

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

**CIV-2014-404-770  
[2014] NZHC 1915**

IN THE MATTER OF            of an appeal from the Weathertight Homes  
Tribunal

BETWEEN                    COLIN LOUIS SAYLES  
Plaintiff

AND                            PETER JAMES ADAMS and SUSAN  
MARGARET ADAMS  
Respondents

Hearing:                    18 June 2014

Appearances:            Mr P Finnigan for the appellant  
Mr J Wood for the respondents

Judgment:                14 August 2014

---

**JUDGMENT OF THOMAS J**

---

*This judgment was delivered by me on 14 August 2014 at 4.00 pm  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

Solicitors:

Romaniuk & Associates Law Offices, Auckland.  
Rainey Law, Auckland.

[1] The appellant, Mr Sayles, has appealed against the final determination of the Weathertight Homes Tribunal dated 13 March 2014 upon the grounds that the decision is erroneous in fact and law. The Tribunal held that Mr Sayles was liable in negligence for breaching a duty of care owed to the respondents, Mr and Mrs Adams.

## **Background**

[2] The respondents bought a house on Waiheke Island in 1993. Extensive alterations were carried out between 1995 and 1996. The alterations were not weathertight.

[3] The alterations had been designed by an architect, Ron Stevenson. Gemini Construction Ltd (Gemini), a Signature Homes franchise, was engaged as the head contractor to carry out the alterations (the works). Gemini has now been liquidated and struck off the Companies Register. Terry Easthope was the sole director of Gemini. Mr Easthope has taken no steps in the proceedings and has previously been found liable for the Adams' loss. He is now bankrupt.

[4] The Adams sued, amongst others, Mr Sayles for the part he allegedly played in causing the loss. They claimed that Mr Sayles was the project manager for the work and responsible for it.

[5] The parties agree that the two possible versions of Mr Sayles' involvement before the Tribunal were follows:

1. Mr Sayles was the person at the heart of the operation, the employee of the head contractor who oversaw the work done, participated in the performing some of that work and was the on site co-ordinator. In short he was the project manager;
2. Mr Sayles was a mere labourer with some narrow expertise in masonry that he had picked up over the years. His authority over the site was limited to being a postman, directing the bits of information

that were received to the right people and, when Mr Easthope was not present, being the spokesperson for Gemini.

[6] At the appeal, the appellant's case appeared to have shifted somewhat. Mr Finnigan's submissions were on the basis that, even if Mr Adams performed a role as the co-ordinator, he did not assume the responsibilities of project manager.

[7] The adjudicator heard evidence from Mr Adams, Mr Sayles and Mr Ramsey. Mr Ramsey was the plasterer involved in the works. The Tribunal preferred Mr Adams' version of evidence deciding that Mr Sayles was the project manager and in charge of the overall quality of the works. It therefore found that Mr Sayles owed a duty of care to the Adams and the duty of care had been breached.

### **Grounds of Appeal**

[8] The appeal is on the grounds:

1. first, that the finding that Mr Sayles was the project manager was against the weight of the evidence and based upon general statements and opinion without reference to the detail of Mr Sayles' role;
2. secondly, that the adjudicator made a number of findings which were unreasoned in that they were not underpinned by any analysis of the evidence and findings of fact;
3. thirdly, that Mr Sayles more closely resembled the role of Mr Lake in *Lake v Bacic* and did not assume a responsibility for the work;<sup>1</sup> and
4. fourthly, the appellant relies on other cases where the courts have "drawn the line" in holding workers such as site managers and site co-ordinators under a duty of care similar to that of a project manager and distinguishes them from the much more limited role Mr Sayles performed on the project.

---

<sup>1</sup> *Lake v Bacic* HC Auckland, CIV-2009-004-1625, 1 April 2010.

