IN THE CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL

CEIT-001-2022

IN THE MATTER OF	CANTERBURY EARTHQUAKES INSURANCE TRIBUNAL ACT 2019
BETWEEN	MA and GA as TRUSTEES OF THE AFT Applicants
AND	TOWER INSURANCE LIMITED Respondent

On the papers

DECISION OF MEMBER FLASZYNSKI ON A PRELIMINARY ISSUE

DATED: 18 JULY 2022

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[1] This is a decision on a preliminary issue: whether the Limitation Act 2010 applies to a claim made under the Consumer Guarantees Act 1993 in respect of an insurance contract?

Background

[2] The Applicants, MA and GA, are the policyholders and trustees of the AFT (the Trust). GA is 92 years old. Sadly, MA passed away during the time of these proceedings. My condolences to the family.

[3] The claim has been bought by RA, GA and MA's daughter, on behalf of the Trust.

[4] The Trust owns the residential property at XXXXX, Christchurch (the Property) where MA and GA lived. The house on that Property was insured by Tower Insurance Limited (Tower) under a Provider House Policy Maxi Protection (the Policy) against sudden and unforeseen

accidental physical loss or damage. Under the Policy, Tower is to arrange for the repair, replacement or payment for the loss, once the claim has been accepted.[1]

[5] The house suffered damage during the Canterbury Earthquake Sequence in 2010-2011. Tower accepted the claim and arranged for the house to be repaired pursuant to a Contract for Residential Rebuild and Repairs (Repair Contract).

[6] Tower, the builder ID Construction Limited, and MA and GA, together with their daughters RA and KA, signed the Repair Contract dated 31 January 2014. Denis McCarron signed on behalf of ID Construction Limited.

[7] The Repair Contract recorded a commencement date of 3 February 2014, a completion date of 26 May 2014 and a defect liability date of 26 August 2014. Within the period between practical completion and the defect liability date the owner must notify the project manager and builder in writing of any defects and omissions in the contract work which require remedial work.

[8] The repairs started in February 2014. The Practical Completion Certificate was issued on 31 July 2014 however in late August 2014 further work was done to the garage and a skirting was added to facilitate access.

[9] It appears from the claim notes disclosed by Tower and the timeline provided by the Trust that repairs were still being carried out after the Practical Completion Certificate was issued and that GA raised concerns about the standard of repair in December 2014. In March 2015 GA made a formal complaint to Tower as he was not happy with the repairs.

[1] Page 11 of the Policy.

The Claim

[10] The Trust's claim was filed in the Tribunal on 22 February 2022. The claim raises concerns about some of the repairs, alleging that they are defective and not to the standard required by the insurance policy. The Trust has asked that Tower remediate the repairs it says are defective or inadequate. The family wants the house fixed.

[11] The Trust contends that Tower, as the insurer, is under an obligation to ensure that the repairs to the house are completed to the policy standard and that this obligation continues notwithstanding the passage of time. The Trust also claims that the duty to pay for the repair exists under the Consumer Guarantees Act 1993 (CGA) and continues until the house is fixed to the policy standard. In addition to this cause of action, the Trust says it is able to claim for breach of the insurance contract and breach of the Repair Contract if the repairs prove to be defective or inadequate.

[12] Tower submits that the appropriate relief if the claim is proven, is monetary relief. That as such, the claim is subject to the limitation periods for money claims under the Limitation Act 2010.

[13] Additionally, Tower submits that if a claim under s 32(a)(i) of the CGA is legally available (which it denies), requiring Tower as a supplier to remedy the repair services, then the claim is subject to the in-built limitation period in s 32 that the claim must be brought within a "reasonable time". That the right to require the supplier to remedy the defect lapses following the expiry of a reasonable time period during which the consumer could discover the defect. Tower points to s 20(2) of the CGA in consideration of what "reasonable time" means.

Issue to be decided

[14] The Tribunal is under an obligation to provide fair, speedy, flexible, and cost-effective services for resolving dispute about insurance claims.[2] It has the power to control its own processes and has adopted a practice whereby affirmative defences such as limitation are to be addressed as preliminary issues. After discussion with the parties, it was agreed that the issue of whether this claim under the CGA is out of time would be determined in the first instance.

[2] Canterbury Earthquakes Insurance Tribunal Act 2019, s 3.

[15] The parties agreed that the Tribunal is to determine whether the Limitation Act 2010 applies to a claim made under the CGA in respect of an insurance contract?

[16] If this is decided in the affirmative, that the Limitation Act does apply to CGA claims, the next issue to determine will be if the Trust's claim is out of time or whether a late notice period or any other considerations apply? Further evidence will be needed before this decision can be made.

The Consumer Guarantees Act 1993

[17] Under s 28 of the CGA there is a guarantee that where services are supplied to a consumer the services will be carried out with reasonable care and skill.

