

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-100-000012
[2011] NZWHT AUCKLAND 33**

BETWEEN **MARIE LITCHFIELD AND
GRAHAM WELLS**
Claimants

AND **THE COUNTRY COTTAGE CO
LIMITED**
First Respondent

AND **AUCKLAND COUNCIL**
Second Respondent

AND **WILLIAM GEORGE
TUNNICLIFFE**
(Removed)
Third Respondent

AND **BLAIR ALEXANDER MELVIN**
(Removed)
Fourth Respondent

Hearing: 16 June 2011
Decision: 4 July 2011

PARTIAL DETERMINATION ON LIMITATION ISSUES
Adjudicator: P A McConnell

BACKGROUND

[1] Marie Litchfield and Graham Wells are the owners of a leaky home situated in Don Buck Road, Massey. They have filed a claim against the Country Cottage Co Limited, Auckland Council, William Tunnicliffe and Blair Melvin. Country Cottage was the developer of the property and Mr Tunnicliffe and Mr Melvin were directors of that company.

[2] Both Mr Melvin and Mr Tunnicliffe have applied to be removed as parties to this claim on the basis that the claim against them is limitation barred. They say that the dwelling was built more than ten years before the claim was filed as all construction work, other than the installation of part of an internal balustrade, was completed by 26 October 1999 which is more than ten years before the claim was filed.

[3] Given the importance of the limitation issues to the way this claim could be progressed it was agreed that a hearing would be convened in order to call evidence to determine when construction work was done and whether the claim against Mr Melvin and Mr Tunnicliffe is limitation barred. In advance of that hearing Mr Tunnicliffe, Mr Melvin and Ms Litchfield filed witness statements. Mr Melvin and Mr Tunnicliffe attended the hearing so that they could be questioned on their statements and cross-examined in relation to any disputed facts. Despite Ms Macleod, the claimants' representative, advising that she would attend the hearing on the limitation issues, neither the claimants nor Ms Macleod attended the hearing. Ms Macleod did however file written submissions in advance of the hearing.

THE ISSUES

[4] The issues I need to determine are:

- What construction work, if any, took place within ten years of the claim being filed?
- Did any act or omission on the part of Mr Tunncliffe or Mr Melvin, which forms the basis of the claim against them, occur after 27 October 1999? In particular do Mr Tunncliffe or Mr Melvin owe a continuing duty of care through to either the date of issue of the Code Compliance Certificate (CCC) or the sale of the property to the claimants? If so, did any breach of that duty occur within the ten years before the claim was filed?
- Should Mr Melvin and Mr Tunncliffe be removed as parties to this claim?

WHAT CONSTRUCTION WORK, IF ANY, TOOK PLACE WITHIN TEN YEARS OF THE CLAIM BEING FILED?

[5] There is no real dispute as to the factual background and chronology of construction. No party sought to question Mr Tunncliffe and Mr Melvin on the contents of their affidavits. Their recollection of the timing of events is supported by the documentary information that it is still available.

[6] During the 1990's Country Cottage undertook the development of a number of dwellings in Don Buck Road, Massey of which 2/485 Don Buck Road was one. This particular dwelling was known as Lot 8 and was built in 1997 and 1998 and was used as a display home throughout 1999 until its sale in October 1999. The relevant factual chronology is as follows:

Building Consent issued	20 August 1997
Dwelling largely complete	Early 1999
Final Inspection by Council	26 October 1999
Settlement of sale to Claimants	12 November 1999
CCC issued	10 March 2000

[7] Country Cottage applied for a final inspection on 26 October 1999. Three outstanding issues were noted on the inspection report. A handrail needed to be installed, further checks done as to whether a soil report had been obtained and there was also a query as to whether a pre-line inspection had been completed. The soil report and pre-line inspection issues required additional paper work and were unlikely to have involved actual construction work. It is difficult to read the inspector's notation in relation to the handrail. It is most likely "handrail to interior stairs required" followed by "OK".

[8] It is unclear why a CCC was not obtained prior to the sale to the claimants. Mr Melvin stated at the hearing that his recollection was that the Council's preference was to approve and sign off these houses in groups. It is possible in these circumstances that the issuing of the CCC was overlooked.

