IN THE SUPREME COURT OF NEW ZEALAND

SC 9/2013
[2014] NZSC 67

BETWEEN	JOHN ANTHONY OSBORNE AND HELEN OSBORNE Appellants
AND	AUCKLAND COUNCIL First Respondent
	THE WEATHERTIGHT HOMES TRIBUNAL Second Respondent

Hearing:	5 November 2013
Court:	Elias CJ, McGrath, William Young, Glazebrook and Tipping JJ
Counsel:	T J Rainey and J P Wood for Appellants K L Clark QC and C R Goode for First Respondent M J Andrews and T I Hallett-Hook for Attorney-General as Intervener
Judgment:	10 June 2014

JUDGMENT OF THE COURT

A The appeal is allowed with the result that the eligibility decision of the Tribunal chair is set aside and there is a declaration that the appellants' claim is eligible.

B Leave is reserved to apply for further relief should that be necessary.

C In relation to this appeal, the appellants are awarded costs of $25,000 and reasonable disbursements against the first respondent. They are also awarded costs on the judicial review proceedings in the High Court and on the appeal to the Court of Appeal, in sums to be fixed by those courts.

REASONS

(Given by William Young J)

Introduction

[1] In issue in this appeal is the extent to which s 14(a) of the Weathertight Homes Resolution Services Act 2006 (the WHRSA) constrains the entitlement of the owners of a leaky home to invoke the processes and remedies available under the WHRSA. Section 14 provides for eligibility criteria which are to be satisfied before an owner's claim may be assessed and determined under the WHRSA and it relevantly provides as follows:

> **14 Dwellinghouse claim**
>
> The criteria are that the claimant owns the dwellinghouse to which the claim relates; and—
>
> (a) *it was built (or alterations giving rise to the claim were made to it)* before 1 January 2012 and *within the period of 10 years immediately before the day on which the claim is brought*; and
>
> …
>
> (Emphasis added)

The Auckland Council maintains that the words we have italicised operate as a limitation period which operates separately from – and more restrictively than – that provided for by s 393 of the Building Act 2004. Mr and Mrs Osborne – who are claimants under the WHRSA – contend that those words should be construed so that a claim is eligible under s 14(a) of the WHRSA if it is, or may be, within the s 393 limitation period.

[2] The problem arises in this way. The Osbornes bought their house on 26 April 1997. It was newly built. Construction work had been substantially completed by 15 August 1996 (the date of the last Council inspection), although the code compliance certificates were not issued until 19 February and 18 April 1997. The house began to leak in late 1997 and some repairs – for which a building consent was not obtained – were subsequently carried out. These were not effective and, on 14 February 2007, the Osbornes applied under the WHRSA for an assessor's report. As we will later explain, this application had the effect of stopping the running of time in respect of any limitation period, at least in respect of proceedings conducted under the WHRSA. At this time, the Osbornes were just inside the Building Act ten

year long-stop limitation period for commencing proceedings against the Auckland Council in respect of the code compliance certificates. Their claim, however, has been held to be ineligible under the WHRSA on the basis that their house was built before 13 February 1997 and that accordingly, s 14(a) was not satisfied.

[3] On the law as contended for by the Auckland Council and so far upheld in this litigation, Mr and Mrs Osborne fell into a rather nasty trap when they initiated proceedings under the WHRSA. As noted, on 14 February 2007, their claim against the Auckland Council was not precluded by s 393 of the Building Act, but by the time their claim under the WHRSA had been ruled ineligible (which was not until June 2007), more than ten years had elapsed since the issue of code compliance certificates, and any proceedings in the courts were barred by the ten year long-stop limitation period provided for by s 393.[1]

[4] For the reasons which follow, we have concluded that their claim is eligible under the WHRSA. We consider that s 14(a), when construed in context and having regard to its purpose, is appropriately interpreted as a paraphrase of s 393 of the Building Act, with the result that a claim which may be within the long-stop limitation period provided by that section meets the s 14(a) eligibility criterion.

The WHRSA legislation

Leaky buildings and the legislative responses

[5] Leaky building syndrome[2] emerged as a problem in the late 1990s and the early years of the current century. It was comprehensively addressed in the *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority* (the Hunn Report) of 2002[3] and there have been a number of legislative responses, including the Weathertight Homes Resolution Services Act 2002 (the

---

1 This is subject to a possible argument referred to in [14] below.

2 The syndrome is associated with the ingress of water through the external building membranes and inadequate water management. This results in the building's timber framing retaining sufficient moisture to permit fungal activity causing decay to the timber framing and posing health risks for those who use the building. It is associated with the use of face-fixed monolithic cladding, flat roof structures, buildings without eaves, the replacement of flashings with sealants, balconies and decks, an increasing focus on energy efficiency at the expense of natural ventilation and the use of untreated pinus radiata timber.

