to those undertaken by Colmark). Ms Grant circumvents the relevant principles of company law, and its attendant relationship of principal and agent, by an assertion that Mr Cooper was in fact and law the developer.

[31] The word `developer' is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the

consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.

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

[33] Council's statement of claim alleges that the joint venture agreement is the source of the duty owed personally by Mr Cooper, not by Colmark, as developer. That instrument was the centrepiece of Ms Grant's submission. Its relevant provisions were as follows:

Colin Leuschke (CL) through his company, Bouffant Holdings Ltd, has a contract on Lots 14 and 16, Rendall Place, Newton ...

Bouffant Holdings Ltd shall nominate, in accordance with the contract, Colmark Developments Ltd, owned jointly by CL and the Cooper Trading Trust (CTT), to carry out the obligations of the contract and develop the project.

In the event that either party ceases to exist, or dies, the shares in Colmark Developments Ltd shall be automatically transferred to the remaining party, with all deposits and advances by shareholders/directors being refunded. The survivor shall be the sole beneficiary of profits or losses. The following points form the general basis of the agreement by CL and CTT.

1. *A limited liability company, Colmark Developments Ltd, shall be formed to develop the property owned equally by CL and CTT (or their respective entities).*
2. *All costs for the company's establishment and development of the project shall be borne equally by the company (sic) except for the costs of preparing architectural drawings (by CL) and management of the development by Mark Cooper (MC).*
3. *CL shall at no cost to the company [undertake architectural work].*
4. *MC shall at no cost to the company:*
   - *Manage the development generally.*
   - *Oversee and monitor the construction process.*
   - *Oversee sales and settlement process.*
5. *A bank account shall be formed immediately and each party shall deposit $2,500 which is to be used for sundry expenses. Two signatories shall be required.*
6. *Upon signing of this agreement MC shall reimburse CL for 50% of any deposits paid under the sale and purchase agreement.*
7. *Upon completion of the development both CL and MC shall be entitled to take their share of the profits as shareholders' salaries, and the company can be disposed of by winding up.*
8. *If at any time the company cannot perform or carry out its financial commitments, the directors shall advance the necessary funds personally, in equal proportions.*
9. *The directors will be required to personally guarantee borrowings from the institutions made to the company to complete the development.*

[34] The intention shared by Messrs Cooper and Leuschke when signing the agreement was plain. They would form Colmark to carry out the development. It was to be the developer. The only steps taken in the period leading to its incorporation were by Mr Leuschke and his company, Bouffant. The former purchased Rendall Terrace in his own name; the latter applied to Council for resource consent.

[35] Ms Grant's assertion that formation of the company by Messrs Cooper and Leuschke, as agreed, amounted to a delegation of the developer's duties and functions begs the question of whether Mr Cooper was then or at any prior time the developer, either solely or jointly with Mr Leuschke.In this context, delegation is the unilateral act of entrusting or passing on one party's duties to another. It is obvious from Cooke J's statement in Mt Albert at 240-241 that the duty must be in existence at the time of purported delegation; otherwise there would be nothing to delegate.

[36] Prior to Colmark's formation Mr Cooper had done nothing more than agree to (a) participate through his shareholding in the company and (b) undertake certain personal tasks - `manag[ing] the development generally, oversee[ing] and monitor[ing] the construction process, and oversee[ing] the sale and settlement process': clause 4, JVA. He had not acquired any powers, or assumed any duties, by signing the joint venture agreement except those imposed by its terms relating to formation of the company and provision of certain personal services for the development. He had taken no steps to assert control over the project or its process, and he had no property or ownership rights in or related to the proposed development. His obligations were owed solely to and enforceable by Mr Leuschke, the other contracting party.

[37] Ms Grant's submission could only succeed if Council established that Colmark was no more than a sham, which was designed and operated as a pretence for reality or *`as a mere cloak to conceal the true nature of the transaction'* ***Re Securitibank Ltd (No.2)*** *[1978] 2 NZLR 136* per Richmond P at 146. She has not, and could not, advance that argument. As Ms Murphy submits in answer, limited liability companies are separate legal personalities from their shareholders; they are a legitimate and well recognised mechanism for carrying out commercial activities: s 15

Companies Act 1993; ***Lee v Lee's Air Farming*** [1961] NZLR 325 (PC). Characterisation of a company as a `mere vehicle' means nothing in the absence of an allegation of sham.

