Recently 2 different Weathertight Homes Tribunal ("**WHT**") adjudicators made interlocutory orders removing AHI Roofing Limited ("**AHI**") from proceedings before them (procedural order dated 29 February 2012 in TRI-2011-100-000064 and procedural order dated 12 March 2012 in TRI-2011-100-000070).

In each case, AHI contracted with the developer or headcontractor to supply and install roofs on the residential homes the subject of the proceedings, but subcontracted the installation work to independent subcontractors. In both proceedings, the WHT applied *Cashfield House Ltd v David and Heather Sinclair Ltd* [1995] 1 NZLR 452 to hold that AHI was not liable for the alleged negligence of its independent contractors.

If the WHT and courts apply *Cashfield House* in this way in future, then it could have a material impact on the ability of homeowners to recover damages given the dwindling pool of financially viable respondents and defendants in these types of cases.

As with construction generally, it is commonplace for head contractors to engage independent contractors for various parts or stages of building a residential home. Curiously, the use by defendants of *Cashfield House* as a defence is not so common.

Perhaps this is because the builder, who is usually the "head contractor", is often independently liable for some aspect of their own work or indirectly for their inadequate supervision of the subcontractors, with the result that any separate negligence of the subcontractor is immaterial or relatively so.

The issue becomes a live one where the negligent subcontractor is impecunious, obliging the claimant to establish liability against the headcontractor in order to achieve a recoverable judgment. If the subcontractor is negligent, but the headcontractor is not, the issue is starkly exposed.

In these weathertight homes decisions, it appears to have been accepted that AHI was not negligent itself, so the parties opposing AHI's removal (equivalent to a strike out in the courts) were obliged to establish that AHI was, or could be, liable for their subcontractors' negligence.

The procedural orders

The written reasons in support of the WHT's order in TRI-2011-100-000064 do not reflect that the "opposing parties" put up a detailed analysis of *Cashfield House* to the WHT adjudicator. The WHT appears to have taken the view that a principal will not be fixed with liability for a subcontractor's negligence unless the subcontracted activity is a particularly hazardous one or the principal breached a duty to select, instruct or supervise with due care and skill. But is this what *Cashfield House* says?

In the TRI-2011-100-000070 decision, the WHT took the view that *Cashfield House* stands for the proposition that a principal has no vicarious liability for the negligence of an independent contractor. But is this the Ratio of *Cashfield House*?

Cashfield House

"Vicarious liability" is a familiar concept. It refers to the joint and several liability imposed on a principal who engages an agent to do something and they do it negligently. Employment supplies the paradigm setting for such liability.

In *Cashfield House* Justice Tipping debunked the notion that vicarious liability is relevant to the consideration of whether a principal is liable for the negligence of its subcontractor stating:

> "… *I consider that it is preferable to reject any thought of vicarious liability and concentrate on whether the principal is in breach of a primary duty, either personal or non-delegable*". (Page 463, line 56)

Earlier in the Judgment (page 460, line 47), His Honour referred to an extract from Salmond and Heuston on the Law of Torts (19th ed, 1987) whose authors state at para 184, p544:

> "*The liability of the employer of an independent contractor is not properly vicarious: the employer is not liable for the contractor's breach of duty; he is liable because he has himself broken his own duty. He is under a primary liability and not a secondary one*."

The most recent edition of Salmond and Heuston repeats this passage in the same terms (see 21st ed, 1996 at para 184, p544).

Justice Tipping began his analysis of the law stating:

> "*It is important before proceeding further with this topic to be clear about terminology and the ambit of the discussion. Reference to vicarious liability of a principal for the negligence of an independent contractors is reference to what is sometimes called the principal's secondary liability. <u>The point I am about to discuss arises when it is said that the principal is liable for the negligence of the independent contractor in circumstances where the principal has no primary liability</u>. This is to be distinguished from a situation where the principal is in breach of an independent, i.e. primary duty of care; for example a duty to select the independent contractor carefully or a duty to give the independent contractor appropriate instructions or information. <u>The point is also to be distinguished from a situation where the principal has a primary and non-delegable duty and thus a duty to see that the independent contractor takes appropriate care</u>".*
>
> *If the principal owes a personal duty of care, a breach of that duty will result in the principal having a primary liability. The present issue is whether there are any circumstances in which a principal should have vicarious liability for the negligence of the independent contractor solely because the independent contractors has been negligent*." (See page 460 line 10).