3 *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority* (Building Industry Authority, 31 August 2002).

2002 Act), the Building Act 2004 and the WHRSA. The broad purpose of the 2002 Act was "to provide owners of leaky dwellinghouses with access to speedy, flexible and cost-effective procedures for the assessment and resolution of claims relating to those buildings".[4] That broad purpose has been maintained under the WHRSA.[5]

[6] Some of the relevant features of the WHRSA scheme as it currently exists are:

(a) The WHRSA is administered by the Ministry of Business, Innovation, and Employment (MBIE). Previously, it was administered by the Department of Building and Housing.

(b) The WHRSA provides for the chief executive of MBIE and the Secretary for Justice to assist and guide claimants and respondents in respect of, inter alia, informal dispute resolution, mediation and adjudication and to do so throughout the process.[6]

(c) There are different processes for single dwellinghouses and multi-unit complexes.[7] The present case concerns a single dwellinghouse and, for the sake of simplicity, we will confine our attention to the provisions which apply in respect of such dwellings.

(d) A claimant brings a claim under the WHRSA by applying for an assessor's report.[8] This application is in a prescribed form and does not require the identification of any likely respondent.

(e) Such a claim is assessed for eligibility and, if found eligible, is investigated and evaluated by an assessor.[9]

(f) The owners of dwellinghouses may formulate claims against any identified respondents and such claims can be determined by the

---

4 Weathertight Homes Resolution Services Act 2002, s 3.
5 Weathertight Homes Resolution Services Act 2006, s 3. The purpose was further amended by s 4 of the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Act 2011 to provide in addition for a package of financial assistance measures to facilitate the repair of leaky buildings.
6 Weathertight Homes Resolution Services Act 2006, s 12.
7 See subpart 3 of Part 1.
8 Sections 9 and 32.
9 Section 10 and subpart 4 of Part 1.

Weathertight Homes Tribunal.[10] The remedies that may be claimed include any remedy that could be claimed in a court of law[11] and the Tribunal may make any order that a court of competent jurisdiction is able to make in relation to the claim.[12] The Act does not affect substantive principles as to liability or defences. Proceedings before the Tribunal can be transferred to the District Court or the High Court.[13]

(g) An application for an assessor's report has the same effect for the purposes of a limitation period under any enactment as if it were the filing of court proceedings.[14] We will discuss the relevant provision shortly.

(h) There is a right of appeal to the District Court or the High Court on any question of law or fact arising from a determination of the Tribunal.[15]

(i) A special mediation service is available to the owners of dwellinghouses who are found to have eligible claims.[16]

(j) There is a reasonably elaborate notification system which results in information about leaky homes claims being made available in land information memoranda issued under s 44A of the Local Government Official Information and Meetings Act 1987.[17]

[7] Counsel addressed us on the financial assistance provisions which were inserted in the WHRSA in 2011. These provisions provide for a model of claims resolution under which, in some cases, the Crown meets half and the territorial authority a quarter of the costs of repair.[18] These provisions seem to us to throw no light on the question which we must answer and accordingly there is no point in discussing them.

---

10 Subparts 5, 7, and 8 of Part 1.
11 Section 50.
12 Section 90.
13 Section 119.
14 Section 37(1).
15 Section 93.
16 Subpart 6 of Part 1.
17 See s 124.
18 Part 1A.

The eligibility assessment – relevant provisions

[8] As will be apparent, a claim is brought under the WHRSA simply by applying for an assessor's report. This is provided for by ss 9 and 32.[19] The application is made to the chief executive of the Ministry of Business, Innovation and Employment. This results in an eligibility assessor's report under s 41. Section 41(1) relevantly provides:

> **41 Eligibility assessor's report**
>
> (1) An eligibility assessor's report is a report stating only—
>
> (a) whether or not, in the assessor's opinion, the claim to which it relates meets the eligibility criteria; …

Such a report is then addressed by the chief executive under s 13. This provides:

> **13 Criteria for eligibility of claims for mediation and adjudication services**
>
> To be an eligible claim, a claim must, in the chief executive's opinion under section 48 (or in the chair's opinion under section 49), formed on the basis of an assessor's report, meet the criteria stated in—
>
> (a) section 14 (dwellinghouse claim);
>
> …

[9] We have already set out s 14(a) but at this point it is appropriate to set out the section in full:

> **14 Dwellinghouse claim**
>
> The criteria are that the claimant owns the dwellinghouse to which the claim relates; and—
>
> (a) it was built (or alterations giving rise to the claim were made to it) before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought; and
>
> (b) it is not part of a multi-unit complex; and

[19] If such an application has been made by a former owner, the current owner can also make a claim by applying to have any assessor's report prepared in respect of that claim "approved as suitable for the [new] owner's claim": s 32(1)(b).

