IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000031
[2011] NZWHT AUCKLAND 14

BETWEEN	SUNG-CHUL SHIN and MI-AE JANG Claimants
AND	WHANGAREI DISTRICT COUNCIL (Removed) First Respondent
AND	WARREN and SUSAN HAY (Removed) Second Respondents
AND	TONI SHERWOOD (Removed) Third Respondent
AND	HENRY and ELEANOR ATKINSON Fourth Respondents
AND	DAVID LLOYD BATTEN (Removed) Fifth Respondent
AND	W & R G HAMILTON PLUMBERS LIMITED (Removed) Sixth Respondent
AND	ANDREW GLEN HAMILTON (Removed) Seventh Respondent
AND	DAVID IAN RYAN (Removed) Eighth Respondent
AND	DAVID JAMES FERRIS (Removed) Ninth Respondent
AND	MARTYN WAYNE COTTLE (Removed) Tenth Respondent

Continued.....

AND	NORTHLAND PROPERTY MAINTENANCE LIMITED Eleventh Respondent
AND	GOODE LEITH REALTY LIMITED (Removed) Twelfth Respondent
AND	LEE JOHNSTONE Thirteenth Respondent

Hearing: 18 February 2011

Appearances: Mr G Swanepoel, counsel for the claimant
Mr P Magee, counsel for the second respondent

Decision: 7 March 2011

PARTIAL DETERMINATION
Adjudicator: K D Kilgour

HEARING

[1] A hearing was held in the District Court at Whangarei on Friday 18 February 2011 to determine the narrow issue of whether the claim against the second respondents, Warren and Susan Hay, is time limitation barred.

[2] Present at the hearing were:

- Mr Sung-Chul Shin, a claimant, and his counsel, Mr George Swanepoel; and
- Warren Hay and Susan Hay, the second respondents, and their counsel, Mr Peter Magee.

[3] Prior to the hearing Mr Swanepoel and Mr Magee filed extensive and extremely lucid submissions which I found most helpful.

[4] The hearing was convened to allow oral submissions in support of the parties' respective written submissions.

FACTUAL BACKGROUND

[5] The claimants and the second respondents were in agreement on the factual background. Mr and Mrs Hay owned the land at 10 Scarborough Lane, Kamo. They commissioned the build of the home. On 10 January 1997 they lodged an application for building consent with the local authority. Building consent was issued on 22 January 1997. Building commenced on 30 April 1997.

[6] Mr and Mrs Hay built the dwelling for their own home. This was the only home that they had ever built. The Hays commissioned the build through labour-only agreements with a number of relevant trades. They had no actual involvement with the build other than contracting the trades and paying for the materials and labour. Mr Batten, the fifth respondent, was contracted to be present on the

building site on a daily basis to oversee all construction work and it was he who accepted responsibility for the concrete foundations and flooring, construction of all timber framing, including the roof framing, installing the windows, doors, stairs and internal linings, and the head flashings.

[7] All building work was completed by December 1997 as evidenced by invoices disclosed by Mr and Mrs Hay. Their valuer described the home as complete as of 10 November 1997. Mr and Mrs Hay moved into their home in December 1997.

[8] The builder, Mr Batten, was removed as the fifth respondent by Procedural Order No 5 on 28 October 2009 on the grounds that, as he finished working on the property in November 1997, the claim against Mr Batten was time limitation barred.

[9] All construction work causative of the defects, the basis of the claim were completed by December 1997 at the latest and the claim was filed on 5 November 2008.

[10] Whether the claim against the Hays is time limitation barred is an issue requiring determination before a full hearing is held. As Mr Magee put it, "even assuming the claimants can prove all of the elements necessary to establish their claim against the second respondents ... the claimants will be denied any relief if it can be shown that their claim was commenced outside the ten year limitation period in section 393 of the Building Act 2004 (the Act)...".

[11] The second respondents submit that the claim against them is time limitation barred pursuant to section 393 of the Act because all building work on which these proceedings are or could be based was completed more than ten years before these proceedings were commenced.

