

IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2020-100-006

BETWEEN	JUNG SOOK GWAK & JOSEPHINE YEON JU KIM Claimants
AND	YAN SUN First Respondent (Removed)
AND	ALASTAIR COUPER Second Respondent
AND	AUCKLAND COUNCIL Third Respondent (Removed)
AND	LAI FOOK CHOY Fourth Respondent

PROCEDURAL ORDER 11
(Leave application by claimants)
Dated 8 June 2023

Introduction

[1] There was a telephone conference convened on this claim on 18 May 2023.

[2] At that conference and for the first time, the claimants advised that they wished to join their lawyers, the law firm Russell McVeagh, to this claim. That firm acted on the purchase of the claimants' home in 2003.

[3] They said that the firm had been negligent in not advising them that the Code Compliance Certificate (CCC) was not issued by the, then, North Shore City Council, but rather by Compass Building Certification Ltd (Compass), a liquidated company now removed from the Companies Register.

[4] Following the first case management conference in this claim on 15 October 2020, the Tribunal's Procedural Order 1 of 20 October 2020 ordered any applications for joinder to be filed by 4 December 2020.

[5] Whilst the Tribunal will entertain late applications for joinder or removal, it will normally require an explanation as to the delay and may require leave to be sought for such late applications.

[6] The claimants were directed to file an application for leave to apply to join another party and an application to join Russell McVeagh as a party to this claim.

[7] The claimants have filed those applications. This Procedural Order determines those applications.

Relevant chronology

[8] The chronology relevant to this leave application is as follows:

- (a) A CCC for the property was issued on 26 May 2003;
- (b) The claimants entered into agreement for sale and purchase of the property on 23 July 2003;

- (c) The settlement date of the sale under that agreement was 1 August 2003;
- (d) The claimants' application for an Assessor's report was received by MBIE on 18 June 2012;
- (e) An Assessor's report was completed on 13 July 2012, concluding that an eligible claim existed;
- (f) Confirmation of an eligible claim was issued by MBIE on 26 July 2012;
- (g) The claimants' adjudication claim was filed with the Tribunal on 6 September 2020.

Application for leave to join Russell McVeagh

[9] The time directed to make applications for joinder has long expired.

[10] The Tribunal required the claimants to seek leave to make a joinder application. Generally, there needs to be an explanation as to why the application now made was not able to be made in accordance with earlier timetable directions of the Tribunal.

[11] Leave may be granted where a party has become aware of fresh grounds to seek to join a party. The later disclosure of documents or the exchange of evidence may provide grounds for a late application, based on new material not previously available to the applicant.

[12] The approach the Tribunal will take in relation to this application for leave is twofold.

[13] First, it will consider whether there is an adequate explanation for the delay.

[14] Secondly, it will consider the merits of the joinder application itself as part of its overall exercise of discretion in granting leave.

Explanation for delay

[15] The claimants have filed their leave application together with an affidavit in support.

[16] They accept that the information relating to the allegations against their law firm was available at the time this claim was first filed.

[17] They say, however, that they became aware of fresh grounds to seek to join the law firm and that their delay is explicable.

[18] The claimants explain their reasons for delay by pointing to two factors:

- (a) They only became aware that the North Shore City Council did not issue the CCC on receipt of the Tribunal's Procedural Order 2 on 7 May 2021. That Procedural Order removed Auckland Council as a party to this claim. The claimants say they were not aware until that time that they may have an arguable claim against their lawyers. They say that they were unaware that they were able to join other parties to this claim.
- (b) The claimants say that the joinder application to join their lawyers was further complicated by subsequent removal applications from two respondents and an appeal they launched against the removal of one of those respondents. They say that they had to attend to "three continuous proceedings of two second removal applications and an appeal to the High Court between May 2021 and April 2023".

[19] The claimants express their alleged claim against their previous law firm in the following terms.

[20] They say that the agreement for sale and purchase of the property was subject to a special condition in the following terms:

- 14.a Prior to settlement the Vendor will supply the Purchasers Solicitor with a copy of the Code of Compliance from the North Shore City Council.

[21] The exchange of correspondence appended to Ms Kim's fifth affidavit makes it clear that the parties' respective lawyers corresponded about the special condition and that the claimants' lawyers were provided with the CCC. The transaction then proceeded to settlement on 1 August 2003.

[22] The CCC was issued by Compass. It was not issued by North Shore City Council.

[23] The claimants say that they were never advised that the CCC was not issued by North Shore City Council but rather by Compass. They do not expand on what the consequence of that distinction is or what they or their lawyers could have done about that in those circumstances.

[24] It is inferred that their complaint is that the fact that the CCC was issued by a company which no longer exists means they are deprived of a respondent in circumstances where, had the North Shore City Council (now the Auckland Council) issued the CCC negligently, they could have advanced claims against that entity.

[25] Procedural Order 1 specifically addressed the joinder of further parties at paragraph [11]. Joinder was discussed at the Preliminary Conference. Procedural Order 1 set a timetable for the joinder of further parties.

