

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2007-404-1771

BETWEEN	ROGER THOMAS PHILLIPS AND SUSAN PHILLIPS Plaintiffs
AND	LOUCAS PETROU First Defendant
AND	JAMES DOUGLAS ALEXANDER Second Defendant
AND	TERENCE HUGH ARNOLD Third Defendant
AND	NORTH SHORE CITY COUNCIL Fourth Defendant

Hearing: 26 November 2007

Appearances: J M Trotman for the Plaintiffs
D L Salmon and C I Wilson for the First, Second and Third
Defendants
S A Thodey and A J Thorn for the Fourth Defendant

Judgment: 1 February 2008 at 12 noon

INTERIM JUDGMENT OF ASSOCIATE JUDGE ROBINSON

*This judgment was delivered by the Court on 1 February 2008 at 12:00 noon
pursuant to Rule 540(4) of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors: *Neumegan & Co, PO Box 5968, Auckland for plaintiffs*

[1] The first, second and third defendants, who are known as Castor Bay Partners, seek to strike out the plaintiffs' claim and apply for summary judgment in their favour on the ground that the plaintiffs' claim is time-barred. The application to strike out the claim and enter summary judgment is supported by the fourth defendant.

[2] The fourth defendant, being the North Shore City Council included in its statement of defence a cross-claim for contribution from Castor Bay Partners pursuant to s 17(1)(c) of the Law Reform Act 1936, should Mr and Mrs Phillips' claim be successful against the Council. Castor Bay Partners has applied to strike out the cross-claim against them, alleging it to be time barred. As there was insufficient time to deal with the application to strike out the cross-claim, and because the outcome of the application to strike out the plaintiffs' claim and enter summary judgment for the defendants would have a significant impact on the application to strike out the cross-claim it was agreed that the application to strike out the cross-claim be adjourned. That application has now been set down for hearing before me on 29 February 2008 at 2:15 pm.

Background

[3] On 13 February 1998, Mr and Mrs Phillips purchased a new luxury unit at 75 Beach Road, Castor Bay, from Castor Bay Partners. The purchase price was \$730,000 and the agreement was conditional upon Mr and Mrs Phillips obtaining a satisfactory valuation and land information reports by 20 February 1998. The unit had been constructed by Castor Bay Partners and Mr and Mrs Phillips were to be the first occupiers of the unit.

[4] As the unit had only been recently constructed by Castor Bay Partners, the agreement for sale and purchase between Castor Bay Partners and Mr and Mrs Phillips included provision for Mr and Mrs Phillips to have the benefit of all guarantees and warranties for any materials and work completed. The agreement also contained a warranty from Castor Bay Partners to rectify, at their expense, all

defects which appeared on the premises within 90 days of possession which were attributable to faulty workmanship and/or materials and were advised to them in writing within that period.

[5] During the construction of the unit, building inspectors in the employ of the North Shore City Council inspected the building work from time to time. A penultimate inspection on 11 April 1997 listed a number of items. According to the records of the North Shore City Council, on 9 May 1997 the Council was satisfied that outstanding items referred to in the penultimate inspection had been satisfactorily attended to by Castor Bay Partners.

[6] According to Mr and Mrs Phillips, the valuation they obtained of the property on the date of purchase listed some minor damage to paintwork within the upper level landing where it appeared that rainwater had penetrated a flashing. Consequently, their solicitors wrote to Castor Bay Partners on 20 February 1998 requesting that the repairs referred to in the valuer's report be undertaken and seeking to hold back \$300 from settlement, pending satisfactory completion of the repair. On 17 March 1998, Mr and Mrs Phillips received a facsimile from Barfoot & Thompson, real estate agents, advising amongst other things that there was a leak at the landing of the second level staircase. The carpet was wet and water-stained. There was also water collecting in puddles on the third floor exterior deck and not draining away. There was concern that, as the deck formed the roof of the lounge, water could penetrate into the lounge if this problem was not rectified.