ISSUE FOR DETERMINATION

[12] Counsel for the claimants and second respondents agree that the issue requiring my determination is, given that these proceedings were filed on 5 November 2008, whether or not the acts or omissions upon which they are based on occurred on or after 5 November 1998.

[13] If there is no act or omission that has occurred within the ten year timeframe on which the claimants can base their claim the second respondents should accordingly be removed from this proceeding by order of this Tribunal pursuant to section 112 of the Weathertight Homes Resolution Services Act 2006

THE HAYS ROLE

The Claimants' Arguments

[14] Counsel for the claimant submitted that the claim against the second respondents arises in tort and that the second respondents were the original owners and developers of the home, and as such they had a duty to ensure that the proper skill and care was exercised in developing the home.

[15] Mr Swanepoel submitted that as a matter of principle it must be accepted that a developer owes a non-delegable duty of care to subsequent owners.[1] Mr Swanepoel said further support that the second respondents were developers is found in Justice Venning's discussion on the issue in *Wong v Weathertight Homes Tribunal*[2]. I accept that it is clear that Mr and Mrs Hay were the land owners of the property upon which the home was built. Mr Swanepoel submitted they were also developers for they arranged for the design

[1] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 239 (CA) at [240] – [241]; and *Wong & Ho v Weathertight Homes Tribunal & Ors* HC Auckland, CIV-2010-404-001751, 22 October 2010.
[2] *Wong v Weathertight Homes Tribunal.*

of the home, for its construction, sought the building consent, employed a builder on a labour-only contract and employed all the other sub-trades. He argued that this leads to the conclusion that the second respondents were fully responsible for the implementation and completion of the development process in all respects.

[16] Discussion on the limitation issue, which is dealt with later in this judgement, proceeded on the assumption that Mr and Mrs Hay owed a duty to the claimants as developers of the home. However, I now set down my determination on the issue of whether Mr and Mrs Hay were "developers".

[17] I accept that it is clear that a developer owes a non-delegable duty of care to subsequent owners:[3]

> In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially – as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in Anns may prove of guidance on questions of non-delegable duty also. There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.

[18] And whilst I accept that the judgment of Venning J in *Wong* supports this proposition, I do not accept that the decision of *Wong*

[3] Ibid.

lends support to the claimants' proposition that the Hays are developers in this case.

[19] Mr and Mrs Hay personally commissioned, by labour-only contracts, the build of their own home. Once the home was built they lived in it as their own home for some years selling it to the claimants. It is the only home which Mr and Mrs Hay have built. Williams J in *Boyd v McGreggor*[4] dismissed the submission that the label applied to a building party should determine their liability. Weighing the factual situation in this case, Mr and Mrs Hay were nothing more than property owners wishing to build a home. They entered into agreements with appropriate tradesman to carry out the physical building job which needed to be done to construct their home. I cannot accept the submission of Mr Swanepoel that the evidence discloses that Mr and Mrs Hay were developers or builders. In my opinion the evidence points to another conclusion.

[20] I determine that Mr and Mrs Hays' role was similar to that of the owner in *Mowlem v Young*[5] and indeed Mr Findlay's role in *Lee Anthony Findlay & Ors v Auckland City Council & Ors.*[6]

> This was nothing more than a professional man building a house and getting appropriate workmen to come in and do the physical jobs which needed to be done. I cannot accept the submission that the evidence discloses that Mr Young was the builder and head contractor and was accordingly the constructor of the retaining wall. I understand why Mr Bush uses those words in his submission. But they lack an air of reality in what was going on. Mr Young needed walls. Mr Young arranged for people to do it. To now say that makes him a contractor or developer, is in my judgment to miss the

[4] *Boyd v McGreggor* HC Auckland CIV-2009-404-5332, 17 February 2010.
[5] *Mowlem v Young* HC Tauranga AP35/93, 20 September 1994
[6] *Anthony Findlay & Michael Arne Sandelin v Auckland City Council & Ors* HC Auckland CIV-2009-404-6497, 16 September 2010, Ellis J.

import of the distinction which the Court of Appeal was drawing in Mt Albert Borough Council.[7]

[21] For the reasons above mentioned I therefore determine that Mr and Mrs Hay were not developers and as such did not owe the non-delegable duty of care to subsequent owners that a developer would.

