IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000117
[2012] NZWHT AUCKLAND 41

BETWEEN	ROBYN COLEMAN AND PATRICIA BAMFORD Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	RONALD ANTHONY URLICH AND JANICE WILMA URLICH (Bankrupt and Removed) Second Respondents
AND	GRAHAM HAYHOW (Deceased and Removed) Third Respondent
AND	JOHANNES LAURENTIUS APERS Fourth Respondent

Hearing:	19 July 2012; closing submissions 26 July 2012
Appearances:	T J Rainey and J Wood for the claimants F Divich for the first respondent, Auckland Council J L Apers in person (on 19 July 2012)
Decision:	11 September 2012

FINAL DETERMINATION
Adjudicator: S Pezaro

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BACKGROUND

[1] The claimants in these proceedings are Patricia Bamford, the owner of Unit 112B Remuera Road and Robyn Coleman, the owner of Unit 112D. These units are leaky homes and Ms Bamford and Ms Coleman claim that the Auckland Council is liable for the estimated cost of repair, consequential losses and damages. Mr Apers, the fourth respondent, provided a pre-purchase report for Ms Coleman.

[2] At the commencement of the hearing on 19 July 2012 Mr Rainey and Ms Divich advised that there was no dispute between the claimants and the Council in relation to liability or quantum. The parties agreed that Ms Bamford is entitled to the sum of $345,912.00 from the Council, if found liable. On 26 July 2012 when closing submissions were heard the Council consented to judgment being entered for the sum of $341,739.50 in favour of Ms Coleman. A consent order was issued accordingly.

[3] The remaining issues which I now need to determine are:

(a) Whether the Council has an affirmative defence under s 393 of the Building Act 2004 in respect of the claim by Ms Bamford for Unit 112B.
(b) Whether Mr Apers is liable to the Council under the Fair Trading Act 1986.

DOES THE COUNCIL HAVE AN AFFIRMATIVE DEFENCE TO THE CLAIM FOR UNIT 112B?

[4] On 25 August 2008, Benjamin Coleman, the representative of Unit 112D, applied for an assessor's report. Unit 112B was not included in this application however Ms Bamford subsequently authorised Mr Coleman to bring the claim for her unit. The relevant chronology is set out below:

Date	Action
10 December 1998	Final inspection of 112B by the Council.
22 December 1998	A Council officer completes a code compliance memorandum.
5 May 1999	A code compliance certificate was issued for 112B.
25 August 2008	A stand-alone complex claim was initiated for the complex by the application for an assessor's report, it was assigned the claim number 05762
30 January 2009	Claim 05762 is determined to be an eligible claim by the Chief Executive.
26 March 2009	Patricia Bamford's authority to join a representative claim was received by the Department of Building and Housing.
7 April 2009	The representative completes a request for an addendum report on Ms Bamford's unit.
19 June 2009	The assessor issued the addendum report
19 November 2010	An application for adjudication form for single house dwelling claims was filed for both units.

The limitation period for Unit 112B

[5] A claim is defined in the Weathertight Homes Resolution Services Act 2006 (the Act) as a claim by the owner of a dwellinghouse that the owner believes suffers damage as a result of water ingress.[1] A 'dwellinghouse' is defined as a building, apartment flat, or unit within a building, that is intended to be used principally as a private dwelling.[2]

[1] Weathertight Homes Resolution Services Act 2006, s 8.
[2] Weathertight Homes Resolution Services Act 2006, s 8.

[6] The claimants' units are dwellings in a stand-alone complex.[3] Section 21(1) provides that a representative of owners in a stand-alone complex may bring a claim on behalf of other owners. However Ms Coleman made her claim under s 14 as a single dwellinghouse claim.[4] When Ms Bamford applied to join this claim, DBH issued the WHRS report for Ms Bamford's unit as an addendum report to the report for Ms Coleman's unit.[5]

[7] Section 37(1) of the Act provides that:

> **37 Application of [Limitation Act 2010] to applications for assessors' report etc,**
>
> (1) For the purposes 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.

[8] In *Kells v Auckland City Council*[6] the High Court confirmed that for the purpose of determining the limitation period for claims in the Tribunal, time stops running against all parties when an application for an assessor's report is filed. The issue that I need to decide is when time stopped running in respect of Ms Bamford's unit.

[9] Ms Divich submits that at 25 August 2008, only Ms Coleman had authorised her claim to be brought and that this application for an assessor's report did not stop time running in respect of Ms Bamford's unit. It is submitted that time did not stop running for Ms Bamford until she gave her authority for the claim to be brought on 26 March 2009 or, at the latest, on 7 April 2009 when she authorised invasive testing.

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[3] Weathertight Homes Resolution Services Act 2006, s 8.
[4] WHRS report issued 26 November 2008 at [3.2].
[5] WHRS addendum report issued 19 June 2009 at [3].
[6] *Kells v Auckland City Council* HC Auckland, CIV-2008-404-1812, 30 May 2008 at [44].