This article focusses on the portions underlined by the writer.

In respect to the WHT's procedural orders mentioned earlier, the key issue ought, arguably, to have been whether AHI owed a primary or non-delegable duty, not whether it is liable for its sub-contractors simply because it engaged them.

The legal principles espoused in *Cashfield House* are not challenged in this article and it is accepted by the writer that the authority stands for the general rule that where a principal employs an independent contractor it is not generally liable for the contractor's negligence, via vicarious liability or otherwise. *Cashfield House* is not about whether or not the principal there owed a primary or a non-delegable duty however. A "primary duty" argument was not alleged in that case (see page 463, line 23).

The facts in *Cashfield House* involved a landlord (Cashfield House Limited ("**CHL**")) who wished to carry out demolition work on one floor of its building. CHL hired an independent contractor with demolition expertise to do the work. The contractor, who was not supervised or controlled by CHL, did the work negligently and caused damage to another occupier of the building who sued CHL on the basis it was vicariously liable for its contractor's negligence.

Cashfield had no demolition expertise and, as mentioned no argument was raised that it owed any primary or non-delegable duty. There were no special considerations arising from the nature of the work, which made it particularly hazardous in nature. In such circumstances, perhaps it was inevitable that the general rule of "no liability" would apply.

Had Cashfield owed a personal duty however the position would have been different. Tipping J pointed out that where a principal owes a duty of care which cannot be delegated to someone else, then:

> "… *the principal has a personal and primary duty to exercise appropriate care and if the principal chooses to entrust the performance of that to someone else the principal will be liable if the other person fails to take necessary care*." (See page 463, line 16).

In *Cashfield House* the court considered examples where non-delegable duties have been imposed historically i.e. where dangerous activities had been carried on by the contractor (*Rylands v Fletcher*) or where a land-owner owes duties to their neighbours in certain other circumstances such that the duties cannot be delegated. These factors were held to be irrelevant in *Cashfield House* and, in the writer's view, are similarly irrelevant in the WHT proceedings involving AHI.

AHI Roofing Limited

The context of the WHT proceedings against AHI are distinguishable from those in *Cashfield House* in the following key respects:

- Unlike CHL, AHI had contracted with the developers or headcontractors to supply and install the roof. It follows that AHI owed a duty of care, at least, to those it contracted with to ensure installation was carried out with due care and skill.
- Section 7(1) of the Building Act 1991 provides that "*All building work shall comply with the building code to the extent required by this Act, whether or*

not a building consent is required in respect of that building work." Section 17 of the Building Act 2004 is in similar terms. AHI contracted to do the work, so arguably were subject to these provisions.

- In the context of residential home construction, it is reasonably settled jurisprudence that all those involved in the construction, whether as headcontractor or subcontractor, owe duties of care to subsequent homeowners.

This article is not about whether AHI could be argued to have breached a duty to select, instruct or supervise its roof installer subcontractors. That is a factual matter in respect to which AHI's arguable reputation as a leading roof designer and supplier may be relevant is might any internal policy or practice it may have regarding how it selects, trains, if it does, and or supervises and or signs off the work of its subcontractors.

This article is about whether a primary or non-delegable duty exists outside any selection, instruction or supervision related duties.

Is the contract between AHI and the developer relevant?

In *Cunat Products Ltdv Landbuild Ltd* [1984] 3 All ER 513 His Honour Sir William Stabb QC of the English High Court (QBD) was faced with the situation where the main contractors did "*absolutely nothing, except to hand over the work to the subcontractor to be done by them*". He posed the question "... *whether or not they* [the main contractors] *owed to a primary duty of care which they could not delegate to anyone else".* Later and in answer to his this question, His Honour stated:

> "*I take the view that [the main contractors] by entering in to this contract to erect a factory which was properly designed and built, were under a common law duty of care to take reasonable steps to see that this result was achieved. They took no steps and, in the result,* [the employer - plaintiff] *suffered damage in consequence of the collapse of the roof. The duty of* [the main contractors] *was a primary duty which they could not delegate to* [the subcontractor] *or anyone else*." (See page 523 line d).