[26] The Chair's Directions, which the claimants had, also outlines the process of and ability to seek joinder of further parties.

[27] It is not accepted that the claimants were not aware of their ability to make an application for joinder.

[28] Even if that is incorrect, then the claimants' own evidence makes it clear that they realised that they had a claim against their lawyers on

receipt of Procedural Order 2 in May 2021. There is no explanation as to why that application was not made then.

[29] The reference to the other applications being dealt with does not explain or excuse the delay. There was adequate time to do so, even whilst dealing with the other applications made by respondents. There were opportunities to raise the joinder at case management conferences held after May 2021.

Merits of application

[30] The Tribunal now turns to consider the merits of the substantive joinder application. In doing so, it is relevant to consider the claim raised by the claimants and the relevant statutory background to the issue of the CCC.

[31] A review of the documentation on this claim makes it clear that under the Building Act 1991 (the Act), it was for the relevant territorial authority to issue the building consent.

[32] The North Shore City Council issued building consent no. BB/06159/02 on 6 August 2002. Compass was the contact address for the applicant for building consent.

[33] At the time the building consent was applied for, Compass was an approved, registered, building certifier.

[34] Under a “Scope of Building Certifier’s Engagement” issued under s 56(3) of the Act, Compass was engaged to approve:

- (a) Plan and specification compliance;
- (b) Construction compliance; and
- (c) Issue [of] Code Compliance Certificates.

[35] Compass, therefore, had a full scope engagement in relation to the construction of this property.

[36] North Shore City Council received advice of completion of building work from Compass on 8 May 2003. That advice was issued under s 43(1) of the Act.

[37] Compass then issued the CCC for this construction project under its powers as an approved building certifier and pursuant to s 56(3) of the Act.

[38] So, whilst the North Shore City Council issued the original building consent, it was Compass that undertook the construction inspections, completed the advice of completion of work and issued the CCC.

[39] All of those functions were performed pursuant to its authorisation to do so as an approved building certifier. The relevant sections are s 43 and 56 of the Act.

[40] It is clear from s 43(3) of the Act that the territorial authority does not issue a further CCC where one has already been provided, pursuant to s 43(2)(b) of the Act. That is because a building certifier is authorised to issue a CCC by s 56(3) of the Act. It does so if it is satisfied on reasonable grounds that the building work complied with the provisions of the Building Code on the date of certification.

[41] Therefore, Compass, as an approved building certifier, was entitled to issue the CCC applying to this property. The North Shore City Council was not required or entitled to issue a further CCC.

[42] Notwithstanding the provision in the agreement requiring a CCC from North Shore City Council, the relevant body with statutory authorisation to issue a CCC did that.

[43] It is unlikely that the claimants could have refused to declare the agreement unconditional on that ground. It is unlikely that they could have refused to settle on that ground.

[44] Given the above, it is difficult to see how any complaint could be made against the claimants' lawyers on the ground simply that the CCC

was issued by an approved building certifier and not the territorial authority itself.

[45] At the time the alleged negligence by the lawyers occurred, which was the date of settlement, Compass was an approved building certifier exercising statutory powers within its authority.

[46] It is very difficult to see what claim the claimants could have had against their lawyers arising from this part of the transaction. The only ground of loss could be the loss of an opportunity to sue the territorial authority. But, the CCC was properly issued by a body with the appropriate authority to do so. The legislative framework permitted what occurred to happen.

[47] It was clearly the purchaser's concern to ensure that the building was code compliant and that that was reflected in a certificate to that effect. That is what the purchasers bargained for and that is what the purchasers received before settlement.

[48] The Tribunal considers that the claimants do not have a tenable claim against their previous lawyers on the grounds alleged.

[49] There is, however, a larger and fundamental difficulty with this claim. That is limitation.

[50] If, and it seems unlikely, the claimants' lawyers were negligent in allowing the sale transaction to proceed to settlement based on a CCC issued by Compass and not by the territorial authority, then that negligence occurred just prior to or at the date of settlement which was 1 August 2003.

[51] The negligence must be allowing the transaction to proceed to settlement on the basis of a CCC issued by Compass and not the North Shore City Council.

[52] The alleged negligence occurred at settlement, because, at that date, to develop the claimants' argument, they did not receive what they bargained for. The negligence and the loss arising from that negligence occurred on settlement on 1 August 2003. At that date, their ability to

recover losses from a limited liability company and not a territorial authority was set.

[53] There is no evidence of any other advice given after that date by the lawyers.

[54] The claimants' application for an assessor's report was received on 18 June 2012, almost ten years later.

[55] Section 37(1) of the Weathertight Homes Resolution Services Act 2006 provides that for the purpose of the Limitation Act 2010 (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.

[56] That means that the date that the clock stopped running for limitation purposes was 18 June 2012, when the claimants sought an Assessor's report.

[57] That date is the date that is considered the date proceedings were filed.¹ The "claim" against the claimants' lawyers is considered filed for limitation purposes on 18 June 2012, notwithstanding that they are not yet joined to this claim.

