JUDGMENT : J.P. Doogue Associate Judge. High Court of New Zealand, Auckland Registry. 21st December 2007.

Background

[1] The defendant has brought an application to strike out the plaintiffs' proceeding.

[2] On 27 April 2007 the plaintiffs filed the present claim. The claim relates to their home at 32B Ngake Street, Orakei. The building has faults that have caused it not to be watertight. When they issued their proceedings the plaintiffs said they estimated that the building would cost $300,000 to repair.

[3] The defendant is the territorial authority which has coverage for purposes of the Building Act 1991. The defendant issued a building consent for the construction of the property on 27 September 1994. It would appear that building was completed in May or June of 1995 when the plaintiff moved into the dwelling. On 4 October 1996 the defendant issued a code compliance certificate. On 13 June 2006 the plaintiffs applied to the Weathertight Homes Resolution Service (WHRS) to have an assessor's report prepared in relation to the property. However their claim was deemed ineligible by the WHRS evaluation panel.

[4] On 4 October 1996 the defendant issued a code compliance certificate.

[5] The plaintiffs now bring the present proceedings against the defendant. They claim that in the first place, the defendant owed them a duty to exercise reasonable skill and care in performing its functions under the Building Act 1991 in regard to issuing the building consent, inspecting the building work that was actually carried out pursuant to the consent and in making its decision to issue a code compliance certificate. It is said that the defendant was negligent in that it failed to identify defects in the house when it carried out its inspections. As well, the defendants allege that when it issued the code compliance certificate it could not have been satisfied on reasonable grounds that the building works complied with the Building Code. There is a second cause of action based on negligent mis-statement.

[6] It will be apparent from the above chronology that the proceeding was filed more than 10 years after the defendant issued a code compliance certificate for the construction of the dwelling. The defendant submits the proceeding should be struck out, as it is time barred by s 393 of the Building Act 2004.

[7] Ms Rice counsel for the defendant submitted - and I accept, correctly - that the relevant dates for the purposes of assessing whether the proceeding is time barred are:

a) 4 October 1996, the date the defendant issued the code compliance certificate.

b) 4 October 2006 being a date of 10 years after the issue of the code compliance certificate.

c) 27 April 2007 being the date when the plaintiffs filed the proceeding in the High Court.

[8] The plaintiffs say the proceeding was "filed" on 13 June 2006, which is the date the plaintiffs applied to the WHRS pursuant to section 9(1) of the Weathertight Homes Resolution Services Act 2002 (the WHRS Act) to have an assessor's report prepared in relation to the property.

[9] The plaintiffs accept that, but for the effect of s 9 and s 55(1) of the WHRS Act 2002, the cause of action against the defendant cannot succeed due to the operation of s393 of the Building Act 2004 (the so-called "longstop" limitation period). Mr Thornton submitted:

"The issue for the Court is whether the combined effect of the plaintiffs making an application pursuant to s 9(1) and s55(1) is that this proceeding was commenced in time, i.e. on 13 June 2006 to determine whether the plaintiffs' application for an assessor's report pursuant to section 9(1) of the WHRS Act 2002 is the filing of a court proceeding in the High Court. The determination of this issue will mostly be a matter of statutory interpretation."

Approach to applications to strike out on limitation ground.

[10] I intend to be guided on this topic by what Tipping J said in ***Matai Industries Ltd v Jensen*** [1989] 1 NZLR 525, 532:

The present defendants contend that this is a very clear case of claims barred by the Limitation Act and apply to dismiss the proceeding, inter alia, on that ground. The onus is clearly on the defendants to show that the plaintiffs claim, or at least some part of it, is statute-barred. Evidence can be tendered either way by affidavit, and that is what has occurred in the present case.

If the plaintiff in opposition to the defendants' proposition can show that it has a fair argument that the claim is not statute-barred or that the limitation period does not apply or is extended for any reason, then of course the matter must go to trial. To hold the interests of plaintiffs and defendants in fair balance in this context the Court should in my view be slow to strike out a claim or cause of action altogether in limine but against that, if the position is quite clear, then a defendant should not be vexed by having to go to full trial when the answer is obvious and inevitable.

Discussion

Statutory background

[11] The two statutes applicable to this application are the WHRS Act 2002 and the Building Act 2004.