## Appeal

[9] Section 93 of the Weathertight Homes Resolution Services Act 2006 (the Act) provides:

- (1) A party to a claim that has been determined by the tribunal may appeal on a question of law or fact that arises from the determination.
- (2) An appeal must be filed in—
  - a. the District Court if the amount at issue does not exceed \$200,000; and
  - b. the High Court if the amount at issue exceeds \$200,000.
- (3) For the purposes of subsection (2), the amount at issue in relation to a determination is—
  - a. the amount of any money required to be paid under the determination by the person filing the appeal (including any amount determined under section [90\(2\)](#)); or
  - b. if the appeal relates to a determination in which the tribunal has declined to require payment of any amount of money (or money's worth in terms of section 90(2)) to a claimant, or has required payment of an amount of money (or money's worth in terms of section 90(2)) that is less than the amount claimed by the claimant, the amount claimed unsuccessfully by the claimant.
- (4) A claimant may abandon so much of a claim to which an appeal relates as exceeds \$200,000 in order to bring the appeal within the jurisdiction of the District Court.
- (5) If an appeal is commenced by a person who is required to pay money to a party to a claim, the person may bring the appeal within the jurisdiction of the District Court by paying the other person the difference between the amount required to be paid under the determination and \$200,000.
- (6) Section 182 of the Building Act 2004 does not apply to an appeal under this section.

### *Approach to general appeal*

[10] On a general appeal, the appellate court has the responsibility of considering the merits of the case afresh.<sup>2</sup> In *Austin, Nichols & Co Inc v*

---

<sup>2</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].

*Stichting Lodestar*, Elias CJ stated that the appellate court must reach its own opinion “even where that opinion is an assessment of fact and degree and entails a value judgment”.<sup>3</sup> She continued:<sup>4</sup>

If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[11] This does not mean that the appellate Judge should be “uninfluenced” by the lower court.<sup>5</sup> What influence the lower court’s reasoning should have is for the High Court’s assessment. As Elias CJ stated in *Austin, Nichols*:<sup>6</sup>

The High Court Judge was obliged to reconsider the issue. He was entitled to use the reasons of the Assistant Commissioner to assist him in reaching his own conclusion, but the weight he placed on them was a matter for him.

[12] The extent to which an appellate court should defer to findings of fact on credibility made at first instance was discussed by the Court of Appeal in *R v Munro*.<sup>7</sup> The Court concluded that assessing credibility from a written transcript will not achieve better outcomes and, although credibility assessments are not sacrosanct, there are recognisable advantages in seeing and hearing witnesses in the context of the entire trial. The Supreme Court affirmed this approach in *Owen v R* where it recognised the advantages that juries (as opposed to appellate courts) have in assessing the honesty and reliability of witnesses.<sup>8</sup> Although these were criminal cases, the Courts’ comments are equally relevant to the civil context.<sup>9</sup>

[13] Asher J discussed of the rights of appeal pursuant to s 93 of the Act in *Lake v Bacic* where he said:<sup>10</sup>

---

<sup>3</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

<sup>4</sup> At [16].

<sup>5</sup> *Kacem v Bashir*, above n 2, at [31].

<sup>6</sup> *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 3, at [17].

<sup>7</sup> *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87; *K v V* [2012] NZHC 1129 when the Court noted these cases.

<sup>8</sup> *Owen v R* [2007] NZSC 102, [102, [2008] 2 NZLR 37.

<sup>9</sup> See *K v V* [2012] NZSC 1129.

<sup>10</sup> *Lake v Bacic*, above n 1, at [19]

...the appellate court in an appeal by way of rehearing such as this should carry out its own assessment of the facts and should not hesitate to substitute its own findings of the facts. Thus the appellant Court must apply independent judgment to the conclusion reached by the Court of first instance. Nevertheless...the onus is still on an appellate to show that the first instance Judge or Tribunal was wrong and in this regard the Tribunal has the particular advantage of having heard the evidence.

[14] In *Boyd v McGregor* it was said in the context of an appeal from the Weathertight Homes Tribunal:<sup>11</sup>

...this is an appeal and accordingly the precepts set out by the Supreme Court in *Austin Nicholls [sic]* apply...While it may be appropriate to hesitate before differing from an expert tribunal on issues of fact, if a consideration of the cases on which the parties relied showed the adjudicator's decision in law to have been wrong, then this Court should say so. If not, this Court should be slow to interfere.

[15] The comments advising caution before differing from an expert tribunal on issues of fact may be applicable to findings by an expert Tribunal relating to technical matters within the expertise of the Tribunal. That is not the position in this case where the issue is whether the findings of fact were justified on the basis of the evidence. There is nothing in my view which requires a departure from the principles laid down in *Austin Nichols*.

### **Basis of liability**

[16] The Tribunal described the defects in the works as:<sup>12</sup>

[T]he 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.

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

---

<sup>11</sup> *Boyd v McGregor*; HC Auckland civ-2009-404-5332, 17 February 2012; Hugh Williams J at [52].