[18] Where services fall short of this guarantee, the consumer has remedies as set out at s 32. Section 32(a)(i) provides the consumer with the ability to require the supplier to remedy the failure within a reasonable time. Where the supplier, who has been required to remedy a failure, refuses or neglects to do so, or does not do so within a reasonable time, then the consumer can have the failure remedied by another and can recover from the supplier all reasonable costs incurred in doing so. Section 32 (c) enables the consumer to obtain from the supplier damages for any loss or damage to the consumer resulting from the failure which was reasonably foreseeable as liable to result from the failure.

Can an insurer be held liable under the CGA and if so, what is the remedy?

[19] An insurer provides services pursuant to an insurance contract. The types of services provided are determined by the terms of that contract and any election that is made under the contract in respect of repair.

[20] In *Sleight v Beckia Holdings Limited,* the High Court held that IAG was a service provider under the CGA by virtue of it having included the Sleights claim in its managed repair programme.[3] IAG had procured a project manager and made milestone payments to the builder. The Court found that IAG had breached the guarantee under s 28 of the CGA through its dealings with the project manager and builder.[4] The remedy sought by the insured customer

[3] *Sleight v Beckia Holdings Limited* [2020] NZHC 2851.
[4] Ibid at [260-277]

was monetary damages based on an estimate of the repair costs. IAG was held liable for the work to remedy the defective repairs.

[21] In *E v IAG,* Chair Boys adopted the reasoning in *Sleight* to find the same CGA breach had occurred.[5] IAG were held responsible for the cost to restore the damaged property to a repaired condition.

[22] While it is clear from *Sleight* that the High Court considers insurers to be service providers, and that they are to be held responsible in the event of a defective repair, neither *Sleight* nor the *E* decision considered the implications of the Limitation Act 2010 as claims were filed inside any potential limitation period.

Does a claim under the CGA need to be bought within a "reasonable time"?

[23] Tower says that if Tower, as a supplier of services, is required to remedy the repair services under s 32(a)(i) of the CGA, then the claim is subject to the in-built limitation period in s 32, that the claim must be brought within a reasonable time. "Reasonable time" means within the period from the time of supply of the repair services in which it would be reasonable to expect each defect to become apparent. That the right to have the supplier remedy the defect lapses following the expiry of a reasonable period during which the defect could be discovered.

[24] Tower points to s 20(2) of the CGA which defines "reasonable time" in the context of the right to reject goods. Section 20(2) states:

> In subsection (1)(a), the term **reasonable time** means a period from the time of supply of the goods in which it would be reasonable to expect the defect to become apparent having regard to-
> *(a)* the type of goods:
> *(b)* the use to which the consumers likely to put them:
> *(c)* the length of time for which it is reasonable for them to be used:
> *(d)* the amount of use to which it is reasonable for them to be put before the defect become apparent.

[25] Tower points to the Court of Appeal case of *Nesbit* [6]for guidance about how to interpret this standard. The Court of Appeal sets out 6 principles to consider:

[5] *E v IAG* [2021] 2019-0013 at [194].
[6] *Nesbit v Porter* [2000] 2 NZLR 465 (CA)

(a) the consumer's actual use is to be considered against the use expected of a notional consumer;

(b) the older the goods, the shorter is likely to be the reasonable time;

(c) the reasonable time period may be longer if the goods are likely to be used infrequently or seasonable;

(d) the reasonable time period may be shorter where inspections are customary or required by law;

(e) the reasonable time period must allow the consumer to become fully acquainted with the nature of the defect and learn what must be done to fix it (i.e. learn whether the defect is substantial); and

(f) sometimes a defect will be obvious but will require a professional to weigh in: this will lengthen the reasonable period.

[26] Tower says that it cannot be required to remedy the alleged defects pursuant to s 32(a)(i) as the claim was not bought within a "reasonable time". Tower also says that the right to monetary damages survives the lapsed right to require remedial work but, like all monetary claims, is subject to the Limitation Act 2010.

[27] Tower says that the limitation periods under the CGA coincide with the start of the late knowledge period under the Limitation Act 2010. Therefore, under the Limitation Act the right to claim monetary relief runs for three years from the date the defect was discovered or ought reasonably to have been discovered. However, the right to make a CGA claim to have the supplier remedy the defect lapses earlier, following the expiry of a reasonable period of time in which the defect ought reasonably to have been discovered.

[28] The timeline filed on behalf of the Trust indicates that GA raised concerns about the standard of the repair in December 2014. In March 2015 GA made a formal complaint to Tower conveying that he was not happy with the repairs to his home. The claim was filed in the Tribunal in February 2022, the Trust asking Tower to remedy the defects.

[29] The Trust has filed another document identifying the defects and the approximate date that each defect was discovered. Most of the defects were discovered in late 2014, at the conclusion of the repair.

[30] While there are many factors that could be taken into consideration when assessing the reasonableness of the lapse of time between the conclusion of the repair, discovering defects and asking Tower to remedy these defects, I find that the time lapse between late 2014 and making the request in 2022 is outside what can be considered as reasonable.

[31] Accordingly, I agree that Tower cannot be required to remedy the alleged defects pursuant to s 32 (a) (i) of the CGA. However, the right to claim all reasonable costs to have the failure remedied by another under s 32 (a) (ii) (A) remains.

