

Supreme Court ruling good news for leaky home owners

The Supreme Court on 22 December 2016 released its decision in *Lee v Whangarei District Council*. At issue was whether section 37(1) of the Weathertight Homes Resolution Services Act 2006 (**the WHRS Act**) – which provides that an application for an assessor's report stops the running of the period of time set forth by Limitation Acts – applies equally to claims that proceed in the ordinary courts (rather than the Weathertight Homes Tribunal (**WHT**)). The Supreme Court held that it did, after the High Court and Court of Appeal had struck out the plaintiff's claim as time-barred. This ruling is extremely significant to leaky home claimants because it allows homeowners to decide whether to proceed in either the WHT or the High Court without giving rise to any new limitation issues.

Partner Stuart Dalzell, and Solicitor Danielle Thorne discuss the decision and its implications below.

Section 37(1)

Section 37(1) provides that, “for the purposes of the Limitation Act 1950 (and any other enactment that imposes a limitation period, the making of an application under section 32(1) [i.e., the filing of an application for an assessor's report] has effect as if it were the filing of proceedings in a court.”

A 2014 decision of the Supreme Court in *Osborne v Auckland Council* touched on the meaning of s 37(1). That decision – while noting the issue did not need to be decided in that case, which concerned the meaning of “built date” in the WHRS Act – commented that s 37(1) could be construed as meaning that the stopping of time is not confined to claims which proceed under the WHRS Act. But uncertainty remained, with a Court in a 2008 decision having adopted the narrower reading of s 37(1). That is, that the application for an

assessor's report “stops the clock” for limitation purposes *only in the WHRS resolution services process* – a reading that was followed by the High Court and the Court of Appeal in the *Lee* case.

Facts

In rejecting the narrower interpretation favoured by the High Court and Court of Appeal, the Supreme Court referred to the process Ms Lee had been through as “*tortuous and fraught with procedural difficulties*.”

Ms Lee had her house built in 2007 and early 2008. In February 2008 she obtained a report from a building surveyor, and also obtained a further report on 30 April 2008. The house was not weathertight, so on 6 June 2008, Ms Lee commenced adjudication proceedings under the Construction Contracts Act 2002 (**the CCA**) in relation to a dispute with the builder.

On 12 August 2008, Ms Lee filed an application under the WHRS Act for an assessor's report. On 10 March 2010, Ms Lee applied to have her claim adjudicated by the WHT, but in March 2013, her adjudication claim was terminated on the basis that the subject matter of the claim was the same as her counterclaim against the cladding company, and was also closely related to her claim under the CCA.

On 21 May 2014, Ms Lee started court proceedings in the High Court, suing the District Council for alleged negligence in inspection while her house was under construction between 2006 and 2008. The District Council applied for summary judgment, arguing that the proceedings had been filed more than six years after Ms Lee had become aware of defects and was therefore time-barred under the six-year limitation period in the Limitation Act 1950. The six-year limitation period bars claims where the cause of action

has accrued more than six years before the claim is filed. Ms Lee argued that no cause of action accrued more than six years before the claim was filed in the High Court but that in any event, s 37(1) of the WHRS Act was effective to stop time running for the purposes of court proceedings, not just claims proceeding under the WHRS Act.

The High Court rejected both of Ms Lee's arguments, and held that her claim was time-barred by the six-year limitation period. The Court of Appeal upheld the High Court decision. Ms Lee sought and was granted leave to appeal to the Supreme Court.

Supreme Court

The Supreme Court reversed the decisions of the High Court and Court of Appeal. The key finding of the Supreme Court was that:

“the clock stopped for limitation purposes when Ms Lee applied for an assessor's report. Her proceedings filed in the High Court against the Council were not statute barred.”

In Particular:

- a) While the narrower interpretation of s 37(1) was open, it was not consistent with the text and purpose of the section;
- b) The effect of s 37(1) is to make it clear that the Limitation Act applies to Tribunal proceedings. However, it is no part of the purpose of s 37(1) to limit the stopping of time to proceedings under the WHRS Act;
- c) The more expansive reading of the section is consistent with the scheme and purpose of the WHRS Act, including the need

- for a separate application for adjudication under the WHRS Act, the ability to transfer claims to the High Court under s 119 of the WHRS Act and the fact that adjudication, arbitration, mediation or court proceedings are all possible ways to resolve a claim at the time of applying for an assessor's report. The Court noted it would be "odd" if the clock was stopped for Tribunal proceedings but not for court proceedings;
- d) Added certainty for homeowners is also an apparent purpose of the WHRS Act. The Court accepted that s 37(1) is meant to allow homeowners to make informed decision about their options without, in the meantime, any legal claim they may have becoming time-barred. It could not be right, in the Court's view, that leaky-home owners would have to "keep an eye on the passage of time" to make sure they did not let the limitation period for court proceedings expire;
- e) There was nothing in the legislative history to the contrary;
- f) Nor was any concern about "open-ended" liability valid because s 37(1) was limited in its application by the fact that the WHRS Act applies only to houses built prior to 1 January 2012. In addition, s 37(1) is limited to the particular dwellinghouse the subject of the application for an assessor's reports and claims cannot be transferred to new owners.

For those reasons, the Court concluded that time stopped for limitation purposes when Ms Lee applied for an assessor's report, and her proceedings in the High Court were not time barred.

Comment

This ruling is extremely significant for leaky-home owners. The ruling means

that the stopping of time under s 37(1) is not limited to claims which proceed under the WHRS, but extends to claims which proceed in the ordinary courts such as the High Court. It also means that the stopping of time applies for the purposes of "*the Limitation Act 1950 (and any other enactment that imposes a limitation period)*," such as the Building Acts (which impose a 10-year longstop limitation period on claims relating to building work).

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