<sup>12</sup> At [35] and [36]

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.

[17] The second statement of claim dated 8 December 2011 claimed:

...Colin Sayles was the site co-ordinator of Gemini, he undertook building work himself and had control over the other employees and contractors of Gemini.

Sayles owed the claimants a duty to exercise reasonable skill and care when undertaking:

- (a) Control of the site;
- (b) Performing building work personally; and
- (c) Directing the work of the other employees and contractors.

[He] failed to exercise due skill and care in exercising these tasks. In particular he built and/or the employees and contractors over which he had control built, the Property with the Defects and the Further Defect.

Sayles's failure to exercise reasonable skill and care above so the Property was built with the Defects and Further Defect, led to the claimants incurring the loss outlined at paragraphs 49-51.

[18] To be liable Mr Sayles must have undertaken the requisite degree of control and supervision of the project to mean that he assumed a degree of responsibility for ensuring that the building work (which later proved defective) was performed with reasonable skill and care.<sup>13</sup>

[19] Mr Finnigan said that the role performed by Mr Sayles was analogous to that performed by Mr Lake in *Lake v Bacic*. Mr Lake had no formal building training and worked as a labourer describing himself as the onsite gofer and site administrator. While he coordinated projects, that did not involve the application of building skills. Asher J considered Mr Lake's qualifications, experience and skill, his assumption of responsibility, the degree of reliance on Mr Lake by the claimant and Mr Lake's ability to foresee loss. He found no evidence that Mr Lake assumed

---

<sup>13</sup> *Body Corporate 202254 v Taylor* [2001] NZCA 317, [2009] 2 NZLR 17; *North Shore City Council v Wightman* HC Auckland CIV-2010-404-3942, 30 November 2010; *Boyd v McGregor*, above n 10; and *Lake v Bacic*, above n 1

responsibility for the quality of specific building work, rather that was left to the builders. Mr Lake had managerial site skills. The claimant had no specific reliance on Mr Lake as he did not contract with the owners. He may have been seen as the face of the building company but did not put himself forward as having any particular building skills. Given that particular function, Mr Lake would not have foreseen that anything that he was doing would cause loss.

[20] Mr Finnigan referred to the analysis carried out by Duffy J in *Body Corporate 185960 v North Shore City Council* and submitted that a similar exercise should have been undertaken by the Tribunal adjudicator.<sup>14</sup> It was, in his submission, incumbent on the adjudicator to articulate how she could conclude that Mr Sayles was the project manager. She failed to do so, he said.

[21] That case concerned a residential development, Kilham Mews, and the role of Mr Gailer. Relevant to this case was the assessment of his liability as project manager. Duffy J discussed the liability of a project manager in the following terms:<sup>15</sup>

But, for the purpose of determining whether he can be found liable as a project manager under the principle in *Bowen v Paramount Builders*, it is necessary to look at his role in the development from a different perspective. This is because the liability the law imposes on contractors, architects or engineers and *a fortiori* project managers of construction projects such as Kilham Mews is different in some respects from the liability which is attached to developers of those projects.

The principle to be derived from *Bowen v Paramount Builders* will apply to anyone having a task in the construction process (either as contractor or subcontractor) where the law expects a certain standard of care from those who carry out such tasks.

[22] In respect of the basis of liability she said:<sup>16</sup>

In *Body Corporate No 188289 v Leuschke Group Architects* Harrison J identified the cornerstone of liability as being the assumption of a degree of personal responsibility for an item of work which was subsequently proved to be defective. It follows that someone who takes on the role of project manager of a residential construction project assumes a degree of

---

<sup>14</sup> *Body Corporate 185960 v North Shore City Council*, HC Auckland CIV-2006-004-3535, 22 December 2008.

<sup>15</sup> At [104] and [105].

<sup>16</sup> At [107].

responsibility for ensuring that the work is performed with reasonable skill and care.

[23] In that case Mr Gailer's obligations were set out in an agreement which provided he was the manager of the project and had the obligation to ensure the buildings were constructed in a good and workmanlike manner. Duffy J listed the tasks carried out by Mr Gailer as accepted by him. It was that type of analysis which, in Mr Finnigan's submission, should have been carried out by the Adjudicator. However the lists of tasks were those Mr Gailer accepted were carried out by him. Duffy J simply noted they were consistent with Mr Gailer being the project manager.