[9] There is no evidence or information to suggest any construction work was done to the property after the final inspection on 26 October 1999, other than the installation of the internal handrail. Mr Tunnicliffe's recollection is that this was part of a handrail only. In any event the handrail has no relevance to the leaking issues with this dwelling.

[10] Ms Litchfield stated in an affidavit that when they viewed the property it had no furniture, no curtains, no stove, fridge or dishwasher and was nearing completion. There is no information as to what date the property was viewed nor does she say that any building work was incomplete. The omissions referred to, such as curtains, white ware and furniture, are not construction matters but are more furnishing matters. The installation of these items has not been implicated in the dwelling leaking and was not required for construction to be considered to be complete.

[11] Ms Macleod in her submissions suggests that the failed final inspection dated 26 October 1999 put Mr Tunncliffe and Mr Melvin on notice that the building lacked material details which have contributed to the damage suffered. There is no evidence to support this. As already stated the only construction issue the building failed on was the omission of part of an internal balustrade. This has no connection with any of the alleged defects and there were no other issues of defective building work noted. Ms Macleod also appears to be challenging Mr Melvin and Mr Tunncliffe's evidence in relation to the property being used as a show or display home prior its sale to the claimants. Ms Macleod and the claimants were given the opportunity to question both Mr Melvin and Mr Tunncliffe at the hearing which was convened for that purpose. They chose not to do so. They therefore cannot appropriately make submissions disputing direct evidence when they chose not to appear to question Mr Melvin and Mr Tunncliffe at the hearing.

[12] Based on the uncontested evidence that is before me I conclude that by 26 October 1999 all of the construction work that was required in order to obtain a CCC had been completed, other than the installation of part of an internal balustrade. Mr Tunncliffe's recollection is that this balustrade was not detailed in the consented plans. The only other outstanding work was the installation of items such as the stove, fridge, dishwasher and curtains.

**IS THE CLAIM AGAINST MR MELVIN OR MR TUNNICLIFFE
BASED ON AN ACT OR OMISSION THAT OCCURRED AFTER 27
OCTOBER 1999?**

[13] The Council and the claimants argue that Mr Tunncliffe and Mr Melvin were developers and as such they owe a non-delegable duty of care. They also submit that they owed an ongoing duty of care until either the property was sold or the Code Compliance Certificate was issued, whichever was the earliest. Mr Tunncliffe and Mr Melvin accept that Country Cottage was the developer but do

not necessarily accept they personally were developers. Mr Tunnicliffe was the designer of the property but other than that advised he had little involvement in the construction or supervision of the work done on site. Mr Melvin had more on site involvement and another of his companies, Melvin and Stark Limited, was the builder engaged to construct the dwelling. I accept that it is arguable that Mr Melvin and Mr Tunnicliffe were personally developers. Therefore, for the purposes of this partial determination only, I will proceed on the basis that they were developers.

[14] I accept that developers can owe an ongoing duty of care until either the property passes its final inspection or the dwelling is sold, whichever is the earliest. The relevant issue however is not whether the developers owed an ongoing duty of care but whether they breached that duty of care, and in particular whether there was any breach that occurred within the ten years prior to 28 October 2009 which has been causative of loss.

[15] The third and fourth respondents rely on s 91(2) of the Building Act 1991 and they say the claim against them is statute barred because any act or omission on which these proceedings are based occurred more than ten years before 28 October 1999. Section 91(2) of the Building Act 1991 states:

- (2) Civil proceedings relating to any building work may not be brought against any person ten years or more after the date of the act or omission on which the proceedings are based.

[16] The claimants accept the cut-off date for limitation considerations is 28 October 1999. They however submit that Mr Tunnicliffe and Mr Melvin remained as developers beyond this point at least until the sale of the property on 12 November 1999. They say that in the period between 28 October and 12 November 1999 Mr Melvin and Mr Tunnicliffe had an opportunity to detect and remediate the defects to the house but omitted to do so. They submit therefore that the negligence was ongoing.

[17] Ms Macleod on behalf of the claimants also seems to be suggesting that because other neighbouring dwellings, constructed by Country Cottage Co Limited, were completed much later than the claimants' dwelling the passage of time argument fails when seen in the context of other properties consented at a similar time. I do not accept there is any validity in this argument. The fact that neighbouring properties may have been constructed later has little relevance to the issue of whether the claim against Mr Tunncliffe and Mr Melvin, for this property, is limitation barred.

