IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-3457
[2012] NZHC 1732

UNDER	the Building Act 2004
IN THE MATTER OF	**25A Heretaunga Avenue, Onehunga, Auckland**
BETWEEN	NIGEL JAMES MONTGOMERY AND CATHERINE MICHELLE MONTGOMERY Plaintiffs
AND	AUCKLAND COUNCIL Defendant

Hearing: 17 July 2012

Appearances: G D R Shand for Plaintiffs
G J Christie/D J Barr for Defendant

Judgment: 17 July 2012

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
Grimshaw & Co (G D R Shand) P O Box 6646 Auckland 1140 for Plaintiffs
Email:

Simpson Grierson (G J Christie/D J Barr), Private Bag 92518 Auckland 1141
Email: dave.barr@simpsongrierson.com

Case Officer:
Madeline.Butler-Munro@justice.govt.nz

[1] In this leaky building case the defendant applies to strike out paragraphs 16(a), (b) and (d) of the first amended statement of claim. The defendant says that the plaintiffs cannot run these allegations because they are statute-barred under s 393 of the Building Act 2004.

[2] The essential facts are these: the plaintiffs are the current owners of the property at 25A Heretaunga Avenue, Onehunga, Auckland. The defendant is the successor to the Auckland City Council, which was the relevant territorial authority under the Building Act 1991. In July 1999 a former owner of the property applied to the Auckland City Council for a building consent under to build a house on the property. The council issued a building consent on 10 August 1999. The council inspected the construction of the house in 1999 and 2000. The last inspection was in April 2000.

[3] On 14 June 2001 the council issued a code compliance certificate for the work carried out under the building consent. The plaintiffs became owners of the property on 7 February 2002. The house is said to have numbers of defects relating to weathertightness said to arise from defective construction. The building suffers from moisture ingress.

[4] The plaintiffs claim the estimated cost of repair, $189,870.63, consequential losses of $4,410.20 and general damages.

[5] Paragraph 15 of the statement of claim pleads that the council owed the plaintiffs a duty to exercise reasonable skill and care in issuing the code compliance certificate.

[6] Paragraph 16 of the statement of claim pleads breaches of that duty of care:

> 16. In breach of its duty of care the Council:
>
> (a) Failed to implement an inspection régime designed to ensure compliance with the Building Code and/or which would identify the defects;

(b) Failed to competently carry out inspections of the dwelling because:

(i) in its inspections it failed to identify the defects;

(ii) the defects would have been reasonably apparent to a competent building inspector;

(c) Negligently issued the Code Compliance Certificate when reasonable grounds did not exist on which the Council could be satisfied that the building work at the property complied with the building code by reason of the defects;

(d) failed to identify/advise that the building work at the property did not meet the performance requirements of B2 and E2 of the Building Code.

[7] The plaintiffs issued this proceeding on 8 June 2011. Ten years before the plaintiffs issued their proceeding the Auckland City Council had completed all its inspections of the property, but the issue of the code compliance certificate under s 43 of the Building Act 1991 took place within 10 years of the issue of the proceeding. The parties advise that this case raises a new issue. They say that no case has yet gone to trial against a territorial authority on liability related solely to the issue of a code compliance certificate. Apparently all cases that have gone to trial so far have also involved council inspections during the course of construction.

[8] There is no allegation that the claim is statute-barred under s 4 of the Limitation Act 1950. However, the defendant has pleaded that the claim is statute-barred under the 10-year rule under s 393 of the Building Act 2004. It says that the matters pleaded in paragraphs 16(a), (b) and (d) are outside the 10-year period and therefore should be struck out.

[9] The plaintiff cites the principles applicable to strike-out applications recognised in *Attorney-General v Prince & Gardner*[1] that:

(a) pleaded facts are assumed to be true, unless they are entirely speculative and without foundation;

(b) the cause of action must be so clearly untenable that it cannot possibly succeed;

---

1 *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267.

(c) the jurisdiction is to be exercised sparingly and only in clear cases. This reflects the court's reluctance to terminate a claim or defence short of trial;

(d) the jurisdiction is not excluded by the need to decide the real questions of law, requiring extensive argument; and

(e) the Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation.

[10] There are two further matters.

[11] First, a strike-out application goes to the adequacy of the pleadings. Accordingly, evidence is normally not required. The application is decided on the basis that pleaded facts can be proved. The parties did not rely on evidence in this application. However evidential issues have emerged. The plaintiffs were required to serve their statements of evidence yesterday. The argument today has in part turned on evidence as to steps that the plaintiffs allege the Council ought to have taken but did not take.