[7] There followed correspondence between the solicitors for Mr and Mrs Phillips and the solicitors for Castor Bay Partners relating to defects requiring attention and efforts by Castor Bay Partners to attend to these defects.

[8] In August 2000, Mr and Mrs Phillips arranged for Craig Rendell of Commercial Plumbing Limited to inspect the premises with regard to concerns about leaks. At that time leaks were evident in the balconies and in an area near the level two staircase. On 15 August 2000, Mr Rendell reported to the solicitors acting for Mr and Mrs Phillips. In that report, Mr Rendell identified three leaks requiring attention and concluded there to be sufficient evidence that the subject property did

not meet the requirements of the New Zealand Building Code. The solicitors acting for Mr and Mrs Phillips forwarded that report to Castor Bay Partners by letter of 17 August 2000. In that letter, the solicitors for Mr and Mrs Phillips expressed concern that the property did not meet the requirements of the New Zealand Building Code and required Castor Bay Partners to attend to the problems identified in the report from Commercial Plumbing Limited.

[9] On 16 November 2000, Mr Petrou, who is the first defendant and one of the partners in Castor Bay Partners, met with Craig Rendell of Commercial Plumbing at the Castor Bay premises. In his report to the solicitor for Mr and Mrs Phillips, Mr Petrou advised that the problem relating to leaking at the top of the stair at the base of the third floor landing had been successfully addressed. He reported that there was no evidence of any moisture egress in that area and that the timber was dry. He also reported that the window behind was properly and correctly flashed and there was no leaking in that area. This is one of the areas referred to in the report from Commercial Plumbing.

[10] The second area related to the wall above the first floor landing above the front door. Mr Petrou reported that:

This was wet and obviously moisture is egressing from above through the wall. This is on the same wall that had a previous leak coming from the top floor above was attended to at an earlier stage. Craig from Commercial Plumbing, however, believes that this is a new leak and is coming through the lower floor roof adjacent to the window above and is finding its way to this wall.

[11] Mr Petrou also advised in that report:

The house was constructed in 1996 and the roofer has provided a warranty for materials and workmanship. This warranty was given to you at the time of the purchase. Usually warranties have a defined duration for materials and workmanship.

In any case I have advised the roofer and gave him your name and Commercial Plumbing details to make contact with either of you. I am sure that his obligations (and limitations) are clearly detailed in the warranty and you are more than competent to manage this process.

[12] In March 2001, Commercial Plumbing attended to minor leaks at a cost of \$402.85, which was paid by Mr and Mrs Phillips.

[13] In April 2001, Commercial Plumbing Limited did further work to the property, involving installing steel flashing to the roof above the front entry, re-installing copper gutter to a fascia, including a new stop and dropper, short downpipe and spreader, sealing the corner of an external wall immediately above a fascia gutter, and installing a copper rainhead with associated downpipe and spreader, which appeared to have been omitted from the initial installation. The cost of this work amounted to \$2037.38, including GST, which was once again paid for by Mr and Mrs Phillips.

[14] On 19 July 2001, a further leak was located. According to Mr and Mrs Phillips, this leak was caused by poorly designed and installed copper dropper which allowed water to pass under the dropper and track to the wall below. This work was attended to at a cost of \$329.20, including GST. Mr and Mrs Phillips paid this account.

[15] Mr and Mrs Phillips then observed that water was pooling on the top balcony. They obtained a report from SDS Design Consultants on 6 January 2000. In that report, it was noted that the fall of the deck was obviously sloping towards the house, creating the water-holding problem. They recommended one of two solutions. The first involved removing the tiles and replacing with a new fall ensuring adequate tanking between the wall and the floor junction at a cost of \$8000. In the alternative, they suggested removing or overlaying the existing tile deck with a raised floor to match the existing level and provide glazing to three sides of the deck with a new overhead roof, at a cost of between \$25,000 to \$30,000. According to Mr and Mrs Phillips they adopted the first option and this work was completed at the expense of Castor Bay Partners sometime after July 2000.