[10] Mr Rainey submits that, just as s 37 of the Act may allow claims against a respondent who would otherwise have a limitation defence, some unit owners in the position of Ms Bamford will be able to bring claims that may otherwise be out of time because another unit owner in their complex has filed proceedings in this Tribunal.

[11] Mr Rainey may be correct in respect of stand-alone or multi-unit complex claims. Section 26 of the Act provides that further owners may be added to representative claims. However, the claim for Ms Bamford's unit was accepted by the Department for Building and Housing as an addendum to the single unit dwelling claim brought by Ms Coleman under s 14 of the Act. Ms Coleman's claim was not a representative claim therefore Ms Bamford cannot rely on it for limitation purposes.

[12] Section 37 of the Act provides that proceedings are filed when an application for an assessor's report is made under s32(1). The date on which Ms Bamford authorised invasive testing was effectively that date as, until Ms Bamford took this step, the assessor was not authorised to carry out the investigation. Time therefore stopped running in respect of Ms Bamford's claim on 7 April 2009 and any claim based on acts or omissions that occurred before 7 April 1999 is time barred.

Was the Council negligent in issuing the CCC?

[13] The second part to the Council's limitation defence is that, as time did not stop running in respect of Ms Bamford's unit until 7 April 2009 at the latest, only the issuing of the CCC occurred within time and any claim arising from negligent inspections is time-barred. The Council denies any negligence in issuing the CCC.

[14] Ms Bamford claims that the Council was negligent in inspecting the building work and issuing the CCC without having reasonable grounds to determine that the building work complied

with the Building Code. For the reasons given, any claim based on the Council inspections is out of time.

[15] The Council officer recorded after the inspection on 10 December 1998 that the CCC could be issued and Ms Divich argues that all the loss suffered by Ms Bamford flowed from the Council's negligence prior to the issue of the CCC. Ms Divich submits that there was no negligence in the issuing of the CCC because all inspections had been passed. She suggests that if the CCC was not pleaded as a cause of loss in the statement of claim and the narrative of events pleaded stopped on 22 December 1998, the date that the Council recorded its decision to issue the CCC, the claim would not alter in any way, demonstrating that all the losses suffered flow from the negligent act or omissions relating to the inspections. For these reasons, she submits that the claim does not depend on the issue of the CCC.

[16] Ms Divich relies on the decision of the Court of Appeal in *Byron Avenue*[7] for authority that a claim based on reliance on a territorial authority as in *Hamlin*[8] does not depend on the issue of a CCC. I do not accept that because there can be a claim in negligence based on the inspections by the Council where no CCC has been issued, that no claim arises from the issuing of the CCC. The question is whether there was any negligence in the issuing of the CCC.

[17] Ms Divich argues that the Council did nothing between 22 December 1998 and 5 May 1999 that was negligent and was not the direct consequence of its earlier acts or omissions. Ms Divich relies on the decision of Heath J in *Sunset Terraces*[9] as support for her submission that it is the date on which the Council decides to issue the CCC which is relevant and not the date on which the CCC was issued.

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[7] *Byron Avenue* [2010] NZCA 65, [2010] 3 NZLR 486.
[8] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.
[9] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

[18] The difficulty with this submission is that s 393(3) of the Building Act 2004 provides that:

> **393 Limitation Defences**
> (3) For the purposes of subsection (2), the date of the act or omission is,—
> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3 the date of issue of the consent, certificate, or determination, as the case may be; and.....

[19] Section 393(3)(a) clearly provides that the issue of a CCC is the relevant date for determining acts or omissions based on Council liability. In my view the High Court decision in *Sunset Terraces*[10] implies that there is no difference in the weight to be given to the three regulatory functions for which the Council owes a duty of care:

- The decision to grant or refuse a building consent.
- The inspection of the premises.
- The certification of compliance with the Code.

[20] I am not satisfied that the fact that the Council decided at the time of the final inspection to issue the CCC removes any meaning, or obligation to exercise due care, from the issuing of the certificate. The Council mounted a similar argument in *Campbell v Auckland City Council*[11] arguing that the concept of general or community reliance on the Council to properly exercise its regulatory functions does not apply to CCC. Christiansen AJ rejected this submission, concluding that s 393 expressly provides for acts or omissions relating to the issue of a certificate.[12] His Honour concluded that the certificate provides an assurance of performance and that it is clear

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[10] Above n 9 at para [220].
[11] *Campbell v Auckland City Council* HC Auckland, CIV-2009-404-1839, 10 May 2010.
[12] Above n 10 at para [10].

from *Sunset Terraces* that the CCC is significant because of its connection with the sale and purchase of residential properties.