> (c) water has penetrated it because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration; and
>
> (d) the penetration of water has caused damage to it.

[10] The procedure for determining eligibility is as follows:

(a) The chief executive addresses the claim in a preliminary way with a view to determining whether the information supplied "indicates that the claim meets or is capable of meeting the eligibility criteria".[20]

(b) If of the view that the information does indicate that, the chief executive must arrange for an assessor's report to be prepared.[21] If not, the chief executive must decline to arrange for an assessor's report to be prepared and advise the claimant accordingly.[22]

(c) The chief executive can commission either an eligibility assessor's report or a full assessor's report.[23]

(d) The commissioned report must address the eligibility criteria.[24]

[11] From the point at which there is an assessor's report, the process for determining eligibility is provided for by ss 44, 45, 48 and 49:

> **44 Copy of assessor's report must be given to claimant**
>
> When an assessor's report is completed, the chief executive must give a copy to the claimant.
>
> **45 Claimant may make submission on assessor's report stating that claim does not meet eligibility criteria**
>
> Within 20 working days after receiving the copy of an assessor's report stating that, in the assessor's opinion, the claim to which it relates does not meet the eligibility criteria, the claimant may make a submission on it to the chief executive so the chief executive can make his or her evaluation decision under section 48.

---

[20] Section 32(2).
[21] Section 32(3).
[22] Section 32(4).
[23] Section 38.
[24] See ss 41(1)(a) and 42(1)(b).

48 Chief executive to evaluate assessor's reports

(1) The chief executive must evaluate every assessor's report … and decide whether the claim to which it relates meets the eligibility criteria.

(2) In evaluating the report, the chief executive must consider only the report itself and any submission made by the claimant under section 45.

(3) The chief executive must give the claimant written notice stating—

(a) the chief executive's decision as to whether or not the claim meets the eligibility criteria; and

(b) if the chief executive has decided that the claim does not meet those criteria, his or her reasons for that decision.

49 Reconsideration of chief executive's decision

(1) Within 20 working days of receiving notice under section 48(3) of a decision that his or her claim does not comply with the eligibility criteria, the claimant may write to the chair—

(a) asking for the decision to be reconsidered; and

(b) making any supporting submissions the claimant wishes to make on the claim's compliance with the eligibility criteria.

(2) If the claimant writes to the chair asking for the decision to be reconsidered, the chair must decide whether or not the claim meets the eligibility criteria.

(3) The chair must give the claimant and the chief executive written notice stating—

(a) the chair's decision as to whether or not the claim meets the eligibility criteria; and

(b) the chair's reasons for that decision.

(4) If the chair decides that the claim meets the eligibility criteria, his or her decision replaces that of the chief executive.

[12] At this point we note that:

(a) Eligibility is assessed in the first instance by the chief executive and, on reconsideration, by the chair of the Tribunal without reference to any possible respondent.

(b) The WHRSA does not provide for any system of review, whether by the claimant or a possible respondent, of an eligibility decision by the chair.

(c) Although it is open to a respondent to proceedings before the Tribunal to invoke limitation defences, the statute does not confer on a respondent a defence based on ineligibility under s 14(a).

(d) Accordingly, a decision on eligibility under s 14(a) can be challenged only by judicial review proceedings in the High Court.

Limitation

[13] A ten year long-stop limitation period in respect of building claims was introduced by s 91 of the Building Act 1991 and is currently provided for by s 393 of the Building Act 2004 which, as at February 2007, provided:

> **393 Limitation defences**
>
> (1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be;
>
> …

[14] Limitation defences, including, of course, the standard six year limitation for claims in tort, are available in proceedings under the WHRSA. This is provided for by s 37:

> **37 Application of Limitation Act 2010 to applications for assessor's report, etc**
>
> (1) For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.
>
> …

As is also apparent from this section, time stops running when a claimant applies for an assessor's report, at least in respect of an eligible claim and later proceedings before the Tribunal. Section 37(1) could also be construed as also providing that:

(a) time stops running once an assessor's report is requested irrespective of whether the claim is later held to be eligible under s 14; and

(b) the stopping of time is not confined to claims which proceed under the WHRSA.