LIMITATION

The Claimants Arguments

[22] As stated, I do not consider that the Hays owed a duty to the claimants as developers. However, for the purpose of completeness, I will now deal with certain arguments regarding the limitation period to show that even if I did consider that the Hays were developers in the current situation, the claim would ultimately still fail.

[23] Counsel for the claimant submitted that, in terms of the Act, the completion date is generally accepted as the date of application for final inspection and the issue of a Code Compliance Certificate (CCC) and sought support for this proposition in the decision of Auckland City Council & Ors v Attorney-General sued as the Department of Building and Housing (Weathertight Services)[8]. However, I do not accept that this decision is support for the claimant's proposition. It is my opinion that on this point the claimants have incorrectly interpreted the High Court's decision in Auckland City Council.

[24] The Court in Auckland City Council held that "built" was to have its natural and ordinary meaning- that it meant that the point in time at which the house was physically constructed and that was a

[7] *Mowlem v Young,* above n 5, at 7.
[8] *Auckland City Council & Ors v Attorney-General sued as the Department of Building and Housing (Weathertight Services)* HC Auckland CIV-2009-404-1761, 24 November 2009.

matter of judgment for the decision-maker based on the available evidence.[9]

[25] Paragraph 22 of Mr Swanepoel's submissions was that the second respondents' act of making an application for the final Code of Compliance Certificate and the final inspection meant that 1 April 1999, the date in which the inspection was carried out, was the critical date for determining the start of the long stop time period. It was submitted that it was at that point in time that the Hays gave an undertaking to the local authority and to future homeowners that the building complied with the Building Act and the Building Code, and that as such it was their duty to ensure compliance, which they failed to do. Mr Swanepoel referred me to paragraph 27 of the Court of Appeal decision *Johnson v Watson,*[10] where Tipping J stated:[11]

> [I]ndeed, in case like the present where the Johnsons could not be expected to point to an exact day on which the act or omission took place, there may be an argument for saying that where original building work is faulty, the builder is under a continuing duty to remedy it right through until the date of completion, and there is a continuing "omission" until that date...

[26] In respect of Johnson v Watson the section of the Court of Appeal's decision that was relied upon by the claimants was obiter dicta and as such the Tribunal is not bound by it. Subsequent judicial consideration of this argument has been lukewarm; Justice French found the concept unconvincing but tenable in O'Callaghan v Drummond.[12]

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[9] At [91] and [92].
[10] *Johnson v Watson* [2003] 1 NZLR 626 at [27].
[11] At [27].
[12] *O'Callaghan v Drummond* HC Christchurch CIV-2007-409-1441, 21 October 2008 at [17].

[27] Mr Swanepoel further referred me to the Court of Appeal decision of *Nathan Stanley Gedye v Collin Robert South & Ors*[13] which stated at paragraph 41, amongst other matters:

> As the date of the relevant consent, certificate or determination; or the date that an accreditation certificate was relied on. Hence, it is not the building work itself which comprises the act or omission, but the approval of the work (or reliance on that approval) which sets time running for the purposes of the long stop provision...

[28] The claimants' submissions concluded with the proposition that section 43 of the Building Act 1991 imposed an obligation upon the owner to make application for a CCC. And that is the point in time that the owner warrants that the work undertaken was in full compliance with the Building Act and regulations.

[29] Furthermore, the reference in the *Nathan Gedye v Collin South* decision was solely relevant to the territorial local authority and not an owner or builder. Accordingly, I do not accept that the decisions of *Johnson v Watson* and *Nathan Gedye v Collin South* support the propositions advanced by the claimants.