[24] Therefore I am not persuaded that the case takes the matter any further than emphasising the need to consider the nature of the duties Mr Sayles was required to perform and what he in fact did.

### **Issue**

[25] The real issue in this case is whether the Tribunal was justified in finding on the balance of probabilities that Mr Sayles' role was as a supervisor of the works with responsibilities and duties of care owed to the Adams or whether he was simply performing the role as a site co-ordinator responsible only for the work carried out and controlled by him being the block work to the lower floor of the property.

[26] It having been clarified by Mr Wood for the respondents that there would be no pursuit of the claim against Mr Sayles unless he was found to have acted in a project manager role, there was no need for the Court to make any finding as to whether Mr Sayles had been involved in incorrectly applying the waterproof membrane.

[27] It is helpful to analyse the evidence in respect of three periods, activity pre-contract, what was done on site and post contract.

### **Activity pre-contract**

[28] Mr Sayles is a qualified fitter and turner but did not give evidence of any building or carpentry qualifications. His evidence was that he was employed on wages by Mr Easthope on Mr Easthope's home and on two other building works under Mr Easthope's direction. He did not have any directorial interest or management involvement in Gemini or any shareholding in Gemini. Mr Sayles had been bankrupt and was an undischarged bankrupt until about 1996.

[29] Mr Adams' evidence was that Mr Sayles was active in soliciting their business and took steps to prepare for the works. Mr Sayles said he played no part in this and simply visited the site pre-contract to check the alignment of the block work in the existing house.

[30] Mr Sayles' evidence was that he made two or three inspections of the property in the preliminary negotiation stage to determine if the house could be jacked up to make it square. That was relevant to the blockwork at the property which Mr Sayles carried out himself. If the house could not be made square, then Gemini would not be able to carry out the alterations.

[31] The Signature Homes brand was already known to Mr Adams before he dealt with Messrs Easthope and Sayles. In the Tribunal Mr Adams gave evidence about a meeting on 10 April 1995 attended by Mr Easthope, Mr Sayles and Mr Adams prior to the contract being entered into. It was put to Mr Adams' that he had assumed that the works were to be carried out under the direction of Mr Sayles. His response was:

Well it was based on the fact that at the first meeting I was told Mr Sayles was going to be my point of contact and in charge of ensuring the quality of the job was up to the Signature Homes brand that I had seen elsewhere. I think it was a fair assumption to assume that he would be directing the work.

[32] In Mr Finnigan's submission that was the first time that had ever been mentioned, some 19 years after the events in question. Mr Finnigan says that neither Mr Adams' affidavit in support of the application to join Mr Sayles in the proceedings, nor the second amended statement of claim, nor Mr Adams' witness statements had previously contained such an allegation. In those circumstances, Mr Finnigan submits the Court cannot accept that statement as reliable evidence.

[33] However, I am satisfied from the material that this was not the first time Mr Adams had made an allegation about Mr Sayles' involvement in the works. In his affidavit in support of the application for joinder Mr Adams referred to meeting Mr Sayles on 10 April 1995 and said:

Mr Sayles assured me that Gemini was able to match the quality of the Signature Homes buildings I had seen on the North Shore and showed me and my wife another house he had built in Onetangi. Mr Sayles appeared to have a wide range of building knowledge and it was in part his interactions with me that persuaded me to engage Gemini as I know he would have a guiding hand in construction of our home.

[34] Mr Adams had a file note regarding the meeting of 10 April 1995. Mr Sayles was unable to recall the meeting.

[35] Following the meeting Mr and Mrs Adams were taken by Mr Sayles to view a property with which Mr Sayles had been involved on Waiheke Island. Mr Sayles recalled that but claimed his work on that building was also limited.

[36] Mr Adams gave further details of Mr Sayles' involvement in his supplementary witness statement dated 5 February 2014 where he said:

The impression that Mr Sayles gave me in all our meetings prior to engaging the builder was that Mr Easthope was running the business, doing the office-work and undertaking the administrative task, while he would be running the on-site work. He held himself out as having the skill to do so. It made sense to me that one person would oversee and check the work on site rather than leave each employee and sub-contractor to their own devices.

[37] Mr Sayles admitted that he went to the sites six times before starting work. Mr Adams thought that Mr Sayles was the only Gemini employee who had been on site prior to the works starting. Mr Sayles disputed that but could not suggest who else might have been on site.

