IN THE SUPREME COURT OF NEW ZEALAND

SC 68/2016
[2016] NZSC 173

	BETWEEN	OLIVIA WAIYEE LEE Appellant
	AND	WHANGAREI DISTRICT COUNCIL Respondent

Hearing: 19 October 2016

Court: William Young, Glazebrook, Arnold, O'Regan and McGrath JJ

Counsel: T J Rainey and J Heard for Appellant
A R Galbraith QC and F P Divich for Respondent

Judgment: 22 December 2016

JUDGMENT OF THE COURT

A The appeal is allowed. The order for summary judgment is set aside.

B Costs of $25,000 plus usual disbursements are awarded to the appellant. We certify for second counsel.

C If not agreed, costs are to be set in the High Court and the Court of Appeal in the light of this judgment.

REASONS
(Given by Glazebrook J)

Introduction

[1] Section 37(1) of the Weathertight Homes Resolution Services Act 2006 (the WHRS Act) provides that the filing of an application by the owner of a dwelling-house for an assessor's report under s 32(1) of that Act has the same effect for the purposes of the Limitation Act 1950 (the 1950 Act) as filing proceedings in a court. The issue in this appeal is the extent to which s 37(1) "stops the clock" for limitation purposes.

[2] Ms Lee applied for an assessor's report on 12 August 2008. Her position is that proceedings she eventually filed in the High Court on 21 May 2014 against the Whangarei District Council are therefore to be treated as having been "brought" on 12 August 2008 for the purposes of s 4(1)(a) of the 1950 Act. This section provides that an action (defined in s 2(1) to mean "any proceeding in a Court of law other than a criminal proceeding") founded on tort "shall not be brought after the expiration of 6 years from the date on which the cause of action accrued".

[3] The High Court rejected Ms Lee's argument on the application of s 37(1).[1] This meant that the court proceedings had to have been filed within six years of the cause of action accruing. The Court held that Ms Lee's cause of action accrued before 21 May 2008, referring to reports obtained by Ms Lee in February and April 2008 and letters to the builder and the cladding manufacturers in May 2008 showing

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[1] *Lee v Whangarei District Council* [2015] NZHC 2777 (Associate Judge Bell) [*Lee* (HC)] at [50]–[55]; following *Bunting v Auckland City Council* HC Auckland CIV-2007-404-2317, 13 August 2008 at [22] per Duffy J.

Ms Lee understood the nature of the problem with the dwelling.[2] It followed that her High Court proceedings were brought out of time and summary judgment was given in favour of the Council.[3] The Court of Appeal upheld the High Court decision.[4] Leave to appeal on the effect of s 37(1) was granted by this Court on 3 August 2016.[5]

[4] In this judgment we discuss the relevant parts of the legislation and the background to these proceedings, before identifying and dealing with the issues in the appeal.

The WHRS Act

Limitation provisions

[5] At the relevant time s 37(1) of the WHRS Act provided:[6]

> **37 Application of Limitation Act 1950 to applications for assessor's report, etc**
>
> (1) 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) has effect as if it were the filing of proceedings in a court.

[6] This Court referred to s 37(1) in *Osborne v Auckland Council* but did not need to determine its scope in that case. It did recognise that it could be construed as

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2 At [68]–[69]. The High Court accepted that Ms Lee's knowledge of the defects may not have been as full as it is now, but held that she did know enough by 21 May 2008 to realise that the value of the house has been adversely affected by defects in the cladding system.

3 At [70]–[71].

4 *Lee v Whangarei District Council* [2016] NZCA 258 (Winkelmann, Simon France and Woolford JJ) at [44] and [48]–[54] [*Lee* (CA)].

5 *Lee v Whangarei District Council* [2016] NZSC 98. Ms Lee sought leave to appeal on other points but leave was refused. At the hearing of this appeal, Ms Lee sought to raise some of these issues again. Because she has succeeded in this appeal, it is not necessary to address whether or not it was open to Ms Lee to raise these other issues.