[12] The second matter is that when a limitation issue is raised, the basis for strike-out is not that the cause of action is not reasonable or arguable but that the claim is frivolous, vexatious and an abuse of process. In *Matai Industries Ltd v Jensen* Tipping J said that there will be strike-out on a limitation point only where it is obvious and inevitable that the claim cannot succeed:[2]

> 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.

---

2 *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 at 532. See also *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) at [32].

[13] The relevant 10-year provision is under s 393 of the Building Act 2004. That is because the Building Act 1991 has been repealed.[3] Section 393 of the Building Act says:

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies 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, 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.
>
> (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.

[14] However, when it comes to establishing the functions of a territorial authority in inspecting and in issuing a code compliance certificate, the Building Act 1991 comes into consideration. The territorial authority's conduct is assessed against the law in force at the time. See also s 17 of the Interpretation Act 1999.

[15] The 10-year provision under s 393 is a longstop provision which cannot be extended, for example, on the grounds of concealment for fraud: see *Johnson v Watson* and *Gedye v South*.[4] Under s 393(2), the inquiry is whether the acts or

---

3 Building Act 2004, s 415.

4 *Johnson v Watson* [2003] 1 NZLR 626 (CA); *Gedye v South* [2010] 3 NZLR 271 (CA).

omissions on which the plaintiffs sue took place within 10 years of the issue of the proceeding.

[16] The defendant's case is that all inspections in this case took place more than 10 years before the issue of the proceedings. Because the inspections took place outside the 10-year period, they cannot be the subject of the plaintiffs' claim against it. The council says that the only matter on which it can be sued within time is the issue of the code compliance certificate under s 43 of the Building Act 1991. The defendant says that a clear distinction can be drawn between inspections on the one hand and the issue of code compliance certificates on the other. For that, it relies on a statement in the judgment of the majority in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)*.[5] In that decision, the Supreme Court was considering the issue whether a council could owe a duty of care to building owners in respect of defective inspections, even when no code compliance certificate had been issued. It held against the council. At [61] the majority said:

> The reason is that it is fundamental to the *Hamlin* principle that homeowners are entitled to place general reliance on councils to inspect residential premises with appropriate skill and care. The absence of a CCC does not mean that the duty of care otherwise resting on an inspecting council is somehow retrospectively abrogated. The duty is owed and (if such be the case) breached at the time of the relevant inspection or its absence. What loss the homeowner may be able to claim on account of the breach may be influenced by the absence of a CCC and whether the owner should have been aware of that fact. The point may go to causation or it may go to contributory negligence.

[17] From that, the defendant argues that carrying out inspections and issuing code compliance certificates are discrete matters. Inspections which are well outside the 10-year period are said not to be part of the regulatory regime of issuing a code compliance certificate. So the Council's argument runs that paragraph 16(a), relating to an alleged failure to implement an inspection regime designed to ensure compliance with the building code or to identify defects, goes to conduct outside the 10-year period. Similarly, it says that failure to carry out inspections competently as alleged under paragraph 16(b) of the amended statement of claim also goes to matters that occurred more than 10 years before the proceeding was issued. It says

---

5 *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289 (SC) at [61].

that paragraph 16(d) is superfluous because it simply refers back to paragraphs 16(a) and 16(b).

[18] On the council's case, the case ought to go to trial only on the pleading in paragraph 16(c). That is, whether the council negligently issued a code compliance certificate because reasonable grounds did not exist on which the Council could be satisfied that the building work complied with the building code.

[19] There are two general responses to the council's argument. There is my response, and there is Mr Shand's response. I will deal with my response first, then with Mr Shand's.

[20] It is common ground that the council owed the plaintiffs a duty to exercise reasonable care and skill in issuing the code compliance certificate under the Building Act. The council's function is set out in s 43(3) of the Building Act 1991:

> **43. Code compliance certificate**
> ...
>
> (3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that –
>
> (a) The building work to which the certificate relates complies with the building code; or
>
> (b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.

[21] It is also relevant to note s 43(6) which requires the Council to issue a notice to rectify if it considers on reasonable grounds that it is unable to issue a code compliance certificate for the particular building work:

> (6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act. ...

[22] When a territorial authority is alleged to have issued a code compliance certificate in breach of a duty of care to building owners, it will be necessary to inquire whether the territorial authority could have been satisfied on reasonable grounds that the building work in question complied with the building code. The information held by the territorial authority will go to whether the territorial authority could be satisfied on reasonable grounds. The information would have to relate to building work carried out under the building consent. The territorial authority would have to know whether the work carried out complied with the code. There are a number of sources of knowledge for the territorial authority. They can be:

(a) information given by the consent holder,

(b) information given in producer statements,

(c) information given by agents of the consent holder such as engineers,

(d) information given by third parties, and

(e) information which the territorial authority had obtained for itself.