[16] In December 2002, proceedings brought by Mr and Mrs Phillips against Castor Bay Partners in the Disputes Tribunal resulted in a decision given against Mr and Mrs Phillips.

[17] In 2003, Mr and Mrs Phillips located a further leak in a ceiling below a balcony. They arranged for this leak to be repaired at a cost of \$2927.01.

[18] In May 2006, Mr and Mrs Phillips noticed further leaks in one of the bedrooms. Following a report from Prendos Limited of 18 September 2006, they commenced proceedings in the Weathertight Homes Tribunal. On 2 February 2007, Mr and Mrs Phillips were advised by the Weathertight Homes Tribunal that they had a valid claim. Because of limits that they say then applied to the jurisdiction of the Weathertight Homes Tribunal, on 4 April 2007 Mr and Mrs Phillips commenced these proceedings in the High Court.

The Pleadings

[19] The statement of claim contains three causes of action. The first two causes of action are against the first, second and third defendants and are based in negligence. The third cause of action is against the fourth defendant and is also based in negligence.

[20] The first cause of action alleges that Castor Bay Partners did not build the unit in a proper and workmanlike manner using sound materials and in conformity with the Building Code, the Building Act 1991, and other relevant standards. It is claimed that Castor Bay Partners owed a duty of care to Mr and Mrs Phillips as future owners of the building to build the property in accordance with the Building Act, the Building Code and other relevant standards. Because of the breach of this duty of care, Mr and Mrs Phillips have incurred costs in attending to remedying defects and are likely to incur a further sum of \$350,000 to attend to all the defects that have been discovered. Consequently, Mr and Mrs Phillips, based on the first cause of action, seek judgment against Castor Bay Partners for damages in the estimated sum of \$350,000, being the cost of carrying out all remedial works, damages in the sum of \$5,015.63 for the costs incurred by Mr and Mrs Phillips in repairing some of the defects, the costs of employing experts to investigate the leaks and oversee the repairs, and general damages for stress and inconvenience in the sum of \$20,000.

[21] The second cause of action against Castor Bay Partners alleges breach of a duty of care owed by the partners to Mr and Mrs Phillips to ensure that remedial work was effective and did not cause further loss. It is claimed that such remedial

work was not effective resulting in further loss to Mr and Mrs Phillips. In this respect, they claim the sum of \$2927.01 for the cost of repairing a leak in the level two living room, such further sum as shall be found to have been caused by the remedial work undertaken by Castor Bay Partners, (particulars of which will be provided following completion of the remedial works being undertaken), the costs of employing experts to investigate the leaks and oversee the repairs to the Castor Bay property, and a further sum of \$20,000 by way of general damages for stress and inconvenience.

[22] The final cause of action against the fourth defendant alleges breach of a duty of care by the fourth defendant, being the North Shore City Council, to exercise reasonable care when approving the building consent, to exercise reasonable care in inspecting the property during the course of construction, to exercise reasonable care to ensure that the property was constructed in accordance with the plans and specifications, and to exercise reasonable care to ensure that the property had been constructed in accordance with the Building Act 1991, the Building Code and other relevant standards. It is claimed that the property was not built in accordance with the Building Act 1991, the Building Code and other relevant building standards.

[23] It is claimed that because of a failure to ensure that the building was constructed in accordance with the appropriate standards, Mr and Mrs Phillips have suffered considerable inconvenience. They have also incurred costs in remedying defects, and will incur further costs in remedying the defects that have recently been discovered. Consequently, Mr and Mrs Phillips seek judgment against the North Shore City Council for the sum of \$350,000 for the estimated cost of carrying out necessary repairs, \$5,015.65 for the cost of repairing a balcony, the cost of employing experts to investigate the leaks and oversee the repairs to the property, and general damages for stress and inconvenience in the sum of \$20,000.