#### *Documentation pre-contract*

[38] The contract, which comprised a quote and a letter, were authored by Mr Easthope on behalf of Gemini and sent to Mr Adams. The contract was signed by Mr Adams and Mr Easthope for Gemini. None of those documents involved Mr Sayles.

[39] Mr Adams made a file note of his conversation on 15 March 1995, before the contract with Gemini was entered into, with Mr Hastings, a builder who did some work at the property before the involvement of Gemini. He noted that Mr Sayles had been on site looking at stage two, the work to be undertaken by Gemini. Mr Adams then wrote to Mr Hastings on 12 April 1995 expressing his hope to make a start “with Colin Sayles’ firm next week”. Mr Adams’ file note of a telephone call with Mr Hastings on 21 April 1995 recorded that Mr Hastings had passed the key to Mr Sayles, something Mr Sayles could not recall.

[40] Mr Adams wrote to Gemini by letter dated 12 April 1995 attaching a list of amendments for the works. That noted:

It is agreed the external concrete block veneer should be removed & replaced with “Hardiebacker” & timber framing etc. as recommended by Colin Sayles.

[41] Mr Adams accepted that Mr Sayles did not recommend use of the product Hardiebacker on the property but said Mr Sayles suggested it be continued around the rear of the property. The use of Hardiebacker was not in itself a contributing factor to the weathertightness issues with the property, although correctness of its installation by Mr Ramsey was at issue. The reason for reference to Hardiebacker is the extent to which it shows Mr Sayles had a role in the oversight of the works. Having reviewed the transcript, I am satisfied that Mr Adams acknowledged that Hardiebacker had been specified by the architect and his point was that Mr Sayles suggested that system of cladding be continued on to the rear of the house. That is corroborated by Mr Adams’ letter of 12 April 1995. Mr Sayles denied that he made the recommendation.

### **On site work**

[42] Mr Sayles portrayed his role as being a general hand. He said that Mr Easthope worked off Waiheke Island during the week but was on site during weekends including Sundays at times. Mr Sayles described himself as co-ordinator and as a non experienced labourer fulfilling non skilled work. He accepted that he was the point of contact between workers and Mr Easthope but said he did not

undertake any supervisory or management role. He did not complete any job sheets as to progress of the works.

[43] Mr Sayles was involved in painting the liquid membrane on the deck but said he did not do any of the carpentry work. He had nothing to do with construction of the deck or with nailing through any of the liquid membrane. He had nothing to do with the plastering work or the installation of any flashings. If he were involved in any carpentry, that was under direction and he would report back to Mr Easthope. (p 71 of transcript).

[44] The Tribunal heard evidence from two others present during the building work: Mr Adams and Mr Ramsey, who was on site while applying three coats of stucco plastering.

[45] In his first witness statement Mr Adams said:

I recall visiting the site during construction 5 or 6 times. Mr Sayles was always there and he seemed to be in charge. As to work I saw him undertaking himself it was the block-work to the lower storey of our home, working with timber to straighten the walls, and applying the liquid applied membrane to the deck.

Whenever I spoke with Mr Sayles he was clear with what stage the work had got to, what materials had been used and how things had been built and what was needed in the near future. The details he knew gave me the impression, not that he was merely following the instruction of others, but that he was actively monitoring the progress of the work.

[46] At paragraph 7 and 12 he said:

Mr Sayles either did the work himself, or directly supervised it.

Given what I recall of the construction of our home I cannot see how Mr Sayles was unaware of the defects that it was being built with. He cannot have failed to notice that either he or employees he was co-ordinating had done, or were doing the following:

- (a) Installing the cladding so that it was hard against the deck and ground level;
- (b) Fixing the external joinery with the manufacturer's recommended waterproofing;
- (c) Nailing or screwing the deck through the waterproofing membrane;

- (d) Applying the waterproofing membrane to the roof and deck in a way that did not adequately waterproof the substrate of those areas.

[47] At the Tribunal Mr Adams' evidence was that Mr Sayles was his point of contact for site matters. Mr Adams understood it was Mr Sayles' role to oversee all the work on site. Mr Adams gave evidence of discussions with Mr Sayles about the thickness of GIB board in the ceilings; using two layers of building paper instead of one; that a steel beam shown on the drawings had not been installed as it was not needed; Mr Sayles' suggestion of revising the bathroom and laundry layouts; and Mr Sayles' recommending a new profile for the skirting.

