Jon Everest & Heidi Borner v Robin Schwass Construction Ltd (in receivership & liquidation), Christopher Robin Schwass, QBE Insurance (International) Ltd, Vero Liability Insurance Ltd, Masterbuild Service Ltd & AHI Roofing Ltd

JUDGMENT OF ASSOCIATE JUDGE D I GENDALL : High Court of New Zealand, Wellington Registry. 28th September 2005

Introduction

[1] This is an application by the second defendant for summary judgment to be entered against the plaintiff in this proceeding. The application is opposed by the plaintiff.

Background facts

[2] The second defendant is one of four directors of the first defendant company, Robin Schwass Construction Limited which was incorporated on 19 March 1996.

[3] The first defendant went into liquidation and receivership on 14 June 2004.

[4] Since early 2001 the plaintiffs have been the owners of a residential property at 17 Meadowcroft Grove, Johnsonville. They have issued the present proceedings against the first defendant company as vendor and builder of the dwelling at that property; the second defendant as a director and shareholder of the first defendant company; QBE Insurance as the insurer of Nationwide Building Certifiers, a building certification company that inspected the building work, the third defendant; Vero Liability Insurance Limited, the fourth defendant, also an insurer of the building certification company; a masterbuild guarantee company, Masterbuild Services Limited as fifth defendant and AHI Roofing Limited, the sixth defendant as the manufacturer of the roof of the dwelling.

[5] The claim is essentially a leaky building claim - the plaintiff claims water is penetrating the roof, walls and sub-floor of the house causing damage. The plaintiffs have made a claim to the Weathertight Homes Resolutions Services which has been accepted.

[6] A Weathertight Homes Resolutions Services assessor has undertaken a weathertightness assessment of the dwelling and produced a report. According to the plaintiff, the cost of remedial work as outlined in that report is estimated to be $258,343.30 plus GST.

Counsels' arguments and my decision

[7] The claim against the second defendant is essentially that as an experienced master builder and the project manager director of the first defendant he was negligent, in that he owed the plaintiffs a duty of care to supervise and oversee the building operations which he breached causing them loss.

[8] Rule 136(2) High Court Rules, which was added by amendment to the Rules in 1998, enables a defendant to apply for summary judgment against a plaintiff.

[9] Rule 136(2) states:

(2) The Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff s statement of claim can succeed.

[10] The Court of Appeal has considered this new power in a number of cases including ***Westpac Banking Corporation v MMKembla New Zealand Limited*** [2001] 2 NZLR 298; ***Bernard v Space 2000 Limited*** [2001] 15 PRNZ 338; ***Attorney-General v Jones*** [2001] 15 PRNZ (CA) - also considered at [2004] 1 NZLR 433 by the Privy Council.

[11] The starting point in considering any such applications must be the assumption that a plaintiff has the right to have its claim determined following a fair hearing by the Court - ***Attorney-General v Jones***. In that case the Privy Council in its decision at page 440 said: ... *summary judgment should not be given for the defendant unless he shows on the balance of probabilities that none of the plaintiffs claims can succeed. That is an exacting test, and rightly so since it is a serious thing to stop a plaintiff bringing his claim to trial unless it is quite clearly hopeless.*

[12] Where the defendant applies for summary judgment it will have the significant burden of establishing that none of the plaintiffs causes of action can succeed. In other words the defendant must be able to undermine the plaintiff's entire claim. Furthermore, the Court should only give judgment against the plaintiff where the defendant has a clear answer to the plaintiff which cannot be contradicted - Westpac Banking Corporation v MMKembla New Zealand Limited.

[13] It is clear that to succeed a defendant has the burden of showing that none of a plaintiff's causes of action can succeed. It is not enough that the claims have weaknesses.

[14] As the Privy Council stated in Jones v Attorney-General at page 439: *It cannot be doubted that, properly used, Rule 136(2) can save both time and cost by permitting claims with no hope of success to be summarily dismissed at an early stage. But rarely, if ever, will the procedure be appropriate where the outcome of the action may depend on disputed issues of fact, and reliance on the rule in an inappropriate case may serve to increase both the length and the cost of proceedings.*

[15] Here, as I have noted, the cause of action pleaded against the second defendant is that he was negligent, in that he owed the plaintiffs a duty of care, which he breached, causing them loss.

[16] In the specific causes of action pleaded against the second defendant, in their Statement of Claim at paragraphs 41, 42, 43, 44 and 45 the plaintiffs plead:

41. At all material times Mr Schwass was the director and one of the shareholders of RSCL.

42. Mr Schwass personally undertook and oversaw the construction work at the dwelling.

43. Mr Schwass had control of and responsibility for the development and for all decisions in the course of construction such as method of construction and materials used and including whether or not to follow or depart from the design and specifications.