Case for first, second and third defendants to strike out claim and for summary judgment in favour of defendants

[24] It is submitted on behalf of Castor Bay Partners that the claims by Mr and Mrs Phillips against them are time-barred because of the provisions of s 4 of the

Limitation Act 1950 and s 393 of the Building Act 2004. It is acknowledged that for the striking out application and application for summary judgment to succeed, Castor Bay Partners must proceed on the assumption that the facts pleaded in the statement of claim are true, even though they may not be admitted. It is also acknowledged that before this Court can strike out the proceedings and enter summary judgment for the plaintiffs, the causes of action must be so clearly untenable that they cannot possibly succeed. Furthermore, this jurisdiction is one to be exercised sparingly and only in a clear case where the Court is satisfied that it has the requisite material. However, the fact that applications to strike out raise difficult questions of law and require extensive argument does not exclude the jurisdiction. In this respect, counsel for the Castor Bay Partners relied upon the Court of Appeal decision of *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267, line 17.

[25] Pursuant to s 4 of the Limitation Act 1950, these proceedings cannot be brought after the expiration of six years from the date on which the cause of action accrued. In the leading case of *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, the Privy Council held that in the case of latent defects in building construction, the cause of action accrues when the defects become so obvious that any reasonable home owner would call in an expert. In the judgment of Lord Berwick at 526, the reason the cause of action arises at that time is:

Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: *Ruxley Electronics & Constructions Ltd v Forsyth* [1995] 3 WLR 118.

[26] Counsel for Castor Bay Partners pointed out that by August 2000, Mr and Mrs Phillips were aware that the leaking problems they were experiencing indicated that the building did not meet the requirements of the New Zealand Building Code. This concern was pointed out by the solicitors for Mr and Mrs Phillips in a letter to Mr Arnold, one of the partners and the third defendant, dated 17 August 2000.

[27] Counsel for Castor Bay Partners also emphasised that, prior to 4 April 2001, Mr and Mrs Phillips were aware of significant defects in building construction which

involved rain water penetrating from a roof flashing causing damage to paintwork, wet carpet and water stain from a leak at the landing, water collecting in puddles on an exterior deck and not draining, the fall of the deck sloping towards the house, damage to wall lining at the top of stairs, a leak at the level two ensuite bathroom, a rotten structural corner post at the level two stair landing, and rubberised surfaces on top of tiles causing water to pool and collect. It is therefore emphasised on behalf of the Castor Bay Partners that by 4 April 2001, the defects were so obvious that any reasonable home owner would have called in an expert. Consequently, by April 2001, it is submitted that defects appearing in the construction were so bad that the market value of the building depreciated and the cause of action, had therefore crystallised.

[28] It is further submitted that as the cause of action therefore accrued prior to April 2001, s 4 of the Limitation Act 1950 prevents the plaintiff from issuing these proceedings on 4 April 2007.

[29] It is further submitted, on behalf of Castor Bay Partners that even if s 4 of the Limitation Act 1950 does not prevent the issue of these proceedings, s 393(2) of the Building Act 2004 applies. That section provides that:

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.

[30] In this respect, counsel for Castor Bay Partners drew the Court's attention to evidence establishing that the construction of the building had been completed by 26 September 1996, being the date when real estate agents were instructed to market the property. At that time, according to advertising material, the construction of the building had been completed. There was evidence in the form of an advertisement in the *North Shore Times Advertiser* of 11 October 1996 showing a photograph of the completed building and the view from its terrace.

[31] In a requisition dated 11 April 1997, the building inspector employed by the Council raised four issues for the attention of the builders, being Castor Bay Partners. Those issues were as follows:

- 1) To raise gully to comply;
- 2) Repair plaster work behind downpipe western end;
- 3) Extend downpipe to direct water into stormwater system;
- 4) Perimeter cut plaster to 50 mm below floor level and remove landscape material from against both units.

The building inspector then comments:

All other items okay.

