IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-006150

BETWEEN	BRUCE NELSON DAVIDSON, LINDA MARY DAVIDSON AND ROSS GEORGE DAVIDSON AS TRUSTEES OF THE LM DAVIDSON (CLIFF ROAD) TRUST AND THE RG DAVIDSON (CLIFF ROAD) TRUST Plaintiffs
AND	ANTHONY WAYNE BANKS First Defendant
AND	JANET RAEWYN BANKS Second Defendant

…… Continued

Hearing: 18 March 2009

Appearances: BM Easton for first, second and third defendants
SC Dench for sixth third party

Judgment: 23 March 2009 at 3:00pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment]

Solicitors: Grimshaws & Co, PO Box 6646, Auckland for first, second and third defendants
Styants Law, PO Box 116, Papakura for sixth third party

AND	ANTHONY WAYNE BANKS, JANET RAEWYN BANKS AND PETER ALAN LEWIS AS TRUSTEES OF THE BANKS FAMILY TRUST Third Defendants
AND	AUCKLAND CITY COUNCIL Fourth Defendant
AND	SUMICH ARCHITECTS LIMITED First Third Party
AND	AUCKLAND CITY COUNCIL Second Third Party
AND	MICHAEL JOHN POWER Third Third Party
AND	PAUSMA WROUGHT IRON LIMITED Fourth Third Party
AND	JAMES PRINCE Fifth Third Party
AND	DESMOND PHILIP REDGWELL Sixth Third Party
AND	LAWRENCE NICHOLAS SUMICH Seventh Third Party

[1] The sixth third party applies for an order either granting summary judgment against the first, second and third defendants or, alternatively, striking out the claim of the first, second and third defendants against the sixth third party.

[2] This proceeding relates to a residential dwelling at 55 Cliff Road, St Heliers, Auckland. The plaintiffs' claim alleges defects to the building caused by moisture. The first, second and third defendants' (the "Banks") interests were previous registered proprietors. The first, second and third defendants allege that the sixth third party carried out building work on the dwelling and supervised and co-ordinated the construction of the dwelling.

[3] A Code of Compliance Certificate was issued in respect of the residence on or about 17 February 1998. The third party proceedings were filed in respect of the sixth third party on 23 October 2008. It is therefore conceded by the first, second and third defendants that any negligent acts or omissions as alleged on the part of the sixth third party occurred more than ten years before the first, second and third defendants filed their third party claim against the sixth third party.

[4] This application therefore raises one issue for the Court to determine. That issue is whether a claim for contribution by the first, second and third defendants against the sixth third party is subject to the ten-year limitation period in s 393(2) of the Building Act 2004 or, the former provision, s 91 of the Building Act 1991. Counsel were agreed that, for the purposes of this application, nothing turns on whether it is the 2004 Act which applies or the 1991 Act which applies. The substantive parts of both provisions are, for all intents and purposes, the same.

[5] At the time of the filing of the application the applicable Rule dealing with a summary judgment application was to be found in Part 2 of the High Court Rules. The primary Rule governing an application by, what is in effect, a defendant is that set out in the former r 136(2) of the High Court Rules. The equivalent provision in the new High Court Rules, r 12.2, provides that the Court may grant judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action

in the plaintiff's statement of claim can succeed. Rule 12.2 applies in respect of an application by a third party seeking judgment against a defendant by the combined operation of r 4.7 and the definition of *plaintiff* as contained r 1.3 of the High Court Rules.

The Court's approach to summary judgment by defendants

[6] The Court of Appeal has given guidance as to the approach which is to be adopted when the Court considers entering summary judgment on a defendant's application against a plaintiff pursuant to r 136(2) of the High Court Rules. That was given in *Westpac Banking Corporation v MM Kembla (NZ) Ltd* [2001] 2 NZLR 298 at [58]-[64] and *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338.