44. As the builder of the dwelling Mr Schwass owed the plaintiffs a duty to exercise all due and proper care in undertaking the building work to complete the building work in a proper and workmanlike manner.

45. Further Mr Schwass as builder owed the plaintiffs a duty to:
(a) Undertake his work with due care and skill in a proper and workmanlike manner.
(b) Use appropriate materials of good quality.
(c) To ensure that both the workmanship and materials used would be fit for the purpose for which they were required - namely for human habitation.
(d) To ensure that the building work complied with the requirements of the New Zealand Building Code, current New Zealand Codes of Practice and Wellington City Council's specific requirements.
(e) To properly supervise the work of any servants, agents or subcontractors engaged by Mr Schwass or RSCL.

[17] There is no argument that in appropriate circumstances a director or employee of a company may come under a personal duty, breach of which may entail personal responsibility - ***Trevor Ivory v Anderson*** [1992] 2 NZLR 517, Cooke P, page 520, and ***Morton v Douglas Homes*** [1984] 2 NZLR 548.

[18] In the present case, the grounds for the second defendant's summary judgment application are essentially that the plaintiffs are unable to establish a duty of care on the part of the second defendant here, and that being the case, any questions of standard of care and loss are irrelevant.

[19] The second defendant does acknowledge that he and the other three directors, all of whom had shareholdings in the first defendant company, were involved in the day to day running of the company.

[20] The first defendant company's own labour force was said to be thirty staff. It had at least 9-10 construction jobs on the go at any one time.

[21] There is no dispute that the second defendant is an experienced master builder, nor that he was the only director with building experience. The other three directors were all qualified quantity surveyors. They worked principally in the office of the first defendant.

[22] The second defendant at paragraph 11 of his 28 July 2005 affidavit filed in this proceeding states: *My responsibilities can be generally defined as finding new work, relationship management with consultants and contractors, and to see that the job got done. I was the "mobile director".*

[23] The property at 17 Meadowcroft Grove was developed by the first defendant company as a spec house. At paragraph 14 of his affidavit the second defendant notes that labour-only contractors were used for this project. He says that the use of labour-only contractors was rare for the company.

[24] The second defendant goes on to depose at paragraph 15 of his affidavit that each of the generally 10-15 building project sites which the company was engaged in at any one time was managed by a site foreman who was to co-ordinate the carpentry work with the other trades and ensure quality control. As to this, however, there have been no affidavits provided to the Court from any of the labour-only contractors who were said to be designated as site foreman for the Meadowcroft Grove job the subject of this proceeding.

[25] For the Meadowcroft Grove house, the first defendant company's own employees undertook the foundation work. Thereafter the company contracted with PJ Builders on a labour-only basis to build the house with other trades contracted directly by the first defendant. This included contracts with Climax Building Services to complete cladding works and with other trades such as painting, roofing and plumbing.

[26] The first defendant company's own employees finished the downstairs interior, however.

[27] The first defendant company ordered and paid for all materials required for the building of the house. It seems likely that the second defendant was the person involved in purchase of these materials on behalf of the first defendant. From his own affidavit it is clear that he assumed responsibility for the security of the materials on site.

[28] As to these aspects, the second defendant generally expands on his role in his 28 July 2005 affidavit, and in particular at paragraph 25 he states:

25. I did not personally undertake nor oversee construction of the dwelling at 17 Meadowcroft Grove. It was my job to check all 1015 projects that RSCL was working on at least once a week. I think I would have spent an average half an hour at the Meadowcroft site a week. Part of my job was to ensure that workmen were on site, materials were not stolen and the work was done. Therefore my visits needed to be unpredictable ... For the few jobs that we had that were labour only, I would be checking that they were actually on site. If they were not on site, I would give Warwick at the office a call and he would find out where they were. If materials were needed while I was on site, I would call Kim or Richard and ask them to order whatever was required by the team.

26. When I was on site I also paid the builders and checked what stage the works were at...

[29] Significantly, from these comments at paragraphs 25 and 26 of his affidavit, the second defendant acknowledges checking all the company projects at least once a week and paying the builders when he was on

site, and he confirms that for at least half an hour a week he was on this particular site at Meadowcroft Grove. As I see it, this is consistent with his role as overall project manager. He clearly took responsibility for both ensuring that workmen were on site, bearing in mind that this was a labour-only contract, and checking progress of the works.