[12] Ms Rice submitted that the WHRS Act 2002 which has been repealed and replaced by the WHRS Act 2006 remains the relevant enactment for the purposes of this case. I understand that counsel for the respondent accepts that is the correct approach and so do I. I also accept Ms Martin's submission (counsel for ??) that other relevant parts of the WHRS Act include s 4 which sets out an overview of the WHRS Act. It provides:

4 Overview

In general terms, this Act provides for the following matters:

(a) Assessment and evaluation of claims in relation to leaky buildings

Sections 7 to 12 provide a mechanism for owners of dwellinghouses who consider that their dwellinghouse is a leaky building to

(i) submit their claim; and

(ii) have it, and the nature of the particular problem, assessed and evaluated; and

(iii) be provided with an assessor's report:

(b) Mediation of claims

Sections 13 to 21 make provision for access to a special mediation service that is available to dwellinghouse owners with eligible claims. The claiming owner and any of the other parties against whom the claim is made may agree to refer the claim to mediation, with provision for binding settlements by agreement:

(c) Compulsory adjudication of claims

Sections 22 to 55, and the Schedule, set up a mechanism whereby dwellinghouse owners can have their eligible claims referred to adjudicators whose powers and procedures are flexible and whose determinations, subject to appeal, are binding and enforceable:

(d) Miscellaneous provisions

Sections 56 to 64 set out various miscellaneous matters that underpin the substantive provisions of this Act.

[13] Under the WHRS Act, the claimant commenced a claim by applying to have an assessor's report prepared in relation to the dwellinghouse. Section 9 provided:

9. Application for assessor's report

(1) An owner of a dwellinghouse who wishes to make a claim may apply to the chief executive to have an assessor's report prepared in relation to the claim.

(2) An application must be in the approved form (if any) and must be accompanied by the prescribed fee (if any).

(3) On receiving an application that complies with this section the chief executive must make an initial assessment as to whether the information in the application indicates that the claim meets or is capable of meeting the criteria set out in section 7.

(4) If the chief executive considers that the information does indicate that the claim meets or is capable of meeting those criteria, the chief executive must arrange for an assessor's report to be prepared on the claim.

(5) If the chief executive does not consider that the information indicates that the claim meets or is capable of meeting those criteria, the chief executive must

(a) decline to arrange for an assessor's report to be prepared; and

(b) advise the claimant of that decision and the reasons for it.

[14] Section 7 provided:

7. Criteria for eligibility of claims for mediation and adjudication services

(1) A claim may be dealt with under this Act only if

(a) it is a claim by the owner of the dwellinghouse concerned; and

(b) it is an eligible claim in terms of subsection (2).

(2) To be an eligible claim, a claim must, in the opinion of an evaluation panel, formed on the basis of an assessor's report, meet the following criteria:

(a) the dwellinghouse to which the claim relates must

(i) have been built; or

(ii) have been subject to alterations that give rise to the claim within the period of 10 years immediately preceding the date that an application is made to the chief executive under section 9(1); and

(b) the dwellinghouse is a leaky building; and

(c) damage to the dwellinghouse has resulted from the dwellinghouse being a leaky building.

[15] So the process was that the completed assessors report was evaluated by the WHRS evaluation panel as to whether the claim met the eligibility criteria set out in section 7 WHRS Act. A claim may be dealt with under the WHRS Act only if it is an eligible claim.

[16] Section 12 of the WHRS Act set out the procedure for the evaluation panel to evaluate an assessor's report and the procedure for claimants to seek a review of the WHRS evaluation panel's decision. If a review of the WHRS evaluation panel's decision was requested then the Chief Adjudicator was required to consider whether or not the WHRS evaluation panel's decision appears to be manifestly unjust.

[17] If the claim was deemed eligible then the claimant could refer the eligible claim to adjudication. Section 22 of the WHRS Act provided:

22 Right to refer claims to adjudication

(1) The owner of a dwellinghouse that is the subject of an eligible claim has the right to refer the claim to adjudication, except as provided in subsection (3).

(2) Subsection (1) has effect despite any provision of any existing agreement or contract that requires or provides for

(a) the submission to arbitration of any matter; or

(b) the making of an arbitral award as a condition precedent to the pursuit of any other proceedings or remedy.

(3) An owner of a dwellinghouse may not, however, refer an eligible claim to adjudication, or continue adjudication proceedings, if, and to the extent that, the subject matter of the claim is the subject of -

(a) an arbitration that has already commenced; or

(b) proceedings initiated by the claimant (including by way of counterclaim) by way of -

(i) proceedings in a court or a Disputes Tribunal; or

(ii) proceedings under section 17 of the Building Act 1991.

(4) Subsection (3) does not limit the power of any party to apply for proceedings to be transferred to adjudication under section 59 or agree that they be transferred under section 60.

(5) In this section, existing agreement or contract means an agreement or contract entered into before the commencement of this Act."

[18] Section 55 of the Act is of central importance to the strike out application. It provides:

55 Application of other enactments to adjudications

(1) For the purposes of the Limitation Act 1950, and any other provision that imposes a limitation period, the making of an application under section 9(1) is deemed to be the filing of proceedings in a court.

