IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-2295

BETWEEN	BRIAN PATRICK BERGIN AND BEVERLY JOAN BERGIN Plaintiffs
AND	NORTH SHORE CITY COUNCIL & ORS First Defendant
AND	STEWART NEVILLE COX AND GAYLE MARIE COX Second Defendants
AND	HIBISCUS COAST PROPERTIES LIMITED Third Defendant
AND	SANDERS PREMIER LIMITED Fourth Defendant
AND	RICHARD ARTHUR ZGIERSKI-BOREYKO OF CAD DRAUGHTING TECHNOLOGIES Fifth Defendant
AND	GATLAND ROOFING CONTRACTORS LIMITED Sixth Defendant
AND	SHINGLE & SHAKE ROOFING LIMITED Seventh Defendant
AND	LESLIE PATTERSON ENGLAND Eighth Defendant
AND	TAYLOR FASCIA (AUCKLAND) LIMITED Ninth Defendant

Hearing: 7 March 2007

Appearances: M L Thornton for Plaintiff
G Bogiatto for Second Defendants

Judgment: 5 April 2007 at 2:30pm

RESERVED JUDGMENT OF ANDREWS J

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*In accordance with r540(4) I direct that the Registrar endorse this judgment with the delivery time of **2:30pm** on **5 April 2007**.*

....
Deputy/Registrar

Date: ....

Solicitors:
Mr M Thornton, PO Box 91 441 Auckland
Mr G Bogiatto, PO Box 106 120 Auckland

Introduction

[1] The second defendants, Mr and Mrs Cox, apply for summary judgment against the plaintiffs, Mr and Mrs Bergin. Mr and Mrs Cox are the directors of the third defendant, Hibiscus Coast Properties Ltd ("Hibiscus Coast"), and are sued, along with several other defendants, in relation to a townhouse at Long Bay, Auckland ("the townhouse").

[2] The application for summary judgment is made in reliance on rr 135 and 136 of the High Court Rules and is on the grounds that the two causes of action pleaded against Mr and Mrs Cox in the second amended statement of claim cannot succeed. Mr and Mrs Bergin oppose the application and assert that they have an arguable case on each of the causes of action, that can only be tested at trial and after cross-examination.

Background

[3] The townhouse is a "leaky building". It was built between March 2001 and October 2002. Mr and Mrs Cox were the registered owners of the townhouse until just before it was sold to Mr and Mrs Bergin in May 2002. In November 2005 a Weathertight Homes Resolution Service inspector identified various defects that have resulted, it is alleged, in the entry of excessive moisture into the building elements and timber framing, causing decay, water damage, fungal growth and toxic mould.

[4] There are two causes of action alleged against Mr and Mrs Cox. The first cause of action alleges negligence as developers. It is alleged that, as developers, they purchased the land with the intention of subdividing it and building three townhouses. It is alleged that they subdivided the property, applied for building consents, and either themselves constructed, or contracted third parties to construct, the townhouse. Mr and Mrs Bergin claim that Mr and Mrs Cox owed them a duty of care to take reasonable steps to ensure that any building work complied with the minimum standard set by the Building Act 1991 and that it was carried out to a

workmanlike standard. They claim that this duty was breached and that as a result they have suffered and will suffer loss.

[5] The second cause of action is in negligence and alleges that Mr and Mrs Cox, as directors, shareholders and employees of Hibiscus Coast, owed the Bergins a duty of care to ensure that the townhouse was constructed to a workmanlike standard. It is again alleged that this duty was breached.

[6] Mr and Mrs Cox have filed a statement of defence. In relation to the first cause of action they say that at all times they held the title to the townhouse for the benefit of Hibiscus Coast. They say further that Hibiscus Coast made the application for building consents, subdivided the land and constructed the townhouse. Accordingly, they say, they cannot be liable as developers. In relation to the second cause of action Mr and Mrs Cox deny that they were responsible for the development, or exerted control, such that they owed any duty of care to the Bergins.

Preliminary issue: leave to apply

[7] The application for summary judgment was not filed at the time the statement of defence was filed. Accordingly, leave is required for the application to be made, pursuant to r 138 of the High Court Rules. Mr and Mrs Bergin did not oppose the granting of leave.

[8] Accordingly, leave is granted to make this application for summary judgment.

The law: summary judgment by defendants

[9] As made clear by the Court of Appeal in *Westpac Banking Corporation v M M Kembla (NZ) Limited*[1] Mr and Mrs Cox must establish, on the balance of probabilities, that Mr and Mrs Bergin cannot succeed on either of the causes of action against them. The Court of Appeal commented at [61]:

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[1] *Westpac Banking Corporation v M M Kembla (NZ) Limited* [2001] 2 NZLR 298

> Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim.

