

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-100-000091
[2014] NZWHT AUCKLAND 02**

BETWEEN	PETER JAMES ADAMS AND SUSAN MARGARET ADAMS Claimants
AND	TERRENCE EASTHOPE First Respondent
AND	AUCKLAND COUNCIL Second Respondent
AND	RONALD STEVENSON Third Respondent (<u>Removed</u>)
AND	MICHAEL RAMSEY Fourth Respondent
AND	COLIN SAYLES Fifth Respondent

Hearing: 27 February 2014

Appearances: Jonathan Wood, for Peter & Susan Adams
Paddy Finnigan, for Colin Sayles

Decision: 13 March 2014

FINAL DETERMINATION
Adjudicator: P A McConnell

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[1] In 1993 Peter and Susan Adams purchased a property in Waiheke which they subsequently renovated and extended. Even before the end of the maintenance period leaks occurred and despite various repair attempts further and more widespread leaking occurred. Mr and Mrs Adams filed an application with the Department of Building and Housing in late 2002 and the assessor's report confirmed that they had a leaky home and found the claim was eligible in relation to the alterations.

[2] They subsequently filed a claim in the Tribunal against a number of the construction parties including Colin Sayles. Mr and Mrs Adams say that Mr Sayles was one of the builders and the project manager responsible for the building work. The claim originally went to hearing in February 2012. Prior to the hearing commencing the claimants settled their claim against all the respondents other than Mr Sayles and Terrence Easthope. Neither Mr Sayles nor Mr Easthope attended the hearing and following a formal proof hearing both were found jointly liable.

[3] Mr Sayles appealed the decision. The District Court set aside the orders in so far as they related to Mr Sayles and referred the matter back to the Tribunal. Mr Sayles disputes any liability as he says that he was not the project manager and there is no causative link between the work for which he was responsible and the defects which have caused loss.

[4] I accordingly directed that there would be an initial hearing on the issue of whether Mr Sayles owes Mr and Mrs Adams a duty of care and if so whether he breached that duty of care.

[5] The issues I therefore need to decide are:

- What was Mr Sayles' role in the construction of the Adams' home?
- Does Mr Sayles owe Mr and Mrs Adams a duty of care?
- If so, has he breached that duty of care?

MR SAYLES' ROLE

[6] Mr and Mrs Adams contracted Gemini Construction Limited to carry out the majority of the additions and alterations to their home. Under that contract Gemini was responsible for engaging the necessary contractors to complete the construction work required for code compliance. Mr Adams chose Gemini Construction to extend and renovate the house as it had the Signature Homes franchise on Waiheke. At the time Mr Adams thought Gemini was a joint venture of Mr Sayles and Mr Easthope. However Sayles was not a director or shareholder but worked for Gemini at the time of the construction work on the Adams' home.

[7] Mr and Mrs Adams say that Mr Sayles was the Gemini person who was on site throughout construction. He carried out building work and oversaw the work on site. In other words he was the project manager and one of the builders. Mr Adams says that the pre-contractual discussions were with both Mr Easthope and Mr Sayles and when leaks were first discovered he contacted Mr Sayles who carried out some preliminary investigations and offered to do further work on the property.

[8] Mr Sayles accepts that he was on site throughout the majority of the construction work. He however says that he was just an employee of Gemini and apart from the masonry work his role was only as a labourer working under the instruction of others. He says he was not responsible for

the quality of the work but his site supervisory role was primarily administrative ensuring materials and contractors were on site.

[9] Mr Adams bases his opinion as to Mr Sayles' role on the negotiations and discussions prior to entering into the contract, what he saw while visiting the site and also what happened when leaks were first discovered. It is therefore relevant to look at the evidence in relation to all three phases in order to resolve the disputed evidence on Mr Sayles' role.

Pre contract discussions

[10] When Mr Adams was looking for a builder he made some enquires as to who was a good builder on Waiheke. He heard that there was a Signature Homes franchise on the Island and that Mr Sayles and Mr Easthope were the Signature Homes builders on the island. Mr Adams then met with both Mr Easthope and Mr Sayles. He says that during that visit he was told that Mr Sayles would be the person on site responsible for the build as Mr Easthope worked during the week in Auckland. Nothing was said at that meeting in relation to what Mr Sayles now claims to be his limited building experience. Mr Sayles says he cannot remember that meeting but acknowledges it may have taken place.

