

## Significant victory for leaky home owners

Last week the Supreme Court released its decision in *Osborne v Auckland Council and the Weathertight Homes Tribunal* [2014] NZSC 67. This is an important victory for the owners of leaky homes.

The decision clarifies the eligibility criteria for claims brought under the Weathertight Homes Resolution Services Act 2006 (WHRS Act), in particular by confirming that such claims are eligible if made within 10 years of the date of issue of the Code Compliance Certificate (CCC). This expands the previous position, which held that time began to run once construction was completed, even if the CCC was yet to issue.

This decision opens the door for leaky home-owners who were previously declined eligibility despite making a claim within 10 years of the CCC date. We await with interest an announcement from MBIE as to how it proposes to respond to the decision. In our view it should review its earlier eligibility decisions in light of the Supreme Court's ruling.

In order to be eligible for the Weathertight Homes Tribunal, an application for an assessor's report needs (among other things) to be made within 10 years of the house being "built". At first blush, the eligibility criteria attempts to paraphrase the long stop limitation period in section 393 of the Building Act, which required claims to be brought within 10 years of the act or omission on which the proceedings are based. The Council's act or omission is taken as the date of the Building Consent and/or CCC if a CCC has been issued.

Unfortunately as the two sections used different language, there was often argument about when a property was actually "built". The Osbornes' position illustrates the issue. The Osbornes' home was substantially completed by August 1996, with CCCs issued by the Council on 19 February and 18 April 2007. The application to

the WHRS was made on 14 February 2007, more than 10 years after the property was substantially complete, but less than 10 years before the CCCs were issued.

The chair of the Weathertight Homes Tribunal, the High Court and Court of Appeal all considered that the house was "built" by August 1996, that the issue of the CCCs was not building work, and therefore that the Osbornes' claim based on the original construction work was not eligible for the Weathertight Homes Tribunal. This was unfortunate, because had the Osbornes' claim been filed in the High Court, they would have been within the 10 year long stop provision in the Building Act. In addition, by the time the Osbornes were advised that their claim was ineligible for the Weathertight Homes Tribunal, the 10 year period under the Building Act had expired and they could no longer bring proceedings in the High Court. As the Supreme Court observed, this was a "nasty trap" for the Osbornes and others in their position.

The Supreme Court overturned the Court of Appeal. The Supreme Court held that the eligibility provisions (in s 14(a) of the WHRS Act), when construed in context and with regard to their purpose as a way to "screen" out clearly time-barred claims, should be interpreted as a paraphrase of s 393 of the Building Act. Thus, the word "built" in s 14(a) was intended to be construed by reference to the expression "building work" in s 393, which encompasses certifications (CCCs). Section 14(a) therefore operates to exclude claims only where all building work, including certifications where relevant, occurred more than ten years before an assessor's report is requested. Put another way, claims will be eligible (and in time) if brought within 10 years of the CCC if any.

We cannot fault the Supreme Court's analysis on this issue, which aligns the interpretation of these two key

provisions, in accordance the intention of the legislature and common sense.

It is also apparent from the judgment that during the course of argument it became obvious that the Osbornes were likely to be successful. After the hearing the Osbornes and the Auckland Council entered into a settlement, which was conditional on the Supreme Court not issuing its decision. The Supreme Court declined the invitation to withhold their judgment, citing the important issues of public interest which were discussed in the case. While it will be disappointing for the Osbornes to have to continue with their claim, the Supreme Court's decision clarifies an important area of the law.