If the section were construed in that way, the Osbornes would be able to pursue a claim against the Auckland Council in the District Court or the High Court on the basis that their request for an assessor's report stopped the running of time on 14 February 2007, and thus before ten years had elapsed from the granting of the code compliance certificates.

[15] So far, the courts have concluded that the stopping of time provided for by s 37 applies only to proceedings under the WHRSA[25] and for this reason does not apply where claims are held to be ineligible. In the course of argument before us, there was some discussion as to whether this is correct. Given that we are of the view that the Osbornes' claim is eligible, a decision by us as to the scope of s 37(1) is not called for.

---

25 See *Bunting v Auckland City Council* HC Auckland CIV-2007-404-2317, 13 August 2008 (Duffy J).

The legislative history

[16] Section 14(a) of the WHRSA follows reasonably closely the wording of s 7(2) of the 2002 Act. This provided:

> **7 Criteria for eligibility of claims for mediation and adjudication services**
>
> (1) A claim may be dealt with under this Act only if—
>
> …
>
> (b) it is an eligible claim in terms of subsection (2).
>
> (2) To be an eligible claim, a claim must, in the opinion of an evaluation panel, formed on the basis of an assessor's report, meet the following criteria:
>
> (a) the dwellinghouse to which the claim relates must—
>
> (i) have been built; or
>
> (ii) have been subject to alterations that give rise to the claim—
>
> within the period of 10 years immediately preceding the date that an application is made to the chief executive …

[17] Mr Rainey contended, and we agree, that the legislative history of the WHRSA supports the proposition that the purpose of Parliament in respect of s 14(a) was to align the eligibility criteria with the operation of s 393 of the Building Act. That this is so emerges from a number of sources, but for present purposes it is sufficient to refer to the report of the Social Services Committee of Parliament on the Bill which became the WHRSA:[26]

> The ten-year long-stop limitation period is a long-standing provision first enacted in the Building Act 1991 and now contained in section 393 of the Building Act 2004. The provision applies to all claims in respect of building work, and was included in section 7 of the WHRS Act when it was enacted in 2002. The effect of the provision is that any claim in respect of a leaky building must be brought within ten years of when the dwellinghouse was built or altered.

As the Court of Appeal noted, the statement in the second sentence that those provisions were included in s 7 of the 2002 Act is not literally correct as s 7 of the

---

[26] Weathertight Homes Resolution Services Amendment Bill 2006 (75–2) (select committee report) at 7.

2002 Act was in similar form to s 14(a) of the WHRSA.[27] This passage does, however, make it clear that the Committee was of the view that s 14(a), along with its precursor in the 2002 Act, gave effect to the ten year long-stop provision first provided in the Building Act 1991 and as re-enacted in s 393 of the Building Act 2004.

[18] The subsequent discussion in the Committee's report focuses on the length of the limitation period. The Committee noted that submitters had variously recommended that the ten year long-stop limitation period for making WHRSA claims be removed or be extended to 15 years. In the end, the Committee concluded that the ten year long-stop limitation period should remain.

The interpretation of s 14 which has so far prevailed

[19] The interpretation of s 14(a) which has prevailed to date is that it provides a constraint on eligibility that operates in substance as a limitation period and is, in some cases, particularly where the focus of liability is on the issue of a code compliance certificate, more strict than the ten year long-stop period provided for under the Building Acts of 1991 and 2004. On this interpretation, a claim becomes ineligible at the expiry of ten years from when it was built, which, in the case of a dwellinghouse, is to be determined primarily by when it has been completed to the extent required by the building consent which will be before a code compliance certificate is issued.[28]

The history of the present litigation

[20] As noted, the application for an assessor's report was made on 14 February 2007. An eligibility assessor's report of 8 March 2007 concluded that the house became habitable on or around 15 August 1996 and was thus outside the eligibility criterion specified in s 14(a). On the basis of this report, the chief executive determined on 29 June 2007 that the claim was not eligible. On a

---

[27] *Osborne v Auckland Council* [2012] NZCA 609, [2013] NZCCLR 14 [*Osborne* (CA)] at [28] (Arnold, Randerson and Stevens JJ).

[28] The most elaborate discussion of this interpretation is in *Auckland City Council v Attorney-General* HC Auckland CIV-2009-404-1761, 24 November 2009, a case which was decided by reference to the 2002 Act.

reconsideration of this decision, the chair of the Tribunal concluded that the claim was eligible as to the work which was carried out after 13 February 1997, but was otherwise ineligible.

