

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

**CIV 2007-404-004206**

BETWEEN HERMAN CHARLES FISHMAN, TANA  
GAIL FISHMAN AND ANTHONY JOHN  
WALKER AS TRUSTEES OF THE  
FISHMAN FAMILY TRUST  
Plaintiff

AND MATTHEW JOHN RIDGE, SALLY  
ANNE RIDGE AND SUSAN HELEN  
HARRISON AS TRUSTEES OF THE  
RIDGE FAMILY TRUST  
First Defendant

AND CARNACHAN ARCHITECTS LTD  
Second Defendant

AND SIMON JOHN CARNACHAN  
Third Defendant

AND NORTH CITY BUILDERS LTD  
Fourth Defendant

AND AUCKLAND CITY COUNCIL  
Fifth Defendant

Judgment: 19 December 2007

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**JUDGMENT OF HARRISON J**

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*In accordance with R540(4) I direct that the Registrar  
endorse this judgment with the delivery time of  
11.30 am on 19 December 2007*

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**SOLICITORS**

LawWorks (Auckland) for Plaintiffs  
McVeagh Fleming (Auckland) for First Defendants  
Keegan Alexander (Auckland) for Second and Third Defendants  
Minter Ellison Rudd Watts (Auckland) for Fourth Defendant  
Heaney & Co (Auckland) for Fifth Defendant  
Izard Weston (Wellington) for Sunday News

[1] There is nothing exceptional or particularly interesting about this proceeding. In fact, it follows a depressingly familiar course in this registry.

[2] The plaintiffs, the trustees of a family trust, are suing Matthew Ridge, his former wife, Sally Ridge, and Susan Harrison in their capacities as trustees of the Ridge Family Trust, along with architects, builders and the Auckland City Council, for the cost of remedial work to a property which they purchased in St Mary's Bay, Auckland. The dwelling is said to suffer a number of defects consistent with the leaky building syndrome which afflicts many dwellings recently constructed in the Auckland area. As a result of alleged defects, water is said to have penetrated the cladding of the dwelling, both interior and exterior, and timber framing resulting in decay and damage.

[3] The proceeding was filed in July 2007. All defendants have filed statements of defence and cross-claims. The case is in its early stages of preparation for trial.

[4] The Sunday News, a weekend newspaper, applied to the Registrar in September 2007 to search, inspect or copy the file associated with this proceeding. The newspaper apparently believes that the participation of Mr Ridge, a well known sporting and media personality, will be of some interest to the public. In an affidavit sworn in this proceeding, Mr Jonathan Marshall, a Sunday News journalist, justifies the application on this basis:

... I was surprised to learn that Mr Ridge was involved in a leaky building case as I believed he would have taken more than sufficient measures to weatherproof his home in this regard and in all likelihood would own a house of more than a modest nature. I do not know of either the nature of Mr Ridge's home, or the circumstances surrounding its construction. Despite not knowing the precise details of how Mr Ridge is involved in this dispute, I believe that publication of his involvement in such a dispute would dispel some of the 'myths' that surround 'leaky building syndrome'. Reporting of individual proceedings (rather than just on the general leaky building issue) gives the wider public real insight into the problem, highlighting the impact it can have on real people's lives.

[5] Correspondence followed between the Sunday News, its solicitors and the Registrar over whether or not the newspaper had a 'genuine or proper interest' in searching, inspecting and copying the file. The Registrar declined the Sunday News' request on 3 October 2007.

[6] After discussing the relevant legal principles, the Registrar's decision stated:

I have previously referred to the notes to rule 66 in *Sim's Court Practice* at HCR66.5. Those notes refer to *Re Fourth Estate Periodicals Ltd* (1989) 3 PRNZ 189 where it is suggested that it would normally be appropriate for the parties to a proceeding to have the opportunity to be heard. I also note that at HCR66.5 'Persons with genuine or proper interest', it is suggested that 'In relation to news reporters, it may be necessary to show an interest greater than that of the public at large, such as a specialist publication or where the matter is of considerable local or community importance: *Re Fourth Estate Periodicals Ltd* (above); *Currie v YMCA of Hamilton Inc* (1989) 2 PRNZ 343; *Pratt Contractors Ltd v Palmerston North City Council* (1992) 5 PRNZ 556; however, see *Titchener v Attorney-General* (1990) 3 PRNZ 60'.

