

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

**CIV 2008-419-129**

BETWEEN ELIZABETH ANNE WOODGATE AND  
LLOYD HARVEY MURCOTT AS  
TRUSTEES IN THE EAW TRUST  
Plaintiffs

AND STEVEN JOHN PAPWORTH  
First Defendant

AND MARY ANNE SYLVIA PAPWORTH  
Second Defendant

AND MARSHALL BRYCE  
Third Defendant

AND WAIKATO DISTRICT COUNCIL  
Fourth Defendant

AND ROSS BROWN  
First Third Party

AND ANTHONY NORMAN SAYER  
Second Third Party

Hearing: 21 April 2009

Appearances: David Taylor for Plaintiffs  
Ross Dillon for Third Defendant  
Victoria Whitfield and Rochelle McKenzie for Second Third Party

Judgment: 24 April 2009

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**JUDGMENT OF HARRISON J**

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*In accordance with R11.5 I direct that the Registrar  
endorse this judgment with the delivery time of  
3:00 pm on 24 April 2009*

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**SOLICITORS**

Evans Bailey (Hamilton) for Plaintiffs  
Gaze Burt (Albany) for Third Defendant  
Victoria Whitfield (Cambridge) for Second Third Party

**COUNSEL**

DJ Taylor

## **Introduction**

[1] The trustees of the EAW Trust own a residential property in Raglan, Waikato. They allege that the house suffers from extensive defects causing leakage. They have sued a number of parties for damages in excess of \$400,000 being the cost of remedial works.

[2] Mr Marshall Bryce is one of the defendants. He was engaged by the original owner to build the house. He has joined as a third party a subsequent or intermediate owner, Mr Anthony Sayer, on the grounds that (1) the two were arguably joint tortfeasors as against the EAW Trust and (2) an issue likely to arise in the proceeding requires Mr Sayer's participation. Mr Sayer has applied for orders setting aside the third party notice or alternatively for a better and more explicit pleading.

[3] Mr Bryce's statement of claim against Mr Sayer is plainly deficient. Leave was given to his counsel, Mr Ross Dillon, during the hearing of Mr Sayer's application to draft an amended claim. Mr Sayer's application will be determined on the basis that the amended document pleads Mr Bryce's claim against him.

## **Background**

[4] The EAW Trust bought the property from Mr Sayer's family trust on or about 28 April 2006 for the sum of \$700,000. The Sayer Family Trust had earlier purchased the property from Steven and Mary Papworth, the first and second defendants, in June 2000. The agreement for sale and purchase between the Papworths and the Sayers provided that:

The purchasers are aware that the dwelling has not been issued with a final code of compliance [certificate] and have been given a list of items to be completed from the Waikato District Council. This will be the purchasers' responsibility to rectify and not the responsibility of the vendors.

[5] Mr and Mrs Sayer subsequently separated. Mr Sayer then entered into a relationship with Ms Elizabeth Woodgate, who is both a trustee and beneficiary of the EAW Trust, before the sale in April 2006. They are now married.

[6] There is an unusual aspect of the sale from the Sayer Family Trust to the EAW Trust. It is that the agreement for sale and purchase was entered into by private treaty on 27 April 2006, one day before settlement, and the EAW Trust did not require a LIM report from the local authority. Mr Bruce has pleaded an affirmative defence that the EAW Trust purchased with knowledge of actual or implied defects.

[7] The EAW Trust applied to Council after purchasing the property to add a garage and extend the upper storey. While the building work was being carried out, rotting and saturated timbers were exposed in the dwelling. The EAW Trust alleges that this decay is the consequence of numerous defects in construction of the building itself by the Papworths before 2000.

[8] The EAW Trust has sued the Papworths, Mr Bryce and Council on these grounds:

- (1) The Papworths were the developers of the property and owed the Trust a non-delegable duty to exercise reasonable skill and care in ensuring that the development work complied with all requirements of the Building Code and that design and construction was carried out in a manner which met those requirements. The Papworths breached their duty in numerous ways, leading to the Trust's losses;
- (2) Mr Bryce was the builder of the dwelling and owed the Trust a non-delegable duty of the same nature owed by the Papworths, which he breached in the same way;
- (3) Council owed the Trust a non-delegable duty to exercise reasonable skill and care in ensuring that the building work complied with the Code when issuing a building consent and carrying out inspections, which it breached in a number of ways.

[9] All defendants deny liability and have filed comprehensive statements of defence.

### **Third Party Claim**

[10] Mr Bryce has, as noted, joined Mr Sayer on two bases.

[11] Mr Bryce's primary ground is that if, which is denied, he owed and breached a duty of care to the EAW Trust, then Mr Sayer also owed and breached a duty to the same entity. On this basis, Mr Bryce says, he is entitled to a contribution to the extent of a full indemnity from Mr Sayer for any liability to the EAW Trust. This allegation is made on the unarticulated premise that the two are joint tortfeasors liable, if at all, on a common demand to the Trust. Mr Bryce's claim alleges that Mr Sayer breached his duty in a number of ways.

[12] The second and subsidiary ground for joinder is to the effect that the EAW Trust purchased the property with full knowledge of the defects, given the relationship between Mr Sayer and Ms Woodgate at the time of purchase and therefore suffered no loss. Mr Bryce says that accordingly the question or issue in this proceeding should be properly determined as between himself, the EAW Trust and Mr Sayer.