(2) Adjudications must be treated as

(a) proceedings for the purposes of section 24 of the Insolvency Act 1967; and

(b) actions or proceedings for the purposes of section 42 of the Corporations (Investigation and Management) Act 1989; and

(c) legal proceedings for the purposes of section 248 of the Companies Act 1993.

[19] Provision was also made in the WHRS Act to transfer claims from the Resolution Service to the High Court under section 58, which provided:

58.Transfer of claim to court

An adjudicator may order a claim to be transferred to a District Court or the High Court in its ordinary civil jurisdiction if

(a) the claim presents undue complexity; or

(b) the claim presents a novel claim; or

(c) the subject matter of the claim is related to the subject matter of proceedings that are already before the court so that, in the adjudicator's view, it is more appropriate for a court to determine the claim.

[20] Both sides agreed that s 393 of the Building Act 2004 applied to theproceedings which the defendant is applying to strike out. It provides:

393 Limitation defences

(1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from

(a) building work associated with the design, construction, alteration, demolition, or removal of any building; or

(b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.

(2) However, civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.

(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

(b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[21] Ms Rice submitted that, in summary, where a plaintiff seeks to rely upon an act or omission other than a consent or certificate, it is the date the act or omission took place that triggers the limitation defence. In the event that a consent or certificate is relied upon, it is the date of the certificate or consent that is relevant. Mr Thornton did not disagree with that submission and I accept that it is correct.

Did the filing of an application with the WHRS stop time running with regard to proceedings later filed in High Court?

Introduction

[22] Unless the proceeding is saved by s55 of the WHRS Act, the plaintiff accepts that its claims are time-barred. The plaintiffs' argument is that the proceeding was commenced on 13 June 2006 when they applied to the WHRS pursuant to s 9(1) of the WHRS Act to have an asessor's report prepared in relation to the property. This

submission is made notwithstanding that the plaintiffs' claim was deemed ineligible by the WHRS evaluation panel.

Defendant's submissions

[23] The defendant submitted, in effect, that in deciding when the High Court proceedings were commenced for limitation purposes, the court had to determine whether the act of making the plaintiffs' application for an assessor's report pursuant to section 9(1) of the WHRS Act 2002 constituted the commencing of court proceedings in the High Court for the purposes of s 393 of the Building Act 2004. She said that the determination of this issue will mostly be a matter of statutory interpretation.

Plaintiffs' submissions

[24] In making his submissions that s 55 saved the proceedings from being timebarred, counsel for the Plaintiff focused closely on the words of s 55: *"and any other provision that imposes a limitation period."*

[25] Counsel for the plaintiff said the above words mean that s 55(1) applies to s 393 of the Building Act 2004. He referred me as well to s 5 of the Interpretation Act which provides:

> *5 Ascertaining meaning of legislation*
>
> *(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
>
> *(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*

Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[26] Mr Thornton's submission was:

> *16. Therefore, the meaning of s 55(1) is its ordinary meaning: the making an application for an assessor's report pursuant to s 9(1) has the effect that the date of this application is deemed to be the filing of proceedings in a court for the purposes of s 393 of the Building Act 2004. This is an interpretation consistent with s 5 of the Interpretation Act 1999.*

[27] Mr Thornton said the heading to s 55, referring as it does to "adjudications" made it explicit that the section was concerned with completed determinations. If, as here, the applicants did not proceed with their application to the point of resolution, then, he said, the termination of the running of time applied to any proceedings that the applicant might make to a Court. Therefore, if the application to the WHRS was made in time, the applicants were similarly protected if they changed their minds and decided to issue Court proceedings. For the purpose of measuring limitation of time in such Court proceedings, the applicable measure would not involve the usual termination point at the commencement of Court proceedings. Instead, the termination point would be one borrowed from procedures under the WHRS Act.

[28] Mr Thornton said that this would be necessary to protect persons such as the Buntings from injustice. Injustice, he said could arise because the applicants, having elected to use the WHRS procedure, would not in the beginning know if that course was going to be advantageous to them. There were differences between the two procedures. One was that claims under the WHRS could not formerly succeed unless the damage they suffered was proved to have been caused by ingress of water into the building. (The position is now, apparently, otherwise because of statutory amendments.) The applicants, Mr Thornton said, would not know until they had gone some distance down the WHRS track whether that crucial feature was present in their case. That is, they would not know until the assessor had looked at their property pursuant to s 10. By then so much time might have gone by that the applicant's claim might be time-barred under the Building Act 2004 or the Limitation Act 1950. It was therefore to guard against that situation that the time stopped running when an application was made to the WHRS: and that cessation point applied equally to any Court proceedings that the applicants might later bring.

