

## Body Corporate 90247 & Ors (being the owners of 14C Glenmore Street) v Wellington City Council [2014] NZHC 295 (per Ronald Young J)

Parker & Associates acted for the successful body corporate and owners of four units at 14C Glenmore Street, Thorndon, Wellington (**Glenmore**) in their claim against Wellington City Council (the **Council**) for negligent inspection and issue of Code Compliance Certificates (**CCC**).

Following a three week hearing in the High Court in Wellington in October and November 2013, Ronald Young J issued a judgment on 27 February 2014, awarding Glenmore over \$1.9 million plus costs. The Court found the Council negligent; its process "hopelessly inadequate"; and the owners neither contributory negligent, nor vicariously liable for alleged negligent acts on the parts of the purchasers' solicitors or building inspectors.

### Facts

The four story townhouse property was constructed between 1996 and 2001. The units are of predominantly weatherboard construction with iron roof, aluminum windows, and membrane coated decks.

The Council issued a building consent (the **original consent**) and carried out inspections in 1996 and 1997, the last building inspection being a failed preline In December 1996 (there were subsequent plumbing inspections).

In 2000, the Council returned to the site following a complaint about a deck being built at the property without a building consent and found that construction had been almost completed in the interim despite the Council not having been called in to inspect.

The Council required the owner to apply for building consents for the deck (the **deck consent**), and for the work to complete the units (**consent 71330**). The consents were granted in November 2000 and the Council then

carried out a further 15 inspections at the property in 2000 and 2001.

In June 2001, CCCs were issued for the deck consent and consent 71330.

The owners first discovered water leakage issues at the property in 2011. Investigations were undertaken and a claim was filed on 19 April 2011.

### Key issues

The key issues in the case were as follows:

- Whether the original consent had lapsed.
- Whether building consent 71330 and the CCC for that consent applied to the whole property, or just some minor building work and handrails.
- Whether the Council inspections were time barred pursuant to s393 of the Building Act 2004.
- Whether the Council was negligent. This turned on whether the defects were observable and should have been identified by the Council inspector prior to the issue of the CCC.
- Whether any of the owners were contributory negligent.
- Whether the owners were vicariously liable for alleged negligence on the part of their solicitors and/or building inspectors.
- What the correct measure of damage was.
- If the correct measure of damages had been cost to repair, whether post remediation stigma would have been awarded.

### Consents and CCC

The Court held that the original consent had not lapsed. Additionally, based on the wording of consent

71330, and in light of the inspections undertaken (which covered the property as a whole), the Court held that the building consent and therefore the CCC applied to the entire property.

### Limitation

Where the Information gathered by the Council, including Inspections undertaken, was relied upon to issue a CCC, the Court held that the relevant date for limitation purposes under s393(3) of the Building Act 2004 is the date of issue of the CCC. Therefore, the Council inspections could be considered by the Court in determining whether or not the Council was negligent in issuing a CCC even when those inspections may have been undertaken more than 10 years before the claim was filed.

### Council negligence

Based on evidence from Glenmore's remediation and Council process experts, the Court held that a number of defects at the property were obvious on even a superficial inspection and some were in fact identified by the Council inspectors, but were not remediated prior to the issue of the CCC. Given the obvious defects at the property, there should have been a more detailed Inspection of the building. That in turn would have led to the discovery of further defects and the realisation that the building was seriously vulnerable to water entry.

### Contributory negligence/break in the chain of causation

The Court held that none of the owners were contributory negligent.

The Court went on to hold that the owners' solicitors were not negligent for failing to identify what the Council referred to as an ambiguity in the wording of the CCC. The Court held that the building inspectors who provided pre-purchase inspection

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reports had been negligent in failing to identify some of the obvious defects at the property.

Even if the solicitors had been negligent, the Court held that such negligence was not attributed to the plaintiffs. The Court of Appeal in *Byron Avenue*<sup>1</sup> held a solicitor's negligent failure to obtain a LIM was an exceptional situation that was able to be attributed to the owner. The Court in Glenmore noted that this was a limited exception to the normal rule (the "both ways" rule) that plaintiffs are not liable for negligent acts on the part of an independent subcontractor. The Court distinguished *Byron Avenue*, as the interpretation of the content of a CCC is in a different category to an obligation to obtain a LIM. Interpretation of a CCC, or carrying out research as to the scope of a CCC, is "lawyerly work". The solicitors were performing an independent and expert function and the plaintiffs were therefore not vicariously liable for any negligence on the part of their solicitors in that respect.

The Court also held that the owners were not vicariously liable for the negligence of the building inspectors. The building inspectors were not agents, and undertaking a pre-purchase inspection is not a non-delegable duty of the plaintiffs. There were no policy reasons for the burden of negligent building inspections falling on the house purchaser.

The Court also held that, had the solicitors been negligent, their negligence was not a break in the chain of causation in respect of the owners' claim against the Council. The issue of the CCC is a function of the Council's inspection role and it is ultimately responsible for ensuring houses are properly built. The Council is aware of that responsibility and of the reliance of purchasers, yet the CCC in this case did not clearly indicate any issues. Therefore, the Court held that the Council was responsible for any ambiguity and negligence (if any) on the part of the plaintiffs' solicitors did not break the chain of causation.

#### Measure of damages – loss of value

The Court confirmed the assessment of the correct measure of damages as

set out in *Dynes*<sup>2</sup> and *Johnson*<sup>3</sup>. The prima facie position for the assessment of damages for negligent inspection and Issuing a CCC is the cost to repair, subject to what is necessary to do fairness between the parties.

In this case, the Court held that loss of value was the correct measure of damages in order to do fairness between the parties, because:

- a. It was possible for people to continue to live in the property in its unrepaired state for some time;
- b. There are no particular unique features of the property;
- c. Repairs had not been commenced; and
- d. Most importantly, there was considerable uncertainty about the exact extent of damage and therefore the cost to repair.

In this case, the loss of value was higher than the Court's assessment of the cost to repair.

#### Post remediation stigma

While the Court found that the correct measure of damages in this case was loss of value, Ronald Young J also analysed the remediation cost arguments. If the cost to repair had been the correct measure of damages, the Court found that there is a basis for saying that some post remediation stigma will exist.

Ronald Young J used the example of two similar properties for sale, one which had been fully remediated and the other which was not a leaky building and therefore had not been remediated. If the properties were marketed at a similar price, in the Court's view, the purchaser would almost certainly purchase the property that had never been the subject of weathertightness problems. Therefore, the owner of the remediated property would need to lower the price in order to achieve a sale.

That reduction represented an allowance for post remediation stigma which, in this case, the Court assessed as 5% of the unaffected current market value of the property, being just over \$100,000.

#### Conclusion

This is a very helpful decision for all those involved in leaky building litigation. It confirms many of the principles that have been developing in this area and deals in some detail with several issues which have not so far been the subject of a substantive decision following a defended hearing. In particular, this case sets out the law in relation to s393(3) of the Building Act 2004 (the 10 year limitation period in relation to CCCs) and to post remediation stigma. It also provides a fairly stinging criticism of the Council's practices at the time.

If you would like any further information in relation to this case, or any other matter we would be happy to discuss.

<sup>1</sup> *O'Hagan v Body Corporate 189855* [2010] 3 NZLR 486

<sup>2</sup> *Warren & Mahoney v Dynes* CA49/88 26 October 1988

<sup>3</sup> *Johnson v Auckland Council* [2013] NZCA 662