



Stop the clock

Assessor's report stops time running in all jurisdictions.

THE GOOD NEWS FOR COUNCILS IS THAT THE SAME 'STOP THE CLOCK' PROVISION WILL APPLY WHEN THEY COME TO JOIN CONSTRUCTION PARTIES TO A COURT PROCEEDING WHERE THE OWNER IS RELYING UPON AN ASSESSOR'S REPORT TO STOP TIME RUNNING.

A judgment released by the Supreme Court on December 22, 2016 provides leaky building owners, who have an assessor's report and an eligible claim, a choice of jurisdictions where one may not have existed before. The issue considered (in Olivia Waiyee Lee v Whangarei District Court [2016] NZSC 173) was whether, pursuant to s 37(1) of the Weathertight Homes Resolution Services Act 2006 (WHRSA) the owner's application for an assessor's report "stopped the clock" for limitation purposes for not only claims brought in the Weathertight Homes Tribunal (WHT) but also in the courts.

The owner, Olivia Lee, built a house between 2007 and 2008. It suffered leaks right from the start. On August 12, 2008 she applied for an assessor's report. In October 2008 the assessor confirmed that her house suffered from numerous weathertightness defects and that it met the eligibility criteria for a claim to be brought.

Since 2008 Lee had been involved in a number of proceedings against various parties including the builder and the cladding installer. On March 10, 2010 she brought adjudication proceedings in the WHT naming several parties including the council.

In March 2013 the WHT terminated Lee's claim because of a provision in the WHRSA that prevents a claim continuing where the subject matter of the claim is being arbitrated or heard in a court. The WHT held that the subject matter of her claim in the WHT was closely related to her proceedings against the builder and the cladding installer and terminated her claim.

Lee then commenced a proceeding in the High Court against the council. The High Court found that the proceeding was brought out of time and summary judgment was given in favour of the council. This was on the basis of the High Court's interpretation of s 37(1) of the WHRSA, which provides that the filing of an application by a home owner for an assessor's report has the same effect, for the purposes of

the Limitation Act 1950, as filing proceedings in a court.

Lee argued that the proceedings in the High Court are to be treated as having been "brought", for the purposes of the Limitation Act 1950, on August 12, 2008 when she applied for the assessor's report. The Limitation Act 1950 provides that an action founded on tort "shall not be brought after the expiration of six years from the date on which the cause of action accrued".

The High Court rejected Lee's argument and held that her cause of action accrued before May 21, 2008, so she was out of time. The Court of Appeal agreed with the High Court.

The Supreme Court found that the purpose of s 37(1) was to "stop the clock" on limitation while the house is assessed, allowing home owners to make informed decisions about their options. If s 37(1) is interpreted too narrowly those with leaky homes risk falling into procedural traps where their legal claims become time-barred while they are pursuing remedies. This would not accord with the WHRSA's purpose of providing leaky home owners access to speedy, flexible and cost-effective procedures for the assessment and resolution of claims.

The decision means that home owners with assessor's reports, can rely on them to stop time running in all jurisdictions. It will not cause an increase in claims, as most of those claims already exist, with home owners waiting to make an election as to whether to pursue their claim. It will probably cause an increase in those pending claims being brought in the courts instead of the WHT.

The good news for councils is that the same "stop the clock" provision will apply when they come to join construction parties to a Court proceeding where the owner is relying upon an assessor's report to stop time running. Prior to this judgment councils may have been time barred from joining others as they are usually the last party in time to take steps. **LG**