

Time limits and voluntary assumption of risk in leaky home claim

If you suspect you may have a leaky home, the best advice is to act quickly to investigate your suspicions. If you deliberately refrain from making inquiries or confirming your suspicions because you prefer not to have the result, that will not prevent the running of the applicable limitation periods. In particular, under the Limitation Act 1950 any claim in negligence or contract must be brought within 6 years of the claim accruing. And a claim "accrues" when there is a material loss of value due, for example, to the building defects or damage becoming "reasonably discoverable". But does the making of inquiries by itself imply reasonable discoverability and loss such as to trigger the running of the applicable limitation period?

In a recent case, *P-Onefive Investments Limited v Auckland Council* [2014] NZHC 825, Council argued that it did; that time started running by virtue of the fact that the homeowner had applied for a WHRS assessor's report. Further, Council argued that this was so despite the fact that the WHRS report, when received, advocated targeted repairs only at an estimated cost of \$13,000, which later turned out to be wholly inadequate.

The Court accepted that parts of the claim should be dismissed, but on unrelated grounds. More importantly, the Court was not prepared to do so without first analysing and rejecting the Council's argument on this 6 year point. We think the Court's analysis is right and provides helpful guidance for future cases. If the position were otherwise then homeowners would be penalised where they have acted entirely appropriately as information has arisen.

The case also considered whether the WHRS report in question provided a clear defence of "voluntary assumption of risk". This defence

arises where the defendant is liable but seeks to escape liability on the basis that the plaintiff knew of and accepted (effectively; consented to) the risk of loss. Here, Council argued that the advice of targeted repairs plainly put the plaintiff on notice of the claim before it purchased the property from a related company. However, this argument was rejected, with the Court finding that the allegations of "voluntary assumption of risk" depended on the specific facts of the case. That made the question inappropriate for determination without a full trial of the evidence. Again, we think the analysis, centring as it does on the fact that the plaintiffs could not have known about latent defects, accords with common sense.

Background

The plaintiff company, P-Onefive Investments Limited ("P-15"), was the owner of a leaky house built in 2002. The house was initially owned by a company called Staccato Trading Ltd. The directors of both companies were Mr and Mrs Monk.

In 2004 and 2005 Mr Monk became aware of some apparently minor leaking in the property, and on 7 February 2006, "out of an abundance of caution", Mr Monk applied to the WHRS for an assessor's report. A WHRS assessor issued a report on 23 March 2006, which report expressly stated that the dwelling was a "leaky building". The report recommended "targeted" (ie, localised or isolated repairs, as opposed to a full reclad) which he estimated would cost just under \$13,000. An addendum report was issued in October 2007 in which the assessor suggested further, but still targeted, repairs estimated to cost just over \$62,000.

Following the assessor's report, Mr Monk had on the advice of his accountant arranged for the incorporation of another company, P-15, to which the property was

transferred for full value in December 2006. Later, in October 2007, Mr Monk sought to assign the property and claims relating thereto to P-15, without carrying out the targeted repairs as recommended by the WHRS assessor.

In May 2011 Mr and Mrs Monk (presumably on behalf of P-15) engaged a private building consultant, a Mr Alvey of Kaizon Limited, to peer review the assessor's report and recommendations. As a result of that work and subsequent further investigations, Mr Alvey advised, in short, that the property required comprehensive recladding and remedial work affecting the whole house; so not just targeted repairs.

Rather than proceed in the WHRS, P-15 commenced High Court proceedings on 12 March 2012, claiming the estimated costs of the remedial works. Given the purported assignment of Staccato's claims to P-15, that claim included a claim as assignee of Staccato's claims.

Auckland Council in turn applied for summary judgment as defendant on the basis that none of the causes of action could be sustained. That argument was advanced on, broadly, two grounds: firstly that P-15 had voluntarily assumed the risk of loss when it bought the property in the face of, in particular, the WHRS assessor's report; and secondly, that P-15's assigned claims were time-barred.

