

What is the scope of a builder's duty of care?

WRITTEN BY MARK COLTHART



Most lawyers, particularly those practising in the area of construction law, will know that the courts have long held that a builder owes a duty to current and future owners to exercise reasonable skill and care when carrying out building work.¹ The duty is owed both by the contracting party and by the individual carrying out the work. Where the individual carrying out the work is the contracting party, the duty in tort is co-extensive with the contractual duty to exercise skill and care. However, where that is not the

case – most commonly where the building contractor is a company – interesting issues can arise as to the precise scope of the individual's duty of care.

The scope of the duty of care has been described as a duty to exercise reasonable skill and care to achieve compliance with the Building Code.² However, and with all due respect, that is not strictly correct.

This issue was examined in depth in the 2021 decision of Cooke J in *Palmer v Hewitt Building Ltd*.³

**FortyEight
Shortland**
Barristers

- 1 *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA).
- 2 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297.
- 3 *Palmer v Hewitt Building Ltd* [2021] NZHC 1460.

Facts

This case involved a residential building project that went *seriously wrong*.⁴

In June 2016, Ms Palmer signed a fixed-price building contract with Hewitt Building Limited for the extension and renovation of a house she had purchased in Masterton. The fixed-price was slightly over \$525,000.

Initially, there was some confusion as to who would be the contracted building company. Mr Hewitt had suggested that a company called Design Builders (Wairarapa) Limited (in which he was a 60% shareholder) would be the contractor. When the contract was signed, the contractor was changed to Hewitt Building Limited (which was fully owned and controlled by Mr Hewitt). The Judge accepted Ms Palmer's evidence that when she queried the change, Mr Hewitt said that the change did not make a difference as he would still be the builder responsible for doing the works.

The judgment records that there were issues with the consented plans from the outset. A copy of the consented plans was not provided to Ms Palmer, or retained on site in a manner that she could inspect them. Furthermore, the plans were not of good quality. They were described by Mr Hewitt's expert witness as *pretty poor*.

In terms of Mr Hewitt's approach to interpreting the

plans, the Judge said:⁵

In effect Mr Hewitt treated them as outlining the essence of what Ms Palmer wanted, but he would depart from them not only to deal with variations agreed with Ms Palmer, but also where he could save costs on the fixed price contract. This was part of Mr Hewitt's *modus operandi* through his company. If Mr Hewitt could achieve the building work in the consented plan in a different way from that in the plan that he thought that Ms Palmer would be happy with, and which the Masterton District Council would accept, he would seek to do so if it involved cost saving. In terms of variations from the building consent, and therefore the building contract, when he could personally do the variation work he would

not arrange a contractual variation. He would also complete some works that should properly have been undertaken by one of the other trades. He would only arrange a formal variation if sub-contractors work was required which needed to be paid for. Otherwise he would treat it as part of the swings and roundabouts he was seeking to manage for the overall project through which he hoped to make a profit. As part of this process he would also seek to persuade the Masterton District Council that any departures from the consented plan should be able to be dealt with by a variation to the consent, or if he believed he could get away with the change without informing the Council he would keep the change to himself.

The judgment records that

4 *Palmer*, above n 3, at [5].

5 *Palmer*, above n 3, at [9].



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disagreements between Ms Palmer and Mr Hewitt began almost from the beginning. The disagreements started at the time the contract was signed, and escalated from there. To summarise, the Judge said:⁶

By the time of the trial, at which both Ms Palmer and Mr Hewitt gave evidence, Ms Palmer regarded Mr Hewitt as incompetent, unreliable and dishonest, and Mr Hewitt regarded Ms Palmer as obdurate, unreasonable and vindictive.

Returning to the narrative, the building work was largely completed by December 2016, by which point Ms Palmer had paid some \$542,988 (being more than the fixed-price because of

variations and other elements). Mr Hewitt took the view that he had achieved practical completion, but Ms Palmer raised a series of concerns she had with the building work.

In May 2017, the Council undertook an inspection, and failed a number of items. In July 2017, the septic tank system flooded, and there were issues with water in the pipes freezing, and the gas and open fires not working. Later in 2017, there were issues with the property flooding due to an inadequate stormwater disposal system, and issues with the ventilation of the toilets. Attempts by Ms Palmer and Mr Hewitt to agree on a list of remedial works to be completed were unsuccessful.

In 2019, Ms Palmer issued

proceedings in the High Court against both Hewitt Building Limited and Mr Hewitt personally. The case was heard in March and June 2021, by which time a Code Compliance Certificate had still not been issued for the work.