[7] In *Westpac Banking Corporation v MM Kembla (NZ) Ltd* the Court said:

> [58] The applications for summary judgment were made under R 136(2) of the High Court Rules which permits the Court to give judgment against the plaintiff "if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed".
>
> [59] Since R 136(2) permits summary judgment only where a defendant satisfies the Court that the plaintiff cannot succeed on any of its causes of action, the procedure is not directly equivalent to the plaintiff's summary judgment provided by R 136(1).
>
> [60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under R 186. Rather R 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.
>
> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in *McGechan on Procedure* at HR 136.09A, are

where the wrong party has proceeded or where the claim is clearly met by qualified privilege.

[62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

[63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.

[64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

[8] This passage was cited with approval by the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433 at 437.

[9] The application is made on the dual basis, namely, seeking summary judgment or a strike out of the third party proceedings. Counsel were in agreement that I should consider the matter as a summary judgment application because, in essence, the same principles as they apply to the facts of this case apply to either form of application. Under the new High Court Rules the jurisdiction to strike out is to be found in r 15.1. A summary of the applicable principles in respect of such

applications may be found in the Court of Appeal decision in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267.

[10] The Court's approach to strike out applications involving limitation defences was considered in *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 at 531. I need not review the principles which apply and which were referred to in that decision because counsel agree that, in the event that I find that the limitation defence which is the subject of this application is available and is proven, none of the causes of action pleaded by the first, second and third defendants can succeed against the sixth third party. I approach this application having regard to the matters just summarised.

The case as pleaded against the sixth third party

[11] The material allegations pleaded against the sixth third party are found in paragraphs 8, 36, 37, 38, 39 and 40 of the amended statement of claim by the first, second and third defendants against various third parties dated 23 October 2008. The paragraphs just mentioned, I now set out:

> 8. The sixth third party carried out building work on the dwelling on the property and supervised and coordinated the construction of the dwelling.
>
> …
>
> 36. The sixth third party:
>
> a. carried out building work on the dwelling; and
>
> b. supervised and coordinated the construction of the dwelling.
>
> 37. At all material times the sixth third party owed the defendants a duty to exercise reasonable skill and care to ensure that the subject dwelling was built in accordance with the Building Code, the Act and in accordance with good trade practice.
>
> 38. The sixth third party breached the abovementioned duty by building/allowing the dwelling to be built with the defects set out in paragraph 15 of the claim.
>
> 39. As a result of the sixth third party's breach of his duty the defendants will suffer loss if they are required to pay any damages, interest or costs to the plaintiffs.

40. The defendants are entitled to contribution or indemnity from the sixth third party pursuant to s 17(1)(c) of the Law Reform Act 1936.

WHEREFORE THE DEFENDANTS CLAIM AGAINST THE SIXTH THIRD PARTY:

A An order that the sixth third party contribute or indemnify the defendants for any judgment that the plaintiffs may obtain against the defendants.

B Costs.

[12] The sixth third party's application is made on the basis that the proceeding brought against him has been brought more than ten years after the act or omission on which the proceedings are based. On his behalf it is submitted that he is entitled to the benefit of the long-stop limitation defence in either s 91(2) of the Building Act 1991 or s 393(2) of the Building Act 2004. Both counsel agreed that it was most likely that the 2004 Act applies. In any event, there is no material difference between the two for present purposes.

[13] Section 393 of the Building Act 2004 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.

[14] Building work is defined in s 7 as:

…

building work —

(a) means work—

(i) for, or in connection with, the construction, alteration, demolition, or removal of a building; and

(ii) on an allotment that is likely to affect the extent to which an existing building on that allotment complies with the building code; and

(b) includes sitework; and

…

Subsection (b) was amended by s 3 of the Building Amendment Act 2005 to read:

3 Interpretation

…

(b) includes sitework; and

(c) includes design work (relating to building work) that is design work of a kind declared by the Governor-General by Order in Council to be restricted building work for the purposes of this Act; and

(d) in Part 4, and the definition in this section of 'supervise', also includes design work (relating to building work) of a kind declared by the Governor-General by Order in Council to be building work for the purposes of Part 4.

