

# Personal liability of builders

## When will a builder be personally liable for defective building work?

November 2021

*A builder has a personal duty of care to meet the standards of a “reasonable” builder when engaging in building work. This article touches upon two aspects relevant to this duty:*

1. *When will a builder be personally liable for defective building work? In other words, can they ‘hide’ behind their company to escape personal liability?*
2. *Does a builder have a duty to comply with the building consent or the Building Code?*

### **PALMER V HEWITT BUILDING LTD**

This was a recent (June 2021) decision of the High Court. Ms Palmer had contracted Hewitt Building Ltd to extend and renovate her house. Mr Hewitt was the owner and sole director of the company, as well as the builder responsible for doing the works. Ms Palmer raised concerns about the building work and issued legal proceedings against both the company and Mr Hewitt personally.

#### ***A builder’s duty of care***

A builder may be sued for loss caused by his or her failure to take reasonable care in building work that they personally undertook. The key word here is *personally*. What must be looked at is what specific work the builder *personally* undertook or *personally* supervised.

To determine whether a builder owes a duty of care, it is therefore important to not only make an assessment on a case-by-case basis, but on an item-by-item basis. For example, in Mr Hewitt’s case, one claim related to a gas fireplace. Mr Hewitt gave evidence that he was not personally involved in completing the installation of the gas fireplace and that he did not have the skills and qualifications necessary to carry out this work. The Judge accepted his evidence that he did not personally engage in the defective work or engage in negligent supervision and therefore this particular claim against Mr Hewitt was dismissed. Conversely, Mr Hewitt was found to owe a duty for work that he personally undertook. In one such instance the Court accepted that he personally engaged in poor building practices, in that he applied the cladding in a manner that did not comply with the Code. Personal liability for the loss followed.

The ‘status’ of the builder does not matter, i.e. whether they are an employee, a director of a company or self-employed. The Judge stated, “*the nature of Mr Hewitt’s relationship with the first defendant – the party which had the building contract with the plaintiff – is essentially immaterial*”.

#### ***Is the duty of care to comply with the Building Consent or Building Code?***

The question of whether a builder has failed to comply with a building consent and/or the Building Code can be important. It was particularly important in *Palmer v Hewitt Building Ltd* because many of the criticisms levelled at Mr Hewitt were that he did not build some elements in accordance with the building consent, but which did meet the requirements in the Building Code.

The Judge largely agreed with the view that the duty is to conduct building works that comply with the standards set by the Building Code, although noted that compliance with the Code is not the only thing that needs to be considered where there is a claim in negligence. The obligation of the builder is to meet the standards of a reasonable builder, which are generally found in the Building Code. However, he considered it possible to imagine a situation where a builder builds to the Code, but where a duty of care is breached because the building is nevertheless not sound because of a failure to take reasonable care.

In assessing Ms Palmer’s argument that Mr Hewitt had a duty of care to comply with the building consent, the Judge observed that this would not make sense with the very reason for imposing a duty of care; that building owners should have a remedy when a building is badly built causing possible future or actual damage. Just because a building element does not comply with the building consent, it does not mean it will result in damage and loss.

It is common for building works to depart from a consent; variations and amended consents can and do occur. Whether the variation has been agreed to by the property owner is a matter of contract law (which in Ms Palmer’s case, was with the company).

#### **CONCLUSION**

Whether a builder has a personal duty of care will require a careful assessment of their involvement in each alleged defective building element. It will then need to be

### **KEY JACKSON RUSSELL CONTACTS**

Mark Sullivan PARTNER  
CONSTRUCTION LAW TEAM  
DDI +64 9 3006934 | M +64 021 163 9997  
E mark.sullivan@jacksonrussell.co.nz

Sarah McNulty SENIOR LAWYER  
CONSTRUCTION LAW TEAM  
DDI +64 9 3006927 | M +64 021 881 487  
E sarah.mcnulty@jacksonrussell.co.nz



**Disclaimer:** *The information contained in this document is a general overview and is not legal advice. It is important that you seek legal advice that is specific to your circumstances.*

# Personal liability of builders

When will a builder be personally liable for defective building work?

November 2021

determined whether the duty of care has been breached, by reference to the Building Code and standards of a “reasonable” builder. Jackson Russell can assist with these assessments.

## KEY JACKSON RUSSELL CONTACTS

Mark Sullivan PARTNER  
CONSTRUCTION LAW TEAM  
DDI +64 9 3006934 | M +64 021 163 9997  
E [mark.sullivan@jacksonrussell.co.nz](mailto:mark.sullivan@jacksonrussell.co.nz)

Sarah McNulty SENIOR LAWYER  
CONSTRUCTION LAW TEAM  
DDI +64 9 3006927 | M +64 021 881 487  
E [sarah.mcnulty@jacksonrussell.co.nz](mailto:sarah.mcnulty@jacksonrussell.co.nz)

**Disclaimer:** The information contained in this document is a general overview and is not legal advice. It is important that you seek legal advice that is specific to your circumstances.

