SUMMARY

Case: Hearn & Ors v Parklane Investments Limited & Ors – INTERIM DECISION
File No: TRI 2008-101-000045/ DBH 05356
Court: WHT
Adjudicator: R Pitchforth
Date of Decision: 30 April 2009

Background

This is an interim determination relating to a claim filed by the trustees of the A Hearn Family Trust (the Trust). The Trust sought redress from the following parties believed to be responsible for their leaky unit:

- First respondent: Parklane Investments Limited (Parklane) –previous owner and developer. Parklane was removed from the proceedings as it is in liquidation
- Second respondent, EMPA Group Consultants Ltd (EMPA) - engineer onsite
- Fourth respondents, I & R Morar Family Trust (Morars) - previous owners
- Seventh and eighth respondents, Mr Barry Millage and Barry Millage Architects Ltd respectively – alleged architects
- Tenth respondent, Mr Nachum - sole director of Parklane. The claim against Mr Nachum is yet to be heard.

Note: Joinder of the Body Corporate

The claimants sought to join the Body Corporate as a respondent due to uncertainty over what part of the property is controlled by the Body Corporate and the part controlled by the claimants. It was acknowledged that s 22(3) of the Weathertight Homes Resolution Services Act 2006 (Act) was not complied with and therefore the Body Corporate could only be joined as a respondent. The Tribunal held that because the Trust is one of the tenants in common of the Body Corporate land, any claim arising from the construction on the Body Corporate land falls within the claimants' claim based on the provisions of the Unit Titles Act. The application to join the Body Corporate was therefore declined.

Summary of Facts

- 1998: Parklane divided the land into two sites and had two built units on each. Units 2A and 2B were on one, while units 2C and 2D were on the other. Although the two sites had separate consent numbers, both projects were undertaken at much the same time and were treated as one. The subject dwelling is Unit 2C
- 1 Dec 1998: Mr Liu (sixth respondent now removed) applied to the Council for a building consent for two new houses whereby Parklane was named as the owner
- Mr Blades of EMPA completed a producer statement (PS1) for the design of units 2C and 2D. Mr Blades noted that he was to provide structural design services and that he believed on reasonable grounds that the drawings, specifications and other documents for the proposed building, complied with the Building Code
- 18 Dec 1998: the Council did not approve the proposed works, as resource consent was required. By the end of February 1999, resource consent still had not been obtained but the Council had already carried out two inspections of the work that had been done. Mr Blades was noted as the person who supervised all

foundation work. On 3 March 1999 the Council issued a stop-work notice until resource consent was approved
- 19 Aug 1999: Council issued a Code Compliance Certificate for units 2C and 2D
- 1999: Parklane sold the property to the Morars who purchased the property through a real estate agent and did not seek any pre-inspection reports and assumed that their legal adviser checked for a resource consent and CCC
- 2004: the Morars experienced damage to the garage floor due to faulty plumbing. Mr Nachum was involved with the repairs
- 27 September 2004: in a letter from the Council to the Morars, the Council inspectors found that the property did not have stormwater controls to the external decks and urged the Morars to urgently fit spouting and downpipes to all decks and discharge them to an approved out-fall. The letter was not specifically directed to weathertightness issues, though there may have been some factors that were relevant. A witness for the Council stated that such work was not a Council requirement. The Morars therefore took no action as it was not obligatory
- The Morars undertook almost no maintenance during their occupation of the property. The Morars stated that they saw no signs of dampness or external leaks
- 2002-2003: The Morars attempted to sell the property but were unsuccessful due to findings in pre-purchase inspection reports obtained by prospective buyers. The Morars contacted Mr Nachum concerning the difficulty in gaining a sale but Mr Nachum suggested that the real estate agent was not doing his job properly and recommended an agent who could sell the property. However that agent would not proceed with a sale as the garage floor needed repair. The Morars were not shown the pre-purchase inspection reports and so they sought a report from the WHRS. At that time they did not then believe that the house was leaking.
- The WHRS report estimated repair costs at $6,000-$8,000. The Morars disagreed with aspects of the report as it did not identify work relating to leaks nor did it identify particular leaks. The report was not part of the official record for this claim
- Due to an excess of buyers for unit 2B, the real estate agent took prospective buyers to unit 2C. During the sale and purchase, the Morars were not asked and did not volunteer any information about weathertight issues
- 13 Oct 2005: The Morars sold the property to the claimants who they had not met. The Morars say they were unaware of any leaks or weathertight issues at the time of sale. The agreement referred to repairs to be completed before purchase but the Morars' evidence was that such damage was unrelated to weathertightness.
- About Dec 2006: the claimants became concerned about weathertightness issues at the property and applied to the WHRS for an assessment on 16 March 2007

Claim

Remedial Costs

The experts all agreed that the only satisfactory remedy is to completely reclad the building. The WHRS assessor set out a general scope of work that was further developed by the claimant's expert witnesses. These costs were revised taking into account any repainting that would be betterment and an undertaking from the Council that double glazed windows are not required in order to obtain a CCC.