Shortly before the trial, Mr Hewitt advised that his company would not be defending the claims. He confirmed that the company would be unable to meet any judgment against it. For that reason, the trial focused on Mr Hewitt's personal liability to Ms Palmer.

The claims against Mr Hewitt were based on breach of the statutory warranties under the Building Act 2004, and negligence. The amount claimed, circa \$400,000, was based upon the estimated costs of remedial

⁶ *Palmer*, above n 3.

work required to achieve compliance with the original consented plans, and an element of diminishment in value of the completed work.

The Judge's findings

The Judge dealt first with the claims against Mr Hewitt based upon alleged breach of the statutory warranties imposed into contracts involving residential building work under Part 4A of the Building Act 2004. The Judge dismissed the claims on the basis that the statutory warranties are implied into the relevant contract, and therefore only the contracting party can be liable for their breach. As Mr Hewitt was not a party to the relevant contract (only his company was), he could not be liable for breach of the implied warranties.

The Judge also rejected an alternative argument that Mr Hewitt was liable for the tort of breach of statutory duty for failing to comply with the Building Act. He held that, in light of the specific provisions in the Act establishing a system of civil liability for residential building works, and for regulating licensed building practitioners, there is no room to imply a legislative intent to create a cause of action in damages for breaching the duties set out in the Act.⁷

The Judge then considered the claims against Mr Hewitt in negligence.

In terms of the duty of care owed by a builder, the Judge stated that a builder has a personal duty of care to a building owner to meet the standards of a reasonable builder when engaging in building work. That is so whether they are an employee, a director of a company, or are self-employed. Importantly, that duty is different from the contractual obligation of the entity engaged to undertake the building work. The Judge held that, in the present case, that meant Mr Hewitt could not be sued for the failure of Hewitt Building Limited to build in accordance with the contract with Ms Palmer, but he could be sued for any loss caused by his failure to conduct the building work he personally undertook with reasonable care.⁸

The Judge then considered, but rejected, two arguments advanced by counsel for Ms Palmer for why Mr Hewitt was nevertheless liable for the company's failures.

First, he rejected the argument that Mr Hewitt had assumed personal responsibility for the company's obligations on the basis set out in the decision of the

Court of Appeal in *Trevor Ivory v Anderson*.⁹ He held that the evidence did not justify such a finding. He held that, if anything, the evidence about the change of the contracting party made it clear to Ms Palmer that she was entering the contract with a limited liability company, and not with Mr Hewitt personally. He held that Mr Hewitt's statement that he would be responsible for doing the work was correct, as he was the builder doing work under the contract, but that fell far short of establishing that he assumed personal responsibility for performance of the contractual promises made by his company.

Second, the Judge rejected an argument that Mr Hewitt had a duty to conduct the building works in conformity with the building consent that had been issued. Instead, he held¹⁰ that the scope of a builder's personal duty of care is to conduct building works that comply with the standards set by the Building Code.¹¹ Although one might be forgiven for thinking that this amounts to the same thing, the difference is important. The duty to build in conformity with the building consent, is a duty imposed by the contract, not by tort. The Judge put it this way:¹²

7 *Palmer*, above n 3, at [36].

8 *Palmer*, above n 3, at [55].

9 *Trevor Ivory v Anderson* [1992] 2 NZLR 527.

10 Following the approach taken by Downs J in *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871.

11 *Palmer*, above n 3, at [73].

12 *Palmer*, above n 3, at [75].

Departure from the contract, or departure from the consent, might still be relevant to an allegation that the builder failed to build in accordance with the standards of a reasonable builder. That is because the consent is a means to an end, and the end is compliance with the sound building standards set by the Code. But a departure from the contract or the consent neither defines the duty, nor establishes a breach of it. It is common for the building works to depart from a consent, including in contemplation of an amendment to that consent. People make changes as they go. If a departure from the consent is without the agreement of the building owner, but that departure remains consistent with the Building Code there may well be a claim in contract, but there is no claim in tort. So a builder who fails to install gold taps in the bathroom in accordance with the consent obtained under the contract is not liable in negligence. The entity that promised to build in accordance with the consent may be liable in contract, however.