[23] Under s 76 of the Building Act 1991, the territorial authority is given power to obtain information by inspections. Section 76 gives an extended definition of "inspection". The section gives the territorial authority powers to obtain that information by entry and physical inspection:

> **76 Inspection by territorial authority**
>
> (1) For the purposes of this Part of this Act, **inspection** means the taking of all reasonable steps to ensure—
>
> (a) That any building work is being done in accordance with a building consent; or
>
> (b) That in respect of any building concerning which a compliance schedule is issued, the inspection and maintenance provisions of that compliance schedule are being complied with; or
>
> (c) That buildings remain safe, sanitary, and have means of escape from fire; or

(d) That buildings which, in the opinion of the territorial authority, are likely to be deemed to be dangerous or insanitary under section 64 of this Act come to the attention of the local authority

...

[24] The plaintiffs' case is that when the Auckland City Council issued its code compliance certificate on 14 June 2001, it could not be satisfied on reasonable grounds that the building work complied with the code. It seems to me that their case is that there is a clear link between the council's inspection function and the issue of a code compliance certificate. The plaintiffs cite paragraph [446] of the judgment of Heath J in *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*:[6]

> The Council's statutory obligation, when it came to certify compliance with the Code, was to be satisfied, on reasonable grounds that the building work complied with Code requirements. The inspection process, leading up to that certification, is designed to enable the Council to express that final conclusion and to incorporate it into the code compliance certificate required by the legislation.

At [451] Heath J said:

> Code compliance certification is the end result of information gathered by a Council through its inspections, as well as additional information provided through producer statements and other sources. Section 43(3)(a) of the 1991 Act required the Council to be satisfied, on reasonable grounds, that the building work complied with the code before it issued a certificate. The issue is whether, having regard to the information the Council had, the certificate ought to have been issued.

[25] As I understand the plaintiffs' case, if inadequate inspections were carried out then the territorial authority cannot have had reasonable grounds to certify under s 43 of the Building Act 1991. In terms of the 10-year rule under s 393(2), the relevant act or omission on the part of the council is the issue of the code compliance certificate. However, the quality of the council's actions, that is, whether it had reasonable grounds, goes to the adequacy of the information that the council had in its hands at the time it considered the issue of the code compliance certificate. Earlier alleged inadequate inspections go to the standard of the information available

---

6 *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2008] 3 NZLR 479 (HC) at [446].

to the Council when it issued its certificate, and its grounds for the issue of the certificate.

[26] Seen in this light, the council's inspections cannot be separated from its actions in satisfying itself that a code compliance certificate ought to be issued. They are part of one process that straddles the limitation period. The council's inspection of the building went to whether the Council had reasonable grounds to be satisfied under s 43(3). The allegations that there was not a satisfactory system for inspection established and that competent inspections had not been carried out, go to the inadequacy of the information that the council had when it came to consider whether to issue a certificate. Inadequacy of information goes to impeach the Council's decision. It is that decision which is relevantly inside the 10-year period.

[27] In cases under s 393 of the Building Act 2004, it can happen that activities started outside the 10-year period may be completed within the period. It will be a question of fact in any case whether the actions said to give rise to liability were completed (in the sense that no further work was done on that particular task) inside or outside the 10-year period. For this case it is arguable that inspections under s 76 of the Building Act 1991 were part of the information gathering required for the issue of a certificate under s 43. Gathering the information, considering it and issuing a certificate were arguably one activity which was not completed until the council issued its certificate under s 43.

[28] I come back to the pleadings. Paragraph 16(a) of the statement of claim alleges a failure to implement an adequate inspection regime. The adequacy of the inspection regime goes to the adequacy of the information that would be available to the council when it came to consider whether to issue a code compliance certificate. If an adequate inspection regime has not been established, then that may go to the reasonableness of the grounds of the council and goes to the council's performance of its obligations within the 10-year period.

[29] Similarly, paragraph 16(b) relates to the adequacy of inspections. The alleged failure to carry out inspections competently may arise from the failure to implement an adequate inspection regime. It might also go to whether the council

had reasonable grounds to be satisfied when it considered the issue of the code compliance certificate because it may have allowed the council to proceed on incorrect assumptions. Accordingly, paragraphs 16(a) and (b) can be read as particulars going to the reasonableness or otherwise of the grounds for the council to be satisfied at the time it issued the code compliance certificate.

