

Owners can join weathertightness case

Parker & Associates acted for the successful appellants in *Body Corporate 85978 v WCC* [2013] NZHC 2852 (Dobson J), where the High Court allowed an appeal which could have resulted in up to one third of the owners of a Wellington apartment complex being time-barred from the proceedings.

A representative “multi-unit complex” proceeding began in the Weathertight Homes Resolution Service in June 2008, nearly 10 years after the owners’ apartments in Wellington’s St Paul’s Apartments complex were completed. The Wellington City Council had granted Code Compliance Certificates for the apartment complex in December 1999.

The Body Corporate of the apartments instituted proceedings on behalf of all the owners in the complex, with the requisite 75% majority of owners authorising the claim.

Most of the remaining 25% of owners, along with some owners of units who had purchased subsequent to the proceedings being instituted, joined the claim in February 2012, when an application for adjudication was brought in the Weathertight Homes Tribunal (**WHT**).

In December 2013, the Wellington City Council applied to the WHT for orders striking out these so-called “late joiners” as time-barred – orders which the Chair of the WHT granted on the grounds that representative proceedings under the Weathertight Homes Act were instituted only for the benefit of owners who had opted in to the claim in 2008 or otherwise prior to the expiry of the 10 year limitation period from the issue of the CCCs in December 2009.

The WHT also held that a number of units now leased by Quest as long stay accommodation were no longer eligible as “dwellinghouses” to be a part of the claim given the change in use from residential dwellings.

But the High Court has allowed an appeal against the WHT’s decision, holding that the representative claim was brought within 10 years and for the benefit of all of the owners, not just those who opted-in before the expiry of the 10 year limitation period. This means that owners in a complex which is the subject of a representative “multi-unit complex” or “stand-alone complex” claim in the WHRS can join the claim even if the complex was built more than 10 years ago.

The decision also overturned the WHT’s decision relating to the eligibility of the Quest units. Adopting a “bright line” test, the High Court ruled that the relevant time for assessing eligibility was at the time of building consent, when the units were identified as being intended for residential use, and not at the time of any subsequent change/s in use.

Background

The St Paul’s Apartments in central Wellington suffer from systemic and substantial leaks. There are 114 units in St Paul’s, of which two are commercial, and a number of which were added to the claim after it was commenced and more than 10 years after the completion of the building work and issue of the code compliance certificates. A number of the other units are leased by their owners to a Quest franchisee, who offers the units to the public as serviced apartments for short or long stay.

The Wellington City Council applied to the WHT for removal of a number of the units on limitation and eligibility grounds. The WHT granted the removal application, holding that even although the Body Corporate’s application to the WHRS for an assessor’s report was in time, time continued to run against owners who had not yet joined the claim; and the units leased to Quest were not “dwellinghouses” (as defined in the Weathertight Homes Resolution

Services Act 2006 (**WHRS Act**)) and so were not eligible to bring a claim under that Act.

Dobson J overturned the WHT’s determination both in respect of the limitation and the eligibility units and awarded costs to the Body Corporate.

Limitation

A key purpose of the WHRS Act is to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to those buildings.

Claims are brought simply by filling out and filing an application for an assessor’s report in respect of the building, to which a small fee attaches. Such claims can be made in respect of single dwellings as well as “stand-alone” or “multi-unit complexes” although different forms apply and representative claims require the authorisation of a specified majority of owners.

There is a 10 year time limit for claims, meaning that no claim can be brought if the relevant dwellinghouse was “built” more than 10 years ago. Additionally, the dwellinghouse must have been built before 1 January 2012 and be a dwellinghouse (as defined under the Act).

It is however a unique feature of the WHRS process that, under s37 of the WHRS Act, the 10 year time limit on claims stops running against an owner/s as soon as the application for an assessor’s report is made. There is no need to prepare and file a detailed statement of claim as in the High Court.

There are specific sections (see ss 26-27 WHRS Act) which allow the addition of owners to representative stand-alone or multi-unit complex claims. However, these provisions do not impose any special rules relating to limitation issues.

Accordingly, in the case of St Paul's Apartments, when an adjudication claim was filed in the WHT in early 2012, a number of owners were added to the claim after the expiry of the 10 year limitation period. It is those owners who were removed following the WHT's determination.