[48] Mr Adams' conceded that Gemini (as opposed to Mr Sayles) employed three labourers but would not concede that Gemini employed Mr Ramsey, notwithstanding Mr Ramsey's evidence to the contrary.

[49] Mr Ramsey agreed that Mr Sayles was the site co-ordinator liaising between sub-trade's and workers. Mr Ramsey's evidence before the Tribunal was that, if he had any questions regarding the job, he always raised them with Mr Sayles and that he worked under Mr Sayles' direction. Mr Sayles was onsite most of the time Mr Ramsey was. He said:

When I was on site any questions about detail or, you know, anything to do with the site, I would go to Colin, he was basically managing the job...well as I say if there was any question about detail on the site, you know, regardless, how far the plaster was going to be or whatever, I would - I mean it's such a long time ago, all I can recall is that I'd ask him the questions

[50] Mr Ramsey said his comments as to who was in charge were based on his impression of how the site was run, he being an experienced tradesman with "a good handle" on who would be in charge of a site.

[51] Mr Ramsey considered Mr Sayles to be the site manager and said it was the site manager's job to supervise the quality of the work. He said Mr Sayles "directed the work onsite".<sup>17</sup> He said the work was inspected and approved by Gemini. When asked who from Gemini inspected the work, Mr Ramsey was unable to say.

---

<sup>17</sup> Brief of Evidence at [5].

[52] There was no evidence from any of the other workers on the site who apparently could not be located.

*Documentation during the works*

[53] Mr Adams' file note of 24 June 1995 refers to a telephone conversation with "Neil" about window size. Mr Adams' file notes between 23 May and 18 July 1995 referring to discussions with the architect do not refer to Mr Sayles.

[54] Other contemporaneous documents support Mr Ramsey and Mr Adams' assessment: the Lincoln Aluminium specifications were sent to Mr Sayles; when Mr Adams wrote to Gemini he mentioned his discussion with Mr Sayles about the balustrade alterations; Mr Adams wrote to Mr Easthope and Mr Sayles in June on four aspects of the work (living room, flat roof, fixing details of balustrade and bathroom); Mr Sayles wrote to Mr Adams about a variation to the roof and described himself as the site co-ordinator.

**Post contract**

[55] When the weathertightness problems became apparent, the Adams first contacted Mr Stevenson, the architect, who recommended they contact Mr Sayles. Mrs Adams called Mr Sayles and made a note of that. Mr Sayles was adamant he had not spoken to Mrs Adams. Mr Sayles made an inspection a few weeks later and Mr Adams recalls him as demonstrating an intimate knowledge of the construction of the home. Mr Sayles offered his services in three months when he would be available.

[56] Mr Sayles' evidence was that when he inspected the leaks he did not do so as a building expert but using "pretty simple logic".<sup>18</sup>

---

<sup>18</sup> P 51, line 22.

## **Appellant's submissions**

[57] Mr Finnigan referred to the findings of the adjudicator that the available documents and records tended to support Mr Adams' recollection of events; that Mr Ramsey's evidence was that Mr Sayles was the project manager; that during pre-contract discussions Mr Adams was advised that Mr Sayles would have the role of project manager and would be responsible for the quality of the job; that Mr Sayles met Mr Adams during the contractual negotiations and suggested some changes to the plan; that technical information was provided to Mr Sayles by the office manager of Gemini; that Mr Sayles' building experience and skills were not as limited as he says they were; and that Mr Sayles not only carried out some of the building work but controlled the work carried out by Gemini.

[58] In Mr Finnigan's submission those conclusions are without evidential foundation, do not support the findings on the balance of probabilities and, in crucial respects, are dependent upon Mr Adams' assumptions.

[59] Mr Finnigan said that all Mr Adams could describe, when he said that "Mr Sayles was always there and he seemed to be in charge", was his impression. That is insufficient, in his submission, to underpin any finding of responsibility on Mr Sayles for control of the overall construction. Mr Adams made assumptions, he said, and, at its highest, the evidence shows that Mr Sayles was the site co-ordinator.

[60] Mr Finnigan also referred to detailed notes made by the previous builder, Mr Hastings, and contrasted them with the lack of similar detailed notes or letters on the part of Mr Sayles. The lack of any such written material further supports Mr Sayles' position, Mr Finnigan said.

