IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2007-101-12

BETWEEN	**JOHN WILLIAM BOSWELL BURNS, PETER GEOFFREY STUBBS and WILLIAM GRAHAM GEORGE CAMERON CLEARY as Trustees of the FUTURE HOLDINGS FAMILY TRUST**
	Claimant
AND	**ARGON CONSTRUCTION LIMITED**
	First Respondent
AND	**AUCKLAND CITY COUNCIL**
	Second Respondent
AND	**BERNARD MOHAN**
	Third Respondent
AND	**PAUL BAYER** (Removed)
	Fourth Respondent

DECISION ON STRIKE OUT APPLICATIONS

Dated 8 October 2008

BACKGROUND

The strike out applications

[1] This decision follows a hearing on 2 September 2008 to determine strike out and removal applications by the first respondent Argon Construction Limited ("Argon") and the second respondent Auckland City Council ("the Council"). These applications arise from a claim filed by John William Boswell Burns, Peter Geoffrey Stubbs and William Graham George Cameron Cleary as Trustees of the Future Holdings Family Trust ("the Trust") against Argon and the Council. Bernard Mohan was joined as third respondent on the application of Argon. The fourth respondent, Paul Bayer has been removed from the proceedings.

[2] On 9 June 2008 Argon applied to be struck out as a party to these proceedings then filed an amended application on 17 July 2008. The Council filed an application for removal also dated 17 July 2008. Mr Mohan has taken no steps in these proceedings.

[3] The applications are made by the first and second respondents on the grounds that:

(a) the claim is statute-barred by reason of limitation;
(b) the claimants were not the owners of the property when the damage occurred and therefore the cause of action did not accrue to the current claimants;
(c) the claimants have suffered no provable loss.

[4] Mr Booth and Ms Macky's submissions put forward similar legal and factual arguments. I address the issues raised primarily with reference to Mr Booth's more comprehensive submissions.

[5] The issues that I have addressed in considering the applications before the Tribunal are:

- the Tribunal's jurisdiction to strike out proceedings;
- the date that marks the start of the limitation period;
- whether to allow an amendment to the claim;
- the claimants' ownership of the property;
- costs.

Chronology

[6] In order to determine these issues it is necessary to set out the chronology to the claim by the Trust. This chronology is not in dispute.

[7] Mr Cleary and his then partner, Kim Johnstone purchased the property in or about August 1994. Mr Cleary and Ms Johnstone then agreed that Argon would carry out alterations and additions to the dwelling. This work proceeded through to early 1997 during which time the Council carried out certain inspections.

[8] Late in 1996 a leak was found in bedroom four on the ground floor of the dwelling. There were discussions and correspondence between Mr Cleary and Argon. Mr Cleary consulted Prendos Limited and Prendos prepared two reports.

[9] The first Prendos report was prepared by Sean O'Sullivan after two visits in January 1997. An additional report dated 14 February 1997 provided a diagnosis and recommendations that were to be read in conjunction with the earlier report.

[10] On or about 22 December 1997 Mr Cleary and Ms Johnstone transferred the property to the then trustees of the Future Holdings Trust. The trustees at that time were Mr Cleary, Ms Johnstone, John William Boswell Burns and Peter Geoffrey Stubbs. The property was

transferred to the current trustees on or about 21 August 2000. A Code Compliance Certificate ("CCC") was issued on 25 July 2001.

[11] In late 2003 Mr Cleary noticed signs of leaking. Further repairs were carried out however the problem was not resolved and on 28 May 2004 the current trustees applied under section 9 of the Weathertight Homes Resolution Services Act 2002 for an assessor's report. The claimants filed for adjudication on 31 May 2006. The claim was then withdrawn and re-filed under the Weathertight Homes Resolution Services 2006 Act ("the Act").

THE RELEVANT LAW

Limitation

[12] In accordance with section 4 of the Limitation Act 1950 a claim in contract or tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[13] Section 37(1) of the Act provides:

> For the purpose of the Limitation Act 1950 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.

[14] As section 32(1) is the equivalent of section 9 of the 2002 Act the claimants are deemed to have commenced their action on 28 May 2004.

[15] The issue for the Tribunal in determining the strike out applications is whether the claimants' cause of action accrued before or after 28 May 1998.