[38] Messrs Cooper and Leuschke were entitled to form Colmark to undertake the Rendall Terrace development. Its defining characteristic was its legal personality separate from its shareholders. Its legitimacy is not diminished by virtue of its intended function of isolating or protecting Messrs Leuschke and Cooper from personal liability. That intention is not to be confused with the separate question of whether or not, when performing duties as a director or employee, a shareholder assumes a direct personal responsibility to third parties, to which I will come later.

[39] I am satisfied that, upon its incorporation, Colmark became the entity which assumed legal responsibility for and controlled all aspects of the development. As Ms Murphy points out, Colmark settled the purchase of the property (taking over Mr Leuschke's personal obligations) and became registered proprietor; obtained resource consent in its name; applied for and obtained the building consent; carried out the tender process, contracted with MacRennie to build the apartments, and paid the company for its contractual services; borrowed monies from Westpac to fund the development; deposited the title plan; and completed the sale of all 18 units. Colmark was the developer of the Rendall Terrace project.

(b) Mr Cooper

[40] Ms Grant advances an alternative or fallback proposition. She says that, if Colmark was a developer, so too was Mr Cooper in his personal capacity. By this I understand she suggests that he performed powers or functions concurrently with the company, and was himself involved directly in or controlled the building process.

[41] Ms Grant identified eight factual circumstances in support. On analysis, those factors fall into two broad categories. One relates to the joint venture agreement and the construction process; the other falls into the general category of financial control. Separately Ms Grant relies on the ground that Mr Cooper was in the business of developing houses for other people for profit. I shall deal with these three categories separately.

(i) Joint Venture Agreement and Building Process

[42] First, Ms Grant refers to Mr Cooper's participation in the joint venture agreement, and the obligation which he assumed to Mr Leuschke to manage the development generally and oversee and monitor the construction and sales and settlement processes. Mr Cooper allocated responsibilities to himself for construction, and to Mr Leuschke for architectural services. Furthermore, he agreed to assume actual responsibility for constructing and monitoring the on-site work and progress on the development through his employees or those under his control, and he personally engaged MacRennie to build the units.

[43] The weight of evidence which I find to the contrary is as follows:

(1) While he agreed with Mr Leuschke to perform certain services, Mr Cooper did not in fact carry them out. Colmark engaged Lastel Construction Ltd, of which Mr Cooper or his interests was the sole shareholder, to undertake project management. MacRennie assumed the contractual obligation to oversee and monitor the construction process. And Lastel and Colmark oversaw the sales and settlement process;

(2) Mr Cooper did not engage MacRennie personally. Mr Leuschke and MacRennie had enjoyed a longstanding relationship. Acting in their capacities as Colmark's directors and agents, Messrs Cooper and Leuschke resolved to accept MacRennie's tender. The building contract was entered into between Colmark as principal and MacRennie as contractor. Messrs Cooper and Leuschke were not parties;

(3) Mr Cooper never attended on site during development. He gave no directions at all relating to the design and construction process. Mr Jeffery Bird, a Lastel employee, attended site meetings, but solely in his capacity as quantity surveyor for the financial administration of the project, and to report to Colmark on any financial issues. He was not there to monitor and control the quality of the contractor's performance.

(ii) Financial Management

[44] Second, Ms Grant says that Mr Cooper had effective control of the whole development, along with Mr Leuschke, because no payments could be made unless he signed cheques; that he agreed (clause 8, JVA) to advance funds personally if Colmark was unable to perform or carry out its financial commitments; and that Messrs Cooper and Leuschke had absolute control of the project because they were Colmark's sole directors.

[45] In answer to this submission:

(1) In a loose and literal sense it may be said that any agent authorised to sign cheques has ultimate control of the principal because, if he refuses to exercise his authority in accordance with this mandate, the account holder is financially paralysed and cannot transact business. The logical consequence of acceptance of Ms Grant's argument, though, would be that all cheque signatories of accounts held by companies, whatever their size or constitution, would by virtue of that appointment control the entity's activities. The argument is fallacious and circular here for another reason. It confuses functions and powers. A signatory must act according to the account holder's mandate. Messrs Cooper and Leuschke, in their capacities as directors and Colmark's controlling mind and force, authorised payments. In signing a cheque, either or both were simply acting in accordance with directions already given in another capacity. They were not exercising any new or separate degree of control by that act;

(2) An agreement to advance funds to Colmark if it was unable to perform its financial commitments did not constitute Mr Cooper personally a developer of this project. It was no more nor less than a personal covenant to provide financial assistance. That obligation is frequently assumed by a shareholder, and does not operate to change or elevate his legal status;

(3) Messrs Cooper and Leuschke's office as Colmark's sole directors does not vest either of them with absolute control of the building project. The company owned and controlled the development, and acted through the agency of its two directors. Performance of the powers and duties inherent in that agency does not mean that either agent was in personal control of the project. Their duties as directors were owed to the company - the entity with absolute control of the project. Ms Grant's proposition equates and confuses agency control through the office of director with personal control of the principal's operations simply by virtue of that agency.