6 Section 37(1) of the Weathertight Homes Resolution Services Act 2006 (the WHRS Act) now refers to the Limitation Act 2010. The Limitation Act 1950 continues to apply to an action based on an act or omission before 1 January 2011: Limitation Act 2010, s 59. See also s 2A of the Limitation Act 1950. The predecessor section, s 55(1) of the Weathertight Homes Resolution Services Act 2002 (the 2002 Act), read that the application for an assessor's report "is deemed to be the filing of proceedings in a court". The parties do not seek to make anything of the change in wording. We note that modern drafting practice is to avoid the term "deem". The Parliamentary Counsel Office, in its *Principles of Clear Drafting* (August 2009) lists "deem" as a "problematic word" and notes that it should only be used to create a legal fiction "and even then it should be avoided if there is a sensible alternative way of achieving the same result": at 28.

meaning that the stopping of time is not confined to claims which proceed under the WHRS Act.[7]

Assessor's reports

[7] Section 32(1)(a) provides that "an owner of a dwellinghouse who wishes to bring a claim in respect of it" may apply for an assessor's report. Claim and claimant are defined in s 8:

> **claim** means a claim by the owner of a dwellinghouse that the owner believes—
>
> (a) has been penetrated by water because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration; and
>
> (b) has suffered damage as a consequence of its penetration by water
>
> **claimant**—
>
> (a) means a person—
>
> (i) who applies to the chief executive to have an assessor's report prepared in respect of a building; or
>
> (ii) whose claim is transferred to adjudication under section 120 or 121; and
>
> (b) includes a claimant's successor by operation of law

[8] Section 14 deals with the requirements for an eligible claim with regard to a single dwellinghouse:

> **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
>
> (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

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7 *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [14](b) and [15].

(d) the penetration of water has caused damage to it.

[9] The procedure and eligibility criteria for bringing a claim in a multi-unit complex differ from those for a single dwellinghouse. The provisions (set out in ss 15 to 18) are designed to ensure that, where there is damage to more than a single unit, any claim covers all the affected units and/or common areas. There are provisions setting out procedures for representative claims with regard to multi-unit complexes under ss 19 to 21.

[10] When faced with an application for an assessor's report, the chief executive[8] must make an initial assessment as to whether the claim meets or is capable of meeting the eligibility criteria[9] and, if so, must arrange for a report to be prepared.[10] An assessor's report can be a report on eligibility or a full assessor's report.[11] This is at the option of the owner.[12] Ms Lee in this case applied for a full assessor's report.

[11] An eligibility assessor's report only states whether the claim meets the eligibility requirements.[13] A full assessor's report covers the eligibility criteria and, if these are met, it must also, under s 42(2), state the assessor's view on:[14]

(a) why water penetrated the dwellinghouse concerned; and

(b) the nature and extent of the damage caused by the water penetrating the dwellinghouse; and

(c) the work needed to repair the damage; and

(d) the work needed to make the dwellinghouse weathertight (both in relation to the deficiencies that enabled the damage to occur and in

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8 The Chief Executive is currently that of the Ministry of Business, Innovation and Employment: see WHRS Act, s 8.

9 Section 32(2). See also *Osborne*, above n 7, at [10].

10 Section 32(3). This section is overridden by s 39, which provides that no full assessor's report may be done if all damage to the dwellinghouse concerned has been repaired and it has been made weathertight, and no eligibility report may be done if a full assessor's report has previously been applied for (or if, before the transition date of 1 April 2007, an assessor's report has been applied for) in respect of the same claim.

11 Section 38.

12 Section 38 and sch 1. The obtaining of an eligibility assessor's report does not preclude a claimant from obtaining a full report: s 40. Section 40 is also subject to s 39, outlined above at n 10.

13 Section 41.

14 This is if a claim has been made under ss 14, 15 or 18 of the WHRS Act. The requirements for a claim made under s 16 (a multi-unit complex claim) or s 17 (a common area claim) are listed separately in s 42(3) and (4) but are substantively the same.

relation to any deficiencies that are likely in future to enable damage to be caused to the dwellinghouse by water penetrating it); and

(e) the estimated cost of the work referred to in paragraphs (c) and (d); and

(f) the persons who should be parties to the claim.

[12] A copy of the assessor's report, once completed, must be given to the claimant.[15] The chief executive then evaluates the report and decides whether it meets the eligibility criteria and gives notice in writing to the claimant of his or her decision.[16]

Adjudication

[13] If a claim meets the eligibility criteria, there is then the right to apply to the Weathertight Homes Tribunal (the Tribunal) to have the claim adjudicated. Sections 60 and 62 provide (in their relevant parts):

60 Right to apply for adjudication of claims

(1) The owner of a dwellinghouse has the right to apply to the tribunal to have the claim adjudicated if it is an eligible claim.

(2) Subsection (1) has effect despite any provision of any existing agreement or contract that requires or provides for—

(a) the submission to arbitration of any matter; or

(b) the making of an arbitral award as a condition precedent to the pursuit of any other proceedings or remedy.