[11] As Mr and Mrs Adams wanted some assurance as to Gemini's workmanship Mr Sayles took Mr and Mrs Adams to a property he had helped to build at Bell Terrace in Onetangi. Again, Mr Sayles does not recall that visit but accepts he had some involvement in the construction of that property. It is relevant to note that neither Gemini nor Mr Easthope had any involvement in the construction of the Bell Terrace property.

[12] Mr Sayles then visited the Adams' property on a number of occasions prior to the building contract being completed and signed. Mr Adams believes this was to size up and cost the job. Mr Sayles accepts he made these visits but says he only went to see whether the floors could be made level as if they could not Gemini would not take on the building project.

[13] Mr Adams however notes that Mr Sayles involvement during contractual negotiations extended beyond the levelling of the property. He notes that Mr Sayles recommended extending the hardibacker and stucco cladding around the rear of the house so that the cladding would be uniform around the house. This is confirmed in the written contract amendments. While this may be something even a layperson might advise it does show that Mr Sayles was involved in the contractual discussions.

During construction

[14] Mr Sayles accepts he did the block work that formed part of the walls to the lower level. He also accepts he was responsible for the associated work that ensured the floor of the upper storey was level. This was the first stage of the construction. However other than that Mr Sayles says his role during construction was more an administrative role and as an extra pair of hands. He said he worked under the direction of others and was not responsible for the quality of the work.

[15] Mr Adams however says that Mr Sayles' role during construction appeared to be that of a project manager responsible for the work as it had been represented to him by Mr Sayles and Mr Easthope in the pre-contractual discussions. He said that except on four occasions towards the end of the contract it was Mr Sayles he dealt with in relation to any issues and who he saw on site. Mr Adams also notes that when he provided some additional technical product information to Gemini this was sent both to Mr Sayles and one of the other builders. He said there would have been no reason for this to have been sent to Mr Sayles if he had not been in charge of the work.

[16] Mr Adams also says that during construction Mr Sayles suggested changes such as repositioning an upstairs toilet and improving the layout in the laundry under the house. Accordingly to Mr Adams it was Mr Sayles who recommended Mr Ramsey to do the plastering work involved as he had worked with him before. Mr Adams considers that his discussions with Mr Sayles during the construction work and what he observed also confirmed Mr Sayles was actively monitoring the progress of the work.

[17] Mr Ramsey was the plasterer engaged by Gemini for the job. His recollection was that Gemini was run by Mr Easthope and Mr Sayles jointly. He says that Mr Sayles was the site manager and directed the work on site. He also says that he talked to Mr Sayles about what he was required to do and that Mr Sayles agreed that Gemini would do the waterproofing.

After construction

[18] In 2002 the Adams first experienced significant issues with leaks. In September they contacted the architect Ron Stevenson who carried out some of the investigations and suggested that they contact a local glazier and Mr Sayles. Mrs Adams rang Mr Sayles who then visited the property. Mr Sayles cannot recall the conversation but accepts that he visited the property and carried out an inspection.

[19] During that inspection he cut a hole in the ceiling near the laundry tub and hosed water onto the deck from above. He also offered to come back and carry out further work. Mr Adams says, and this is not disputed by Mr Sayles, that there was no suggestion by Mr Sayles that he was not qualified to do the work nor was it ever suggested that Mr Sayles was not the appropriate person to have called back to have a look at the problems with construction.

Conclusion

[20] It is understandable that Mr Sayles and Mr Adams recollection of events may differ given the length of time since the building work was done. For the same reason it is also understandable that Mr Sayles cannot remember a lot of what happened. However I preferred Mr Adams' evidence to that of Mr Sayles on points where they conflicted. Mr Adams kept detailed notes of meetings and conversations he had and he has used those notes to refresh his memory. Unfortunately not all the notes he kept are still available as they were not passed on by his original lawyer when he changed legal counsel. Mr Adams however confirmed that he had the benefit of all his records at the time litigation was commenced.

[21] Mr Adams clearly had a much better recollection of key events than Mr Sayles did. Mr Sayles could not remember various events and only appears to recollect events which are not associated with the defects causing leaks. He also appears to be confused as to the cladding system. In closing submissions Mr Finnigan says that “Ramsey’s work was the application of plaster creating a membrane over the Hardibacker. Sayles states that Ramsey used a spray gun which Sayles never held or used.” The cladding construction is not a membrane over a backing board. The cladding is reinforced solid plaster, sometimes referred to as stucco, which was applied over the Hardibacker. A waterproof paint was then applied over the top of the solid plaster. Mr Ramsey’s evidence was that he would provide the plaster façade but that it was up to Mr Sayles, or Gemini to do the “waterproofing”. His invoice only covered plastering and not painting.

