SUMMARY

Case: Tweeddale v Pearson
File No: TRI 2008-101-000067/ DBH 02946
Court: WHT
Adjudicator: R Pitchforth
Date of Decision: 1 December 2009

Background
This is a decision dealing with claims made against:

- First and second respondents: Mr Pearson and Ms Tucker as previous owners
- Third respondent: Palmerston North City Council
- Fourth respondent: Mr Humphries as the alleged project manager and director of Humphries Construction Ltd, the construction company
- Fifth respondent: Mr Harley as the plasterer
- Sixth respondent: Barrakuda Designs Ltd as the designer

It also deals with whether a rental property is a commercial property

Factual Background
Mr Pearson and Ms Tucker owned a section and contracted with Barrakuda Designs to provide plans and specifications – project supervision was expressly excluded. Mr Pearson applied for building consent. Humphries Construction Ltd was engaged by Mr Pearson and Ms Tucker to build the house while Mr Harley undertook the plastering work. After construction was complete Mr Pearson and Ms Tucker contracted with Mr Currie to put the garden in. Mr Currie put the soil in the garden next to the house. Mr Pearson and Ms Tucker removed the front garden from the wall before the Council would grant a code compliance certificate.

Mr Pearson and Ms Tucker occupied and maintained the property and had no concerns about leaks. However they later decided to sell the house. As real estate agents they attempted to sell it themselves but later used the services of LJ Hooker. The property was sold to the claimant for possession on 29 June 2001. The claimant obtained a brief LIM report which did not indicate anything amiss. A building inspection report was not ordered as the claimant and her solicitor considered that it was unnecessary for a nearly new house.

In late 2004 the claimant was alerted to possible problems by a tenant and arranged for a building inspection which later reported a number of issues relating to internal plumbing problems and water ingress. Some of the recommended repairs were effected in February 2005. The claimant made a claim to the Earthquake commission which was declined for a failure to install control joints is not an earthquake issue. She also made an insurance claim which was unsuccessful.

On 9 December 2004 the claimant applied for an assessor's report. Two reports arranged by DBH were relied upon before the Tribunal identifying a number of defects causing water ingress and that the cost of remediating the damage would be $106,221.00 including GST plus the cost of professional fees.

Decision

Is the claim time-barred?

The parties did not refer to s 37 of the Act which provides a special approach to limitation periods. This claim was therefore treated as abandoned.

Was the house a commercial building?

The Tribunal found that the house was not rented out for the first two years of its life, it was not built as commercial premises; nor was it sold on that basis. It could also easily revert to a residential home without structural changes. Consequently the building fits within the definition of a dwelling under s 8 of the Act and there was no authority for the proposition that the Tribunal was restricted to dealing with cases relating to owner-occupants.

Liability of the first and second respondents, Mr Pearson and Ms Tucker

(i) As developers

Whether or not Mr Pearson and Ms Tucker were developers involves an objective test. The list of activities they carried out was sufficient to show that the site development was not a complete turnkey operation, though the construction of the dwelling was wholly delegated to the building company. The Tribunal therefore found that Mr Pearson and Ms Tucker have some responsibility for parts of the project which caused problems and owed subsequent owners a duty of care in relation to the actions they took. The Tribunal also found that Mr Pearson and Ms Tucker were commercial developers which would remove any responsibility of the Council.

(ii) Breach of contract: Vendor warranty under the Agreement for Sale and Purchase

As the works were not compliant not all the obligations imposed under the Building Act were complied with. It was clear that the plaster was defective from the start but the inherent defects would not have been known without investigation. The warranty was that the building complied with all the aspects of the Building Act 1991, not that it complied with the best of the vendor's knowledge – it is an objective test. Mr Pearson and Ms Tucker may have reasonably believed that the house was code compliant on sale. But the evidence is that it was not and they are therefore liable under the agreement for sale and purchase. As active real estate agents they should have known the scope of the warranties they were entering into and the implications for them in having that clause in the contract if the house was not compliant. They, or their agent, proffered the written contract to the claimant who had no reason to vary that term. The Tribunal therefore found that Mr Pearson and Ms Tucker breach their contract and were jointly and severally liable for the full amount of the claim.

Liability of the sixth respondent, Barrakuda Designs – designer

Mr Pearson and Ms Tucker claimed an indemnity from Barrakuda for the damage resulting from the inadequacy of the plans. The claimant did not claim against Barrakuda. The Tribunal found that it was widely accepted within the profession that it could be assumed that the builders and tradespeople would have reference to the appropriate manufacturers' specifications and relevant building standards and therefore both the Council and the designer were entitled to assume that a competent contractor would construct the dwelling to the requirements of the code from the documents submitted for consent. The Tribunal therefore held that the plans were adequate for the purposes of building a weathertight home and so Barrakuda was not negligent. There was also no evidence that Barrakuda was contracted to provide supervision for the project. The claims against Barrakuda were therefore dismissed.