(3) **Existing agreement or contract**, in subsection (2), means one entered into before 27 November 2002.

(4) However, the right referred to in subsection (1), and its exercise, are restricted by subsections (5), (7), and (8).

(5) An owner of a dwellinghouse may not, however, apply to have an eligible claim adjudicated, or continue adjudication proceedings, if, and to the extent that, the subject matter of the claim is the subject of—

(a) an arbitration that has already commenced; or

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15 Section 44.
16 Section 48.

(b) proceedings initiated by the claimant (including by way of counterclaim) by way of—

(i) proceedings in a court or a Disputes Tribunal; or

(ii) proceedings under section 177 of the Building Act 2004.

(6) Subsection (5) does not limit the power of any party to apply for proceedings to be transferred to adjudication under section 120 or agree that they be transferred under section 121.

…

62 How to initiate adjudication

(1) A claimant initiates the adjudication of a claim by applying to the tribunal, in writing and in a form (if any) approved for the purpose by the chair, to have the claim adjudicated, and serving a copy of the application for adjudication on—

(a) the other party or parties to the adjudication; and

(b) the department.

(2) The application to the tribunal must be accompanied by—

(a) a copy of the decision of the chief executive under section 48 (or the decision of the chair under section 49) on the eligibility of the claim; and

(b) the prescribed fee (if any).

(3) The application in writing in the approved form (if any) must state—

(a) the date of the application; and

(b) the nature and a brief description of the claim and of the parties involved; and

(c) the remedy (see section 50) that is sought; and

(d) the names and addresses of the parties to the adjudication; and

(e) if available, the addresses that the parties have specified for the service of notices.

(4) Every copy of the application that is served on another party to the adjudication must be accompanied by a copy of the assessor's report that relates to the claim, and may be accompanied by any other documents.

[14] Section 50 sets out the remedies that can be claimed under the Act:

> **50 What remedies may be claimed**
>
> (1) As long as it is an eligible claim, a claim under this Act may be for any remedy that could be claimed in a court of law in relation to, or for consequences of, all or any of the following:
>
> (a) deficiencies that enabled the penetration of water into the building concerned:
>
> (b) the penetration of water into the building concerned:
>
> (c) damage or loss of value caused by the penetration of water into the building concerned:
>
> (d) loss of value caused by the fact that there are deficiencies in the building concerned:
>
> (e) deficiencies that are likely in future to enable the penetration of water into the building concerned.
>
> (2) **Remedy**, in subsection (1), includes (without limitation) general damages (for example, for relevant mental distress).
>
> …

Transfer of proceedings

[15] Sections 119, 120 and 121 provide for the transfer by the Tribunal of claims to the District or High Courts, the transfer of proceedings from a court to the Tribunal and the transfer of proceedings from arbitration. We set s 119 out in full:

> **119 Transfer of claim to court**
>
> The tribunal may order a claim to be transferred to a District Court or the High Court in its ordinary civil jurisdiction if, in the tribunal's view, it is more appropriate for a court to determine the claim for all or any of the following reasons:
>
> (a) the claim presents undue complexity:
>
> (b) the claim presents a novel claim:
>
> (c) the subject matter of the claim is related to the subject matter of proceedings that are already before the court.

Withdrawal of claims

[16] Section 61 provides that, where a claimant initiates other proceedings (including court or arbitration proceedings[17]), there is an obligation to notify the tribunal. This notification is treated as a withdrawal of the claim:

> **61 Effect on other dispute resolution procedures**
>
> (1) If a claimant who has applied to the tribunal to have a claim adjudicated under this Act initiates proceedings of a kind referred to in section 60(5)(a) or (b) during the course of the adjudication,—
>
> (a) the claimant must notify the tribunal; and
>
> (b) that notification is to be treated as a notice of withdrawal under section 67, and that section applies accordingly.
>
> (2) Nothing in this Act prevents the other parties to an adjudication from submitting any matter in relation to a claim to another dispute resolution procedure (for example, to the courts, to arbitration, or to mediation).

[17] Section 67 deals with withdrawal of claims generally:

> **67 Withdrawal of claim from adjudication**
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> (1) A claim may be withdrawn from adjudication—
>
> (a) if the parties agree to its withdrawal; or
>
> (b) if the claimant serves written notice of withdrawal on the tribunal, and either—
>
> (i) no respondent objects to the withdrawal; or
>
> (ii) the tribunal does not recognise a legitimate interest on the part of any respondent who objects to the withdrawal in obtaining a determination in respect of the claim.
>
> (2) The tribunal does not have to determine a claim withdrawn in accordance with subsection (1).

