EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WHANGAREI

CIV-2015-088-000433
[2016] NZDC 11441

BETWEEN	HAROLD JOHN ROBINSON DAWN SYLVIA BELL Plaintiffs
AND	GUYCO CONSTRUCTION LIMITED Defendant

Hearing: 10 May 2016

Appearances: B Fox for the Plaintiffs
J Golightly for the Defendant

Judgment: 8 July 2016

RESERVED JUDGMENT OF JUDGE K B de RIDDER

Introduction

[1] Guyco Construction Limited ("Guyco") carried out building work for Mr Robinson and Ms Bell ("the owners") in 2002 – 2003. At the completion of the building works neither Guyco nor the owners applied to the Kaipara District Council ("the Council") for a code compliance certificate to be issued.

[2] In September 2009 the owners entered into a conditional agreement for the sale of their property. The sale did not proceed as the prospective purchasers noted that the building work carried out by Guyco did not have a code compliance certificate.

[3] The owners have issued proceedings against Guyco seeking damages for losses they say they have suffered as a result of Guyco's failure to obtain a code compliance certificate for the building work.

[4] Guyco has now applied to strike out the owners claim on the grounds that it is precluded by s 4 of the Limitation Act 1950 ("the Act").

Background

[5] In 2002 a fire heavily damaged the owner's house. Their insurance claim was accepted, an approved scope of works was prepared, and Guyco was the successful tenderer for the repair contract.

[6] The parties entered into an agreement for Guyco to carry out the necessary building work.

[7] The building work was completed in March 2003. Guyco did not submit any documentation to the Council in order to obtain a code compliance certificate for the work. It appears to be also accepted that Guyco did not advise the owners of this.

[8] In September 2009 the owners entered into an agreement to sell their property. The agreement was subject to the prospective purchasers obtaining finance. The owners were later advised that the prospective purchaser's bank would not approve their finance application as there was no code compliance certificate for the building work carried out by Guyco. The owners were unable to obtain a code compliance certificate in order for the sale to proceed, and it lapsed.

[9] Following this the owners then took steps to obtain a code compliance certificate. Guyco provided the necessary documentation to the Council in order for the certificate to issue which it did on 9 October 2009.

[10] The owners resumed their attempt to sell the house but did not achieve any sale until April 2015. However, the sale of the property in 2015 was for a price $32,500 less than the sale which did not proceed in September 2009.

[11] Accordingly, the owners now sue Guyco for breach of contract and negligence.

[12] Guyco maintains that both claims are time barred under the Act and therefore should be struck out.

Defendant/applicant submissions

[13] Guyco points to s 4(1)(a) of the Act which provides for a six year limitation period for actions founded on contract or on tort. As to the owners cause of action on contract, Guyco argues that the cause of action accrued as soon as there had been a breach of the contract, which in this case occurred in March 2003 when Guyco did not apply for a code compliance certificate, or submit documents to the Council necessary to support an application for a certificate.

[14] As to the cause of action founded in tort, Guyco argues that the owner's cause of action accrued when Guyco failed to apply for the certificate upon completion of the building works in March 2003. Guyco submits that at that point the owners suffered immediate loss. Guyco relies upon the Supreme Court decision of *Murray v Morel & Co Ltd*[1] in support of its argument that the plaintiffs cause of action on tort accrued in March 2003 and is therefore caught by s 4(1)(a) of the Act.

[15] Guyco also submitted that, again in reliance on *Murray v Morel & Co Ltd,* the postponement period of limitation in cases of fraud or mistake as provided for in s 28 of the Act does not apply in this case.

Submissions for the owners

[16] Mr Fox for the owners submits that the owner's cause of action arose only upon them becoming aware in September 2009 that a code compliance certificate had not been applied for and therefore had not been issued. Furthermore, there had been a mistake in this case and therefore, s 28(c) of the Act applies, postponing the commencement of the period of limitation to September 2009.

[1] [2007] NZSC 27

[17] He submits that the owners were in the hands of Guyco and that all documentation was in Guyco's hands as they were engaged by the insurance company to carry out the work.

[18] The owners also rely upon the decision of *Invercargill City Council v Hamlin*[2] as being one of the exceptions referred to in *Murray v Morel & Co Ltd.* It had no knowledge of Guyco's omission, and therefore it was not discoverable.

Discussion

[19] It is clear from s 59 of the Limitation Act 2010, that the defendant's application falls to be considered pursuant to the provisions of the Limitation Act 1950. That is of some significance as the provisions of the Limitation Act 2010 might have been more favourable to the owner's position.