The Limitation Act 2010

[32] A money claim is a claim made under the common law, principles of equity or under an enactment for monetary relief.[7] This includes a claim made under s 32 of the CGA. This provision also applies whether the Trust makes a claim for breach of the insurance contract and /or breach of the Repair Contract.

[33] As noted in the commentary in *Colinvaux's Law of Insurance in New Zealand*, once an insurer makes an election to repair a property, the insurance contract becomes enforceable as a repair contract, the insurer being liable to remedy any defects in workmanship in the reinstated subject matter.[8]

> The insurer's obligations following an election to reinstate are those of ordinary builders. If those standards are not satisfied, the assured can recover damages for breach of the building contract. If the insurer replaces the lost subject matter with something inferior, the assured is entitled to reject it, or to accept it and to claim damages representing the difference between previous worth and repaired or reinstated worth. If the insurer, having determined to reinstate, fails to do so, the assured may not claim specific performance but is entitled to damages.

[34] If the Trust proves that there are defects in the repairs undertaken, then it is entitled to damages whether under the CGA, insurance contract and/or Repair contract. All actions, including the claim under the CGA will be subject to the Limitation Act 2010.

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[7] Limitation Act 2010, s 12.
[8] Robert Merkin *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2017) at [8.5.2(5)].

[35] Accordingly, the answer to the preliminary issue I am being asked to determine is yes, the Limitation Act 2010 applies to a claim being brought under the CGA in respect of an insurance contract.

The defence available under s11 Limitation Act 2010

[36] Section 11(1) of the Limitation Act 2010 states that it is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the primary period).

[37] If the claimant has late knowledge of the claim, a late knowledge date may apply. In that case it is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 3 years after the late knowledge date, or 15 years after the date of the act or omission on which the claim is based (the claim's longstop period).[9] Section 14 sets out the parameters for defining the late knowledge date.

Next steps

[38] As noted at paragraph 16, the next step in this claim's journey is to determine the start date of the primary period and if a late knowledge date or any other considerations apply.

[39] In our next case management conference, I will invite discussion on how the start date of the primary period should be calculated. Consideration should be given to when this could be. Whether the act or omission on which the claim is based is the signing of the Repair Contract; the date the Practical Completion Certificate was signed; the defect liability date; the date of the defective repair; and/or the date concerns were raised and not addressed.

[40] In addition, and as this is an inquisitorial process, it would assist if the parties considered and if appropriate, filed further evidence about:

(a) the compilation of the snagging list as provided for in the Repair Contract and when and if the items on it were addressed and signed off;

[9] Limitation Act 2010, s 11(2).

(b) the nature of the concerns raised by GA in December 2015 regarding the repairs and the complaint made in March 2015;

(c) the steps taken by Tower (it or via its project manager, builder or otherwise) to address these concerns and complaints raised; and

(d) whether Tower (it or via its agents) completed a post repair inspection to ensure that the repairs were to policy standard. If not, why not?

[41] A further matter I encourage consideration of, is whether the duty of good faith can affect an affirmative defence from being claimed?

[42] A contractual duty of good faith is implied into every insurance contact and is a duty that flows both ways.[10] The duty requires both parties to act reasonably, fairly, and transparently when observing and honouring the policy terms. It applies to the initial formation of the contract, actions taken during the contract term and after the lodgement and dealings of a claim. An insurer must process a claim in a reasonable time. What is reasonable will depend on the circumstances. The conduct of the insurer and the policy holder will be relevant when deciding whether the duty of good faith has been breached.

[43] Can the duty of good faith act as a brake upon or a barrier to an insurer's reliance on the defence available to it under the Limitation Act 2010? Determination of this question will be contextual and will depend on the conduct of the parties.

[44] For example, further evidence may be needed to address the following:

(a) What are the responsibilities of the insurer once a repair has been declared complete? Was Tower responsible for completing the final inspection to check that the repairs had been completed to the standard required by the policy, including compliance with the building code? Who compiled and checked off the snagging list?

[10] *Young v Tower Insurance Limited* [2016] NZHC 2956.

(b) When GA made a formal complaint about the standard of the repair what actions were taken? If no actions were taken, is this a breach of the duty of good faith to deny assistance now? If so, what remedy is available to the Trust?

Conclusion

[45] The claim being made by the Trust, whether under the CGA, the insurance contract or the Repair Contract, is subject to the Limitation Act 2010

Directions

[46] Having resolved the first preliminary issue, I make the following directions:

(a) The parties are to review all documentation within their control to assess if further disclosure is required to address the points made at [39-40] and if so, all such documents are to be filed in Tribunal and served on all parties 5 working days prior to the next case management conference.

(b) The case manager is to convene a second in person case management conference for all parties including ID Construction Limited.

(c) The parties consider what steps are needed to address the second part of this inquiry, an assessment of the primary period start date and any late knowledge date.

E J Flaszynski
Member
Canterbury Earthquakes Insurance Tribunal

Mr Lester for the Applicants
Gilbert Walker for the Respondents