The learned authors of Salmond and Heuston say:

> "… *it is important not to give an undue advantage to the ignorant employer who confides all his affairs to independent contractors*". (See 21st ed, 1996 at para 21.13(1) under the heading "Duty to take reasonable care", p462)

In the footnote to this passage, the learned authors cite *Cunat Products* with a less than ringing endorsement by stating: "*Perhaps this is the justification for Cunat Products … (defendant builders said to be under a "primary duty which they could not delegate)*".

The tentative reference to *Cunat Products* appears justified by the decision of the House of Lords in *D & F Estates v Church Commissioners for England* [1988] UKHL 4, [1989] AC 177. Where at page 19 the Court rejected a submission that a non-delegable duty is owed to third parties by any main contractor in the building industry who contracts to erect an entire building. The Court said:

> "*I cannot recognise any legal principle to which such an assumption of duty can be related. Just as I may employ a building contractor to build me a house, so may the building contractor, subject to the terms of my contract with him, in turn employ another to undertake part of the work. If the mere act of employing a contractor to undertake building work automatically involved the assumption by the employer of a duty of care to any person who may be injured by a dangerous defect in the work caused by the negligence of the contractor, this would obviously lead to absurd results. If the fact of employing a contractor does not involve the assumption of any such duty by the employer, then one who has himself contracted to erect a building assumes no such liability when he employs an apparently competent independent sub-contractor to carry out part of the work for him. The main contractor may, in the interests of the proper discharge for his own contractual obligations, exercise a greater or lesser degree of supervision over the work done by the sub-contractor. If in the course of supervision the main contractor in fact comes to know that the sub-contractor's work is being done in a defective and foreseeably dangerous way and if he condones that negligence on the part of the sub-contractor, he will no doubt make himself potentially liable for the consequences as a joint tortfeasor*."

The Court went on to note the New Zealand Court of Appeal's decision in *Mount Albert Borough Council v. Johnson* [1979] 2 N.Z.L.R. 234 where the purchaser of a flat suffered damage due to the subsidence of a building erected on inadequate foundations. The Court observed that one of the issues in *Johnson* was whether the plaintiff was entitled to recover damages against the development company which had employed independent contractors to erect the building, an issue decided in the plaintiff's favour. The House of Lords stated (page 20):

> "*As a matter of social policy this conclusion may be entirely admirable. … As a matter of legal principle, however, I can discover no basis on which it is open to the court to embody this policy in the law without the assistance of the legislature and it is again, in my opinion, a dangerous course for the common law to embark upon the adoption of novel policies which it sees as instruments of social justice but to which, unlike the legislature, it is unable to set carefully defined limitations*".

New Zealand jurisprudence in the residential building context has followed a different path from that in the United Kingdom and as the Supreme Court in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289 observed at para 45 :

> " … *the Privy Council expressly held in Hamlin the New Zealand courts were entitled to forge their own common law approach so as to reflect local conditions*".

The Supreme Court affirmed the jurisprudence underpinning *Mount Albert Borough Council v. Johnson*.

Statutory duty

Before considering the Building Act in particular, it may be noted that statutory non-delegable duties have been recognised by the New Zealand Court of Appeal in other contexts:

- In *S v A-G* [2003] 3 NZLR 450 at 476 to 478 the Court of Appeal addressed a claim arising from the molestation of children while in foster care. It held that the Superintendent of the Child Welfare Division was charged with the administration of the Act and notwithstanding the fact he was obviously expected to act through officers authorised for the purpose, the statutory scheme made it clear that committal orders under s13 placed the child in the care of the Superintendent and that foster care was to be preferred to long term institutional care. The Court stated:

  "*In this statutory setting it could well be said that while performance of the Superintendent's duties to the child could be delegated, responsibility for improper performance could not. This is another way of saying that in liability terms the duties were non-delegable*: *see Cashfield House (supra) at 464. Hence the independent contractor dimension is neutralised.*" (Page 478, para 113).