[22] Mr Sayles did not produce any documents or evidence in support of his recollection of events. In particular he did not produce any bank accounts, tax returns or income statements to support his statement that he was an employee who was probably not paid a lot. Nor did he call any evidence from Mr Easthope or others he worked with at the time. The documents and records that are still available, while not definitive, tend to support Mr Adams’ recollection of events rather than Mr Sayles. Mr Ramsey’s evidence also tends to support Mr Adams evidence as to Mr Sayles’ role.

[23] I do not accept that Mr Sayles’ role was as limited as he now recalls it being. In particular I do not accept that he was an inexperienced builder working under the direction of others. I am satisfied that Mr Sayles was involved in soliciting the work on behalf of Gemini and was present during the pre-contractual discussions when Mr Adams was advised that it was Mr Sayles who would have the role of project manager and that he would be responsible for the quality of the construction work. The fact that Mr Sayles took Mr and Mrs Adams to a house which he helped build, to assure them as to the quality of Gemini’s work, rather than one built by Mr Easthope or Gemini also supports the contention that Mr Sayles was going to be the key person on site with responsibility for the work. I also accept that Mr Sayles met with Mr Adams during the contractual negotiations and suggested some changes to the plans.

[24] Mr Sayles held himself out to Mr Adams as the person who would be in charge of the job and so someone with sufficient building knowledge and experience to manage the job. I am also satisfied that he did in fact manage the build on behalf of Gemini. While the title given to Mr Sayles' role was "Site Co-ordinator" it is the actual role carried out rather than the name given to the role that is most relevant when considering whether a duty of care is owed.

[25] During the construction work itself Mr Sayles accepts he was in charge during the initial block laying work which formed part of the walls to the lower level. While Mr Sayles says he was working under the instruction and supervision of others in relation to the rest of the building work there is no corroborating evidence to support this. To the contrary others involved in the job considered Mr Sayles was in charge. This was clearly the view of both Mr Adams and Mr Ramsey. In addition Ms Williams, the office manager and co-director of Gemini sent the technical information to him that had been provided by Mr Adams. Mr Sayles accepts he remained on site full time after completing the block work. This would not have been necessary if his role was as limited as he says it was.

[26] I therefore conclude that Mr Sayles not only carried out some of the building work but also controlled the work carried out by Gemini. He was the project manager primarily responsible to ensure the proper construction of the Adams' house.

DOES MR SAYLES OWE MR AND MRS ADAMS A DUTY OF CARE?

[27] There is no significant debate that a person who is primarily responsible to ensure proper construction owes home owners a duty of care.¹ The existence of a duty of care is established by determining whether in all the circumstances it is just and reasonable that a duty be imposed having regard to:²

¹ *Auckland City Council v Grgicevich* HC Auckland CIV-2007-404-6712, 17 December 2010.

² *NorthShore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341.

- a) i. Whether it was reasonably foreseeable that the claimants would suffer harm if Mr Sayles was careless.
- ii. If so, whether the relationship between Mr Sayles and Mr and Mrs Adams was sufficiently proximate to give rise to a duty of care.
- b) If so, whether there are any relevant policy considerations that might militate against or in favour of the imposition of such a duty.

[28] My conclusions as to Mr Sayles' role in the construction process establishes that it was reasonably foreseeable that Mr and Mrs Adams would suffer harm if Mr Sayles was careless either in the actual building work he carried out or in his role as project manager.

[29] Although the contractual relationship was between Mr and Mrs Adams and Gemini and not with Mr Sayles directly this does not in itself negate a duty of care being owed. Directors, sub-contractors, labour only contractors and senior employees can owe a duty of care and have been held responsible for loss that has resulted from their carelessness.³ I do not accept that Mr Sayles building experience and skills were as limited as he now says they were, nor do I accept he was a mere employee working under the direction of others.

[30] While assumption of responsibility is not something that claimants need to establish for personal liability in negligence I am satisfied that Mr Sayles assumed responsibility for the quality of the work to be carried out by Gemini. It is also clear that Mr and Mrs Adams relied on him to ensure the work was done properly. This is not a situation like that of Mr Hardy in *Koria v Hardy*⁴ where there was no meaningful contact between Mr Sayles and the claimants. Nor is it a case where Mr Sayles was spread thinly over a number of sites and did not or could not have any responsibility for the quality of the build.