Liability of the third respondent, Council
The test is not only what a reasonable council officer, judged according to the standards of the day, should have observed but a council may also be liable if defects were not detected due to the council's failure to establish a regime capable of identifying critical waterproofing issues. The Council should have observed that the plaster was finished too low down – by not doing so was negligent. Therefore based on the evidence, the Tribunal found that the Council's monitoring systems were inadequate and was therefore jointly and severally liable for the visible defective plastering to a maximum of $4,657.85. The Tribunal also accepted that concerning the Council's responsibility, Mr Pearson and Ms Tucker were joint tortfeasors for failing to give attention to what was being done by their contractors. Mr Pearson and Ms Tucker were therefore found responsible for 20% of the Council's responsibility.

Liability of the fourth respondent, Mr Humphries – project manager
There was little information about the physical work undertaken by Mr Humphries on site. Instead the Tribunal made its finding based on Mr Humphries as the alleged project manager. There was a clear lack of supervision by a senior person in the companying. Employing a foreman is not a sufficient quality control measure as the foreman was limited in his powers. Instead it was Mr Humphries' task to provide overall supervision and on his own evidence he did not do it. It was Mr Humphries who signed a contract to say that the company would construct a code compliant house and as the senior company officer responsible for project managing this project, Mr Humphries was liable for failing to do it properly. Accordingly he was found jointly and severally liable for the full amount of the claim.

Liability of the fifth respondent, Mr Harley – plasterer
There was no evidence to support Mr Harley's view that maintenance would have remedied certain matters. The Tribunal therefore found that the plaster was defective and that the plasterer was in breach of the duty of care he owed to the owners and subsequent owners when he applied the defective plaster coating. Mr Harley was therefore jointly and severally liable to the claimant for the full amount of the claim.

Quantum
Cost of Remediation
There was no strong evidence that the assessor's proposed repairs and the quantity surveyor's estimated costs were not reasonable. Accordingly the claimant was entitled to claim $106,221.00 for repairs.

General Damages
The High Court has made awards for stress for those owning rental properties and therefore the Tribunal awarded $10,000.00 for general damages.

Loss of Rental
The claim for loss of rental was abandoned during the hearing

Summary of Quantum

Remediation		$106,221.00
Stress		$ 10,000.00
	Total	$116,221.00 (incl GST)

Mitigation of Loss
The Tribunal held that the claimant attempted to mitigate her loss and make such repairs as advised and seemed necessary. Her attempts to identify the causes of

damage and pursue a claim were vigorous. There was little more that she could have done. It was therefore held that the claimant acted reasonably in mitigating her loss.

In regards to maintenance, the claimant undertook steps to mitigate her loss in relation to the leaks and at the time she applied for an assessor's report the house was less than 5 years old and the painting was not then an issue. Maintenance was therefore minimal – more maintenance would not have cured the defects in any case.

Costs

The claimant sought costs against Mr Humphrises on the basis that he decided the day before the scheduled mediation that he would not attend. The Tribunal found that the abandonment of the mediation made the hearing inevitable. That abandonment and the lack of notice, triggered the bad faith provision under s 91 of the Act. The Tribunal therefore awarded $1,280.00 in costs based on Category 2B of the District Court scale. A similar argument was made on behalf of Mr Pearson and Ms Tucker and they were also awarded $1,280.00 in costs against Mr Humphries.

Result

- The first and second respondents, Mr Pearson and Ms Tucker were orderd to pay the claimant $116,221.00 and were entitled to a contribution for any amount paid in excess of $27,390.79
- The third respondent, Palmerston North City Council was jointly and severally liable to pay the claimant $14,657.85 and is entitled to a contribution for any amount paid in excess of $6,657.85
- The fourth respondent, Mr Humphries was jointly and severally liable to pay the claimant $116,221.00 and is entitled to a contribution for any amount paid in excess of $27,390.79. He was also ordered to pay the claimant $1,280.00 and the same amount to Mr Pearson and Ms Tucker jointly as costs for the wasted mediation day
- The fifth respondent, Mr Harley, was jointly and severally liable to pay the claimant $116,221.00 and is entitled to a contribution for any amount paid in excess of $54,781.57
- The claim against the sixth respondent, Barrakuda Designs was dismissed