The Second Respondents' Arguments

[30] The claimants commenced this proceeding on 5 November 2008. The second respondents submit that all acts and omissions on which these proceedings are based against Mr and Mrs Hay occurred more than ten years before the claim was filed. All building work alleged by the claimants to be defective was completed by December 1997.

[31] Mr and Mrs Hay's counsel submit that because the claimants have commenced these proceedings more than ten years after the

[13] *Nathan Stanley Gedye v Collin Robert South & Ors* CA 567/2009, 20 May 2010.

date of the act or omission on which these proceedings are based, they are statute barred by section 393(2) of the Act from having any relief granted to them in this proceeding and the second respondents should be removed accordingly.

[32] Mr Magee submitted that for the limitation period to apply there must be:

a) civil proceedings against a person;
b) that arise from building work; and
c) those proceedings must have been brought after ten years or more from the date of the act or omission on which the proceedings are based.

[33] The first two requirements set out in sub-paragraphs (a) and (b) above are accepted for the purposes of the current argument, stated Mr Magee. The claimants allege that the second respondents are liable in negligence for defective building work as a result of their being owners and developers of the home.

[34] I accept the submission of Mr Magee that the only relevant provision in this hearing is section 393(2) and subsection 1 has no relevance.

[35] Section 393(2) clearly states:

> **393 Limitation defences**
>
> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought**]** against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

[36] The definition of "building work" is found in section 7 of the Act and on the face of it includes the actions of the second

respondents in organising and overseeing the work. Mr Magee submits that the third element of the limitation defence – “the act or omission”, raises two questions:

a) What is the “act or omission” in which the proceedings area based?
b) What is the date of the act or omission?

[37] Mr Magee submitted the three cases cited by the claimants in support of their proposition do not support such a proposition. He submitted that the mere act of applying for a CCC does not constitute the giving of an undertaking by the second respondents to anyone. By applying for a CCC, the second respondents were simply complying with their obligation as owners under section 43 of the Building Act 1991 to advise the territorial authority that the building work had been completed to the extent required by the relevant building consent. It is the territorial authority which in issuing a CCC, certifies that the building work complies with the Building Code. The issue of the CCC or the reliance on a CCC is not causative of any defect in the building. Mr Magee further submits that assuming the second respondents did fail in their duty to see that proper skill and care was exercised in the construction of their home, the point of time in which they failed is when the actual building work was undertaken. He submitted that the act or omission on which these proceedings can be based is the alleged negligence of the second respondents in failing to ensure that the dwelling was constructed with proper care and skill and that such acts or omissions can only be when the home was being built not when the CCC was applied for.

[38] Mr Magee further submitted that the relevant cases including those cited by the claimants all support the second respondents' assertion that the ten year limitation period for filing proceedings begins to run from the date that the alleged defective workmanship is

physically completed. Mr Magee argues that in this case that was more than ten years before the claimants filed their proceedings. Mr Magee stated it was wrong for the claimants to assert that Mr and Mrs Hay's duty was somehow extended when they applied for a CCC for their home.

[39] In support of that submission Mr Magee pointed to the High Court decision of Associate Judge Bell in *Lee v North Shore City Council.*[14] Mr Magee suggested that the facts in that case are on a par with the facts in this case. In that case it was alleged that the former owners of the dwelling were subject to tortious liability as builders on the grounds that they had engaged the contractors directly and paid for materials, notwithstanding that they did not personally carry out any building work [para 37].

[40] Associate Judge Bell, in considering, the dates on which invoices were rendered for the particular work alleged to be defective, held that all of that work alleged by the claimants to be defective had been completed no later than the date of the final invoice which was more than ten years before the claimant commenced its proceedings and accordingly the claim was out of time under the Building Act[15].

[41] Associate Judge Bell, said Mr Magee, rejected the argument that the former owners still owed a duty of care until the CCC was issued. He also dismissed the suggestion that by applying for a CCC an owner assumes the obligations and duties of a builder. Mr Magee referred me to paragraphs 36 to 44 of Associate Judge Bell's decision which I accept is relevant.