(iii) Profit Share

[46] Third, Ms Grant says that Mr Cooper was personally a developer because (1) he was in the business of constructing houses for other people for profit and in particular he was entitled to receive a half share of the profits of the director as shareholder's salary (clause 7, JVA); (2) he anticipated making a profit which went to him or an entity controlled by him, and not to Colmark which did not pay tax on any profit; (3) it was always intended to wind up Colmark at the conclusion of the development, which occurred; (4) Mr Cooper accepted a responsibility to guarantee the finance needed for the venture and to pay the capital towards its completion; (5) half of the profit went to Mr Cooper or his interests; and (6) Mr Cooper was instrumental in selling the units once the building work was completed.

[47] These facts are largely undisputed but they do not advance Council's case. A shareholder's receipt of profits anticipated from a development is neutral. The prospect of a dividend is the rationale for subscribing for shares. The subscriber's profit arises from or attaches to his shareholding in the company which owned and developed the property. Mr Cooper had no direct investment in the project at all. And the existence of guarantees from the two shareholders for the substantial borrowings of their minimally capitalised company is orthodox, and also neutral.

[48] Council has not discharged its burden of proving that Mr Cooper was personally the developer or a developer of the Rendall Terrace project such as would give rise to personal duties of care owed to owners of apartments within the complex.

(2) Assumption of Responsibility

[49] Second, Ms Grant submits that Mr Cooper assumed a personal responsibility to the owners by virtue of his total control of the project exercised as a Colmark director: **Trevor Ivory Ltd v Anderson** [1992] 2 NZLR 517 (CA) per Hardie Boys J at 527; **Morton v Douglas Homes Ltd** [1984] 2 NZLR 548 per Hardie Boys J at 595; **Hartley v Balemi** HC AK CIV 2006-404-2589 29 March 2007, Stevens J at [80][94].

[50] Ms Grant's synopsis contained lengthy citations from these authorities but did not analyse the principles or their application to the facts. Her ultimate proposition is that the issue of whether or not Mr Cooper owed a personal duty is to be determined by examining the degree of control he assumed over the development: **Balemi** at [94]. In this sense, her argument restates or overlaps with the elements of her submissions on developer liability, but from a different legal perspective.

[51] Ms Grant says Mr Cooper was involved in every decision made by Colmark relating to this development. She identifies 16 tasks carried out by him which were integral to completion of the development. She says the circumstances of his involvement in Colmark's control were of such a degree and nature that he assumed a personal duty to the owners.

[52] The ground in this jurisprudential area has been furrowed many times before. The starting point is that a director of a corporate entity may assume a personal responsibility to third parties for his acts or omissions while performing that office. That is because an individual who commits all the elements of a tort or other cause of action will be held directly liable for the consequences, whether solely or concurrently with his principal according to the rule of attribution and irrespective of whether or not he was acting as a director or pursuant to any other agency. The status of director does not carry any special immunities from personal liability.

[53] That is not to say, however, that the agency relationship arising from acts or omissions as director or the company structure is irrelevant. It will be material to the extent required when considering the elements of the particular tort. For example, the elements of causes of action for deceit or breach of a statutorily protected proprietary right eliminate any scope for considering whether the alleged tortfeasor, a director, was acting on the company's behalf: **Standard Chartered Bank v Pakistan National Shipping Corporation** [2003] 1 AC 959 (HL); Winchester **International (NZ) Ltd v Cropmark Seeds Ltd** CA226/04 5 December 2005.

[54] On the other hand, where the tort of negligent misstatement is alleged, the relationship becomes directly relevant. An assumption of responsibility is one of its critical elements. The question of whether a director is acting on the company's behalf is material when determining whether he should be personally liable for the advice he gave: **Trevor Ivory; Williams v Natural Life Health Foods Ltd** [1998] 1 WLR 830 (HL) at 835.