[16] At paragraphs 27 to 31 inclusive of Argon's submissions, Mr Booth correctly sets out the case law relevant to determining the date on which the cause of action accrued.

The power to strike out

[17] Section 112(1) of the Act provides:

> **112 Removal of party from proceedings**
>
> (1) The Tribunal may, on the application of any party or on its own initiative, order that a person be struck out as a party to adjudication proceedings if the Tribunal considers it fair and appropriate in all the circumstances to do so.

[18] This power is to be exercised sparingly and in clear cases.[1] Mr Booth submits that this is an appropriate case for the Tribunal to exercise its strike out jurisdiction because, despite Argon's agreement with the facts pleaded, the claim is statute-barred and therefore so clearly untenable that it cannot succeed.

[19] For the claimants Mr Carden argues that a respondent should not be struck out where there are contested questions of fact or unresolved issues in relation to that respondent. This submission can only succeed if there are factual issues in dispute that are material to the question of limitation. There are none. As recorded, the chronology of this claim is not in dispute.

THE CLAIM

The subject of the pleadings

[20] In order to consider the claimants' opposition to the strike out applications I need to confirm the status of the pleadings before the Tribunal.

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[1] *Kay v Dickson Lonergan Ltd v Ors* (unreported) Auckland High Court CIV 2005-483-201 (31 May 2006) Ellen France J.

[21] The orders that I issued between 20 February 2008 and 12 May 2008 reflect the lack of particulars provided by the claimant. There was uncertainty during the proceedings about which work formed the subject of this claim.

[22] Argon denies that it carried out any remedial works other than work on the deck which it claims is not related to the ongoing weathertightness issue. Argon relies on the evidence of Grant Dye, its chief quantity surveyor. Mr Dye states that Mr Cleary would not agree to pay Argon for the proposed remedial work. Exhibit GKD16, produced by Mr Dye, is a letter dated 28 July 1997 from Mr Cleary to Argon. This letter establishes that Mr Cleary made an offer to Argon to let losses lie where they fall provided the permit plans were returned to him. Mr Dye states that after this date no further payment was made to Argon and the plans were returned to Mr Cleary. The evidence of Mr Dye is unchallenged.

[23] Mr Cleary, in his affidavit dated 20 May 2008 confirms that *"Argon practically completed the job on or about May 1997….Eventually Argon walked off the site refusing to attend to significant remedial works"*.

[24] The claimants therefore have no cause of action against Argon for any remedial work or renovations carried out after 1997.

The cause of action

[25] The claim is pleaded in tort although there was clearly a contract between the owners of the property and Argon. At the hearing on 2 September 2008 Mr Carden sought leave to file a draft amended statement of claim making out claims in contract and tort.

[26] Prior to Mr Carden receiving instructions on this matter there was a history of delay by the claimants in finalising their claim. On 9 April 2008 I issued Procedural Order No. 11 ordering that a timetable

would not be set for adjudication until the claimants had finalised the claim and provided all evidence that they would rely on at the hearing. Mr Herzog, then counsel for the claimants, undertook to file a finalised claim by 7 May 2008.

[27] A conference was convened on 12 May 2008 however there was no appearance for the claimants. I made a further order for the claimants to file an amended claim and all briefs of evidence as they had not complied with the previous order. Procedural Order No.12 paragraph 1.5 recorded that I would not admit documents filed outside of the timeframes set. The finalised claim was filed on 20 May 2008.

[28] It was against this background that Mr Carden produced the draft amended statement of claim at the hearing on 2 September 2008. I made it clear at the hearing that while I accepted the documents I would determine the issue of whether this claim could be amended as part of this decision. The respondents opposed any amendment.

[29] Mr Carden acknowledges the history of delays by the claimants but submits that it is in the interest of justice that the matter be fully explored. He suggests that the claimants should not be disadvantaged by any faults on the part of earlier counsel.

[30] I do not consider that this submission has any merit. I am satisfied that the claimants have had many opportunities to amend and finalise their claim. These numerous opportunities are recorded in my orders. Allowing the claimants a further opportunity would be unfair to the respondents who, as a result of the claimants' delays, have been part of proceedings that have extended well beyond the normal length of proceedings in this Tribunal.