Determination

[29] Literally speaking, the making of an application to the WHRS is not the same as the filing of civil proceedings in a Court - an event which would ordinarily stop time running for the purposes of the Limitation Act. The term "civil proceedings" in s 393 of the Building Act would normally refer to Court proceedings. Proceedings in courts, including the High Court, commence with the filing of documents in the form prescribed for the commencement of proceedings in that Court. On its face, the making of an application to the WHRS is not a procedure that would be viewed as commencing proceedings in a Court. Equating the two processes for the purposes of limitation could only be justified if legislation expressly, or by necessary implication, demanded such a result.

[30] The words used in s 55 must be seen in their entire context. The context includes the words "Application of other enactments to adjudications".Instead of expressly providing the WHRS Act with its own limitation provisions, the legislature sought to import the limitation periods enacted in other statutes, including the Building Act 2004. That is why the heading to s 55 says that it is concerned with Application of other enactments to adjudications. The heading is an admissible aid to construction: s 5 Interpretation Act 1999.

[31] Section 4 of the Limitation Act 1950 which by s 393 is applicable to the present proceedings, provides that an "action may not be brought" after certain periods of time have elapsed since the cause of action has accrued.. Section 393 of the Building Act 2004 continues the use of such terminology when it provides that an action "*may not be brought against a person after 10 years or more from the date of the act or omission on which the*

proceedings are based." The point at which an action is "brought" is when a proceeding is commenced in a court (also note the definition of "Action" in the Limitation Act is any proceeding in a Court of law). The Limitation Act defines "action" as any proceeding in a Court of law. The Limitation Act 1950 and the relevant parts of the Building Act 2004 are applicable only to claims brought by way of Court proceedings. If it were thought necessary to institute a limitation period for other forms of adjudication, express provision would have to be made for that purpose. That is why, for example, in the case of arbitrations, for example, specific provision is made in s 29 Arbitration Act 1996.

[32] I have no doubt the intention of the legislature in enacting s 55 was to provide a limitation period for claims brought in the forum of the WHRS. Otherwise, in cases where the claimant decided to proceed down the route which the WHRS Act provided, there would be no limit on the time within which the applicant was required to start its claim. The limitation periods referred to in the Limitation Act 1950 and the Building Act 2004 do not assist because they prescribe a termination point of the commencement of Court proceedings. The initiation of an application to the WHRS does not answer description of the commencement of Court proceedings.

[33] Accordingly, some additional mechanism was required to establish a termination point for the limitation period in the case of WHRS claims. The mechanism that the legislature adopted was to equate the lodging of a WHRS application with the commencement of proceedings. Section 55 says that the relevant event which is "deemed to be the filing of proceedings" is the making of an application under s 9(1) of the WHRS Act.

[34] The application for an assessor's report may result in the claim being accepted by the WHRS. If it does, then an applicant wishing to have the claim resolved under the aegis of the WHRS needs to make a decision whether to seek an adjudication or to obtain the agreement of the other party/ies to a mediation. In the case of an adjudication, it is the making of an application for a report that stops time running. The legislature could have specified that a different point in the process was the appropriate one at which the limitation period ceased to run, e.g. the point at which the applicant referred the claim to adjudication under s 22.

[35] Section 55 applies other enactment's that impose a limitation period to adjudication's only. Issues of limitation are not relevant to consensual processes of dispute resolution such as the mediation process provided for in s 13 et seq.

[36] Before concluding I return to the submission that I noted in paragraph [28]. Mr Thornton submitted that the reason for time ceasing to run on the filing of an application with the WHRS was because there might be a delay before the applicant was in a position to decide whether his interests would be better served by staying under the Act or filing Court proceedings. I do not see this as providing a compelling reason for preferring the plaintiffs' interpretation when weighed against the countervailing arguments. If there was doubt about whether the WHRS was, after all, the preferable route to take, there is nothing that would prevent the claimants from filing Court proceedings on a precautionary basis while they waited for the assessor's report under s 10. This course is open to them because of the terms of s 22(3) of the WHRS Act. Because of that provision, a claimant must eventually chose at a later stage in the WHRS procedures whether to puruse Court proceedings or a WHRS adjudication. But up to the point where the claimant refers an elegible claim to adjudication, there is nothing that prohibits a WHRS claim running in paralell with Court proceedings. Therefore, at the critical point - the stage where an applicant applies for assessment - he/she does not have to make any election between Court proceedings and the WHRS procedure.

Result

[37] The issue in this case is one of statutory interpretation. I have concluded that the interpretation advanced by the plaintiffs is not correct. In the absence of a saving provision, their claim must be statute-barred because of s 393 of the Building Act 2004 and the Limitation Act 1950. Section 55 does not assist them. My decision is that their proceeding should be dismissed under R 477.

[38] If counsel wish to be heard on the issue of costs, they should file memoranda of no more than three pages for me to consider.

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