[55] As is well known, the existence of a duty in a claim of negligence simpliciter in any particular circumstances is determined by a two-stage inquiry, focusing first on the concept of proximity and then expanding into a wider policy analysis. The element of assumption of personal responsibility is now central to the proximity inquiry: **Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd** [2005] 1 NZLR 324 (CA) at [97]-[100]. That concept has been expressly identified as the appropriate test for determining a director's personal liability; and is often satisfied *`where the director or employee exercises particular control or control over a particular operation or activity'*: **Trevor Ivory** at 527.

[56] The concept of control has acquired a particular prominence in claims brought in similar circumstances to these, where the original developer is a one-man or shell company which, by the time of trial, has either been wound up or is insolvent. The question to ask is *`... whether, and if so how, the director has taken actual control over the process or any particular part thereof'*: **Balem**i at [92]. The relevance of the inquiry is that: **Morton** at 595:

... it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty...

[57] It is instructive to consider briefly how Judges at first instance have applied this control test in building cases. The landmark judgment is Morton; it has stood the test of time and, to the best of my knowledge, its authority has never been doubted at appellate level. Morton was another case where defective foundations caused damage to residential units by subsidence. Hardie Boys J found the development company and two of its directors liable to the owners. Each had assumed a personal duty of care.

[58] What is of particular significance to this case is the basis upon which Hardie Boys J found liability. As Ms Murphy emphasises, the Judge examined the extent to which a director's acts or omissions were directly linked to the nature of the defects or damage; it was not enough to find individual control of the company or the development in a general sense: see 593-600. His approach was identical in nature to that followed in Mt Albert but in a slightly different legal context.

[59] The directors in Morton were father and son. Hardie Boys J considered, first, the position of the father. The Judge held him liable for part of the loss caused to both units, but only on the basis of his failure to adopt and implement advice from an engineer to overcome possible problems with the piling. The father's express knowledge of the problem, and his omission to rectify it, was the source of liability.

[60] The son was absolved of responsibility for damage to one unit. The Judge was satisfied that his role in its construction was minimal. However, he was found liable for the damage caused to the second unit and the terraces and other improvements, but again only on the express basis of an assumption of a duty relating to the work recommended by the engineer. The son expressly sought the engineer's assistance but then *`was singularly unconcerned to ensure that it was obtained and utilised'*: at 599.

[61] It is apparent from Hardie Boys J's careful examination of the facts in Morton that control of the development simpliciter is not enough to found liability. There must be evidence of the director's assumption of a degree of personal responsibility for an item of work which was subsequently proved to be defective. In Morton liability rested on the director's knowledge, actual or implied, of the piling problem, and his failure to implement remedial measures when it was within his power and control to do so. Speight J earlier adopted the same approach in **Callaghan v Robert Ronayne Ltd Auckland Registry** All 12/76 17 September 1979, although with a different result, when declining to impose personal liability on the directors of a development company. That was because there was no evidence of individual participation in the project by one or more in the work leading to the defects: see Morton at 593-594.

[62] In **Balemi** Stevens J refused to upset the finding made by an adjudicator appointed by the Weathertight Homes Resolution Service that the director performed so many functions that to the casual observer he appeared to be the builder of the house. Again, critically, the Judge relied on the adjudicator's findings that the director was personally involved in the day-to-day decisions which led to the defects causing loss. This included, for example, ignoring advice from a plasterer that the sill detail on external windows and doors was inadequate, but directing him nevertheless to carry out the work in a certain way which was the ultimate cause of leaking. The director was involved immediately in other aspects of the construction which caused damage.

[63] By contrast, in Drillien v Tubberty (2005) 6 NZCPR 470, Associate Judge Faire found that a director did not exercise a sufficient degree of control to amount to an assumption of personal liability. His role was limited to co-ordinating building supplies, arranging plans and building consents, and paying for materials and labour. He had no direct participation in the building process other than to organise what was necessary for sub-contractors; he did not attempt to interfere at all in their performance of contractual services; and he had no involvement in construction of any aspects which subsequently proved defective.

[64] In this case Ms Grant relies without discrimination on every function apparently performed by Mr Cooper in connection with the development. She has not attempted to link or associate one of them with the defects in the apartments summarised above: at [13]. As noted, many are re-statements of or overlap with the factors alleged to constitute him as the developer. The functions on which Ms Grant relies fall into two apparent categories.

[65] The first category is preparatory, including incorporating Colmark and nominating its directors; preparing the budget and establishing a framework for the project; arranging bank facilities; providing personal guarantees; participating in the resource consent process and inviting tenders. All these functions were plainly performed for or on Colmark's behalf.