[18] Section 141 of the Act permits an existing claim made under the Weathertight Homes Resolution Services Act 2002 (the 2002 Act) in relation to a single unit in a multi-unit complex to be withdrawn for the purpose of enabling a new multi-unit

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[17] Section 60(5).

claim to be made.[18] The application of s 37(1) is extended for the benefit of all units in the multi-unit complex in such circumstances, as long as the new claim is filed within twelve months.[19]

Termination of claims

[19] Section 55 provides that a claim is terminated if there is a change of ownership of a dwellinghouse subject to the claim (except in certain circumstances, including a change in ownership by operation of law).

[20] Section 56 provides for the termination of claims not pursued:

> **56 Termination of claims not pursued**
>
> (1) The chief executive may, if he or she believes that a claimant who has not yet applied to the tribunal to have a claim adjudicated is not making enough effort to resolve it, give the claimant written notice that the chief executive will terminate it unless within 20 working days (or any longer period stated in the notice) the claimant either—
>
> (a) satisfies the chief executive that enough effort to resolve it is being made; or
>
> (b) applies to the tribunal to have it adjudicated.
>
> (2) The chief executive may terminate a claim unless within 20 working days (or any longer period stated in the notice) after receiving a notice under subsection (1), the claimant either—
>
> (a) satisfies the chief executive that enough effort to resolve it is being made; or
>
> (b) applies to the tribunal to have the claim adjudicated.
>
> (3) If a claim is terminated under subsection (2), no further claim may be brought under this Act in respect of the dwellinghouse (or common areas or multi-unit complex) concerned by the claimant or by his or her successor by operation of law.
>
> (4) However, if a claim is terminated under subsection (2) in respect of a dwellinghouse in a multi-unit complex, subsection (3) does not prevent—

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[18] The provision is in Part 2 of the WHRS Act which has the transitional provisions between the 2002 Act and the current Act. Section 141 does not limit the application to the claim of s 67.

[19] See *Auckland Council v Weathertight Homes Tribunal* [2016] NZCA 256 at [46]. Leave to appeal was declined by this Court: *Auckland Council v Weathertight Homes Tribunal* [2016] NZSC 126.

(a) a claim from being brought under this Act in respect of that multi-unit complex; or

(b) a claim brought under this Act in respect of that multi-unit complex from including that dwellinghouse.

[21] With regard to claims brought in respect of a dwellinghouse in a multi-unit complex, under ss 52 and 53, both the chief executive and the Tribunal must terminate such claims where they have ceased to meet the eligibility criteria in ss 15, 17 or 18 (for example because other areas of the complex are damaged). Termination under these provisions does not prevent the bringing of a claim under s 19 (representative claims for multi-unit complexes) or adding an owner to a representative claim under s 26.[20]

[22] Section 54 addresses the application of s 37 if a claim is terminated under ss 52 or 53. Section 54 provides that a claim can nevertheless be brought under s 19 relating to the multi-unit complex if it is brought within one year of the termination of the claim under ss 52 or 53. In that case s 37 applies to the claim under s 19 as if it had been brought when the terminated claim was brought.

Other relevant provisions

[23] The purpose of the WHRS Act is set out in s 3. This provides:

3 Purpose of this Act

The purpose of this Act is—

(a) to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to those buildings; and

(b) to provide for certain matters relating to the provision of a package of financial assistance measures to facilitate the repair of those buildings.

[24] Section 12 of the Act provides:

12 Assistance and guidance for claimants and respondents

(1) For all provisions of this Act, the chief executive, and for justice provisions, the Secretary [for Justice], may, at whatever stage a

[20] WHRS Act, ss 52(5) and 53(5).

claimant or respondent may be in the processes provided for by those provisions (or before any of those processes have begun) assist and guide him or her on those processes.

(2) The assistance and guidance given may include assistance or guidance on—

(a) assessor's reports, the advantages of early repair, the informal dispute resolution process, or the mediation and adjudication process:

(b) other possible means of resolving a particular dispute:

(c) the implications for the claim concerned if the dwellinghouse concerned has damage or deficiencies not related to weathertightness.

(3) Subsection (2) does not limit subsection (1).