[61] In Mr Finnigan's submission, the evidence corroborates Mr Sayles' evidence that, when a technical building matter arose, Mr Adams discussed it with the builder, Neil, not with Mr Sayles. Mr Finnigan placed great weight on Mr Adams' hand written note showing that Mr Adams discussed a question regarding window size with Neil. If Mr Sayles performed the role alleged then any such discussion would have been with Mr Sayles, said Mr Finnigan.

[62] Mr Wood expressed concern about Mr Finnigan's reliance on this hand written note given that Mr Adams was not asked about it at the Tribunal hearing and it was not relied on in closing submissions.

[63] Mr Adams was wrong factually, in Mr Finnigan's submission, in his evidence about Mr Sayles' involvement in the choice of Hardiebacker. That had been a choice of the architect. The only documentation involving Mr Sayles shows him passing on pricing information for the roof and describing himself as the site co-ordinator. It does not show control of building work. The documents do not prove that Mr Sayles was involved in design.

[64] The burden of proof of establishing that Mr Sayles was controlling the works rests with the Adams. In Mr Finnigan's submission criticising Mr Sayles for not calling Mr Easthope as a witness, not producing bank statements or his income tax returns now 20 years old is tantamount to shifting the burden of proof.

#### **Respondent's submissions**

[65] Mr Wood pointed out that the Tribunal was faced with a difficult task as the parties involved were asked to recall events from 19 years ago. He said their evidence needed to be carefully considered in that light and that both sides had reasons, however unconsciously, to recall things that cast their version of events in a better light.

[66] Mr Wood referred to Mr Sayles' own evidence. He noted that Mr Sayles did not have file notes, accepting that it was natural for him to be less sure of his memory as a result. There was one time during his evidence when Mr Sayles changed his position. In contrast Mr Adams took file notes as was his practice.

[67] Mr Wood invited the Court to come to the same view as the adjudicator finding that Mr Sayles was an unreliable witness and that Mr Adams' record on matters in dispute should be trusted.

## Analysis

[68] The key factual findings of the Tribunal were as follows:<sup>19</sup>

[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.

[69] I have carefully perused the transcript and the documentation referred to. I am satisfied that the adjudicator properly assessed the evidence and reached a conclusion safely grounded in the evidence. I am mindful of the adjudicator's assessment of the credibility of the parties, noting that Mr Adams' version of events was supported by the only other person who had been on site and who gave

---

<sup>19</sup> *Adams v Easthope* [2014] NZWHT Auckland 02.

evidence, Mr Ramsey. I have reconsidered the issues and taken account of the reasons of the Tribunal in reaching my conclusion. I concur with the assessment of the Tribunal that weight should be attached to the following:

1. Mr Adams had a practice of file noting his everyday interactions with people. Only some of those were in evidence given that many of his notes were lost by solicitors previously acting for him. He had, however, relatively recently refreshed his memory from reading those notes;
2. The adjudicator, who had the benefit of seeing and hearing from the witnesses, considered that Mr Adams had clearly a better recollection of key events than Mr Sayles;
3. Mr Sayles had no contemporaneous records of his own to refresh his memory;
4. Mr Sayles was unable to recall the events described in Mr Adams' contemporaneous notes;
5. Mr Sayles could only recollect those events which were not associated with weathertightness defects;
6. Mr Sayles' recollection of what happened on site was not objectively likely for example, the Tribunal accepted that Mr Ramsey's work of applying solid stucco plaster would not have involved using a spray gun as Mr Sayles had said;
7. Mr Sayles relied purely on his own evidence rather than any documents or supporting witnesses;
8. The documents that were in evidence tended to support Mr Adams' evidence.

[70] For those reasons the evidence of Mr Adams is preferred to that of Mr Sayles.

[71] The contract was between Mr Adams and Gemini. The contract documents were relatively scant. The documents consisted of a list of estimated costs for each stage; a timeline; a “schedule of particulars for building and land sale contracts” which consisted of a one page printed form filled in by hand with the client and builder (Gemini Construction) named but with no reference to the involvement of any other personnel, for example the architect; and an addendum setting out details of the component parts of the works but again with no reference to personnel. Had the contract been detailed and comprehensive, reference to any project manager would be expected. It was not such a contract and the fact that Mr Sayles’ role as project manager was not provided for does not preclude a finding that he was in fact project manager.