[30] Again at paragraph 27 of his affidavit the second defendant confirms: *If there was something obviously wrong with the building work, I would bring it to the attention of the foreman, but I never told anyone on site how to do their jobs.*

[31] In paragraph 16 of his affidavit the second defendant says he began to hand over jobs to Mr Ron de Wit in early 2001. From the material before the Court, however, I am satisfied this particular project clearly remained the responsibility of the second defendant until at least late February 2001, as he personally dealt with the James Hardie site inspection and 27 February 2001 report at that time, and possibly until July 2003 when the Nationwide Building Certifier's Report identifying further problems was received.

[32] As to the James Hardie Report dated 27 February 2001, the plaintiffs contend that the second defendant received this report from James Hardie as cladding manufacturer and it identified serious concerns with the cladding, specifically the absence of control joints and inadequate ground clearances. The plaintiffs say that the second defendant himself met on site with representatives to discuss this report, but then he did nothing to adequately address the concerns raised in the report. The plaintiffs' argument continues that this in itself gives rise to a personal duty of care - Morton v Douglas Homes.

[33] It is clear that the second defendant has been a registered master builder for many years. He was awarded life membership of the Master Builders Federation in around 2001.

[34] These factors (factors which were essential for the first defendant company to itself register as a master builder) and the fact that the second defendant was the only experienced builder director of the first defendant and actively involved in the company's many construction projects on a daily basis, in my view are significant.

[35] Although the second defendant contends that as part of their contract PJ Builders, the labour-only contractors, were also hired to be the "site foreman" and in charge of site co-ordination at the Meadowcroft Grove job, the material currently before the Court, in my view supports the argument that it was the second defendant who was the project manager here and as such it was he who had overall responsibility for managing and supervising construction of the dwelling.

[36] Indeed, this is to some extent confirmed in the affidavit of Mr Ron de Wit dated 28 July 2005 filed in this proceeding at paragraph 3 where he states: *In 2001 I started taking over some of Robin Schwass' roles in the company and by about September/October 20011 had more or less taken over his role as project manager. Robin still did the banking and some other bits and pieces.* (emphasis added)

[37] And significantly, in the affidavit of Mr Bruce Richardson, the Manager of Master Builder Services Limited dated 31 August 2005 filed herein at paragraphs 30 and 31 he states:

> *30. Whether the supervisory role that RSCL (the first defendant) and a member of its management was required to perform was performed to an adequate standard is not a matter on which MBS (Masterbuild Services Limited) can comment at this stage. However, it is a requirement of and consistent with the Federation and MBS's Rules and expectations that a RMB (Registered Master Builder) take responsibility for the active management, supervision and coordination of the building process and any remedial work to ensure that a property is completed in accordance with the relevant building laws, regulations and standards.*
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> *31. Where the RMB is a corporate, the above responsibility should be discharged by a senior and experienced building practitioner in the management, such as Mr Schwass. From a review of the affidavits filed in support of Mr Schwass' application for summary judgment, Mr Schwass appears to have been the only individual at RSCL that performed this role in relation to the construction of the property.* (emphasis added)

[38] Bearing in mind all these factors, I am satisfied that the plaintiff has put before this Court sufficient material to show a real link between the second defendant as project manager and supervisor for the Meadowcroft Grove building contract to suggest that the second defendant owed a duty of care to purchasers of the dwelling, and the plaintiffs in particular.

[39] I say that mindful that the application before me is a summary judgment application by the second defendant, and as such he has the significant burden here of establishing that none of the plaintiffs' causes of action can succeed.

[40] Here there are a range of evidential matters which no doubt will be the subject of dispute at trial. As the Privy Council noted in Attorney-General v Jones, it is rare, if ever, that this R.136(2) defendant's summary judgment procedure is appropriate where the outcome of the action may depend on disputed issues of fact.

[41] I am satisfied that that is the case here.

[42] And in any event, I note that any enquiry as to whether a duty of care is owed in circumstances such as the present requires a thorough analysis of the facts of the individual case, facts which are strongly contested here.

[43] In my view, recent authorities relating to strike out and defended summary judgment applications by defendant directors of companies in circumstances not altogether dissimilar to the present would provide some support for the view that the present case is unsuitable for summary judgment.

[44] Byway of example, in ***Body Corporate No. 187947 and Anor v EP Maddren & Sons Limited and Others*** (HC AK, CIV-2004-404-1149, 13 May 2005) which was also a leaky building case, Hansen J dismissed applications by the director of a developer building company for strike out and defendant's summary judgment upon the grounds that a duty of care by the director could apply there and that the matter needed to go to trial to test the disputed evidence.