[21] Despite the chair's determination, the Osbornes made a claim in the Tribunal in which the Council was named as a respondent.[29] In a decision made on 10 September 2010, the Tribunal removed the Council as a respondent.

[22] The Osbornes then appealed against the removal decision and sought judicial review of the chair's determination that the claim was ineligible. They were unsuccessful in both proceedings[30] and appealed to the Court of Appeal against the judgment in the review proceedings. The Court of Appeal declined an application for leave to appeal against the dismissal of the appeal against the removal decision.[31] Associated with this are jurisdictional considerations which we will discuss later.

[23] The appeal to the Court of Appeal was dismissed.[32] That Court largely upheld the existing jurisprudence as to the operation of s 14(a). In particular, it rejected the view that s 14(a) should be construed as a paraphrase of s 393 of the Building Act:

> [42] We agree … that there is nothing in either the text or purpose of the WHRSA to support the appellants' interpretation of the eligibility criteria under s 14(a). Parliament has deliberately adopted the term "built" rather than the broader language used in s 393 of the Building Act or the expression "building work" used in that Act. Had Parliament intended to align the two provisions it would have been a simple matter to have done so.
>
> [43] The plain meaning favoured in the High Court is to be preferred and is consistent with the narrower purpose of the WHRSA which is to provide an alternative, speedy and inexpensive means for homeowners to resolve leaky building claims.
>
> [44] Extending the commencement date to the time the [code compliance certificate] is issued could unreasonably prolong the eligibility period in cases where the issue of the [code compliance certificate] is substantially delayed or is never issued. …

---

[29] This claim was not as forlorn as it might appear at first sight. The arguments which the Osbornes relied on are discussed at [34]–[36] below.

[30] *Osborne v Auckland City Council* HC Auckland CIV-2010-404-6582 and CIV-2010-404-6583, 9 September 2011 (Woolford J).

[31] *Osborne v Auckland City Council* [2012] NZCA 199 (2012) 21 PRNZ 76.

[32] *Osborne* (CA), above n 27.

> [45] If the [code compliance certificate] is promptly issued after physical completion of the works, then no difficulty should arise. On the other hand, if the [code compliance certificate] is delayed then any claim by homeowners based on the negligent issue of that certificate by the consent authority can still be brought in the courts for up to 10 years after the date of its issue under the s 393(2) long-stop provision in the Building Act.

The Court concluded that a house should be regarded as built when completed to the extent required by the building consent, which in most cases would be at the time of the final inspection:

> [48] That point is a significant milestone in the construction process and coincides with statutory obligations under the Building Acts. By s 92 of the 2004 Act, an owner is obliged to apply for a [code compliance certificate] as soon as practicable after the building work is completed. Section 43 of the Building Act 1991 was to similar effect except it referred to the work being completed "to the extent" required by the building consent. Section 94 of the 2004 Act obliges the consent authority to issue the [code compliance certificate] if satisfied on reasonable grounds that the building work complies with the building consent. Section 43(3) of the 1991 Act was in similar terms except that it referred to compliance with the building code.
>
> …
>
> [51] The point at which the dwellinghouse is completed to the extent required by the building consent is best assessed by reference to the dwellinghouse passing its final inspection. We view this test as appropriate to make the WHRSA work in the sense used in *Northland Milk Vendors Association Inc v Northern Milk Ltd*[33] and as having the advantage of a clear-cut method of determining the issue. It also avoids the uncertainties and difficulties of proof inherent in the retrospective exercise which the assessors and other decision makers have been undertaking to date in eligibility assessments under the WHRSA. In many cases, the homeowner may be a subsequent purchaser who has little knowledge of what occurred when the house was under construction. The eligibility assessment will sometimes have to be made years after the relevant events. It is particularly important that the decision maker is not required to make unwarranted assumptions or to resort to guesswork or speculation. For example, the mere fact that utilities such as power or telephone have been livened and/or the house has been occupied, is not necessarily determinative of the fact that physical construction is completed at that time. The property may have been occupied when it was closed in but at a stage when it was still well short of physical completion.
>
> [52] We conclude that a dwellinghouse will be "built" for the purposes of s 14(a) of the WHRSA when it has been completed to the extent required by the building consent issued in respect of that work. In all but exceptional cases, this point will be reached when the dwellinghouse has actually passed its final inspection. If it does not pass its final inspection (other than in a trivial way), then it will not be "built" for eligibility purposes until it has passed its final inspection. Any exceptions to this approach are likely to be

33 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 537 (CA).

rare but might include, for example, a case where a request for the final inspection has been unduly delayed and there is clear evidence that the dwellinghouse was built to the extent required by the building consent prior to that date.