The Court further commented at [62]:

> Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. ...

[10] Those principles were adopted by the Privy Council in its judgment in *Jones v Attorney-General*[2] :

> But it is clear, applying the guidance given by the Court of Appeal in *Westpac*, that summary judgment should not be given for the defendant unless he shows on the balance of probabilities that none of the plaintiff's 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.

[11] The inquiry involved requires a consideration of material facts, so that it is necessary for a defendant to establish that a proper determination can be made on the "abbreviated procedure and affidavit evidence".

Issues

[12] Determining whether summary judgment should be entered in favour of Mr and Mrs Cox requires me to consider whether I am satisfied that:

a) Mr and Mrs Bergin cannot succeed in their claim that Mr and Mrs Cox were developers, that is that they owned the property on which the townhouse was built, they subdivided it, obtained building consent, and constructed or contracted others to construct the townhouse; or that

[2] *Jones v Attorney-General* [2004] 1 NZLR 433, [10]

b) Mr and Mrs Bergin cannot succeed in their claim that Mr and Mrs Cox can be held personally liable to them, as directors of Hibiscus Coast.

Liability as developers

Principles

[13] A developer can be held liable to a purchaser. As the Court of Appeal said in *Mount Albert Borough Council v Johnson*[3]:

> 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 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.

[14] In his judgment in *Body Corporate No. 187820 & Anor v Auckland City Council & Ors*[4] Associate Judge Doogue said that there were two essential considerations that gave rise to the non-delegable duty of care on the part of a developer company. These were:

a) Direct involvement or control in the building process, for example by way of planning, supervising, or directing the work;

b) That the company is in the business of constructing dwellings for other people for profit – acquiring and subdividing land, putting up buildings intended to house people, making extensive changes in the landscape.

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[3] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, 240

[4] *Body Corporate No. 187820 & Anor v Auckland City Council & Ors* HC AK CIV2004-404-006508, 26 September 2005, [27]

[15] In the present case, it is not claimed that Mr and Mrs Cox are liable as developers on the basis of being personally liable (as directors) for breaches by Hibiscus Coast. The allegation is that they, personally, were the developers of the property and so have liability independent of any liability of Hibiscus Coast. The principles set out by Associate Judge Doogue need, therefore, to be read with some modification.

[16] Mr Bogiatto submitted that Mr and Mrs Cox did not own the property, subdivide it, apply for building consent, or construct the townhouse, so the allegation of liability as developer could not succeed.

Ownership

[17] Mr Bogiatto referred me to Mr Cox's evidence in his affidavit in support of the application for summary judgment, sworn on 1 September 2006, at paras 9-11:

> 9. … At the time [Mr and Mrs Cox] entered into the [agreement to purchase the property] we did so as trustees for the Third Defendant as intended by the Sale and Purchase Agreement which contains a Nominee Provision. All monies towards the initial purchase and settlement of the property were provided by the Third Defendant. My wife and I were as bare Trustees for the Third Defendant as Beneficiary from the outset. To reflect this arrangement the solicitor for the Third Defendant, John Feast, prepared a Deed creating a Nominee Trust. Annexed hereto and marked with the letter "C" is a copy of that Deed which records the basis on which my wife and I agreed to purchase the land as Trustee for the Third Defendant.
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> 10. In the course of the settlement of the purchase of the land my wife and I signed a Statutory Declaration further recording that we held ownership of the property in Trust for the Third Defendant. This Declaration was entered into for the purposes of satisfying the Inland Revenue Department in respect of GST issues. A copy is annexed and marked as Exhibit "D1".
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> 11. To complete the purchase arrangements were made to obtain funding for the proposed purchase development from New Zealand Finance Limited by Hibiscus Coast Properties Limited. Annexed hereto and marked with the letter "D1" is a letter from John Feast to us with a copy of an undertaking which we were required to sign for the benefit of New Zealand Finance Limited and the Third Defendant.

[18] Mr Thornton, on behalf of Mr and Mrs Bergin, argued that Mr and Mrs Cox were the registered owners of the property until 22 May 2002, when it was

transferred to Hibiscus Coast immediately prior to its transfer to the Bergins. He argued that at all times Mr and Mrs Cox had legal and beneficial ownership.