Regarding future damage, the Tribunal held that it is clear that the house will continue to leak and rot thereby unlikely to have a life of 50 years (as stipulated in the Building Code). After considering quotations and arguments regarding the remedial work and its costs, the Tribunal held that on the balance of probabilities it is more likely that the claimant's figures are correct. The cost of the work was therefore assessed at $444,907.00 including GST.

The claimant also claimed the following ancillary costs, which were not disputed:

• Insurance during reclad		$ 1,200.00
• Alternative accommodation for 4 months		$ 6,750.00
• Furniture storage		$ 850.00
• Moving chattels to and from house		$ 1,900.00
• Cattery costs for 4 months		$ 4,200.00
	Sub-Total	$14,900.00 (inclusive of GST)

The total amount of the claim was therefore $459,807.00

Morars' contribution
The Morars' contribution of $10,000.00 was deducted from the claim and therefore the claimants were entitled to claim $449,807.00 against the relevant respondents.

Lack of maintenance
The Tribunal held that although there were items of incomplete maintenance, this did not contribute to the leaks.

General damages
Mrs Hearn gave evidence of her experiences but she was not a party to this claim in her own right but rather a witness giving evidence as one of the trustees. Moreover, the trust was not in a position to suffer anxiety or stress. The Tribunal therefore concluded that it did not have jurisdiction to make an award in favour of one who is not a party. Mrs Hearn's claim for general damages therefore failed.

Contributory negligence
The Council alleged contributory negligence against the claimants for:
- Failing to request a Land Information Memorandum (LIM) from the Council
- Not making the agreement for sale and purchase conditional upon obtaining a LIM
- Not making the purchase conditional on obtaining a satisfactory pre-purchase inspection report
- Not obtaining a pre-purchase inspection report after defects were identified prior to purchase; and
- Not making the agreement conditional upon her solicitor's approval in all respects

These contributory negligence allegations were largely abandoned during the hearing. However, for the avoidance of doubt, the Tribunal found that none of these actions referred to were negligent or contributed to the claimants' loss.

Failure to mitigate
Once the claimants discovered there was a weathertight issue, they stopped further maintenance. The Council therefore submitted that the claimants failed to mitigate their loss. However in light of the assessor's report, money spent on mitigation would have been wasted. The Tribunal therefore held that there is no loss that mitigation would have prevented and this submission accordingly failed.

Summary of Decision
- *Liability of Mr Millage and Barry Millage Architects Limited – alleged architects*

The claims against these parties were based on the issue of the Practical Completion Certificate thereby alleging that Mr Millage was the architect. However the Tribunal held that neither party has any liability to the Council or any other party as there was no information showing that Mr Millage or his company was the onsite architect. Nor were there Council records sighting the Practical Completion Certificate until some nine years after it was created. It therefore followed that the Council did not rely upon it at the time. The claims against these respondents were therefore dismissed.

- *Liability of Morar Family Trust – previous owners*

  (i) Claim in contract

  Firstly, the claimants argued that the Council's letter to the Morars on 27 September 2004 was a notice in breach of clause 6(1) of the agreement for sale and purchase. The Tribunal found that the letter was clearly advisory and so it was not a "notice, demand, requisition of requirement" for the purposes of clause 6(1). It was therefore held that there was no breach of contract at this point.

  Secondly, the extent of repairs to the garage floor undertaken by the tenants indicated that a permit or building consent was required. The Morars were unaware that such repairs were undertaken until after such repairs had been done, and no such permit was obtained. The Tribunal therefore found that the Morars knew about the issues and breached their warranties and undertakings in the sale and purchase agreement in allowing repairs to be undertaken without appropriate consents and approvals. The Morars were liable to the claimants for $10,000 being the cost of bringing the garage floor up to code compliance standard.

  (ii) Misrepresentation

  This claim failed firstly because there was no evidence of the Morars' alleged misrepresentations to the claimants relating to weathertightness, and secondly the parties had never met and there was no representation by the agent.