Background

[25] Ms Lee's house was built for her in 2007 and early 2008 by Rob Littlejohn Builders Ltd. It was not weathertight. In February 2008 Ms Lee obtained a report from a building surveyor in relation to the building and there were lawyers' letters exchanged with regard to the final payment. Ms Lee obtained a further report from the surveyor on 30 April 2008. In May 2008 Ms Lee gave the builder formal notice of a dispute and also raised issues with the installer of the cladding, disputing payment of invoices.

[26] On 6 June 2008 Ms Lee commenced adjudication proceedings under the Construction Contracts Act 2002 with regard to her dispute with the builder. She was unsuccessful. In July 2008 it was held that Ms Lee was not entitled to deduct money from the contract price with regard to the defects. Her appeal against that decision was put "on hold" while she pursued her substantive rights against the builder through arbitration.[21] We understand that Ms Lee was obliged under the contract with the builder to submit the dispute to arbitration.[22]

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21 *Lee* (HC), above n 1, at [40]. The builder applied for summary judgment against Ms Lee for payment of the outstanding invoices.

22 Section 60(2) of the WHRS Act (which overrides arbitration agreements) was inapplicable. Under s 60(3) the override only applies to contracts entered into before 27 November 2002.

[27] On 12 August 2008 Ms Lee applied for an assessor's report under s 32(1) of the WHRS Act.[23] Under s 124 of the WHRS Act, the Chief Executive notified the relevant territorial authority (here the Whangarei District Council) of this application to enable particulars to be included in any Land Information Memorandum issued under s 44A of the Local Government Official Information and Meetings Act 1987.

[28] On 20 October 2008 the assessor, Mr Dalton, reported that the house suffered numerous weathertightness defects and that it met the eligibility requirements under s 14 of the WHRS Act. The Council, in its capacity as building surveyor and territorial authority, was identified as a potentially liable party among other possible parties.

[29] In the meantime, the cladding installer sued Ms Lee in the District Court for the unpaid balance of the contract price. Ms Lee counterclaimed, alleging defective workmanship. In October 2009, Judge David Harvey gave judgment in favour of the cladding company.[24] In December 2010, Ms Lee's appeal against that decision was allowed and a re-hearing was directed.[25] On that re-hearing Judge Sharp accepted that there were weathertightness defects, but held that Ms Lee had not shown that the cladding company was responsible for them.[26] Ms Lee's appeal against that decision was dismissed on 28 February 2013.[27]

[30] On 10 March 2010 Ms Lee initiated an adjudication in the Weathertight Homes Tribunal naming several respondents, including the Council, but not the builder or the cladding company.[28]

[31] In April 2011 another report on the house was obtained from Mr Gill, a registered building surveyor. This identified further defects to the house. In

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23 She applied for a full assessor's report and not merely an eligibility report. For more on the reports, see above at [10]–[11].

24 *Composite Cladding and Signage Manufacture and Installations Ltd v Lee* DC Whangarei CIV-2008-088-562, 27 October 2009 (Judge Harvey).

25 *Lee v Composite Cladding and Signage Manufacture and Installations Ltd* HC Whangarei CIV-2009-488-828, 16 December 2010 (Rodney Hansen J).

26 *Composite Cladding and Signage Manufacture and Installations Ltd v Lee* DC Auckland CIV-2008-088-562, 16 August 2012 (Judge Sharp).

27 *Lee v Composite Cladding and Signage Manufacture and Installations Ltd* [2013] NZHC 354 (Woodhouse J).

28 *Lee v Whangarei District Council* [2013] NZWHT Auckland 5 [*Lee* (Tribunal)] at [1].

May 2013 the Weathertight Homes Resolution Service assessor, Mr Dalton, made an addendum to his report, confirming Mr Gill's findings. A full re-clad was recommended.

[32] In March 2013 Ms Lee's claim with the Tribunal was terminated on the basis of s 60(5) of the WHRS Act.[29] As noted above,[30] this section provides that an owner cannot initiate or continue adjudication of claims to the extent that the subject matter of the claim is the subject of an arbitration that has already commenced, or of other proceedings initiated by the claimant or brought by way of counterclaim. The Tribunal must terminate adjudication proceedings if s 60(5) is met.[31] The Tribunal held that the subject matter of Ms Lee's claim in the Tribunal was the same as the counterclaim against the cladding company and was closely related to the subject matter of the arbitration claim which Ms Lee had brought against the builder under the Construction Contracts Act.[32]

[33] An application to appeal against that decision out of time was dismissed by the High Court on 14 May 2014.[33] On 21 May 2014, Ms Lee commenced this proceeding by filing a statement of claim in the High Court.