To clarify, the Judge went further

and noted that compliance with the Building Code may not represent the entire analysis required. He noted that the fundamental obligation of the builder is to meet the standards of a reasonable builder. Those standards are generally to be found in the Building Code, and for that reason the duty of care is often described as a duty to comply with the Code. However, the Judge noted that that is no more than a shorthand way of capturing the essence of the obligation. He held that the precise legal obligation is to take reasonable care to avoid causing loss to the building owner arising from actual or prospective damage to the property. This requires the builder to meet the standards of a reasonable builder. Whilst those standards would usually be taken to be those set out in the Building Code, the Judge held that it is not always as straightforward as that. He noted:¹³

It is possible to imagine a situation where a builder builds to the Code, but where a duty of care is breached because the building is nevertheless not sound and this can be attributed to a failure to take reasonable care. Equally it is possible to imagine a scenario where a builder departs from the Code but nevertheless constructs a sound

building such that no duty is breached. Defining of the duty of care as one that precisely matches a statutory requirement may not always be entirely appropriate.

Finally, on the issue of the scope of the duty of care, the Judge noted that departure from a consent may still be relevant to an allegation that the builder has failed to meet the standards of a reasonable builder. He noted that a builder who departs from a consent will need to demonstrate to the consenting authority that the departure is compliant. He noted that if the builder fails to arrange appropriate inspections, or keep appropriate records of the work such that the consent authority will not issue a Code Compliance Certificate, the owner may suffer foreseeable loss represented by the cost of remedying the situation. The Judge held therefore that the scope of a builder's duty of care extends to taking care to conduct the work so that it may be approved by the consenting authority. In short, he held that *negligent building includes undertaking building work that is not consentable*.¹⁴

Following this analysis, the Judge then turned to consider the individual elements of Ms Palmer's claim against Mr Hewitt personally. In relation to each item, the Judge considered whether the claim was a contract issue (for which only

¹³ *Palmer*, above n 3, at [76].

¹⁴ *Palmer*, above n 3, at [78].

the company would be liable), or a negligence issue (for which Mr Hewitt would be personally liable if he had undertaken the work).

The Judge found that the majority of the items amounted to claims that the company had failed to carry out the construction in accordance with the terms of the contract. Examples were such things as the installation of a smaller water tank than that shown on the building consent plans, the use of different cladding material, the omission of a lower roof extension, smaller eaves, and changes to the dimensions of the garage. He entered judgment against the company, but dismissed those claims against Mr Hewitt.

The Judge upheld Ms Palmer's claims that Mr Hewitt had been negligent in respect of only three items. The items related to the defective installation of some of the cladding (a claim for a little over \$21,935), replacement of defective parts of the roof (\$10,000), and defective installation of window flashings (\$35,640).

Result

The end result was judgment against Hewitt Building Limited for \$392,400, and against Mr Hewitt personally, for negligence, for \$67,575.

As a post-script, the judgment was delivered on 18 June 2021. Hewitt Building Limited was put into liquidation on 4 March 2022. The only debt referred to in the liquidator's report was a judgment owed by the company for \$392,400.

Conclusions

The key points to take from *Palmer v Hewitt* are:

1. An individual builder carrying out building work owes a personal duty of care to carry out the work using reasonable skill and care.
2. It is irrelevant whether the individual is carrying out the work as a director, employee, or contractor of the contracting party. The duty of care is owed personally.
3. However, only the contracting party is liable for breach of the statutory warranties implied into a residential building contract by section 362I of the Building Act 2004.
4. A finding that an individual builder has assumed responsibility for the building work (and is therefore personally liable as the contracting party) will not be lightly inferred. Where the owner is aware that the contracting party is a company, as opposed to the individual, this will count strongly against a finding of assumption of responsibility.
5. There is no basis for a general

claim against a builder alleging breach of statutory duty for failing to build in accordance with the Building Act 2004.

6. An individual builder does not owe a duty in tort to build in accordance with the terms of a building consent. That is an obligation owed in contract, by the contracting party.
7. The individual builder's duty of care may be conveniently described as a duty to build in accordance with the Building Code, but there can be exceptions. It is possible to build in accordance with the Building Code, but fail to exercise reasonable skill and care. Equally, it is possible to depart from the Code, but not breach the duty of care. Those will be truly exceptional cases.
8. The scope of the builder's duty of care does extend to taking care to conduct the work so that it may be approved by the consenting authority. For that reason, a failure to build in accordance with a building consent may constitute a breach of the builder's duty of care.

About the author

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Mark Colthart LLM (Hons) FCI Arb FAMINZ (Arb) FACICA, is an arbitrator and adjudicator, with specialist expertise in property, construction, and commercial dispute resolution. He is one of the founding members of FortyEight Shortland Barristers, in Auckland.