[32] It is therefore submitted that, as the above four items were the last items requiring attention from the builders, the building had been completed by 11 April 1997 and probably sometime earlier. Consequently as the building had been completed sometime prior to April 1997, s 393(2) of the Building Act 2004 prevents proceedings being issued after April 2007 in respect of any claims relating to the building work.

[33] Counsel for Castor Bay Partners also submitted that any claim arising out of repairs effected by Castor Bay Partners to the property is also statute-barred by virtue of s 4 of the Limitation Act 1950. Castor Bay Partners claim those repairs were effected between March 1998 and November 2000. According to the statement of claim the repairs were to remedy the second level staircase leak and the top balcony defect.

[34] In paragraph 14 of the first amended statement of claim, Mr and Mrs Phillips claimed that it was in early 2001 that they engaged a builder to investigate a second level staircase leak and undertake repairs. They also claimed in the first amended statement of claim that they discovered a leak in the ceiling of the level two living room in early 2001. In the second amended statement of claim however, the plaintiffs refer to remedial work to leaks to the second level staircase being undertaken between 31 March 2001 and 25 July 2001 and to discovering the leak in the ceiling of the level two living room in September 2001.

[35] It is submitted on behalf of Castor Bay Partners that the change in date in the second amended statement of claim has been effected so that the proceedings are not statute-barred by virtue of the provisions of the Limitation Act 1950. Had the defects resulting from the failure of Castor Bay Partners to properly repair the building been apparent in early 2001, then proceedings based on that cause of action issued in April 2007 would be statute-barred.

[36] Counsel for Castor Bay Partners submitted that further particulars should be supplied relating to the repairs that form the basis of this part of the claim. It is also submitted that such particulars must be limited to any defects that became apparent after the 4 April 2001 as defects becoming apparent prior to that date must be statute-barred.

[37] These submissions on behalf of Castor Bay Partners were supported by counsel for the North Shore City Council.

Case for the plaintiffs

[38] Counsel for Mr and Mrs Phillips accepted as being correct the test that counsel for the Castor Bay Partners submitted must be applied when considering the application to strike out the claim and enter summary judgment for the defendants.

[39] It was emphasised by counsel for Mr and Mrs Phillips that the defects which appeared prior to April 2001 were minor and came within the definition of maintenance and teething problems often encountered in recently constructed homes. This, it was submitted, is confirmed by the fact that Castor Bay Partners attended at their expense to the rectification of these defects.

[40] It was also submitted on behalf of Mr and Mrs Phillips that the report of August 2000 from Commercial Plumbing Limited also referred to relatively minor defects that would come within the definition of maintenance and teething problems. Whilst it is accepted that the report claimed the building did not comply with the Building Code, it was emphasised that such non-compliance was limited to the minor defects that were identified in the report. It was further emphasised that there

was no reference in the report of August 2000 to the serious defects disclosed in the report for the Weathertight Homes assessor which was prepared on Mr and Mrs Phillips lodging a claim with the Weathertight Homes Resolution Service in September 2006. Furthermore, it was pointed out on behalf of Mr and Mrs Phillips that the defects identified in the report from Commercial Plumbing of August 2000 were not sufficiently serious to affect the market value of the property.

[41] Counsel for Castor Bay Partners had placed considerable emphasis on the Court of Appeal decision in *Pullar v The Secretary for Education* CA206/066 September 2007. In *Pullar's* case, the Secretary for Education had obtained a comprehensive report as to defects that had emerged in the building of a school. That report of December 1998 detailed the defects and recommended remedial work. It was argued on behalf of the builder that a claim issued against the builder for negligence in May 2005 was time-barred being outside the six-year limitation period provided by S 4 of the Limitation Act 1950. In overturning the decision of the High Court to the effect that the claim was not time-barred, the Court of Appeal emphasised that by December 1998 over six years before the issue of the proceeding, the Ministry had a report listing all defects and remedial work required to rectify the defects. In coming to that conclusion, the Court of Appeal concluded that the market value of the building was clearly affected by the report prepared in December 1998.