[31] For these reasons I decline to allow any amendment to the claim. The claim remains pleaded in tort and I consider the strike out applications on that basis. As a result of this decision I am not required to address the substantial component of Mr Carden's

submissions which are founded in contract. However, even if the claim had been pleaded in contract the outcome would be the same.

THE ARGUMENTS ON LIMITATION

[32] The correct test for determining the date of accrual of a cause of action for a claim in negligence is set out in *Hamlin.*[2] The time when the defects become so obvious that any reasonable homeowner would call in an expert marks the point when the value of the property depreciates and the cause of action accrues. Argon and the Council argued that on the *Hamlin* test the cause of action accrued in 1997 when the damage was identified by Mr Cleary and Prendos.

[33] Mr Booth and Ms Macky argued that the *Hamlin* test must be satisfied in this case because the defects were patent and Mr Cleary sought an expert report. They further argue that *Pullar*[3] is authority for the fact that it is not necessary to identify every defect for the cause of action to arise.

[34] The claimants argue that the claim is not time-barred and oppose the applications on the grounds that:

(a) the cause of action did not accrue in 1997 as not all defects were identified but rather in 2004 when the claimants became aware that the repairs carried out had not been successful;
(b) the claimants thought that the property had been adequately repaired therefore time stopped running until they re-discovered damage in 2004;
(c) as a result of a mutual mistake between the claimants and Argon the limitation period should be extended.

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[2] *Invercargill City Council v Hamlin* [1996] NZLR 513 (PC).
[3] *Pullar & Anor v R (acting by and through the Secretary of Education)* [2007] NZCA 389.

Should the limitation period be extended?

[35] In order to determine the limitation period that applies to this claim I deal first with the claimants' submission on the Contractual Mistakes Act 1997.

[36] Mr Carden submits that the claimants and Argon entered into the contract on the basis of a mutual mistaken belief that the agreed work would make the property weathertight and comply with the Building Code. Mr Carden submits that the mistake was discovered in 2004 and argues that section 28(c) of the Limitation Act therefore operates to extend the commencement of the limitation period to the time when the mistake was discovered.

[37] Section 28(c) provides that:

> **28 <u>Postponement of limitation period in case of fraud or mistake</u>**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either –
>
> (a) The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) The right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) The action is for relief from the consequences of a mistake,-
>
> The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

[38] Mr Carden has not drawn my attention to any legal basis that might exist for applying the provisions of section 28(c) to a claim in tort. Further, as Mr Booth pointed out, there are obvious difficulties with the concept of applying the law of mistake to a claim founded in negligence. It is inconsistent to argue that a builder can be both mistaken that his work was satisfactory and perform the same work negligently.

[39] Mr Carden's submission on mistake is therefore so contradictory with the claim that Argon was negligent as to be untenable.

[40] For these reasons I do not accept the claimants' arguments that the limitation period is extended by virtue of a mistake between the claimants and Argon.

[41] Mr Booth raised the issue of remedies as a further difficulty with Mr Carden's submissions on the Contractual Mistakes Act. As I reject the submission on mistake I am not required to consider the question of remedy, however, Mr Booth's submissions illustrate the comprehensive difficulties for the claimants with the argument advanced on mistake.

THE CAUSE OF ACTION

[42] I now turn to determine the date on which the cause of action arose.

Did the 1997 Prendos report mark the date when the cause of action accrued?

[43] The facts of this claim are somewhat unusual in that the defects which gave rise to the owners' request for a Prendos report were apparent before the construction was completed. Mr Cleary says in his affidavit of 13 August 2008, paragraph 14 that late in 1996 when the house was almost finished a leak was found in bedroom four on the ground floor of the dwelling. Mr Cleary then sets out in paragraphs 15 to 22 the background to his decision to seek a report from Prendos.

[44] The claimants and Argon have filed briefs of evidence from their experts relating to the question of whether the Prendos report

sufficiently identified all defects for this report to mark the time when the damage occurred.

[45] The Prendos report was prepared by Sean O'Sullivan after two visits in January 1997. This report recommended targeted repairs. An additional report dated 14 February 1997 provided a diagnosis and recommendations to be read in addition to the earlier report.