[58] At the time of the alleged negligence, the Limitation Act 1950 applied.² Section 4(1) of that Act required claims in tort to be brought within 6 years from the date on which the cause of action accrued.

[59] A cause of action in tort arises when a duty owed to a claimant is breached and a loss suffered. It is necessary for the loss to have been suffered for the cause of action to accrue and time commence running for the purposes of the limitation statute.

[60] In the present case, the loss suffered by the claimants as a result of the alleged negligence of their lawyers arose when the transaction

¹ Lee v Whangarei District Council [2016] NZSC 173.

² Limitation Act 1950, s 2A.

settled based on a CCC issued by Compass, not the North Shore City Council. At that time, the claimants lost the right to advance claims against the territorial authority for breach of statutory duty or negligence. Such claims as the claimants held relating to the issue of the CCC could only be advanced against Compass.

[61] Accordingly, the loss arose on settlement. That was when the sale transaction settled on the basis of a CCC issued by Compass, not North Shore City Council. The time to bring a claim, therefore, commenced on 1 August 2003.

[62] Any claim against the claimants' lawyers needed to be brought within 6 years of 1 August 2003.³

[63] No claim was brought until the claimants sought an Assessor's report on 18 June 2012.

[64] That is more than 6 years, accordingly, any such claim against the claimants' lawyers is time barred by virtue of the Limitation Act 1950.

[65] This issue was considered by the Supreme Court in *Thom v Davys Burton*.⁴ In that case, a solicitor had been negligent in advising on a pre-nuptial agreement, with the effect that the agreement was void and Mr Thom was not protected from later claims to his separate property. The lawyers failed to comply with the statutory requirements on execution of the agreement. The agreement was therefore void. Mr Thom did not discover this until many years later.

[66] The question before the Court was whether Mr Thom's claim against the lawyers in negligence was time barred under the Limitation Act 1950.

[67] The negligent advice was given in March 1990. The claim in negligence was filed in July 2002. If the cause of action arose in March

³ Limitation Act 1950, s 4(1)(a).

⁴ *Thom v Davys Burton* [2008] NZSC 65.

1990 (when the agreement was executed) then the claim was filed out of time.

[68] The Court set out that it was settled law that a cause of action in negligence arises only when the loss or detriment is suffered by a plaintiff as a result of a breach of a duty of care by the defendant.

[69] Whether Mr Thom's claim was barred by section 4 of the Limitation Act 1950 turned on when he suffered loss as a result of the agreement being void.

[70] The Supreme Court held that Mr Thom suffered measurable economic loss in March 1990 when, as a result of the negligent advice of the lawyer, he entered into a non-complying matrimonial property agreement and married without the protection he would have had from a valid agreement. The cause of action arose against the lawyers at that date, the date when the agreement was entered into, not when the defect was later discovered.

[71] The Court said that "Mr Thom did not obtain the benefit he should have secured if the defendant had not been negligent: the exclusion of the provisions of the Matrimonial Property Act. He suffered immediate loss on his marriage without the protection of a valid contracting out agreement because he 'did not get what he should have got'".⁵

[72] In the claimants' case, any loss they suffered also arose immediately on settlement of the agreement. At that time, to adopt the wording of the decision in the *Thom* case, they "did not get what [they] should have got". What they say they bargained for was a Code Compliance Certificate issued by North Shore City Council. They did not get that.

[73] It follows that, in terms of section 4(1) of the Limitation Act 1950 and the authority of *Thom v Davys Burton*, the claimants' cause of action

⁵ At [25].

arose in August 2003 and they had 6 years to bring a claim, whether they knew about the negligence or not.

[74] They did not bring such a claim within 6 years and so it is time barred.

[75] The Tribunal has not overlooked that, technically, a limitation defence bars the remedy but not the substantive rights attaching to a claim. That is, a claimant is able to bring a time barred claim but should the respondent successfully raise a defence of limitation, then there is no remedy available. An action may be brought after the prescribed period and will succeed unless the respondent relies on the defence of limitation.

[76] When considering the merits of the joinder application, it is necessary to consider whether the respondent would raise a limitation defence and whether such a defence would be successful.

[77] The claimants' affidavit exhibits a letter from their lawyers dated 17 May 2023.⁶ The lawyers clearly signal a limitation defence.

[78] Accordingly, whilst the claimants may be able to bring such a claim, it would inevitably fail due to the limitation defence.

[79] When considering if the claimants have a tenable claim, the Tribunal concludes that the claimants do not have a tenable claim.

[80] Even if they had, it would be time barred.

Result

[81] I do not grant leave to the claimants to bring a joinder application against their previous lawyers.

[82] There is no valid explanation for the delay in making the application.

⁶ Affidavit of JYJ Kim sworn on 26 May 2023, exhibit "JYK30".

[83] There is no tenable claim against their lawyers, and even if there was, such a claim would be time barred.

[84] The claimants' application for leave is, therefore, declined.

[85] The case manager is to arrange a telephone conference to make further orders to advance this claim to resolution.

DATED this 8th day of June 2023

P R Cogswell

Chair

Weathertight Homes Tribunal