Our views

[24] We see a number of difficulties with the view that s 14(a) should be construed as imposing an independently operating limitation period which is virtually, but not exactly, the same as the ten year long-stop limitation period in s 393 of the Building Act:

(a) The date a house is completed to building consent requirements would provide a strange starting point for what in substance is a limitation period. In many instances it will post-date the relevant acts or omissions of those involved in defective construction. It will, however, necessarily precede the date upon which the code compliance certificate is issued, which will almost always be the last relevant act of the territorial authority.

(b) There is no good reason why a claim which is within the ten year long-stop limitation period provided for by s 393 of the Building Act should not be eligible under the WHRSA. The policy reasons why the legislature provided for the processes stipulated by the WHRSA – quick, and facilitated resolution or adjudication of claims – are just as appropriate for the claim which Mr and Mrs Osborne had against the Council as at 14 February 2007 as they would have been if the claim had been initiated six months earlier (and thus prior to the final inspection of the house).[34]

(c) The informality and ex parte nature of the eligibility assessment procedures and the absence of any intra-statute mechanism for challenge by a respondent (meaning that any such challenge can only

[34] For instance, there can be no good reason for requiring Mr and Mrs Osborne to issue proceedings in the High Court as this would avoid the compulsory notification provisions of s 124 which feed information into land information memoranda issued under s 44A of the Local Government Official Information and Meetings Act 1987.

be by way of judicial review) suggests that s 14(a) was not meant to confer substantive rights on respondents.

(d) Unless s 37 is of general application,[35] s 14(a) will operate as a trap for lay people, as illustrated by the result for the Osbornes contended for by the Council. As we have noted, they sought an assessor's report at a time when their claim against the Council was still within the long-stop limitation period but, by 29 June 2007, when they were notified that the claim was ineligible, the ten year long-stop limitation period had elapsed.

(e) For those reasons there is no plausible legislative purpose which such an interpretation gives effect to. Indeed, it is inconceivable that those responsible for the drafting of the WHRSA could have intended such a result.

(f) The interpretation is inconsistent with the legislative history and what we take to be the purpose of maintaining consistency with the ten year long-stop provision in s 393 of the Building Act.

Against that background, it is clear that s 14(a) should be construed as operating only to exclude claims which are necessarily barred by s 393 of the Building Act, providing that this result can be reconciled with the statutory text. As we will now explain, we consider that such reconciliation can be achieved.

[25] Despite the repetition, it is appropriate to set out again the relevant elements of s 393 of the Building Act:

> **393 Limitation defences**
>
> (1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of a building; or

35 See above at [14].

> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, civil proceedings relating to *building work* may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> (a) in the case of civil proceedings that are brought against a territorial authority, … in relation to the issue of … a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; …
>
> (Emphasis added)

[26] The three subsections must be read together. On this basis, it is clear that a claim against a territorial authority in respect of the issue of a code compliance certificate is, for the purposes of subsection (2), a claim "relating to building work" and that the issue of a code compliance certificate therefore amounts to "an act". The structure of s 393 thus seems to be predicated on the basis that the issue of a code compliance certificate is "building work". Under s 393, no claim can be brought once ten years has elapsed from the completion of all such "building work", including certifications.[36] This is because a claimant in this situation will necessarily not be able to point to any relevant "act or omission" which occurred within the preceding ten years. As we have explained, we consider that the purpose of s 14(a) was to exclude only such claimants.

[27] The purpose of excluding from the WHRSA claimants with obviously time-barred claims would have been most easily achieved by providing that a claim is eligible unless necessarily outside the long-stop limitation period because all building work was completed more than ten years previously. Section 14, however, is structured positively, that is, in terms of criteria to be satisfied, rather than potential exclusions (in this instance the ten year limitation period) to be negated. It is not altogether easy to capture in positively expressed language the nuances of

---

36 Of course, a claimant in this situation will still be outside the limitation period if the relevant acts or omissions of the defendant occurred more than ten years ago.

what is in substance a double negative – that is, the negation of an exclusion. To do so, s 14(a) would have to have been expressed along the following lines:

> (a) *A component of the "building work" (within the meaning of s 393 of the Building Act 2004) was effected* … within the period of 10 years immediately before the day on which the claim is brought; …

We construe the expression "it was built" in s 14(a) as a clumsy but understandable attempt at a précis of the language which we have emphasised. The apparent omission in relation to certification is, however, remedied once it is realised that the word "built" must have been intended to be construed by reference to the expression "building work" in s 393 of the Building Act, which does encompass certification.

