SUMMARY

Case: Marywil Investments Ltd v North Shore City Council & Ors
File No: TRI 2008-100-000031/ DBH 02988
Court: WHT
Adjudicator: Chair PA McConnell
Date of Decision: 14 July 2009

Background
Marywil Investments Ltd as trustee of the Marywil Trust (the Trust) is the owner of the property. In 2004, after seeing evidence of damage from leaks, the Trust registered a claim with the WHRS. The Trust filed a claim with the Tribunal naming the North Shore City Council (Council). Several other parties were subsequently joined to the claim however at mediation a partial settlement was reached between all parties except for Mr Kanon. The settlement agreement provided that the Council could take an assignment of the claim against Mr Kanon on behalf of the claimant. Mr Kanon was a director of Famkanco Construction Ltd, a company that undertook labour-only building work during the construction of the dwelling. Mr Kanon, his work partner Mr Sprenkeling and Mr Kanon's sons, carried out the building work.

Summary of Facts
- 1993: Apex, as previous owners, engaged Butt Design Ltd to prepare drawings and specifications
- 28 February 1994: a building consent was issued based on those drawings
- February 1994-February 1995: the house was constructed with the Council carrying out inspections
- Apex contracted Famkanco to provide labour-only building work. Famkanco was not in control of the site nor did it have any supervisory responsibilities for the sub-trades. Instead Apex had a project manager on site who checked off work being done by contractors on site on a daily basis
- 22 November 1994: Mr Adams, a director of Marwil Investments Ltd, entered into an agreement for sale and purchase to buy the property
- 8 February 1995: the Council issued the final Code Compliance Certificate (CCC)
- 10 February 1995: Mr Adams and his wife moved into the property. On final settlement $10,000 was retained because of various aspects of the house that were not completed to a reasonable standard. These were attended to by Apex.
- 2004: further damage was evident and so Mr Adams engaged a builder and roofer to look into the problem but neither were able to locate the fault
- 12 January 2005: Mr Adams registered the claim with the WHRS

Claim
The claimants engaged North Head Builders Ltd to carry out the remedial work. O'Hagan Building Consultants Ltd was also engaged as a consultant. The cost to fix the house was $334,997.24. The Trust had to borrow the money to pay for the remedial work and as at 16 March 2009 had incurred finance costs and interest of $68,612.66. The claimant also sought general damages of $25,000. The claim

against Mr Kanon was for remedial costs of $265,985.24, general damages of $25,000 and interest pursuant to clause 16 of Schedule 3 of the WHRS Act 2006.

Whilst the Tribunal accepted that Mr Adams has suffered stress and inconvenience from living in a leaky home, he is not the claimant in this claim. The claimant is Marywill Investments Ltd as trustee for the Marywil Trust and it is well established that a company cannot get general damages.

The Tribunal was satisfied on the evidence that the cost of remedial work was reasonable and has been established. The parties agreed that the Tribunal would issue an interim decision as to quantum with a dollar figure given to Mr Kanon's contribution only.

Summary of Decision

Jurisdiction to bring assigned claim

Mr Kanon submitted that the assignment is invalid as the Tribunal has no jurisdiction to deal with an assigned claim, and secondly an abuse of process for an assigned claim for the full amount as it could result in the Council benefiting from the process. The Tribunal held that such a submission is against the policy of the Act and its aim to encourage speedy and cost-effective resolution of claims. The Tribunal therefore concluded that the Council is able to continue with this claim on an assigned basis.

Limitation Issue

Counsel for Mr Kanon submitted that the claim was limitation-barred because of the 10-year long-stop provision in section 393(2) of the Building Act 2004. All parties accepted that Mr Kanon was not involved in construction work on site after October 1994 at the latest. The claim was filed with the WHRS on 12 January 2005 – ie more than 10 years and 2 months after the Kanons completed working on site.

The Tribunal stated that where there was a building contract for the completion of certain work, it would be artificial to conclude that any omission occurred on the date Mr Kanon and the other builders left the site. Mr Kanon's company was contracted to perform certain work and they could have been required to return to the site up until completion of the project to complete further work or rectify any defective work. The Tribunal therefore concluded that the act or omission on which any claim against Mr Kanon is based did not occur until the house was completed. In determining when a dwelling is completed or built, a number of issues need to be considered.

In the circumstances of this case, the earliest at which it could be considered that the house was completed would be early February 1995 as settlement was delayed from 27 January 2009 to early February because work had not been completed and a CCC had not been issued. Even on settlement, $10,000 was retained to cover any additional work requiring completion. The Tribunal accordingly concluded that the date from which the ten-year long-stop provision would start running in relation to any claim against Mr Kanon would be at the beginning of February 1995. The claim was therefore filed within 10 years of that date and so the limitation defence failed.

Mr Kanon's Liability

Mr Kanon was the director of Famkanco, the company contracted to carry out the building work. Builders owe homeowners a duty of care to carry out building work on a house in accordance with the Building Act, the Building Code and in a workmanlike manner. Mr Kanon also did not dispute that he was actively involved in the building work and in the supervision of the building work undertaken by Famkanco. Directors of building companies who actually carry out the building work can be personally liable

for any negligent work they undertook. The fact that there was a site manager or project manager employed by the developers negates any duty of care Mr Kanon or his company owed the claimants. The Tribunal therefore concluded that Mr Kanon owed a duty of care to the claimants to ensure the building work carried out on the house was carried out in accordance with the Building Act 1991, the Building Code and in a workmanlike manner. Mr Kanon was in effect the main builder and the labour-only nature of the contract does not mitigate against concluding that he owed the claimants a duty of care.

Result

Contribution

The Tribunal found that at most, Mr Kanon would be jointly and severally liable for the cost of carrying out targeted repairs to some of the decks and the entrance area. Based on the evidence, the Tribunal therefore assessed that Mr Kanon's total potential (joint and several) liability would most likely be between 10 and 20% of the total remedial costs.

The work done by Mr Kanon was not the major cause of leaks even in relation to the decks. Other parties also potentially have liability for those areas. The Tribunal accordingly assessed Mr Kanon's contribution to the total cost of remedial work to therefore be 5% of the amount established for remedial work which is $13,300

Conclusion and Orders

The Tribunal ordered Mr Kanon to pay the claimants $13,300 plus interest pursuant to clause 16 of Schedule 3 of the WHRS Act 2006.