"Voluntary assumption of risk"

"Voluntary assumption of risk" indicates a principle of wide and various application in the law. In relation to weathertightness claims, White J said in *Coughlan v Abernathy* High Court, Auckland, 20 October 2010:

"It is well established that a person will not have voluntarily assumed a risk unless it is shown that he or she had full knowledge of the nature and extent of the risk and, with that full

knowledge, in fact incurred it...The onus of proof is on the party alleging voluntary assumption of risk by the other party to establish the allegation..." (emphasis added)

Accordingly, where the principle is resorted to for affording a way of escape from liability by a territorial authority, which has failed to perform its duty of care to undertake reasonable inspections and building consent and certification processes, the question to be determined is a question of fact and the Council must show as a fact that the plaintiff *consciously* incurred a particular danger or voluntarily exposed him or herself to it. It is not a question of negligent default by the plaintiff.

In *Coughlan* White J found that the plaintiffs in that case did not have full knowledge of the nature and extent of the risk, because the expert report relied upon by the defendant in that case failed to identify critical defects. Likewise in *Aldridge v Boe* High Court, Auckland, 10 January 2012, another leaky building case, the High Court held that the plaintiffs could not have known about latent defects which ultimately resulted in repairs costing some \$900,000.

In *P-15's* case, it was accepted by Auckland Council that it owed a duty to P-15 as a subsequent purchaser of the property. However, because P-15 purchased the property in the knowledge of the targeted repairs as recommended by the WHRS assessor, Council argued that it had voluntarily assumed the risk to which it was ultimately exposed. P-15 disputed this, arguing that their knowledge of the defects and risks "increased exponentially" after P-15 acquired the property and the Kaizon report and work in 2011 and 2012.

The Court accepted P-15's argument. Following *Coughlan* and *Aldridge*, the Court held that it could not be said that P-15 had notice of the nature and extent of the risk they faced in purchasing the property. **"The required level of knowledge is high"**, the Court said at [53]. While the Monks (and therefore; P-15) had knowledge of minor water damage, had minor repair work done, and had received the WHRS assessor's report stating that the dwelling was a "leaky building" and recommending targeted repairs, it could not be determined at this summary judgement stage that P-

15 was "fully aware" of the risk and, in the knowledge of that risk in fact incurred it.

P-15's claim based on assignment from Staccato struck out

P-15's claim based on assignment from Staccato failed for technical reasons – specifically: because P-15 failed to give written notice of the assignment as required under the old Property Law Act 1952, it had no ability to bring a claim as assignee in 2012. It followed that the claim was not effective to stop the clock on the 10 year limitation period under the Building Acts 1991 and 2004, which expired in 2012 (ten years after code compliance). Further, this defect could not be cured by reassigning the claim in July 2013, because the 10 year period cannot be circumvented by adding "new" causes of actions to existing proceedings.

In case that conclusion was wrong, however, the Court went on to consider Council's argument that the assigned claims were time-barred as having been brought more than 6 years after the claims accrued. As noted above, a negligence claim is said to "accrue" when loss occurs, which in the context of leaky building claims, is normally when the defects and damage become "reasonably discoverable".

The Court's discussion on this point is notable, primarily for its rejection of Council's argument based on P-15's application for the WHRS assessor's report. Council argued that, at the latest, P-15's assigned claim accrued in 2006 when Staccato applied for the assessor's report.

The Court did not accept Council's argument. In doing so, it observed that the occurrence of loss is "necessarily fact dependent". Thus, the Court said, the mere fact that Staccato had applied for an assessor's report was "not...necessarily determinative of loss...." The Court said:

"The occurrence of loss may depend on what triggered the decision to seek a report, and that may be insufficient until the report is received. It is also conceivable, depending on the facts...that the report is inconclusive and a further report is needed before it can be said with certainty that the value of the property has been depreciated."

In this case, the Court was not satisfied that it could determine that the property had suffered a reduction in value at the point that Staccato applied for the assessor's report.

Comment

As a decision on an application for summary judgment, the Court's findings are necessarily preliminary and limited to findings that the questions must be finally resolved at trial in the context of the full evidence. Nonetheless, the Court's findings and observations as to the test for "voluntary assumption of risk" and limitation defences are instructive, and we expect they will provide useful guidance in future cases where defendants pursue affirmative defences based on plaintiffs' applications for and receipt of WHRS assessor's reports. What is clear is that merely pointing to the existence of such reports will not be enough to sustain allegations of conscious risk-taking and/or loss of value.

Case: P-Onefive Investments Limited v Auckland Council [2014] NZHC 825