[19] It is necessary to set out the following chronology:

24 March 2000	Agreement for Sale & Purchase of the property signed by Mrs Cox "as Nominee".
28 March 2000	Letter from Mr Feast to solicitors for a finance provider, advising that Kiwi Homes Limited would be nominated as purchaser.
6 July 2000	Letter from New Zealand Finance Limited to "The Directors, Kiwi Homes Limited" offering finance for the purchase. In this letter the "customer" name has been amended by hand from "Kiwi Homes Limited" to "Stewart Neville Cox & Gayle Marie Cox". Mr and Mrs Cox's names have been crossed out from the list of guarantors.
11 July 2000	Resolution of directors and shareholders of Hibiscus Coast confirming the provision of a guarantee of Mr and Mrs Cox's obligations as borrowers.
20 July 2000	Transfer of property to Stewart Neville Cox and Gayle Marie Cox registered. Mortgages registered to Contributory Mortgage Nominees Limited (first mortgagee) and New Zealand Finance Limited (second mortgagee).
28 July 2000	Mrs Cox instructed Mr Feast to prepare a statutory declaration, to the effect that the property had been "purchased and paid for by Hibiscus Coast". Mr Feast noted as follows on the faxed instructions: S & G Cox purchased – they also borrowed the money to pay for the property.
1 August 2000	Mr Feast submitted a draft deed creating a nominee trust in respect of the property, together with a draft declaration to the Inland Revenue Department relating to accounting for the GST component on sale.
Undated	"Deed Creating Nominee Trust in Respect of

	Land" executed by Mr and Mrs Cox and Hibiscus Coast.
4 August 2000	Statutory Declaration executed by Mr and Mrs Cox recording that they hold the property as trustees for Hibiscus Coast.
12 February 2001	Mrs Cox advised the North Shore City Council that the "correct name" for the application for building consent for the property was Hibiscus Coast Properties Limited, not Kiwi Homes Limited.
12 October 2001	Agreement for Sale and Purchase of the property, signed by Hibiscus Coast and Mr and Mrs Bergin.
16 May 2002	Transfer from Mr and Mrs Cox to Hibiscus Coast.
17 May 2002	Transfer from Hibiscus Coast to Mr and Mrs Bergin.
20 May 2002	Proceeds of sale deposited to Hibiscus Coast's bank account.

[20] Reference was made to the following provisions of the "Deed Creating Nominee Trust in Respect of Land" ("the deed"):

> Recital B:
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> At the request of the beneficiary the Trustee entered into an agreement with [Mr and Mrs Cox] for the purchase of the property…
>
> Recital C:
>
> The deposit, and all other moneys required to be paid for the purchase of the property has been provided by the beneficiary by way of cash and borrowings.
>
> Clause 1(a):
>
> The Trustee has entered into the agreement to purchase the property which they hold and will continue to hold on trust for the beneficiary.

Clause 2:

Beneficiary to provide funds

(a) **Outgoings**

The beneficiary will provide the Trustee with all the money necessary to meet all outgoings payable in respect of the property as and when necessary.

(b) **Mortgages**

The beneficiary will provide the Trustee with all money which the Trustee may require to enable the Trustee to perform and comply with the covenants, terms and conditions contained in any mortgages over the property.

[21] Mr Thornton submitted that the terms of the deed, and Mr Cox's affidavit, are inconsistent with evidence of what actually occurred. Mr Thornton pointed to the following:

a) The initial nomination of Kiwi Homes Limited as purchaser, and borrower.

b) The subsequent nomination and transfer of the property to Mr and Mrs Cox as purchasers.

c) The funding, whereby Mr and Mrs Cox, personally, were borrowers, guaranteed by Hibiscus Coast

[22] Accordingly, Mr Thornton submitted that it is not true to say, as Mr Cox does, that all of the moneys towards the initial purchase and settlement of the property were provided by Hibiscus Coast. The documents show that the advances from the two financiers were to Mr and Mrs Cox, personally, not to Hibiscus Coast.

[23] Further, Mr Thornton submitted that the deed is, in any event, invalid. The witness to the deed has not added his or her name, address and occupation. Accordingly, the document does not comply with the requirements for a deed, as set out in s 4(1) of the Property Law Act 1952:

> Every deed whether or not affecting property shall be signed by the party to be bound thereby and shall also be attested by at least one witness and if the deed is executed in New Zealand the witness shall add to his signature his place of abode and calling or description but no particular form of words shall be requisite for the attestation.

[24] In his decision in *Patricia Margaret Mish-Wills v Graham John Burton*[5] Master J H Williams QC (as he then was) found that a document where the witness had failed to add his place of abode and calling or description meant that the document was not a "deed".

[25] Mr Bogiatto, in reply, noted that in the *Mish-Wills* decision, effect was given to the transaction evidenced by the deed. He submitted that a similar conclusion would be reached in the present case. However, the circumstances of *Mish-Wills* are different from the present case. The document with which that decision was concerned was described as a "Deed of Agreement" and it was held that if supported by consideration, was enforceable as an agreement. Consideration was found to be present, in the form of a forbearance to sue on the part of Ms Mish-Wills.