[42] Mr Magee submitted that when the second respondents applied for the final inspection and the CCC on 1 April 1999 that was simply their responsibility as owners to apply under section 43 of the

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[14] *Lee v North Shore City Council* HC Auckland CIV-2009-404-2091, 12 April 2010.

1991 Building Act. Mr and Mrs Hay do not become builders solely because they applied for a final inspection.

[43] In *Gedye v South* (supra) the Court of Appeal considered and compared the commencement of the limitation period for claims founded in negligence with those founded in contract. Mr Magee submitted that in that case there was a direct contractual relationship between the appellant and the respondents which does not exist in this case however he submitted further that the Court of Appeal agreed with Glazebrook J's analysis in *Kilnac v Lehmann*[16] where her Honour held that the limitation period in relation to a claim for negligent building work must run from the date of the breach, the negligent act or omission on which the proceedings was based being the work itself[17]. Mr Magee submits that that decision supports the second respondent's submission that the limitation period runs from the date that the defective work was carried out.

[44] He further submitted that in *Johnson v Watson* the Court only referred to a possible continuing duty to remedy faulty building work up until "the date of completion", noting that there could be a continuing "omission" until that date. Mr Magee does not accept that *Johnson v Watson* is authority for the claimants' proposition that there was a continuing omission by the second respondents through until the date of completion which they say was the date that the second respondents applied for or obtained the CCC. Mr Magee submits, and I agree with this submission, that in *Johnson and Watson* the Court only mentioned a "date of completion" and what that means must be considered in the context of the case. Mr Magee referred me to the extract of *Johnson v Watson* at page 628, line 10:[18]

[15] At [38] and [39].
[16] *Kilnac v Lehmann* (2002) 4 NZCONV 193, 547 (HC).
[17] At [17] and [44]
[18] *Johnson v Watson,* above n 10, at [4].

> ...the Johnsons do not state a date upon which they say the building contract was completed. They say that, although the house was 'substantially complete' when possession was given and taken on about 16 December 1990, 'building work continued into 1991'. In his affidavit Mr Johnson says that items were finished by Mr Watson 'during early 1991', after they had moved in. No details are given. There is, however, no suggestion that any of this post 16 December 1990 work was causative of the problems to which this proceeding relates.

[45] Mr Magee stated that at paragraph 14 of Mr Swanepoel's submissions, the claimants incorrectly cited Lang J's decision in *Auckland City Council v Attorney-General sued as Department of Building and Housing*, in support of their proposition that "the completion date in terms of the Building Act is generally accepted as the date of application for final inspection and issue of CCC as date of completion". Mr Magee stated that specifically the claimants cited paragraphs [91] and [92] of Lang J's decision. Mr Magee submitted that in those paragraphs Lang J is not considering the completion date in terms of the Building Act, but was rather considering when the house is to be regarded as having being built for the purposes of (the predecessor to) section 14 of the Weathertight Homes Resolution Services Act 2006. Section 14 of that Act specifies the criteria a claim must meet to be eligible. I agree that Lang J's decision does not add support to the claimants' argument.

[46] Mr Magee concluded by reiterating that all building work was completed by December 1997, that the second respondents moved in to their home in late 1997. That the second respondents have thereby shown that the relevant building work in constructing the home in this case was completed more than ten years before the claimants filed their claim on 5 November 2008. As the limitation period runs from the date of the act or omission on which these proceedings are based the act or omission was the alleged defective

building work physically carried out before December 1997. The second respondents should be removed because these proceedings were filed more than ten years after the limitation period commenced.

[47] Before moving to my conclusion, Mr Swanepoel raised further factual issues in his reply submissions filed with the Tribunal on 15 February 2011. He pointed out that the second respondents discovered a leak shortly after moving into their home in December 1997. That leak was in the area of the double doors leading up from the master bedroom. Mr and Mrs Hay took action to repair that leak in 1998 and on 1 April 1999 they called for the final inspection and applied for the CCC which in due course was issued on 4 August 1999.