[30] In the same way, paragraphs 16(c) and (d) can be read as the effects of the council's failure to carry out matters properly under 16(a) and 16(b). On that basis, I see no reason for striking-out paragraphs 16(a), (b) and (d) of the first amended statement of claim.

[31] I now deal with Mr Shand's response.

[32] Mr Shand accepts that there may be an argument that deficiencies in the inspection outside the 10-year period cannot be imputed to the council for a claim relating to issue of a code compliance certificate within the 10-year period. However, he advances an argument which has only become apparent as a result of the service of evidence yesterday. In establishing an inspection regime, the Council ought to have required a follow-up inspection immediately before it considered the issue of a code compliance certificate. He points to the lapse of 14 months between the last inspection in April 2000 and the issue of a code compliance certificate in June 2001. The plaintiffs' case is that there ought to have been a follow-up inspection, and that follow-up inspection ought to have taken place at a time which would be within the 10-year period.

[33] The council only became aware that this was the thrust of the plaintiffs' case when it received the plaintiffs' evidence yesterday. Mr Christie protests that the council did not realise that it was facing a case that it ought to have carried out further inspections. Mr Christie's impression was that the case against the council was only that inspections that were carried out were inadequate. Mr Christie had not identified that the allegations as to an inspection regime went to a claim that a fresh, follow-up inspection would be required.

[34] Mr Shand's response is that the allegations of breach of duty were standard ones made in leaky building litigation. The pleadings have remained unchanged since the start of this proceeding. Particulars had not been sought, and the council is now wise to the issue because it received the evidence yesterday.

[35] Mr Christie's point is well taken. The present pleadings were not adequate to alert the council to the fact that the plaintiffs' case is that an inspection regime ought to have required a fresh, follow-up inspection before a consideration whether to issue a code compliance certificate, and that such an inspection could have taken place within the 10-year period.

[36] It often happens on a strike-out application that the need to refine pleadings becomes apparent. The Supreme Court's decision in *Couch v Attorney-General*[7] is a clear example of that. The way to address this is to require the plaintiffs to amend their pleadings to make it clear that the council is facing that allegation.

[37] While I regard the present pleadings as triable in the sense that the plaintiff can run a case as to the inadequacy of past inspections, the plaintiffs are directed to file further and better pleadings on the issue of absence of inspection. In particular, the defendants are required to provide a pleading as to what they now contend an inspection regime ought to have included, and as to the absence of a relevant inspection.

[38] I come back to the point that in developing areas of the law the court should be slow to strike out a claim. This is one case where that approach should be taken, given that apparently no case has gone to trial where the matter has been run solely on the question of the issue of a code compliance certificate.

[39] The plaintiffs also advance an argument based on an "ongoing duty of care". Those arguments based on ongoing duty of care may also come within the principle that the court should be slow to strike out. I record that the plaintiffs put it as an ongoing duty to inspect up to the time of issue of a code compliance certificate. They did not contend for any duty to inspect after that time.

---

7 *Couch v Attorney-General* [2008] 3 NZLR 725 (SC).

[40] The defendant's application is dismissed.

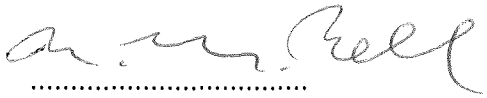
[41] I give a direction for the plaintiff to file and serve further and better particulars of paragraph 16 by way of an amended statement of claim to be filed and served by *24 July 2012*. Leave to file and serve is granted.

[42] Leave is also granted to the defendant to file and serve a further statement of defence ***15 working days*** after service of the amended statement of claim.

[43] One further matter. Mr Christie says that the new basis for the plaintiffs' case is going to create witness difficulties for the defendant. The relevant officer within the Auckland Council who would be able to give evidence on the new approach to the plaintiffs' case has recently retired and is now overseas on a retirement holiday. He may not be available to give evidence at the hearing of this case. There is leave to the defendant to ask for a further case management conference and ask for any further directions that arise out of that difficulty.

[44] Mr Christie signals that if there are difficulties in obtaining the witness in time for the hearing, then there might have to be an application for an adjournment. I invite the parties to confer and to establish whether there will be a need for an adjournment application. Any adjournment application will be considered by the civil list Judge.

[45] I make no order as to costs. Neither side objects. Although the council has not succeeded in its strike-out application, it has also become apparent that the plaintiffs have to amend their pleadings in the light of their new approach. So the honours are divided.



.....

R M Bell
Associate Judge