[66] For example, a director or agent must prepare a budget and establish a project timeframe, arrange bank facilities, and invite tenders. Provision of a bank guarantee, to facilitate funding for the project, is an incident of shareholding. Without doubt, Mr Cooper exerted a degree of control when performing each function. But the control was created by the office of director and agent, and was unrelated to the actual building process or more particularly to any construction defects.

[67] The second or implementation category included appointment of contractors and professionals, engaging Lastel as co-ordinator; liasing with a house removal company to dispose of an old house on the site; authorising real estate agents to market the units for sale; reviewing marketing material, selling units to members of the public; attending at weekly site meetings with builders; and writing to builders regarding time over-runs.

[68] All these functions related to the actual development. Ms Grant's argument faces the same insurmountable obstacles as the others. There is no evidence of Mr Cooper's involvement whatsoever in the actual building process, let alone any knowledge of the defects in design or construction leading to the damage. Mr Leuschke was the architect; his performance of contractual services was subject to an implied duty to exercise reasonable skill and care. MacRennie was the builder; it was subject to a strict contractual duty to ensure that the units were watertight.

[69] The owners or Council did not lead evidence that Mr Cooper played any physical part in the construction process. Nor do they allege that he knew or should have known of design and construction defects, or that he ignored advice on their rectification. The weight of evidence is directly to the contrary.

[70] As Ms Murphy points out, Mr Leuschke confirmed without challenge that Mr Cooper had no specific design or detailing skills. He was a quantity surveyor by training. He had no building qualification or expertise. He never visited the site during construction or attended a site meeting. In short, Mr Cooper did not participate directly in the building process in any capacity other than in accordance with his duties as director, and he did not exercise any particular degree of control over the design or construction process.

[71] In my judgment none of the functions singled out by Ms Grant, whether considered separately or together, approaches the threshold necessary to satisfy the control test on which she relies. They fall well short of the sufficiency of evidence necessary both to prove a linkage or nexus between Mr Cooper's general powers of control and a particular defect or defects, as illustrated by Morton and Balemi, or to displace the premise arising from Mr Cooper's performance of the office of director - that the acts or omissions are those of the company which he physically performs as its agent. All fall squarely within the scope of functions normally performed for the purpose of discharging that office. I agree with Associate Judge Faire that an assumption of responsibility to carry out a particular task is not of itself sufficient to attract liability: Drillien at [43]. Something more is required.

[72] In summary, this ground of the claim by the owners and Council against Mr Cooper must also fail.

Result

[73] I dismiss, first, Council's claim for a contribution from Mr Cooper personally for the sum of $1.4m towards its payment to the owners and, second, the owners' claim for the balance of their loss of $479,509. Mr Cooper is entitled to judgment on both claims.

[74] The basis of my finding is that Mr Cooper did not personally owe a duty of care to the owners. Thus he could not in law be a tortfeasor jointly with Council or any of the other original defendants. It is thus unnecessary for me to apportion responsibility between Mr Cooper, Council and the other defendants for the owners' losses. Another Court would be the appropriate forum for that exercise if it reached a contrary conclusion on liability.

[75] This result may seem unjust or unfair. There is an apparent anomaly in visiting the financial consequences for the failure of these apartments on a local authority which played a limited role, when the shareholder of the now extinct development company who derived a financial benefit is absolved. But it is the necessary consequence of applying established legal principles.

[76] Unless and until Parliament radically reforms the Companies Act 1993, to ensure among other things that all companies are capitalised to a level consistent with the financial obligations they assume, similar decisions will be reached. Mr Cooper acted in accordance with his legal rights in forming Colmark along with Mr Leuschke to obtain the personal protection available from incorporation. In my judgment, Mr Cooper did not lose that benefit by assuming a personal responsibility to the owners. However, the time may be appropriate to carefully examine whether a corporate model designed in the United Kingdom a long time ago is apt to meet the commercial and moral demands of and standards set by modern society.

[77] Mr Cooper is entitled to costs and disbursements fixed according to category 2B. I certify for two counsel. I wish to express my appreciation for the way in which this case was presented and argued at trial.

SOLICITORS Heaney & Co (Auckland) for Fourth Defendant Shieff Angland (Auckland) for Fifth Defendant
Appearances: David Heaney and Georgina Grant for Fourth Defendant Catherine Murphy and Helen Twomey for Fifth Defendant