[46] Mr O'Sullivan and Stephen Alexander, the Council's expert, have set out details of their qualifications and expertise in their affidavits. I am satisfied that both men are entitled to be regarded as expert witnesses. I have therefore given significant weight to their evidence in determining whether the 1997 Prendos report marked the time when the cause of action accrued.

The 1997 report of the WHRS report

[47] Mr Alexander prepared a summary of the defects that Mr O'Sullivan identified in the two 1997 Prendos reports. Mr Alexander lists those defects in paragraph 21 of his affidavit dated 17 July 2008. At paragraph 23 of his affidavit Mr Alexander identifies those defects common to the 1997 Prendos report and the WHRS assessor's report dated 16 March 2005. At paragraphs 24 and 25 Mr Alexander refers to the damage that the WHRS assessor identified in addition to that identified in the earlier Prendos report. Mr Alexander describes the WHRS report as not providing as comprehensive identification and analysis of the defects as the Prendos report seven years earlier. In paragraph 23 Mr Alexander states that the defects identified by the WHRS assessor as causing water entry were identified in the Prendos report of 1997.

[48] Mr O'Sullivan at paragraph 38 of his affidavit disagrees with Mr Alexander's conclusion that all defects identified by the WHRS report were already noted in the 1997 Prendos report. Mr O'Sullivan refers to the WHRS assessor's identification of decay in the front

sunroom, and says he understands this decay to be the result of security cable penetrating a window sill.

[49] Mr O'Sullivan understands the security system was installed as part of the original construction. He did not notice this defect in 1997. The other areas of disagreement noted by Mr O'Sullivan with the WHRS report relate to work that had been done since the 1997 report.

[50] The issue that I have to determine is not whether every single defect was identified in 1997 but when the cause of action arose. The Court of Appeal stated in *Pullar* that it is not and has never been the law that every defect needs to be identified in order to stop time running for the purposes of limitation.

[51] Based on the evidence of Mr Alexander and Mr O'Sullivan I find that any defects that were not identified by Prendos in 1997 and were identified later by the WHRS assessor resulted either from work carried out after 1997 or, in the case of the security cable, did not significantly impact on the extent of damage existing in 1997.

The 1997 report and the 2008 report

[52] Mr Alexander then turns to comparing the 1997 Prendos report with the 2008 Prendos report. At paragraph 27 of his affidavit Mr Alexander identifies five matters raised in the 2008 report which were not identified in the 1997 report. Two of these defects, the adequate height separation between the interior floor level and the exterior surface, and the inadequate connection of various beams in the cladding are items that in Mr Alexander's opinion could have been noticed in 1997.

[53] Mr Alexander expresses the opinion that the absence of damp protection between the timber and the concrete could potentially have been identified. However Mr Alexander's evidence is that these additional defects do not change the overall scheme of the remedial

work that was required. It is his evidence that the defects identified in the 1997 report were sufficient to define the remedial work requirements. Mr Alexander states that the most significant difference between the Prendos report of 1997 and the 2008 report is that the earlier report recommended targeted repairs while the later report recommended a total reclad.

[54] Mr Alexander at paragraph 29 states:

> "The difference in the repair methods proposed from 1997 to 2008 may have caused some to think that the defects are different, however that is not the case."

[55] Mr O'Sullivan at paragraph 45 of his affidavit comments on paragraph 29 of Mr Alexander's affidavit. It is notable that Mr O'Sullivan agrees that the repair methods were different but does not challenge Mr Alexander's conclusion that the defects identified in the two reports are not different despite the repair methods proposed.

[56] It is also significant that Mr O'Sullivan makes no comment in response to paragraph 28 of Mr Alexander's affidavit. Paragraph 28 refers to the five items that Mr Alexander identifies at paragraph 27 which were the new matters raised or identified in the 2008 report that were not identified in the 1997 report. Mr O'Sullivan does not disagree with Mr Alexander's statement that there are only two items that could have been noticed in 1997.

[57] Mr Alexander goes on to say "I do not see these additional items as being particularly significant. They do not change the overall scheme of remedial works that have been required. The defects identified in 1997 were sufficient to define the remedial works requirements."

[58] Mr O'Sullivan agrees with Mr Alexander that the significant difference in the repair recommendations arises from a greater

knowledge about leaky buildings and a change in regulations, such as the requirements for a cavity.