³ *Body Corporate 185960 v North Shore City Council* HC Auckland, CIV-2006-004-3535, 22 December 2008, *Boyd v McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010, *Lake v Bacic* HC Auckland, CIV-2009-004-1625, 1 April 2010, *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17.

⁴ *Koria v Hardy* [2013] NZHC 3178.

[31] Mr and Mrs Adams dealt directly with Mr Sayles and relied on him to ensure the job was done. I therefore conclude that there was the necessary proximity in the relationship between Mr and Mrs Adams and Mr Sayles for Mr Sayles to owe them a duty of care.

[32] If Mr Sayles had been an employee working under the direction of others then it is unlikely that he would owe a duty of care. I however concluded that this is not the case. The factual matrix points in favour of a duty of care being owed and there are no overriding policy reasons that militate against the imposition of a duty of care. Regardless of the contractual relationship between Mr Sayles and Gemini, which has not been satisfactorily established, he was the person who was responsible for the proper construction of the additions and alteration.

[33] Mr Finnigan does not dispute that Mr Sayles owes a duty of care in relation to the block work carried out. I also conclude that the duty owed extended to all the work he undertook in construction including his project management or site supervision role.

HAS MR SAYLES BREACHED THE DUTY OF CARE HE OWED?

[34] The only remaining issue is whether Mr Sayles breached the duty of care he owed Mr and Mrs Adams. The scope of Mr Sayles duty extended to monitoring the work he and other Gemini employees carried out and in ensuring that work met the relevant building standards. However a builder or project manager, unlike a developer, does not owe a non-delegable duty of care. Therefore Mr Sayles does not owe a duty of care for all the workmanship on site particularly that of the specialist subcontractors such as the plasterers and roofer. Mr Sayles was entitled to rely on the expertise of the specialists engaged to carry out such work. He would however have some responsibility for the transition of work between contractors and defects which should readily have been identified from the type of visual inspection that a prudent project manager would normally carry out.

[35] The main defects with this dwelling are the application of the liquid applied membrane to the deck and roof areas, attaching the timber deck

with nails through the deck membrane, lack of slope to the deck and façade roof areas, defects with the installation of the joinery and defects with the plastering including the construction of the substrate over which the plaster was applied. Mr Sayles accepts he helped apply the membrane and install the joinery. It was also Gemini that installed the hardibacker and built the framing including the deck and roof substrate. In addition it is likely that Gemini workers nailed the timber decking through the liquid applied membrane.

[36] Mr Finnigan submits that Mr Sayles had nothing to do with the plastering work and therefore cannot be responsible for plastering defects. However accordingly to Mr Alvey the main fault on the part of the plasterer was plastering over an inadequate substrate. Gemini was responsible for construction of the substrate. Mr Finnigan also submits that Mr Sayles had no involvement with the roof. However the roofing defects relate to the façade roof areas covered with liquid applied membrane rather than the pressed metal roof installed by a specialist sub-contractor. Mr Sayles accepts that Gemini applied the membrane.

[37] I therefore conclude that Mr Sayles was negligent and breached the duty of care he owed Mr and Mrs Adams in relation to the majority of the established defects. The defects for which Mr Sayles has some responsibility caused the dwelling to leak and combined necessitated the remedial work. Mr Sayles is therefore jointly and severally liable with the other responsible parties for the full amount of the established claim.

NEXT STEPS

[38] The hearing, and this decision, was restricted to determining liability rather than quantum or contribution. Having found Mr Sayles liable it may be necessary for a further hearing to be convened to determine quantum and to consider Mr Sayles' cross claims against the respondents that settled with the claimants.

[39] I would encourage Mr and Mrs Adams and Mr Sayles to endeavour to settle the outstanding issues by agreement rather than to incur additional expense in a further hearing. If this is not possible Mr and

Mrs Adams and Mr Sayles may wish to consider whether any further hearing as to the amount payable by Mr Sayles be limited to amount of his contribution. Alternatively Mr and Mrs Adams' counsel may seek to represent the Council and Mr Ramsey as well as the claimants at any hearing to determine quantum and contribution.

[40] Mr and Mrs Adams are to update the Tribunal within two weeks of the issuing of this decision as to what further steps, if any, they require the Tribunal to take to resolve this claim in full.

DATED this 13th day of March 2014

P A McConnell
Tribunal Chair