[28] It follows that we see s 14(a) as applying to exclude a claim where all building work (including certifications where relevant) occurred more than ten years before an assessor's report is requested. In such circumstances, any defendant to the claim will have a cast iron limitation defence and, for this reason, there is no point in committing the resources of the state to its assessment.

[29] Whatever approach is taken, there is potential for some difficulty with the application of the 1 January 2012 cut-off date in cases where some of the critical events took place before 1 January 2012 and others occurred later. As presently advised, we are of the very provisional view that a claim which relates to the building in the state it was at 1 January 2012 will be subject to the WHRSA, whereas claims in relation to acts or omissions which occurred later lie outside its scope.

[30] One final comment on this aspect of the case. The decision that a claim is eligible is not determinative of any rights. A respondent with a limitation defence is not prejudiced by such a determination. We think that it is consistent with the structure of the WHRSA as a whole that decisions as to eligibility are made on the basis that the underlying function is of a screening nature and that the process provided by ss 48 and 49 is not conducive to determining closely balanced issues. The reasonable possibility that building work (including certifications) occurred within ten years of the request for an assessor's report should usually be enough to result in the conclusion that the s 14(a) criterion is satisfied.

Are the Osbornes' judicial review proceedings an abuse of process?

[31] Under the WHRSA there is a right of appeal against determinations of the Tribunal. This is provided for by s 93:

> **93 Right of appeal**
>
> (1) A party to a claim that has been determined by the tribunal may appeal on a question of law or fact that arises from the determination.
>
> (2) An appeal must be filed in—
>
> (a) the District Court if the amount at issue does not exceed $200,000; and
>
> (b) the High Court if the amount at issue exceeds $200,000.
>
> …

Section 95 provides:

> **95 Determination of appeal**
>
> (1) In its determination of any appeal, the court may do any 1 or more of the following things:
>
> (a) confirm, modify, or reverse the determination or any part of it:
>
> (b) exercise any of the powers that could have been exercised by the tribunal in relation to the claim to which the appeal relates.
>
> (2) A determination under subsection (1)—
>
> (a) has effect as if it were a determination made by the tribunal for the purposes of this Act; and
>
> (b) is a final determination of the claim.
>
> …

[32] As we have already mentioned, the Osbornes appealed to the High Court unsuccessfully against the decision of the Tribunal removing the Council as a respondent, and later sought leave to appeal against that decision. This application was unsuccessful as the Court of Appeal held that the effect of s 95(2)(b) was that

the decision of the High Court was final.[37] We should record that the correctness of the Court of Appeal's construction of s 95(2)(b) was not put in issue before us. Nor was there any substantial debate as to whether the removal decision was properly regarded as a determination of the claim, for the purposes of s 93.

[33] In argument before us, the position of the Council seemed to be that:

(a) the claim against the Council has been the subject of a final determination; and

(b) the Osbornes, through their appeals in the judicial review proceedings, are collaterally and illegitimately challenging that final determination.

This argument was not advanced in the Court of Appeal and was not put to us with any great enthusiasm. In the end, however, the Council contended that the finality of the judgment on the removal appeal was relevant at least to remedy.

[34] Following the decision by the chair as to eligibility, the Osbornes pursued two lines of argument. The first was that even on the chair's eligibility decision (under which the claim was eligible because repairs were effected within ten years of an assessor's report being requested), it was still open to the Osbornes to pursue the Council. The second was that the eligibility decision was wrong.

[35] The first of the arguments was along the lines that once the Osbornes' claim was held to be eligible because of the repairs, it was open to them to pursue the Council unless barred by limitation. This argument was rejected by (a) the Tribunal, which removed the Council as a respondent, and (b) by the High Court, which rejected the appeal against the removal decision.[38] Although unsuccessful, this argument was perfectly respectable. Indeed it failed very much on the basis of the view, which we have already rejected, that s 14(a) operates as a limitation provision. This argument was appropriately pursued in the Tribunal and, leaving aside for the moment a mild reservation as to whether s 93 was engaged, also in the appeal to the High Court.

---

37 *Osborne v Auckland City Council*, above n 31.
38 *Osborne v Auckland City Council*, above n 30.

[36] The second argument could only be advanced, as it was, in judicial review proceedings. These were dealt with at the same time as the appeal against the removal decision.

[37] We should make it clear that we see nothing abusive in the general litigation approach of the Osbornes. If they had simply proceeded with the judicial review proceedings, there would never have been anything which was arguably a determination by the Tribunal, and thus no "final" determination by the High Court. If so, the Council's argument would simply not have arisen. It was, however, more sensible and cost-effective for the Osbornes to advance both arguments at the same time, which is what they did.