  (iii) Unilateral Mistake

  This claim failed as there was no evidence showing that the claimant was mistaken about any issue in relation to the contract

  (iv) Common Mistake

  This claim failed as there was no evidence that either party considered the weathertightness issue in the course of the transaction

- *Liability of EMPA - engineer*

The claims against EMPA were dismissed as the Tribunal found that EMPA had no involvement in constructing the dwelling after issuing the PS1 and furthermore that EMPA did not undertake any action that led to leaks and consequent damage.

- *Liability of Wellington City Council - territorial authority*

The Tribunal found that the Council was negligent and accordingly liable for the full amount of the claim due to the following:

i) Consent application

The Tribunal held that the Council was not negligent in this regard for the plans and specifications were consistent with the standards of the day. Moreover, by imposing a condition that the building works required ongoing engineer inspection, the plans and specifications were sufficient to enable a competent builder to build the units in compliance with the Building Code.

ii) Negligent inspections

Although the Tribunal held that the Council's actions were not the cause of the purchases, it was inevitable that someone would rely on the Council's procedures in relation to building houses. Therefore due to the confusion of the Council officers with the numbering systems of the buildings on site as well as the low standard of record keeping, the Council failed to realise that the professionals they were relying on had no part in the construction after the application for consent. The Tribunal therefore concluded that the Council was

negligent in relation to its inspections and record keeping processes and therefore it was not reasonable for the Council to issue a Code Compliance Certificate in the circumstances.

iii) Accrual

The Council submitted that because the Trust purchased the property after the damage was known to have occurred and received no assignment from the Morars (as the previous owners), the claimants now cannot recover damage. The Tribunal had already found that the Morars did not know the house was leaking and neither did Mrs Hearn who lived in the property some time before becoming aware of possible weathertight issues. Accordingly, the Tribunal did not accept the Council's submissions and therefore the accrual argument failed.

iv) Jurisdiction

The Council submitted that the present claim is restricted by s 33 of the Act because the Morars (as the previous owners) had a WHRS assessor's report prepared even though they later withdrew their claim and did not assign it. The Tribunal dismissed those submissions because the claimants did not consider the Morars' assessor's report suitable for their claim and therefore the Chief Executive did not make a refusal under s33(1)(b); the present claim was commenced under the 2002 Act which did not have a provision similar to s32(1)(b) of the 2006 Act and so the Chief Executive did not have the opinion of using the earlier report; and the present claim met the eligibility criteria set out in ss13 and 14. Therefore under s130(1)(b) the Tribunal is required to adjudicate this claim under s62

- *Liability of Mr Debney and Wadestown Developments Limited - builders*

The Tribunal held Wadestown and Mr Debney (director of Wadestown) jointly and severally liable for the full amount of the claim as Wadestown was the contracted builder and Mr Debney was involved in some of the day-to-day running of the construction. Upon an objective assessment, the Tribunal found that Mr Debney and Wadestown are liable for the inadequate supervision provided and for the negligent work that has caused the leaks.

Contribution

Based on the above findings, the Council, Mr Debney and Wadestown are jointly and severally liable for the full amount of the claim less the amount payable by the Morars. These respondents are concurrent tortfeasors and so each is entitled to a contribution from the other according to their relevant responsibilities. The Tribunal noted that the claim against Mr Nachum has not been heard and so there may well be grounds for a reallocation of responsibility under s7(2) once that claim is heard. However in the interim, the Tribunal found that the Council's contribution should be set at 30% thereby leaving Mr Debney and Wadestown jointly liable for 70% of the claim.

Result

- The claimants' claim is proved to the extent of $459,807.00
- EMPA was not negligent and accordingly claims against that party are dismissed
- The Council breached the duty it owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $449,807.00. The Council is entitled to recover a contribution of up to $314,864.90 from Mr Debney and Wadestown for any amount paid in excess of $134,942.10
- Mr Debney breached the duty owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $449,807.00 and is entitled to

recover a contribution of up to $134,942.10 from the Council for any amount paid in excess of $314,864.90

- The Morars breached its contract with the claimant and were therefore ordered to pay $10,000 to the claimants for replacing the garage floor
- Wadestown breached the duty owed to the claimants and is ordered to pay the claimants the sum $449,807.00. Wadestown is entitled to recover a contribution of up to $134,942.10 from the Council for any amount paid in excess of $314,864.90

Therefore if all respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

• Council	$134,942.10
• Morars	$ 10,000.00
• Mr Debney and Wadestown	$314,864.90
TOTAL	$459,807.00