[13] I do not need to dwell further on this claim. I agree with Ms Whitfield that it is patently untenable and should never have been pleaded. Mr Dillon accepts that it does not form the basis of a claim by Mr Bryce against Mr Sayer for contribution or indemnity. There could be no separate question arising between all parties which might require Mr Sayer's joinder: r 4.4(1)(c)(i). Any rights of recourse rest with the EAW Trust against Mr Sayer directly. In any event, this allegation forms the basis of one of Mr Bryce's primary affirmative defences.

### **Duty of Care**

#### *(1) Owner*

[14] Mr Dillon did not attempt to identify the existence of a duty of care owed by Mr Sayer to the EAW Trust in his capacity as an intermediate owner by reference to

the orthodox indicia of proximity, foresight, reliance and policy considerations: see *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA); *Attorney-General v Body Corporate 200200* [2007] 1 NZLR 95 (CA). Mr Dillon's submission was simply that 'the obligations of an owner under the Building Act ... is the core of the claim'. He relies on the fact of Mr Sayer's purchase of the property with knowledge that the building was incomplete and his failure to take any steps to complete it. That may be so but it does not assist in determining whether or not as prior owner of the property, without more, Mr Sayer owed a duty of care to a subsequent purchaser additional to or concurrent with those deriving from their contractual relationship.

[15] Mr Dillon was content to rely on two factors to establish the existence of a duty owed by Mr Sayer to the EAW Trust. One was that the Trust acquired ownership of the property in April 2006. But that event is of no assistance in determining whether or not a duty was owed.

[16] The other factor was that Mr Sayer owed the EAW Trust a non-delegable duty to exercise reasonable skill and care in ensuring that: (1) any statutory duties owed by him as owner (in particular under the Building Acts 1991 and 2004) were complied with timeously; and (2) any works carried out by him would be performed in a way that met all the requirements of the Building Code.

[17] This is not a claim for the tort of breach of statutory duty. The existence of statutory obligations may, depending on the circumstances, provide a sufficient foundation for the existence of a duty at common law. But a party alleging such a duty in a novel situation must justify it by a careful analysis of the policy, structure and framework of the relevant statutory provisions. Mr Dillon did not attempt to discharge that burden, and it is not my function to do it for him.

(2) *Builder*

[18] It is well settled that a builder may owe a duty of care to a subsequent purchaser for the negligent creation of defects: *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA); *Mt Albert Borough Council v Johnson*

[1979] 2 NZLR 234 (CA); *Rolls-Royce* at [70] onwards. Mr Bryce's amended claim, alleging breaches of Mr Sayer's duty, appeared to suggest that Mr Sayer also assumed the duties of a builder (even though, as noted, the duty pleading itself and Mr Dillon's argument were carefully limited to Mr Sayer's status as owner). Mr Bryce's amended claim alleges that in undertaking further work on the property after purchase Mr Sayer: (1) affixed a shade sale to the dwelling, stressing it, creating cracks in the plaster and paint work; and (2) applied a membrane to a deck area adjacent to aluminium stairs, such that water can enter the joint between stairs and the building. Mr Dillon submitted that both of these breaches amounted to failures to meet the requirements of the Building Code and were causative of some of the losses claimed by the EAW Trust.

[19] When pressed, Mr Dillon was unable to identify an evidential foundation for this submission. Mr Sayer has sworn a comprehensive affidavit in support of his application to strike out Mr Bryce's claim. Mr Sayer is a drain layer by occupation. In summary he says that when he and his wife originally purchased the property he personally removed soils around the lower small bedroom and connected the storm water from the carport to the existing drainage system. This work was designed to satisfy two of the four items identified by the Waikato District Council remaining for completion in order to obtain a code of compliance certificate.

[20] Mr Sayer says that none of this work could possibly have contributed to the leaking problems and Mr Dillon does not argue otherwise. He says that he also arranged for removal of a spa pool, which satisfied the third of Council's requisitions. But he never installed handrails around the external deck and stairs as required to meet the one outstanding item necessary for a code of compliance certificate.

[21] Mr Sayer has also deposed that while living at the house he noticed a leak in the downstairs lounge which he traced to the corner of the upstairs deck. In periods of heavy rain the existing rubber membrane was failing due to insufficient upturn and a previous repair attempt by either the builder or the previous owners. He engaged a specialist contractor who recommended that the entire deck tiles be removed and the entire membrane be replaced. The contractor also advised that the

stucco lining, which was hard down on the deck, should be cut back so the new deck liner could be laid up to the walls and under the cladding, a distance of 200 mm, to avoid the existing problem.

[22] Mr Sayer engaged a specialist contractor, a builder and a plasterer to carry out this work. He had no direct involvement in any of it. Also he arranged for the shade sail to be erected and installed by a specialist supplier. Again he had no involvement with this work.

[23] Mr Dillon was unable to point to any evidence that may have led to the damage suffered by the EAW Trust to assert the affirmative proposition that Mr Sayer ever participated in construction of the home or, conversely, which might be available to contradict Mr Sayer's denial. His only response was that Mr Sayer's evidence should be tested at trial. But evidence cannot be meaningfully tested if there is no basis for a challenge. The third party procedure is not to be used as a vehicle for speculative claims.

### **Decision**

[24] Mr Sayer's application must succeed. An order is made striking out the third party claim issued by Mr Bryce against Mr Sayer.

[25] Costs must follow the event. Mr Bryce is ordered to pay Mr Sayer's costs on this application according to category 2B together with a 50% uplift to take account of the unnecessary cost incurred as a consequence of Mr Bryce's failure to take any steps to file an amended pleading when Ms Whitfield drew Mr Dillon's attention to the plain defects in the existing statement of claim in January 2009.

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Rhys Harrison J