[15] Mr Dench submitted that s 393(2) or, if applicable s 91(2) of the 1991 Act, are absolute and unqualified. What is alleged against the sixth third party is an act or omission in the construction of the house. What is alleged occurred more than ten years before the proceeding was issued against the sixth third party.

[16] Mr Dench referred to the judgment of John Hansen J in *Cromwell Plumbing Drainage & Service Ltd v De Geest Brothers Construction Ltd* (1995) 9 PRNZ 218. He submitted that the decision was wrongly decided. He drew attention to the fact that the High Court has declined to follow that decision in two recent decisions. The first is the decision of Courtney J in *Dustin v Weathertight Homes Resolution Service* HC AK CIV 2006-404-276 25 May 2006. The second is the decision of Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd & Ors (No 8)* HC AK CIV 2008-404-1974 29 August 2008.

[17] Courtney J in *Dustin v Weathertight Homes Resolution* in [15] through to [35] comprehensively analysed the case both for and against the proposition that the

long-stop limitation provided by the Building Acts is absolute and unqualified. Her Honour, in the course of that review, considered the matters which were addressed by John Hansen J in *Cromwell Plumbing Drainage & Service Ltd v De Geest Brothers Construction Ltd*.

[18] Like Randerson J in *Carter Holt Harvey Ltd v Genesis Power Ltd & Ors (No 8)* at [44] I agree and adopt, for the purposes of this case, Courtney J's analysis of the issue at [15] to [35] of her judgment. Her Honour's conclusions are consistent with the Court of Appeal decision in *Johnson v Watson* [2003] 1 NZLR 626 and with the analysis of a negligence claim and the application of the particular provisions carried out by Glazebrook J in *Klinac v Lehmann* (2002) 4 NZ ConvC 193,549. I refer, in particular, to Her Honour's analysis at [34] and following under the heading *Negligence* and to the conclusion which she expresses in [57] of that judgment.

[19] In my view, Mr Dench correctly summarised the position in his written submissions and which I now adopt.

> The Banks claim contribution or indemnity from him under s 17(1)(c) of the Law Reform Act 1936. To succeed, they need to show (and need only show) that they and Mr Redgwell are each tortfeasors and liable for the same damage. The relevant tort is negligence for breach of duty of care in connection with the construction of the house at 55 Cliff Rd. The connection between that tort and the building work could not be closer. S 17(1)(c) merely empowers the Court to apportion damages for liability that already exists independently of the section. It is therefore submitted that:
>
> - The present claim under s 17(1)(c) plainly relates to building work on a fact-based approach. It is artificial to maintain otherwise.
>
> - Even if one adopted a cause of action approach, *Klinac* agrees with *Rogers* that the tort of negligence falls within s 91(2) (and, therefore, s 393(2)).
>
> - Unlike *Klinac*, *Dustin* and *Carter Holt* were both 'contribution or indemnity' cases and on point. In neither case was the Court concerned that liability was not related to building work.

Orders

[20] I order that summary judgment be entered in favour of the sixth third party against the first, second and third defendants.

Costs

[21] The proceeding is a Category 2 proceeding. The steps that have been taken in relation to this proceeding appear all to be covered by Band B. There is some issue as to whether there is duplication arising from the fact that the sixth third party's application was originally made in respect of the first, second, third and fourth defendants. The fourth defendant subsequently withdrew its opposition to the application. In case there is some duplication I am allowing counsel the opportunity to resolve costs on an agreed basis, having regard to the fact that in principle I see the answer being broadly within Category 2 and Band B. If counsel cannot agree, memoranda shall be filed in support, opposition and reply at seven-day intervals, counted from the time of the filing of the memorandum for costs filed by the sixth third party. The Registrar shall refer the file to me for judgment on costs.

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JA Faire
Associate Judge