[42] Counsel for Mr and Mrs Phillips emphasised that unlike the situation in *Pullar*, Mr and Mrs Phillips did not have a comprehensive report listing all defects in building construction and specifying action required to remedy those defects. Indeed such a comprehensive report was not available until the report prepared for the Weathertight Homes assessor following the application to the Weathertight Homes Resolution Service in 2006.

[43] It was also submitted on behalf of Mr and Mrs Phillips that the building work was not completed until May 1997 when the Council's inspector certified that such work had been completed. Counsel for Mr and Mrs Phillips referred to a building control officer's field memorandum dated 12 November 1996 which listed the number of areas of the Castor Bay property where work had to be completed; -

Sealing of all pipe penetrations
Silt trap cleared and plastered
Handrail to Retaining wall, courtyard area
Backflow prevention fitted to flexible shower hoses
Tubs secured to floor/wall
Vanity trap loses seal
Access to Bath Traps
Fit Bends to Deck outlets

[44] Counsel also referred to the work to be done listed in the Building Control Field Officer's memorandum of 11 April 1997. Included in work to be done in that field memorandum was:

- a) Raised gully to comply – (100mm above bark garden)
 - i) Repair plaster work behind downpipe western end
 - ii) Extend downpipe to direct water to s/w system
 - iii) Perimeter cut plaster to 50mm below floor level and remove landscape material from against both units (50mm below floor – not carpet)

[45] With regard to the building control officer's field memorandum of 11 April 1997 and in particular with regard to perimeter cut plaster to 50mm below floor level and removal of landscape material, counsel for the plaintiff drew the Court's attention to page 8 of the building inspector's report prepared for the Weathertight Homes Resolution Service where the report makes the following observation.

Photo 14 shows the stucco extending below the ground level. Stucco is required to overhang the floor level by 50mm and the have a gap of 100mm to paved ground levels and 175mm to unpaved ground levels. Dalton's photo no 48, indicated that this has not been complied with. This will require the complete re-levelling of the ground levels around the house. In saying this, it will also be required under a total re-clad operation.

[46] Thus, it is claimed on behalf of Mr and Mrs Phillips that there is evidence of failure to complete work in accordance with the building inspector's requirements within ten years of the issue of these proceedings in the High Court on 4 April 2007.

Dates when calculation of the limitation period ceases

[47] Counsel for Castor Bay Partners submitted that the date when the limitation period ceases to run is the date when proceedings were issued in this Court namely the 4 April 2007. When making his submissions, he assumed that counsel for Mr and Mrs Phillips would not be contesting this submission. However, counsel for Mr and Mrs Phillips submitted the date for determining the end of the limitation period was the date when proceedings were commenced under the Weathertight Homes Resolution Service, namely September 2006. There was insufficient time available to hear argument from counsel on this issue. Consequently, with the consent of counsel I deferred consideration of this issue. This Judgment is an interim Judgment. The date when time ceases to run, if that becomes relevant, will be considered following submissions from counsel at the next hearing.

Decision

[48] According to Castor Bay Partner, construction of the unit acquired by Mr and Mrs Phillips, was practically completed in early November 1996. Indeed, there is evidence in the form of photographs advertising the property for sale that most of the construction of the unit had been completed by September 1996. Consequently because of s 393(2) Building Act 2004 proceedings had to be commenced within ten years of November 1996 this is by November 2006.

[49] The relevant date from which time starts to run for the purposes of S 393(2) is the date of the act or omission on which the proceedings are based.

In *Johnson v Watson* 2003 1 NZLR 626 at 629 paragraph 8 Tipping J stated:

In short, S 91(2) means exactly what it says. A plaintiff cannot in any circumstances sue more than ten years after the act or omission on which the proceedings are based, as the case involves, as this one clearly does, building work associated with the construction of a building.

[50] In the circumstances of this case some of the acts or omissions relied on by the plaintiff must have preceded the date of the issue of the penultimate building inspection requisition and occurred prior to September 1996 when the building work

had been substantially completed. Time begins to run from the date of the act or omission and not necessarily from the date of completion.