[18] There is no evidence that any act by Mr Tunncliffe or Mr Melvin on which these proceedings are based took place after 28 October 1999. The remaining issue is on what is the appropriate date for determining whether any omission occurred?

[19] Ms Macleod submits that Mr Melvin was still involved in supplying appliances to the property in November 1999 and therefore he must have visited the property within the ten year period. She further submits that Mr Melvin would, or should have, carried out a final inspection prior to the sale to Ms Litchfield and Mr Wells within the ten year period and therefore submits that the claim cannot be limitation-barred.

[20] The Council and the claimants argue that any omission did not occur until at least the sale of the property to the claimants as until that time the developers had the opportunity of rectifying any defects. Ms Divich, for the Council, referred to two High Court decisions to support this argument.¹ In both cases developers had applied for the claim against them to be struck out on the basis that they were filed outside the ten year limitation period. The High Court refused to strike out both claims as it accepted as potentially tenable the proposition that a defective act done at some earlier date could be viewed as an omission to remedy that defect at a later date. In

both cases, although the Judge expressed some doubt as to the success of such an argument, they concluded the matter required a factual determination which, in the circumstances of High Court litigation, is more appropriately addressed at trial.

[21] Given the nature of Tribunal proceedings, and the statutory imperative for the Tribunal to provide homeowners with access to speedy, flexible and cost-effective procedures for resolving claims, as noted earlier it was agreed that the Tribunal would conduct a hearing on this issue and make a partial determination. Ellis J in *Yun & Anor v Waitakere City Council*² accepted that the Tribunal has evidence before it from the commencement of proceedings and is entitled to seek further information and evidence throughout the claim's progress. She concluded that when determining removal applications the Tribunal could consider the evidence before it, subject to the requirements of natural justice. She stated³:

If there is to be any prospect of hearing and determining such claims in an expeditious and cost-effective way, the Tribunal must be able to perform an active gate-keeping role in terms of both the joinder and removal of parties. If early receipt and assessment of evidence assists it to sort the wheat from the chaff, then I am of the view that the Act not only contemplates but arguably requires that, subject to the requirement of fundamental fairness that is reflected in s112 (2).

[22] There is no dispute that the defective work was completed before 28 October 1999. It is not necessary to be more precise than that. Therefore unless it can be argued that the date of an omission is extended past the completion of construction until the date of either sale or the issuing of the CCC then section 91(2) clearly bars the claim against Mr Melvin and Mr Tunncliffe. The claimants' case effectively is that Mr Tunncliffe and Mr Melvin owed them a continuing duty of care in tort, to detect the defects and rectify them between the time construction work was completed and the dwelling

¹ *O'Callaghan & Ors v Drummond & Ors* HC Christchurch, CIV-2007-409-001441, 21 October 2008, *Soulis & Ors v Wellington City Council & Ors* HC WN, CIV-2006-484-1164, 18 August 2009.

² *Yun & Anor v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011

was sold to them. They say their failure to do so was negligent and thus a breach of their duty to them and causative of loss. Whether Mr Melvin and Mr Tunnicliffe owed a duty of care is a question of law. Whether they were negligent and breached such a duty of care is a question of fact. Whether any such negligence caused an identifiable damage or loss is a mixed question of fact and law.

[23] Mr Berman, counsel for Mr Melvin submitted that although a developer might owe a continuing duty of care to remedy faulty workmanship within the ten year period, the failure to remedy it was not an omission which extended the limitation period. He referred to *Johnson v Watson*⁴ as authority for the submission that it was when the actual faulty work was performed that was the relevant date of the act or omission. He further submitted that there are two important principles that emerge from *Johnson v Watson* which are directly relevant to the present case, namely:

- Even if the work had been performed within the ten year period the claim is not within time unless that faulty work caused the damage. In other words there must be a causative connection between the non limitation barred act or omission and the damage.
- The omission, within the ten year period, to repair earlier faulty work is not actionable because it is not that omission which caused the damage.