[72] No matter what title Mr Sayles may have given himself or how he or others described him, nomenclature is not determinative. The issue is the work in fact undertaken by Mr Sayles and the obligations assumed by him. I am satisfied that Mr Sayles’ role was as project manager. Mr and Mrs Adams dealt directly with him and relied on him to ensure the job was done. There was a proximate relationship between them such that Mr Sayles owed Mr and Mrs Adams a duty of care. Mr Sayles was the person responsible for ensuring that the works were carried out with reasonable skill and care. His role is factually distinguishable from that of the plaintiff in *Lake v Bacic* on which Mr Sayles relies. Mr Lake’s role was organisational. He had no particular design or building skills and there was no evidence that he assumed any responsibility for the quality of the specific work. That stands in contrast to Mr Sayles for the following reasons:

1. Mr Sayles was clearly heavily involved prior to the contract being entered into. He and Mr Easthope met with Mr Adams.
2. Mr Sayles took Mr and Mrs Adams to view another house built by him or in which he had been involved. It defies credibility that he would do so if he were simply a builder helping out on the site. That he did so supports Mr Adams’ version of events and the assurances he says he was given by Mr Sayles.

3. Mr Sayles' involvement pre-contract and the credibility findings made by the adjudicator support the finding that Mr Sayles gave the assurance of quality Mr Adams said he did before the contract was entered into.
4. Mr Adams' evidence of what he observed when he was onsite. His impression that Mr Sayles was in charge was based on Mr Adams' observations and interactions with Mr Sayles. Mr Adams is clearly an intelligent and detailed man. His meticulous note taking meant he was able give examples of why he reached the conclusions set out in paragraphs 47 and 48 above. That Mr Adams was wrong in his assertion that Mr Sayles had employed Mr Ramsey simply confirms Mr Adams' evidence of who appeared to him to be in control of the works.
5. Mr Ramsey, the only other person present on site who gave evidence, also considered that Mr Sayles was in charge. It was to Mr Sayles whom Mr Ramsey referred if he had any questions. Mr Ramsey considered it was Mr Sayles who was responsible for the quality of the works. Mr Ramsey was an experienced tradesman and, as such, his opinion carries some weight. Mr Ramsey's description of the company being run by Messrs Easthope and Sayles might be legally incorrect but again is evidence of who appeared to be in control.
6. That Mr Sayles is more experienced than he asked the Tribunal to believe is evident from the recollections of Mr Adams and Mr Ramsey.
7. The correspondence to Gemini from Mr Adams was either marked for the attention of Mr Easthope and Mr Sayles or referred to Mr Sayles. That supports Mr Adams' recollection that Mr Easthope was in charge of administrative matters and Mr Sayles was in charge of site matters. If Mr Sayles were simply a general hand on site, it seems unlikely that Mr Adams' obvious misapprehension would not have been corrected.

8. Simply because Mr Adams made a file note of a conversation with the carpenter, does not detract from Mr Sayles' role at the site. There may have been many different reasons for the conversation, for example, that Mr Sayles was unavailable that day. It is something to put into the mix but does not undermine the weight of the rest of the evidence to a material degree.
9. There is clear evidence that Mr Sayles was involved in discussions about the use of Hardiebacker, the balustrading, roofing, walls and windows. He discussed with Mr Adams the changes to the drawings, and why they had been made. He suggested revisions. Mr Sayles was clearly involved in all aspects of the works and his role was not limited to responsibility for the block work to the lower floor as claimed by him. His involvement was not limited to a coordination role.
10. Given the lapse of time, many records are unavailable. Such there are, however, support Mr Adams' recollection.
11. Mr Sayles was contacted and attended the property when the problems became apparent. The architect suggested the Adams contacted Mr Sayles. Mr Sayles volunteered to undertake remedial work. That supports Mr Adams' recollection that Mr Sayles had been the lead person on the site. In the minds of the Adams, he was the person best placed to explain what might have happened. Mr Sayles willingly became involved and offered to assist in effecting repairs.

[73] I do not accept that the adjudicator shifted the onus of proof when referring to the fact that Mr Sayles did not produce any documents or evidence in support of his recollection of events. She was simply stating a matter of fact in contrast to the evidence on behalf of the respondent.

## **Decision**

[74] For the reasons given I concur with the decision of the Weathertight Homes Tribunal and the appeal is dismissed.

[75] There would seem no reason why costs should not follow the event on a 2B basis. If there is any dispute as to this, leave is given for memoranda to be filed.

---

Thomas J