[26] On the question of ownership, I find that there is an arguable case that Mr and Mrs Cox were both legal and beneficial owners of the property up to the time it was transferred to Hibiscus Coast, immediately prior to its transfer to the Bergins.

Subdivision, Building Consent and Construction

[27] To succeed in their claim against Mr and Mrs Cox as developers, the Bergins also have to prove that they had sufficient involvement in the development of the property.

[28] Mr Bogiatto referred to Mr Cox's evidence, in paras 19-36 of his affidavit sworn on 1 September 2006. Mr Cox's evidence may be summarised as follows:

a) The initial application for a Land Use consent was prepared and lodged by Kiwi Homes Limited, on behalf of Hibiscus Coast, but later corrected to Hibiscus Coast.

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[5] *Patricia Margaret Mish-Wills v Graham John Burton* HC WN CP783/89 11 December 1989

b) Hibiscus Coast lodged the application for a Building Consent, in February/March 2001.

c) Hibiscus Coast lodged the application for subdivision consent.

d) The physical preparation of the consent applications was done by Hibiscus Coast, although the applications were "at times" written out by Mrs Cox. Hibiscus Coast was assisted by surveyors, engineers and architects/draftsmen. Associated costs were paid by Hibiscus Coast.

e) The final Code Compliance Certificate was issued by North Shore City Council to Hibiscus Coast.

f) Neither Mr nor Mrs Cox personally carried out any building work, or any supervision of building work. Hibiscus Coast contracted with the builder, and engaged other contractors. The builder generally liaised with suppliers, and with contractors.

g) Mr and Mrs Cox's involvement was limited to:

    i) Mr Cox being the point of contact between the builder and other trades to ensure that the development progressed in a timely manner;

    ii) Liaising with various professionals engaged by Hibiscus Coast, and providing information necessary for those people to undertake their work;

    iii) Writing out consent applications and writing out cheques for payment of fees and other costs;

    iv) Providing plans and specifications to the building suppliers and other contractors to obtain quotations or to engage them on behalf of Hibiscus Coast;

v) Co-ordinating the supply and delivery of material, and ensuring that contractors were on site at the appropriate time;

vi) Liaising with the Council to arrange inspections as appropriate, and being present when inspections were carried out.

[29] Further, Mr Bogiatto referred to affidavit evidence from the builder, three contractors, and an engineer. All said that Mr and Mrs Cox had had an administrative function as co-ordinators of aspects of the building project, on behalf of Hibiscus Coast, but had never been observed actually undertaking any building work.

[30] Mr Thornton argued that there was evidence that Mr and Mrs Cox were sufficiently involved in the process of subdivision, obtaining required consents, and building construction that they could be held liable as developers. In addition to ownership of the property, he referred to the evidence of funding advanced to Mr and Mrs Cox for the purchase. He also referred to Mr Cox's evidence of his and Mrs Cox's roles, set out at [28], above. That evidence, he submitted, pointed to the fact that they did have involvement in the consent, subdivision and construction phases.

[31] Mr Thornton also referred to the evidence of Mr Maiden, a building consultant engaged as expert witness for Mr and Mrs Bergin. Mr Maiden has inspected the townhouse, the North Shore City Council's file, and documents relating to the construction of the townhouse. He identified documents that appeared to indicate that Mr and Mr Cox's personal involvement in supervision of construction and contractors, purchase of materials, and provision of Producer Statements was to a greater extent than stated by Mr Cox.

Conclusion

[32] There is, in my view, sufficient evidence as to Mr and Mrs Cox's ownership of the property, and their involvement in the subdivision, building consent and construction phases to establish an arguable case for their being held liable as

developers. In the circumstances, I cannot conclude that Mr and Mrs Bergin's first cause of action against Mr and Mrs Cox cannot succeed.

Liability as directors of Hibiscus Coast Properties Limited

[33] This was an application for summary judgment. There was no application for strike out. As noted earlier, to succeed in an application for summary judgment a defendant has to show that the plaintiff cannot succeed on **any** of its causes of action. In light of my finding that Mr and Mrs Cox have not satisfied me that Mr and Mrs Bergin cannot succeed on their first cause of action, it is not necessary to consider the second cause of action.

Result

[34] Mr and Mrs Cox's application for summary judgment against the plaintiffs is dismissed.

[35] At counsels' request I reserve the question of costs. I invite counsel to confer on the matter of costs. If they cannot agree, memoranda are to be submitted. If memoranda are required, the plaintiffs' memorandum is to be filed within 21 days of the date of this judgment, with the second defendants' memorandum being filed within a further 7 days. Counsel should indicate whether they wish to be heard on the question of costs and, if so, a half-hour fixture may be allocated. If the parties do not wish to be heard, the memoranda are to be referred to me for a decision on costs.

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Andrews J