[38] Section 95(2)(b) does not operate as a constraint on appeals in judicial review proceedings. In deciding what relief is appropriate, we must of course have regard to the litigation history, including the removal decision of the Tribunal and the judgment of the High Court on appeal from that decision. But in this regard, it is highly relevant that both the Tribunal decision and the High Court judgment proceeded on the basis of an eligibility decision which was wrong. The correctness of that eligibility decision was not in issue on the removal question. This being so, we see no reason why the claim should not simply be processed under the WHRSA as being eligible.

A post-hearing conditional settlement

[39] After the hearing on 5 November 2013, we were notified by counsel that a settlement had been entered into between Mr and Mrs Osborne and the Auckland Council but that it was subject to this Court agreeing not to release a judgment. We invited and received further submissions as to whether we should release our judgment and, as is obvious, we have decided that we should do so.

[40] The parties have not unconditionally settled the case and an abandonment of the appeal has not been filed. But even if there had been an unconditional settlement and a discontinuance had been filed, it would have remained open to the Court to release its judgment. We should explain why this is so in light of r 39 of the Supreme Court Rules 2004 and the rules as to mootness.

[41] Rule 39 provides:

> **39 Abandonment of civil appeal by party**
>
> (1) A party may, at any time, abandon a civil appeal brought by the party by filing in the Registry a notice advising that the party—
>
> (a) does not intend further to prosecute the appeal; and
>
> (b) abandons all further proceedings concerning that appeal.
>
> …

Although not limited in its wording to pre-hearing abandonments, r 39 appears in a part of the rules which is headed "Termination before hearing". As well, the prescribed contents of the notice are more suitable to circumstances where there are further steps required of an appellant rather than just awaiting a judgment. A very similarly worded provision, also containing the phrase "at any time", has been held by the Court of Appeal not to confer an absolute right of abandonment once the hearing has started.[39]

[42] A case which is settled becomes moot. Where the settlement is arrived at after the hearing, the court has a discretion whether to release its judgment. This is consistent with the general approach taken by the courts under which a court may determine a case even though it is moot[40] and there are cases in which judgments have been released despite post-hearing settlements.[41] In one of these cases, *Voss v Suncorp-Metway Ltd (No 1)*,[42] the Queensland Court of Appeal noted that the case involved issues of general importance beyond the interests of the parties and the judgment of the court below warranted correction. The Court observed that it must have become apparent in the course of argument that the appeal would probably be allowed and then went on to say:[43]

> … the compromise reached at this stage has the appearance of one reached at the last minute in the perceived likelihood of a judgment allowing the

---

39 *Waymouth v Ministry of Transport* [1982] 1 NZLR 358 (CA).

40 Compare *R v Gordon-Smith (on appeal from R v King)* [2008] NZSC 56, [2009] 1 NZLR 721; and *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 (HL).

41 *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454 (CA); *Bowman v Fels* [2005] EWCA Civ 226, [2005] 1 WLR 3083; *Prudential Assurance Co Ltd v McBains Cooper* [2000] 1 WLR 2000 (CA); and *Voss v Suncorp-Metway (No 1)* [2003] QCA 252, [2004] 1 Qd R 211.

42 *Voss v Suncorp-Metway Ltd (No 1)*, above n 41.

43 At 213.

> appeal, with a view to suppressing that judgment because of the likely effect which its publication would have on the respondent … .

[43] In the present case, leave to appeal was granted and the approved questions raised questions of public importance which were likely to affect people other than the Osbornes. These questions were fully argued at the hearing on 5 November 2013. From the way in which the argument went, it would have been reasonably apparent that it was likely that the appeal would be allowed. On this basis we would have delivered judgment even if there had been an unconditional settlement followed by an abandonment.

[44] For the reasons just given, we consider that the public interest factors in favour of releasing the judgment outweigh the advantages to the Osbornes of allowing the settlement to become unconditional.

Disposition

[45] Accordingly the appeal is allowed. The eligibility decision of the Tribunal chair is set aside. There is a declaration that the Osbornes' claim is eligible. Leave is reserved to apply for further relief should that be necessary. In relation to this appeal, the Osbornes are awarded costs of $25,000 and reasonable disbursements against the first respondent. They are also awarded costs on the judicial review proceedings in the High Court and on the appeal to the Court of Appeal, in sums to be fixed by those courts.

Solicitors:
Rainey Law, Auckland for Appellants
Heaney & Partners, Auckland for First Respondent
Crown Law Office, Wellington for Intervener