[48] At the hearing, after listening to and considering the evidence, I made a determination that the leak discovered in late December 1997 was not sufficient to indicate to Mr and Mrs Hay that construction defects were apparent in their home to an extent sufficient to give rise to the concerns which prompted this claim. Indeed that leak was not a defect sufficient to give rise to these proceedings. It was an isolated leak capable of remedy directly. I am supported in that determination by the decision of Cooper J in *Body Corporate 169791 v Auckland City Council*[19].

CONCLUSION

[49] It is well established that the long stop provision in the Act provides an absolute bar against claims of negligent building work ten years after the work was completed. The long stop is set out in section 393(2) of the Act (identical in effect to its predecessor, section 91(1) of the 1991 Building Act).

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[19] *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 19 May 2009.

[50] Mr and Mrs Hay were not developers and although they engaged a number of contractors to carry out the building work they did not personally carry out any building work and had no building experience. The defects causative of the damage that now forms the basis of the claim were acts or omissions of the contractors working on the building site. The Hays actions in contracting those contractors does not make them developers.[20]

[51] I accept the submissions of Mr Magee that the cases cited by the claimants do not support their proposition that by applying for a CCC constitutes an undertaking by the second respondents that the building was code compliant. Such cases better support the second respondents' assertion that the ten year limitation period for filing proceedings begins to run from the date that the alleged defective workmanship is physically completed. In this proceeding all building work was undertaken before December 1997, more than ten years before the claimants filed these proceedings.

[52] Associate Judge Bell in *Lee v North Shore City Council* rejected the argument that the former owners in that case were still owed a duty of care until the CCC was issued. Associate Judge Bell also dismissed the suggestion that by applying for a CCC, an owner assume the obligations and duties of a builder. Associate Judge Bell stated:[21]

> In this case, it is the Rundstroms' alleged liability as builders during the construction phase that is in issue. While they did later obtain a CCC, that was their responsibility as owner under section 43 of the Building Act 1991. That section does not require a building contractor to obtain a CCC. An owner does not become a builder because he has applied for a CCC.

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[20] *Mowlem v Young* above n 5.
[21] *Lee v North Shore City Council*, above n 14, at [43].

[53] The second respondents did not owe the claimants any duty to apply for obtain a CCC. The decision of *Auckland City Council v Vincent David Grgicevich*[22] is authority for the proposition that the person who applies for a CCC does not owe a duty of care to end users to take reasonable steps to discover patent construction defects and prevent them from having effect.[23]

[54] The decisions of *Gedye v South* and *Kilnac v Lehmann* support the second respondents' submissions that the limitation period runs from the date that the defective building work is physically carried out. Furthermore the decision of *Johnson v Watson* also supports the proposition that the "date of completion" is the date of the completion of the building work itself, not the date at which the owner applies for a final inspection and/or CCC.

[55] Application for final inspection is not relevant for the purpose of determining the commencement of the limitation period in proceedings such as this.[24]

[56] What is relevant is the date at which the actual defective work complained of is physically completed. The claimants and the second respondents agree on the facts that the date of completion of the building works was by December 1997.

[57] The claimants commenced these proceedings on 5 November 2008. All acts or omissions on which these proceedings are based against the second respondents occurred more than ten years before the claim was filed. All building work alleged to be defective was completed by December 1997. There was no act or omission by the second respondents occurring on or after 5 November 1998. The claimants' claim against Mr and Mrs Hay is statute barred by virtue of section 393(2) of the Act.

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[22] *Auckland City Council v Vincent David Grgicevich* HC Auckland CIV-2007-404-6712, 17 December 2010.
[23] At [121].

Order

[58] For the reasons outlined above, the claimants have no tenable claim against Mr and Mrs Hay, the second respondents.

[59] Accordingly, the Tribunal orders that Warren Hay and Susan Hay, the second respondents, be struck out and removed as a party to this adjudication proceedings.[25]

DATED this 7th day of March 2011

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K D Kilgour
Tribunal Member

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[24] *Lee v North Shore City Council*, above n 14.
[25] Weathertight Homes Resolution Services Act 2006, s112.