[21] His Honour concluded that:[13]

> If it is the Council's contention that the Certificate is a somewhat formal document to confirm only that previous inspection and consents have been done/given, then I think that submission is wrong. It is certification, it gives certainty, that a territorial authority's obligations have throughout been attended to. Its existence is important to those who rely upon it. It is a document by which Council's obligations in connection with the actions certified can be judged.

[22] The issue of reliance on the CCC as the only cause of action in time was recently considered again by the High Court in *Montgomery v Auckland City Council*.[14] The Council's argument that this was distinct from the inspections was rejected on the basis that earlier alleged inadequate inspections go to the standard of the information available to the Council when it issued its certificate, and its ground for its issue of the certificate.[15] Bell AJ therefore concluded that the Council's inspections cannot be separated from its actions in satisfying itself that a CCC ought to be issued.[16]

[23] Although *Campbell* and *Montgomery* were strike out applications, the approach by the High Court supports the conclusion that the adequacy of council inspections is relevant to whether a council has reasonable grounds to issue the CCC.

[24] In Ms Bamford's case, the Council accepts that it was negligent in carrying out the inspections relating to her unit. The Council is liable therefore for issuing the CCC when it had no reasonable grounds for doing so.

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[13] Above n 10 at para [11].
[14] *Montgomery v Auckland City Council* [2012] NZHC 1732.
[15] Above n 14 at para [25].
[16] Above n 14 at para [26].

THE LIABILITY OF MR APERS

[25] The Council applied to join Hans Apers to these proceedings. I declined to join Mr Apers because Ms Coleman made no claim against him. The Council appealed this decision and the High Court upheld the appeal and joined Mr Apers as a party to Ms Coleman's claim.

[26] The High Court considered whether Mr Apers should be joined when Ms Coleman did not wish to proceed with a claim against him. Lang J expressed the view that it was difficult to see how a claim under the Fair Trading Act could be pursued in practical terms if Ms Coleman did not wish to proceed with it. Lang J noted the possibility that the Council could be directed to file a claim against Mr Apers in the name of Ms Coleman if she did not pursue the claim herself. His Honour concluded that Mr Apers' potential liability to Ms Coleman meant that it was desirable that he should be joined to the claim as a respondent.[17] The ability of the Tribunal to order a party, other than the claimant, to file pleadings where the claimant elects not to do so was an important factor in the High Court's decision to join Mr Apers.[18]

[27] In its amended response to the claim, dated 18 July 2012, the Council sought an order pursuant to s 43 of the Fair Trading Act 1986 directing that Mr Apers pay 'the claimant' such loss as has been caused by his misleading conduct.

[28] However Ms Coleman did not alter her position in relation to Mr Apers. The parties discussed settlement up until the commencement of the hearing and, had the Council reached a settlement with Ms Coleman, it may have brought a claim in her

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[17] *Auckland Council v Coleman* [2012] NZHC 175 at [38].
[18] Above n 17 at [41].

name against Mr Apers. However this did not happen and the Council did not seek leave to file a claim against Mr Apers.

[29] In opening, Ms Divich accepted that:[19]

> The claim against Mr Apers is a claim that has to be brought by the claimants; it's not a Council cross-claim because the allegations are that there are breaches of the Fair Trading Act. The claim arises from the report that Mr Apers wrote for Ms Coleman, it's dated 19 August 2002.

[30] In reply submissions however, Ms Divich submitted that the fact that the claimant has not brought a claim against Mr Apers does not bar the Council from bringing a claim against him. Ms Divich relies on s 43 of the Fair Trading Act which allows any person to apply for relief for any other person who has suffered or is likely to suffer loss or damage as a result of contravention of Parts 1 to 4 of the Fair Trading Act 1986. I do not accept this submission. The Council has not suffered loss or damage as a result of Mr Apers' actions; rather, the Council is seeking to reduce its own liability by claiming that Mr Apers is liable to Ms Coleman. In addition, I do not accept that the Council has standing to bring a claim against Mr Apers under the Fair Trading Act. Although this question has not been considered in detail in New Zealand, Trotman and Wilson concluded that third parties do not have standing to sue on a representation made by one person to another, unless the person making the representation either knew of the potential reliance by a third party on the representation or knew that the third party would otherwise be affected by it.[20] I do not consider that either situation applies to the Council.

[31] For these reasons I do not accept that there is any legal basis for the claim by the Council against Mr Apers and therefore dismiss this claim.

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[19] Transcript of hearing, page 2, lines 5-10.

[20] Lindsay Trotman and Debra Wilson, *Fair Trading: Misleading and Deceptive Conduct* (1st ed, Lexis Nexis, Wellington, 2006) at 146.

ORDERS

[32] Auckland Council is to pay Patricia Bamford the sum of $345,912.00 immediately.

[33] The claim by Auckland Council against Johannes Laurentius Apers is dismissed.

DATED this 11th day of September 2012

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S Pezaro
Tribunal Member