[45] In ***Carter v Auckland City Council, Bawden and Others*** (HC AK, CIV-2004404-2192, 14 October 2004) Associate Judge Christiansen refused a summary judgment application by a defendant director of a building company in similar circumstances, albeit where the director was described as having "hands on involvement", again requiring that the matter be fully tested at trial.

[46] In ***Banfield v Johnson*** (1994) 7 NZCLC 260/496 Thorp J refused a Rule 186 strike out application by the managing director of a building company, again in similar circumstances to the present.

[47] Against this, counsel for the second defendant referred at length to ***Drillien v Tubberty and Others*** (Unreported HC AK, CIV-2004-404-2873, 15 February 2005, Associate Judge Faire). In that case, which the second defendant claimed was an almost identical factual situation to the present, the Court found that the special circumstances required to impose a duty of care upon a director in negligence cases involving his/her company were not present. There was no direct personal involvement by the defendant director to such an extent to establish a duty of care, and therefore the director's summary judgment application succeeded.

[48] As I see it, these authorities simply suggest that in situations of building or development companies where a director has some involvement in the operation or management of projects, an intense factual enquiry is required to determine whether a personal duty of care in negligence should attach to a director defendant. The fact that the conclusion in the Drillien case was the opposite of that in either Maddren, Carter, or Banfield may be seen in my view as helping to reinforce the conclusion that these types of action are generally unsuitable for summary judgment.

[49] As Associate Judge Christiansen said in Carter (at paragraph 17):

> *[17] An enquiry into whether personal liability has been assumed requires all the circumstances to be looked at:* ***Banfield v Johnson*** *(1994) 7 NZCLC 260, 496. ... But in his judgment, Thorp J noted:*
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> > *The matter is so much fact specific and dependent upon the degree of such matters as proximity and control and other factors which may lead to the imputation of assumption of liability.*

Conclusion

[50] For the second defendant to succeed here, it is not enough that the plaintiffs' claims may have weaknesses. As I see it, the facts and matters pleaded at paragraphs 41 to 48 of the plaintiffs' Statement of Claim, supported to the extent which they are by the affidavit evidence which has been filed to date, provide a foundation for an argument that the second defendant's actions here involved an assumption of responsibility sufficient to give rise to a possible personal liability. As I see it, the affidavits filed on behalf of the second defendant here, rather than providing an answer to the plaintiffs' case, at least in part suggests that the second defendant played a major part in assuming control and responsibility for the building work on site. The allegations are that the second defendant assisted to supervise and monitor on-site activity, the co-ordinating of subcontractors, ordering of materials, and liaising with consultants, material suppliers and certifiers. The plaintiffs claim also that the second defendant received a report from the cladding manufacturer James Hardie identifying concerns and did nothing to adequately address those concerns. The plaintiffs claim, furthermore, is that the second defendant assumed personal responsibility for control of and liability for work undertaken in relation to defects in the dwelling reported by the plaintiffs, including those items outlined in the report from Nationwide Building Certifiers dated 22 July 2003.

[51] Whether these claims ultimately may prove to be weak or not, the circumstances noted above seem to me to clearly suggest an assumption of responsibility on the part of the second defendant sufficient potentially to found some personal liability on his part.

[52] In conclusion, I am satisfied that the second defendant has been unable to discharge the onus upon him of satisfying the Court that the plaintiffs' causes of action against him in negligence cannot succeed.

[53] This intensely factual enquiry needs the benefit of a full consideration and testing of all evidence at trial.

[54] As I see it, the plaintiffs here have done sufficient to show that the Court ultimately at trial may find that a personal duty should be imposed upon the second defendant under the current circumstances consistent with the principles outlined in Trevor Ivory and Morton v Douglas Homes and subsequent decisions.

[55] That said, the second defendant's application for summary judgment is dismissed.

Costs

[56] As to costs, before me counsel requested that these be reserved for further submissions.

[57] Costs are reserved at this stage.

[58] If there is an issue as to costs, counsel for both parties are directed to file memoranda as to costs within 28 days of the date of this judgment, and in the absence of a request from either counsel to be heard personally on this question, I will decide the issue of costs based upon the material filed.

Parker & Associates, Wellington for Plaintiffs
Hazelton Law, Wellington for Second Defendant
McElroys, Auckland for Third Defendant
J. Swan, P.O. Box 92055, Auckland for Fourth Defendant
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