The Bamford decision

Subsequent to the WHT's determination striking out the St Paul's owners, the High Court released its decision in Bamford (*Auckland Council v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 912). That case dealt with a stand-alone complex, not a multi-unit complex, but the relevant provisions are effectively identical. Heath J held that the original application for an assessor's report had the effect of commencing a claim relating to the whole stand-alone complex, allowing other owners of units to join the existing claim.

Given the similarity of the issues, the St Paul's Apartments owners relied on Bamford to support their argument that the so-called "late joiners" were not time-barred. However, given no first instance decision of the High Court can be binding on another High Court, the Council argued that Heath J's decision was wrong and should not be followed by the Court in the St Paul's case.

The St Paul's Apartments decision

Dobson J rejected the Council's arguments and reversed the WHT determination. Dobson J held that there was nothing in the WHRS Act to indicate that representative claims were not instituted for the benefit of all of the owners in a multi-unit complex such that owners could opt-in at any time after the claim had been brought.

Dobson J dismissed the Council's arguments that such a reading of the Act defeated the purpose of the 10 year limitation period and exposed the Council and others to stale claims. The Judge held that the initiation of the claim by application for an assessor's report would likely identify the underlying building defects and damage relevant to the claim. The addition of further units would be unlikely therefore to introduce new criticisms of the work.

Dobson J upheld Heath J's approach to limitation in the Bamford case, stating that he was satisfied it was

correct, and that a "whole of complex" approach is important, and appropriately dictates the manner in which limitation provisions apply.

Therefore, the owners who were added to the (existing) claim more than 10 years after their units were built were not time barred.

"Dwellinghouse"

In order to be eligible to bring a claim under the WHRS Act, the eligibility criteria in the WHRS Act must be met. For multi-unit claims, those criteria are set out at s 16 and include that the claimant is the representative of the owners of "dwellinghouses".

Dwellinghouse' is defined at s 8 of the WHRS Act as meaning:

"a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence; and... does not include a hospital, hostel, hotel, motel, rest homes, or other institution."

It was accepted that, at building consent stage, the relevant units were clearly listed as residential. The question therefore was: when is the relevant time for assessing whether a unit is a 'dwellinghouse' for the purposes of the WHRS Act? If the relevant time was sometime later than building consent, such as at the date of the application for an assessor's report, or some other date, the question would arise whether the units leased to Quest came within the definition of 'dwellinghouse'.

Dobson J held that the relevant time for assessing whether a building was principally intended for residential use was at the time of building consent. In reaching that determination, Dobson J referred with approval to the 'bright line' test Heath J set out at first instance in Sunset Terraces (subsequently affirmed by the higher Courts on appeal) and in a subsequent High Court decision called Townscape. At paragraph [67], Dobson J stated:

"The approach I favour reflects what has been described as a "bright line" approach. That attributes primacy to ascertaining the nature of responsibilities that are deemed to be assumed by those involved (or, by analogy in the present context, the forum in which any liability may be tested) at the outset, when potential respondents make their contribution to the work, the quality of which is

subsequently challenged."

The key point here is that it is irrelevant if a dwelling has had a change in use subsequent to the Council carrying out its inspection and certification functions. The relevant point is that the building was identified as intended to be residential in building consent documentation so that the Council could put appropriate systems and process in place to protect the interests of eventual owners.

As the units in question at St Paul's were clearly intended for private ownership and to be occupied principally as private residences at the time of building consent, the High Court held that they were 'dwellinghouses' within the meaning of the WHRS Act, so were eligible to bring a claim.

Comment

The key points are that: Owners can join existing representative proceedings at any point after the claims are filed, even if they do so more than 10 years after the complex was built.

We note that the logic of the Bamford and St Paul's decision is borne out by the recent decision of the Supreme Court in *Credit Suisse Private Equity LLC & Another v Eric Meserve Houghton & Others* [2014] NZSC 31 (9 April 2014) where the Supreme Court dismissed an appeal against decisions of the High Court and Court of Appeal that Feltex Investors could join that class action even after the expiry of the relevant limitation period.

The Court's approach to "dwellinghouse" status in the Weatheright Homes Tribunal reflects the inherent logic in the proposition that, where a property is damaged through inadequacies in the construction work and Council processes, the relevant time for assessing the intended use of the property is at the time of construction. That must be right. Otherwise, there would be a situation where owners' eligibility to bring a claim in the WHT would change over time, even during the claims process. That would be an absurd outcome, particularly when, on the Council's approach to limitation issues, that would see owners lose their eligibility and become time-barred as a result of a change in use that has no relevance at all to the merits of the case.

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