[20] The key issue is when did the cause of action arise? In their statement of claim the owners assert that it was agreed that Guyco would complete the building works within two weeks of a letter dated 11 March 2003 from the insurance company's loss adjustor specifying nine matters that need to be attended to before the repair works could be "signed off". Guyco accepts that that work was done in two weeks. Therefore it can be assumed that the building work was completed by 31 March 2003, and a code compliance certificate could have been applied for at that point.

[21] It is to be assumed that it can be established that it was either an express or implied term of the contract between the owners and Guyco that Guyco would either apply for the issue of a code compliance certificate, or take the appropriate steps to ensure that the certificate was issued.

[22] In Burrows Finn Todd *Law of Contract in New Zealand 5th Edition* the authors comment at 21.6.2(a):

> "A cause of action accrues when every fact exists which it would be necessary for the plaintiff to prove in order to support the plaintiff's right to

[2] [1994] 3 NZLR 513

> the judgment of the Court. If, when analysed, it discloses a breach of contract, the long held view is that the cause of action accrues when that breach occurs, from which moment time begins to run against the plaintiff. The fact that actual damage is not suffered by the plaintiff until some date later than the breach does not extend the time within which he or she must sue. But if the factual situation discloses the commission of the tort of negligence, which is not actionable unless actual damage is proved, the cause of action does not accrue at least until the damage is in fact sustained."

[23] In terms of the owners claim on contract, the facts which support the owners claim clearly existed within a short period of time after 31 March 2003. In that regard, s 43(1) of the Building Act 1991 (being the operative provision at that time) imposed an obligation upon the owners to advise the Council "…as soon as practicable.. that the building work has been completed to the extent required by the building consent". Although no actual time is specified, it would be fair to assume that the appropriate advice should have been given to the Council by the end of April 2003, or within a relatively short period after that. At that point, all the facts existed to support a claim for breach of contract. That being the case, the owners claim for breach of contract is clearly caught by the provisions of s 4(1)(a) of the Act and is time barred.

[24] However, the situation regarding the claim on tort is more problematic.

[25] In *Thom v Davys Burton*[3] Elias CJ stated at [2]:

> "It is settled law that a cause of action in negligence arises only when loss or detriment is suffered by a plaintiff by reason of breach of a duty of care owed by the defendant."

[26] Further at [15] the Chief Justice commented:

> "A cause of action in negligence arises not on breach of duty of care, but when the plaintiff first sustains loss attributable to the breach of duty of the defendant."

[27] Again, for the purposes of Guyco's application it has to be assumed that the owners can establish that Guyco owed them a duty of care and that they breached that duty. The issue is simply when did the owners suffer loss or detriment from Guyco's alleged breach.

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[3] [2008] NZSC 65

[28] In his judgment in *Thom v Davys Burton* given on behalf of Tipping, McGrath JJ and himself, Wilson J commented at [38]:

> "A cause of action in negligence does not exist until there is, first, an act or omission of the defendant which breaches a duty of care owed by the defendant to the plaintiff and, secondly, loss or injury caused by that act or omission suffered by the plaintiff. The existence of loss or injury is an element without which the cause of action does not exist and accordingly until it occurs time does not run against the plaintiff for limitation purposes."

[29] Further, at [46] Wilson J commented:

> "In summary, a cause of action in tort for negligence does not exist and hence time does not start running for the purposes of the Limitation Act unless and until the plaintiff has suffered some actual and quantifiable loss, harm or damage as a result of the breach of duty involved. Damage will be contingent, and hence not actual for limitation purposes, if the plaintiff will suffer no damage at all unless and until a contingency is fulfilled. That will be so if the damage results from the plaintiff being exposed to a liability which is contingent on the occurrence of a future uncertain event. A good example is where the liability is that of a guarantor and is contingent on a default by the principal debtor, in contrast to the undertaking…..of a direct and present liability which falls due in the future. The distinction may well be felt to be a fine one, but in any regime of limitation apparently similar cases may fall on opposite sides of the line which divides those which are barred from those which are not. A reduction in the value of an asset, whether tangible or intangible, constitutes actual damage and exists as soon as the asset becomes less valuable."

