

Weathertight homes dispute case study

By **Sarah Macky**, Heaney & Partners.



The decision of *Body Corporate 378351 & Ors v Auckland Council & Ors* [2020] NZHC 1701 considered whether or not claims for fire and structural defects discovered more than 10 years after the code compliance certificate was issued were time-barred relying on the limitation provision in the Weathertight Homes Resolution Services Act 2006 (WHRS).

The claim concerns a multi-unit apartment complex known as the Washington Apartments in Auckland. The Council approved the construction of the apartment complex issuing a code compliance certificate on 17 May 2007.

On 11 July 2013, the Body Corporate applied to the WHRS for an assessor's report. The assessor found that there was an eligible claim. This stopped time running for the purposes of limitation to 11 July 2013 pursuant to s37 of the Act. Applying for an assessor's report with the WHRS stops time running for limitation purposes in all forums be they the Weathertight Homes Tribunal or the District or High Courts.

A statement of claim was filed in the High Court on 25 September 2018 alleging the council's negligence caused the weathertightness defects to exist at the property.

The claimants carried out stage one repairs to remedy some of the weathertightness defects. The plaintiffs discovered additional defects relating to fire and structural matters. The plaintiffs said the fire and structural repairs could not be severed from the remedial work needed to repair the weathertightness defects for stage two of the repair process.

The plaintiffs filed an amended statement of claim on 12 April 2019, which included the additional fire and structural defects. This was 12 years after the Council had issued the code



compliance certificate.

The Council applied to strike out the plaintiffs' allegations relating to the fire and structural defects on the basis they were out of time under the long stop 10-year limitation contained in s393 of the Building Act 2004. The Council said that time stopped running for limitation purposes for the weathertightness defects only on 11 July 2013.

In response, the plaintiffs said that time stopped running for all defects including fire and structural when applying for the assessor's report. They said the fire and structural defects are consequences of water penetrating the building and the fire and structural repairs were required to repair the weathertightness defects.

The same issue was considered recently by another High Court judge. The Court found time stopped running for all defects upon the filing of the application for an assessor's report with the WHRS. The Judge considered applying the s37 limitation provision in the WHRS Act for all defects was more sensible and practical as all the repairs would be done at the same time.

In the Washington Apartments case, the judge formed a different view. There was evidence that the weathertightness defects were not connected or linked in any way to the fire and structural defects.

The court formed the view that just because the council might require structural and fire issues to be repaired does not of itself make the fire and structural repairs part of the repair of the weathertightness defects.

The court also found that any defects that are not water penetration problems are not within the ambit of the WHRS Act and any structural or fire defects would not meet the eligibility criteria for the WHRS Act to apply.

The court also said that where no water penetration is alleged, only the s393 long stop limitation period in the Building Act 2004 can be relevant, not s37 of the WHRS Act.

As a result, the court found the WHRS Act did not apply to bring the fire and structural defects in time. The decision is likely to be appealed so we will write on this again if and when the appeal is determined. **LG**