[24] Mr Berman therefore submitted that any omissions to rectify the defects within the ten year period were not actionable because there was no causation between any such omissions and the claimants' loss. To find otherwise would result in an indefinite deferment of the limitation period particularly where a property was not sold for months or even years after the completion of the building work. This he submitted would fly in the face of the objectives of the

³ Ibid, at [70]

⁴ *Johnson v Watson* [2003] 1 NZLR 626.

long stop provision in the Building Act. These were summarised by Courtney J in *Dustin v Weathertight Homes Resolution Service*.⁵

The objective of a long stop period is to create finality by preventing claims being brought outside it. The inevitable result is that some, otherwise valid, claims will be precluded. However the result is inherent in the concept and operation of the long-stop period. Its purpose is to ensure fairness to all parties, given the effect of time on the freshness of memories and availability of witnesses. Further, it gives certainty for intended defendants so that they can plan such things as document destruction and liability insurance.

[25] I accept that developers owe a continuing duty of care through until the completion of the construction work. It is also arguable that developers owe a duty of care after construction work is completed through until either the CCC has issued or the property is sold, whichever is the earlier. However in order to conclude that there is a tenable claim in negligence for acts or omissions that occurred after the completion of the defective work there needs to be proof of specific acts or omissions that are causative of identifiable damage. *Johnson v Watson* is authority for the submission that this identifiable damage needs to be additional and separate to the loss or damage that occurred as a result of acts or omissions that occurred outside of the limitation period.

[26] The fact a developer has not identified defects in a period after the final inspection but before the CCC issued or the property was sold should not have the effect of extending the limitation period to include negligent acts that occurred outside the ten year period. In this claim the undisputed evidence is that the defective building work on which this claim is based occurred more than ten years before the claim was filed. If any omission on the part of the developers extends past the completion of the construction of the defective building element then, in the circumstances of this case, the culmination of the omission comes to fruition at the very latest when

⁵HC Auckland, CIV-2006-404-276, 25 May 2006, at [22]

they applied for the final inspection. An exception to this could only occur if that final inspection failed and resulted in further building work which is implicated in the leaks. That is not the case with this claim.

[27] The application for the final inspection is the time when the developer, or owner, advises that in their opinion the building work has been completed in accordance with the building consent. It would be artificial to extend the date of any omission past this date unless there is clear evidence of any additional acts or omission which has caused additional loss. Any failure by Mr Tunnicliffe and Mr Melvin to identify defects within the ten year limitation period has not been causative of any additional loss or damage to that caused by the construction work carried out prior to 28 October 1999.

[28] Ms Macleod submits that Mr Melvin and Mr Tunnicliffe were negligent in entering into the agreement for sale and purchase. Ms Macleod is confusing the contractual warranties under the agreement for sale and purchase with a tortious claim against the vendor. I do not accept that vendors owe claimants a duty of care when entering into sale and purchase agreements. There may be a breach of contract in these circumstances but that is not what is being alleged here. A contractual claim in relation to the agreement for sale and purchase can only be made out against the contracting party which is the first respondent. In any event any claim based on the warranties in the agreement for sale and purchase would be limitation barred under the Limitation Act

SHOULD MR MELVIN AND MR TUNNICLIFFE BE REMOVED AS PARTIES TO THIS CLAIM?

[29] I have concluded that there are no acts or omissions on the part of Mr Melvin and Mr Tunnicliffe that caused loss that occurred within the ten years before the claim was filed. Any acts or omissions by them on which any proceedings could be based

occurred prior to 28 August 1999. The claim against them is therefore limitation barred and they are removed as parties.

PROGRESSION OF THE CLAIM

[30] The first respondent is in the process of being struck off the Companies Register and the third and fourth respondents have now been removed. The only remaining respondent is therefore the Auckland Council. The only relevant actions that occurred within the ten years of the claim being filed appear to be the actual issuing of the Code Compliance Certificate. There are accordingly no other parties who can appropriately be joined to this claim.

[31] I further note that there is little established precedent as to the extent of a territorial authority's liability in a situation where the claimants purchased a property before the CCC issued and when all inspections, including the final inspection, occurred outside the ten year period. This is likely to be the most significant issue for any further hearing.

[32] There will be a telephone conference convened on this claim at 9:00am on 14 July 2011 to determine in these circumstances how the claim is best progressed.

DATED this 4th day of July 2011

P A McConnell
Tribunal Chair