[30] In Stephen Todd *The Law of Torts in New Zealand* at 26.5.05(2) the authors summarised the principles to be applied in assessing when loss occurs giving rise to a cause of action as follows:

> "There is actual loss where a person incurs an existing liability or suffers an existing diminution in value of land or personal property or a chose in action. A cause of action accrues at that date even though there has been no demand on the liability, or the loss has not crystallised, or there has been no out of pocket expenditure. There is only a potential loss where a right or liability is subject to a contingency which may or may not occur. A cause of action accrues only when it does occur and actual damage is suffered."

[31] The learned authors also point to the case of *Thom v Davys Burton* as demonstrating the application of those principles. In that case the Court held that the respondent solicitors breached their duty to Mr Thom when they failed to ensure that Mr Thom received a legally enforceable prenuptial agreement and therefore Mr Thom suffered an immediate loss at the time the agreement was prepared rather than

when the Family Court later awarded his wife a share in his property which he had intended by the prenuptial agreement to retain as his separate property.

[32] The Supreme Court held therefore at [49] it was:

> "…a damaged asset case, not one of exposure to a contingent liability. The asset in question is the prenuptial agreement under which the plaintiff was supposed to obtain full protection against claims by his future wife for a share in the matrimonial home. The asset which the plaintiff acquired was, as a result of the combined negligence of his solicitors and himself, defective in that it did not give him the protection which it was his purpose to obtain."

[33] The Court further commented at [50]:

> "….There is a material difference between contingencies relevant to existence of damage and contingencies relevant to valuation of damage. In short, if the defendant's negligence damages an asset of the plaintiff, that damage is immediate and actual. If the negligent exposes the plaintiff to a contingent liability, there is no actual damage until the contingency is fulfilled."

[34] Therefore, in this case the issue narrows to one of whether at the time of the failure of Guyco to obtain the code compliance certificate Guyco damaged an asset of the owners, or their negligence only exposed the owners to a contingent liability.

[35] That issue can be examined from the point of view of what were the owners entitled to get. They were entitled to have the building work carried out by Guyco in accordance with the building code in force at that time such that the work could receive a code compliance certificate. It appears that the owners received that. What they did not receive was the actual issue of the certificate.

[36] Although the Building Act placed an obligation on the owners, and through the duty of care owed, on Guyco, to advise the Council that the building work had been completed to the extent required by the building consent which would then trigger the obligation on the Council to issue the code compliance certificate, there was no penalty or consequence provided for if there was a failure to do so.

[37] Furthermore there is no requirement that a property may not be sold unless it has a code compliance certificate. It may however provide a potential purchaser with reason to withdraw from an agreement for sale and purchase if the prospective

purchaser discovers that a certificate has not been issued, as occurred in 2009 in this case.

[38] In this case, the owners may never have sought to sell their property and the issue of the lack of a certificate may not have come to light. Furthermore, another prospective purchaser may not have been concerned about the lack of a code compliance certificate.

[39] In those circumstances, it appears that the owners were exposed to a liability which was contingent on the occurrence of a future uncertain event, namely a prospective purchaser resiling from an agreement because of the failure of Guyco to obtain the certificate. But there was no loss in the value of their property when the code compliance certificate was not obtained. There was no effect on the property rights of the owners at that point.

[40] Guyco's failure is distinguishable from the cases referred to in *Thom v Davys Burton* such as negligent advice, or negligent preparation of documents where an immediate loss clearly arose at the time the advice was given or the documents prepared, although not necessarily quantifiable. In the case of *Thom v Davys Burton* the document became faulty at the time it was incorrectly signed by Mr Thom's future wife due to a failure of his lawyer to properly advise him as to the requirements for a valid execution of the agreement, and therefore the loss was immediate. In this case, Guyco's work was not faulty and there was no effect on any property rights of the owners at the time Guyco failed to obtain the code compliance certificate. In *Thom v Davys Burton* the Court said that the distinction between an immediate loss and a contingent loss "…may well be thought to be a fine one, but in any regime of limitation apparently similar cases may fall on the opposite sides of the line which divides those which are barred from those which are not"[4]. In this case, the loss was contingent and therefore falls on the side of the line which is not time barred.

[4] At paragraph [46]

Result

[41] Accordingly, the owners claim for breach of contract is struck out, but the defendant's application to strike out the plaintiff's claim on tort is dismissed.

[42] Costs and disbursements are reserved. In the event counsel are unable to agree as to the incidence and amount of costs, the plaintiffs to file a memorandum within ten working days, and the defendants to file a memorandum within five working days thereafter.

K B de Ridder
District Court Judge