[59] Mr O'Sullivan does not appear to challenge Mr Alexander's comments that the defects identified in 1997 were sufficient to determine the remedial work required at that time. Mr O'Sullivan states at paragraph 46 that "the repairs recommended in 1997 were recommended repairs during the construction process of a programme that was still in process, thus not only did the owners know of the problem but also the contractors".

[60] I could find nothing in Mr O'Sullivan's affidavit to contradict Mr Alexander's assertion that all significant defects were identified in 1997. The fact that further defects arose from remedial work carried out since 1997 does not impact on the question of whether or not the cause of action accrued in 1997.

[61] I have already referred to *Pullar* where the Court of Appeal held that:

> "It is not necessary, in order for time to start running, to be able to pin-point with precision the exact cause of every defect. Indeed, that would frequently mean time could not start running until the remedial work was under way! That would in turn mean that the building owner could not sue the builder in advance of repair work as no cause of action would have by then accrued. That is not and never has been the law. What one is concerned to ascertain is when economic loss occurred: when was the market value of the building affected?"[4]

[62] Having carefully considered the evidence of Mr Alexander and Mr O'Sullivan I am satisfied that the extent of the damage identified by the 1997 Prendos report confirmed that at that point the property had significant defects and lost value as a result of those defects.

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[4] *Pullar*, above n 3, [19]

Extension of the limitation period

[63] I now consider whether there is any reason to extend the limitation period or whether the claimants' submission that the remedial work stopped time running has any force.

[64] I have rejected the claimants' submissions that the Contractual Mistakes Act operates to extend the limitation period. The only live argument remaining for the claimants is that the repair work stopped time running.

[65] The *Hamlin* test for determining the date on which the cause of action accrued is an objective one. The cause of action accrues when the damage becomes so bad or the defects so obvious that any reasonable homeowner would call in an expert.

[66] The test is not what the owners understood to be the extent of the damage or whether they believed the damage to be repaired. Even if I accepted that a cause of action could disappear and emerge at a later date, there are significant difficulties with this argument. Firstly the claimants would need to have demonstrated a reasonable basis for believing that all defects had been repaired. Mr O'Sullivan confirmed that not all the repairs recommended in the 1997 Prendos report were carried out. In 2001 the Council issued a CCC however the Council was never made aware of the 1997 Prendos report. The fact that the CCC was issued does not justify a finding that all significant defects identified in 1997 had been completely resolved.

[67] On his own evidence, Mr Cleary acknowledged the significant remedial works required in 1997. It would be unfair if a party who knew of certain defects and elected not to repair all of those defects could rely on the CCC for evidence that the defects were rectified. That was not the specific purpose of the CCC.

CONCLUSION

[68] The 1997 Prendos report was commissioned after the homeowner became sufficiently concerned about the cracks and the leaking to call in an expert. A competent expert prepared a report. I am satisfied that there was a loss of value to the property as a result of the defects that were obvious and the damage confirmed by the Prendos report.

[69] For these reasons I am satisfied that the Prendos report in 1997 marked the time when the cause of action accrued.

[70] The attempt by the claimants to amend the claim and argue on the grounds of mistake for an extension of time to the limitation period has failed. The claimants' argument that having effected some of the repairs recommended by Prendos the cause of action disappeared has no merit. For these reasons I find that the cause of action accrued in 1997 and that the claim filed on 28 May 2004 is therefore out of time.

[71] As a result of this finding I do not have to address the issue of ownership of the property. However, even if I accepted Mr Carden's submission that the current claimants were effectively the same party that entered into the contract with Argon, the claim would be time-barred.

[72] I therefore grant the applications by Argon and the Council. The effect of this decision is to terminate the claim and therefore I also order Bernard Mohan struck out. An order terminating the claim will be made after any applications for costs have been determined.

ORDERS

[73] Argon Construction Limited, Auckland City Council and Bernard Mohan are struck out as parties to these proceedings.

COSTS

[74] Mr Booth indicated that Argon would want to pursue an application for costs in the event that its strike out application was successful. I therefore set the following timetable for written submissions on costs:

- Any party applying for costs is to file submissions by 24 October 2008
- Any reply is to be filed by 10 November 2008.

Dated this 8th day of October 2008

S. Pezaro
Tribunal Member