[51] Such a conclusion is consistent with the Court of Appeal decision in *Johnson v Watson*. In that case, the builder constructed a building for the plaintiffs between March and December 1990. From 1991 to 1998 the builder returned to effect preventive works on leaks. In October 1999 an expert's report commissioned by the plaintiffs concluded that the defendant's original works and repairs were not up to standard and expensive remedial work was required. In the statement of claim, it was pleaded that although the house was substantially complete, when possession was transferred on about 16 December 1990, building work continued into 1991. The proceedings were commenced by the plaintiff's in March 2001.

[52] Notwithstanding a pleading that building work continued into 1991, the Court of Appeal concluded that the work which originally caused the problems had been performed by 16 December 1990 at the latest.

[53] Consequently, acts of Castor Bay Partners in defective construction of the building prior to September 1996 must be statute-barred by reason of the operation of S393(2) Building Act 2004 and cannot form the basis of an action in this Court commenced on 4 April 2007.

[54] In *Johnson v Watson*, the Court of Appeal concluded that claims based on remedial work occurring within the limitation period but to rectify work that occurred outside the limitation period would not be statute-barred.

[55] In coming to that conclusion, Tipping J at [18] and [19], stated as follows:

We return to the question of causation in the present case. There can be no doubt that if the original workmanship was faulty it was a cause of the total damage in a "but for" sense. Had the original work not been faulty there would have been no damage capable of being increased by ineffective prevention work. The fact that the original work was on this basis causative of the total damage does not mean that there cannot in law be any additional and concurrent cause of part of the total damage. It is not unusual to find that certain consequences have more than one cause. To be recognised as a cause in law, the allegedly causative circumstance does not have to be the cause. It is enough if it is a cause which is substantial and material: see for example *Price Waterhouse v Kwan* [2000] 3 NZLR 39 at p 47, para [28]. Substantial

in this sense means more than trivial or de minimis. Material means that the alleged cause must have had a real influence on the occurrence of the loss or damage in suit.

Here negligence in carrying out the prevention work, be it act or omission, if established, is a concurrent cause of the damage which it failed to prevent. Its purpose was to prevent such damage and it would be unrealistic to take the view that it was not a substantial and material cause of that damage. In such circumstances as these it is not the law that because the further damage could not have occurred without (but for) the originally faulty workmanship, such workmanship must be regarded as the sole cause of that damage. A concurrent cause, such as the ineffective prevention work, is in a sense the opposite of a novus actus interveniens. It is in reality a novus actus causans, or in other words a new default which runs with the earlier default so as to cause, or at least materially contribute to, the further damage which it was its purpose to prevent.

[56] However, the Court of Appeal pointed out that a claim relating to faulty preventive work could not include loss resulting from the original construction work. At [24], Tipping J in this respect quoted:

As a cause of action for faulty prevention work is separate and distinct from a cause of action for faulty original workmanship, it must follow that, in pursuing the former, the Johnsons have the onus of establishing what loss or damage they have suffered on its account. That means the Johnsons have the onus of showing on a reasonable basis, how much of the total loss or damage is property to be attributed to the failure of the prevention work. The Johnsons must therefore show, on the balance of probabilities, how much of their total loss derives from actionable prevention work as opposed to non-actionable original construction work or non-actionable prevention work.

[57] According to the evidence produced at the hearing before me, by September 1995, the cladding had been completed. The building inspection report obtained for the Weathertight Homes Resolution Service, noted their investigations :

indicate a house which has severe moisture issues now and these will accelerate significantly over the next short while. The photos show that there were no approved relief joints installed during construction and possibly no relief joints at all. The extent of the cracking around the house would suggest that no relief joints were installed. Therefore the cracking issue will continue especially as it is a two coat system, rather than the typical three coat system, and as the present cracks take up moisture they will enlarge, therefore taking up more and more moisture which will be transferred into the timber framing; as has occurred in areas at present.