- In *Bartle v GE Custodians Ltd* [2010] 3 NZLR 601 the Court of Appeal held that GE had an obligation under the Credit Contracts and Consumer Finance Act 2003 to avoid oppressive lending, stating:

  "*In a broad sense GE was entitled to leave the task of ensuring that it did not enter into such lending primarily to others …. But if the lending turns out to be oppressive, GE remains responsible."* (See page 646 para 192(c))

  The Court referred to *Cashfield House* and drew an analogy with the situation where a body charged with a statutory duty procures someone else to perform it. While the body may not be entitled to delegate the duty, it may procure someone else to perform it. But if that person does not perform it, the body remains responsible.

GE's position is arguably analogous to AHI's position. GE voluntarily shouldered its statutory obligation under the Credit Contracts and Consumer Finance Act 2003 by entering the New Zealand financial lending market. AHI voluntarily shouldered its statutory obligation under the Building Act by entering the contract for supplying and installing the roofs.

In this context, a builder's duty was described by Justice Hardie Boys in *Morton v Douglas Homes Ltd* in the following terms:

> "*The duty of care owed by a builder to purchasers is to observe the by-laws and permit conditions and to take reasonable care to prevent loss or damage from defective construction*". (See [1984] 2 NZLR 548 at 589 line 52).

His Honour referred to the builder's duty in respect to by-laws as non-delegable.

In addition to referring to Clerk & Lindsell on Torts and Salmond on Torts Hardie Boys J noted Speight J's reliance on the non-delegabilty of By-law obligations in *Callaghan v Robert Ronayne Ltd & ors* (1979) 1 NZCPR 98.

In *Callaghan* the builder employed various labour only and independent contractors to carry out what transpired to be faulty roofing, plastering, plumbing and drainage work causative of leaks to the building. His Honour stated at page 22 that:

> "… *delegation is of no avail in respect of failure to perform a statutory duty*."

And on page 23:

> "*By-law 2.11 places a duty on the owner and the employer and the builder to comply with all permit requirements, including the provisions of the specification, which in this case calls for the building to be "absolutely waterproof in all respects". Accordingly even the one trade which was delegated to a proved independent contractor, viz. the tiled roof, has not been carried out in accordance with the permit, and therefore the By-law, and the First Defendant remains responsible because one cannot delegate one's obligation to comply with statutory obligations*."

Applying these authorities, it seems arguable that once AHI took on the contractual obligation to supply and install the roof it automatically took on a corresponding statutory obligation to ensure the roofs installation conformed with the Building Code, an obligation that could not be off to loaded to its independent contractors.

In regard to the significance of the fact that a contract for installation existed between AHI and the developer, Justice Gendall's Judgment in *Frost v McLean* (unreported 2 November 2001, H Ct Wgtn, AP184/01) appears relevant. His Honour stated at para.s [28] and [29]:

> "*It is clear that a builder cannot defend an action of negligence made against him by a third person on the ground that he complied with requirements of his contract with the owner; Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor (supra) although of course the nature of his contractual duties may have relevance in deciding whether he has been negligent or not. Obviously the nature of contractual duties to the owner may define or set a limit to the duty of care owed to that owner but that depends on the precise terms of the contract and what the contract is about. A contract for sale of land is not a contract for the performance of work upon the building or land, so whilst the terms of a building contract can operate to discharge a duty of care to persons who are parties to the building contract it cannot discharge that duty to strangers to those contracts or directly determine what the builder must do to satisfy that duty. His duty arises because it is cast upon him by the law and:*
>
> > *"Not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered." Per Windeyer J Voli v Inglewood Shire Council (1963) 110 CLR 74, 85.*
>
> *The point is that the builder, whether owner or not, has a duty to all persons who might suffer damage through the negligent performance of his work*."

Concluding comment

If it is correct that AHI owed a duty under the Building Act generally and by its contract with the developers or head contractor, then arguably it could not pass this to its subcontractors.

In the context of a residential development it follows that if AHI has such a duty, then it would be owed to subsequent home owners for the same reasons that any contractor involved in the construction owes such a duty.

No doubt the issue of whether a principal is liable for its independent subcontractors in the residential home construction context is a matter that will continue to come before the Courts and WHT. It will be interesting to see the direction followed.

Andrew Steele
Barrister

Princes Chambers, 3 Princes Street, Auckland 1010

021 673 252

09 974 5483