I think it will generally be the case that media representatives can make out a genuine and proper interest in 'leaky building' cases. However when the volume of these cases and the wide reporting of the issues that has occurred is considered, it may be more difficult for media representatives to identify a need to have details of individual proceedings on an ongoing basis. I note that no special reasons for an interest in this particular case have been advanced. I also think that it might be difficult for you to show that your client has a 'an interest greater than that of the public at large'.

It is possibly not entirely certain that privacy and other issues can be considered by a Registrar considering a request under rule 66(9). However it has been my experience that in most cases where the court has considered a request based on a 'genuine and proper interest', that the parties have been consulted. While a formal application to view a proceeding file on notice to the parties might seem an unnecessary impediment to the expeditious consideration of a request, where there is any doubt at all about whether a 'genuine and proper interest' has been shown, it would seem reasonable to expect that the parties (who in this case have all taken steps in the proceeding) should at least receive notice that a request to view the file has been made.

In the circumstances this request is declined.

[7] The Sunday News now seeks to review the Registrar's decision. Notice of its application has been served on the parties to this proceeding. Originally only Mr Ridge advised of his intention to oppose. But, he has now withdrawn his opposition following publication of an article about the subject matter of the litigation in another Sunday newspaper on 25 November 2007.

[8] Ms Sarah Bacon, counsel for the Sunday News, has, in these circumstances, requested that I determine the application on the papers. She has filed an extensive synopsis of submissions, referring to many of the relevant authorities, both at first instance and appellate level. But the principles are fully summarised in the latest

appellate authority: *McCully v Whangamata Marine Society Inc* [2007] 1 NZLR 185 (CA).

[9] The issue is whether or not the Sunday News has a ‘genuine and proper interest’ in gaining access to the file; that is, it is ‘not frivolous or vexatious or merely prurient’: *McCully* at [46]. I accept that it is ‘an established newspaper’; Mr Marshall and the newspaper have already had some involvement with the background matters leading to the proceeding; and that there is a public interest in leaky building cases and the associated litigation: *Attorney-General v Palmer* [2004] NZAR 112; *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841. Also, the freedoms enshrined by the New Zealand Bill of Rights Act 1990 support the genuine and proper interest vested in a national newspaper. In particular, I refer to the right to freedom of expression – including to seek, receive and impart information and opinions – and subsequent authorities which have reaffirmed that principle: *R v Liddell* [1995] 1 NZLR 538 (CA); *Re Victim X* [2003] 3 NZLR 220 (CA) at 237-238. I add that once a person satisfies those threshold requirements, leave to search must be given subject only to the right to impose conditions.

[10] Here I accept that the Registrar erred. He accepted that media representatives may have a genuine and proper interest in leaky building cases generally. Nevertheless, the Registrar required proof that the Sunday News had a particular interest in this particular proceeding. Rule 66(9) provides for ‘leave to any person having a genuine or proper interest’ in any file, part of a file or document. I do not read the rules as requiring proof of a genuine or proper interest in a particular proceeding; that is, in the nature of an interest personal to the applicant.

[11] The issue is whether or not the interest relates to the subject matter of the proceeding. If the law was otherwise, the spirit and intent of the rules would be frustrated. It would mean that only the parties or those closely associated with one of them would be entitled to search, inspect or copy a file, part of a file or a document. There would be no purpose in r 66(9) if that was the case. Even though Mr Marshall’s rationalisation for the Sunday News request is hardly convincing or logical, the newspaper does have a genuine interest in the subject matter of the proceeding.

[12] Accordingly, I set aside the Registrar's decision dated 3 October 2007 and grant leave to the Sunday News newspaper to search the pleadings in this proceeding, namely the statement of claim and statements of defence, on condition that any article published in relation to the proceeding gives appropriate and balanced prominence to the nature of the claim and the nature of the defences.

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Rhys Harrison J