[58] If the cladding was incorrectly installed by the builder prior to September 1996 if the date for calculating the end of the limitation period is taken from the time when proceedings were lodged with the Weathertight Homes Service in September

2006) or prior to the 4 April 1997 (if the time for calculating the end of the limitation period is from the date when the proceedings were issued in this Court on 4 April 2007) then such building construction cannot form the basis of a claim, being statute-barred by reason of s 393(2) of the Building Act 2004.

[59] On the other hand, an alleged failure to comply with the building inspector's requisition of 11 April 1997 as to the level of plaster below the floor level and the need to remove landscape material from against the unit, can form the basis of a claim for damage resulting from such failure. Furthermore, an alleged failure on behalf of the Council to ensure that the requisition was completed satisfactorily before issuing a final certificate can also be the basis of an action against it.

[60] Mr and Mrs Phillips contend that they were unaware of the extent of defective construction in the cladding and in particular the defective installation of the cladding insofar as the cladding did not extend below the floor level until they received the report from the building inspector following the bringing of their claim to the Weathertight Homes Resolution Service. If this pleading is correct, then the report they obtained in August 2000 which related to relatively minor leaking to other parts of the building would not have alerted them to the problems relating to the cladding to which I have referred. In this respect, Mr and Mrs Phillip's claim can be distinguished from the claim by the Secretary of Education in the case of *Pullar v Secretary of Education*. In that case, the Court concluded that the Secretary of Education had a report listing the defects that had emerged in the building and recommending remedial work.

[61] It is therefore important for Mr and Mrs Phillips to specify the dates of the alleged acts or omissions on the part of the Council and/or the Castor Bay Partners which are relied upon as forming the causes of action that are pleaded. At present those dates are not specifically pleaded. There will therefore need to be an amended pleading specifying whether the alleged acts or omissions relied upon by Mr and Mrs Phillips as justifying their claim occurred before or after September 1996 and if possible giving a precise date as to when such act or omission occurred.

Decision

[62] For the reasons set forth above, I conclude as follows:

- i) The plaintiff must plead the dates when it is alleged the acts or omissions occurred that form the cause of action against all of the defendants.
- ii) Such dates must in the case of latent defects be within ten years of the issue of proceedings.
- iii) The date for calculating the expiry of the ten-year period will be determined at the next hearing of these proceedings before me. At that hearing, I will hear argument from the parties as to whether that date is to be the date when Mr and Mrs Phillips commenced their proceedings with the Weathertight Homes Resolution Service, or the date when they commenced proceedings in this Court.
- iv) I will also at the next hearing hear further submissions from counsel for Castor Bay Partners counsel for the North Shore City Council as to whether the Council can bring a cross-claim against Castor Bay Partners for claims against the Council brought within the limitation period relating to building work performed by the Castor Bay Partners outside the limitation period.
- v) The claim by Mr and Mrs Phillips arising out of a failure on the part of Castor Bay Partners to remedy the defect revealed by the stucco wall not extending 50mm below the floor and the level of earth against the stucco wall, arising as it does out of a failure to comply with a requisition issued by the Council on 4 April 1997 to rectify such work, is not statute-barred.

- vi) Similarly, a claim against the Council by Mr and Mrs Phillips arising out of the Council's failure to ensure that such work was completed is also not statute-barred.

[63] Pending filing of an amended statement of claim, I am not prepared to make any orders striking out any of the causes of action pleaded nor am I prepared to enter summary judgment for the defendants. The proceedings are adjourned to 29 February 2008 for a further hearing before me, when I will consider further submissions from counsel as to: -

- a) Striking out various parts of the statement of claim in the event of the plaintiffs not filing an amended statement of claim.
- b) Fixing the date when the limitation period ceases to run.
- c) Determining issues arising out of the cross-claim between the fourth Defendant on the one part and the first, second and third defendants on the other.

Associate Judge Robinson