[34] On 8 November 2014 Ms Lee obtained an award of $772,073.50 against the builder. We understand it has not been paid.

Issues

[35] We propose to examine the issue of the scope of s 37(1) under the following headings:

(a) the text;

(b) the scheme and purpose;

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29 *Lee* (Tribunal), above n 28.
30 See above at [13].
31 WHRS Act, s 109.
32 *Lee* (Tribunal), above n 28, at [39].
33 *Lee v Whangarei District Council* [2014] NZHC 1002 (Wylie J).

(c) legislative history;

(d) significance of ss 54 and 141;

(e) open-ended liability;

(f) effect on the Council; and

(g) effect of termination.

The text of s 37(1)

[36] The Council submits that s 37(1) has to be read against the background of the longstanding limitation principle that the effect of filing a proceeding is that time stops running for limitation purposes for that proceeding and not for any other proceeding.[34] In its submission this means that s 37(1) only applies to claims under the WHRS Act.

[37] On the Council's interpretation, s 37(1) can be seen as serving two purposes:

(a) to make it clear that the Limitation Act applies to Tribunal proceedings; and

(b) to provide a concession (but only for Tribunal proceedings under the WHRS Act) whereby the filing of an application for an assessor's report (a point equivalent in ordinary civil litigation to the undertaking of pre-claim investigations) stops time running for limitation purposes.

[38] We accept that the Council's interpretation is a possible interpretation of s 37(1). Against the background that the Limitation Act 1950 applied only to "courts", we agree that the effect of s 37(1) was to make it clear that the Act applied

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[34] For this proposition, the respondent refers to the comments of Malins VC in *Manby v Manby* (1876) 3 Ch 101 (Ch). The respondent also refers to *Lefevre v White* [1990] 1 Lloyd's Rep 569 (QB); and Andrew McGee *Limitation Periods* (7th ed, Sweet and Maxwell, London, 2014) at [2.001].

to the Tribunal's proceedings.[35] We do not agree, however, that a purpose of s 37(1) was to limit the concession referred to in [37](b) above to proceedings under the WHRS Act. If that had been the purpose, we consider that it would have been expressed in clear language, particularly in the context of a statute intended to provide a scheme to benefit consumers.

[39] Section 37(1) could easily have provided, for example, that it only applies to proceedings under the WHRS Act. The reference to court proceedings in s 37(1) is also significant in our view. It points to an interpretation of s 37(1) that equates the filing of an application for an assessor's report with the filing of a statement of claim in court and therefore to an interpretation that s 37(1) is intended, as Ms Lee contends,[36] to stop the clock for court proceedings.

[40] That Ms Lee's interpretation of s 37(1) is to be preferred is evident from the scheme of the WHRS Act, to which we now turn.

Scheme and purpose

[41] Absent s 37(1), the application for an assessor's report would not constitute the filing of proceedings, either in the Tribunal or in court, as both parties recognised. In making an application for an assessor's report, the claimant does not have to identify defendants or any causes of action. In order to be eligible, the only matters that need to be present are set out in s 14, the most important being damage caused by water ingress resulting from faulty construction, design or materials.[37]

[42] Further, while an assessor's report, at least on eligibility, is necessary before the chief executive can make the final eligibility decision and thus is a necessary

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35 As noted above at [2], action is defined in s 2(1) of the Limitation Act 1950 as meaning "any proceeding in a Court of law other than a criminal proceeding". Tribunals in the past have come to varying views on whether they are courts of law. For example the Human Rights Review Tribunal has held that it is not: see the analysis in *Director of Health and Disability Proceedings v CO* HRRT 34/04, 9 August 2005. The same applied to the Motor Vehicles Tribunal: *Decision CH 15/96* [1996] NZAR 322 at 323. By contrast, the Disputes Tribunal has been held to be a court of law: *Thomas v Morrhall* [2016] NZHC 2853. The Limitation Act has been applied to the Weathertight Homes Tribunal with no discussion on whether the Tribunal is a court of law: see, for example *Burns v Argon Constructions Ltd* HC Auckland CIV-2008-404-7316, 18 May 2009 at [21]–[27]. The Limitation Act 2010 applies to courts, tribunals and arbitration: s 4.

36 See above at [2].

37 See above at [8].

prerequisite to the filing of an application for adjudication, the application for an assessor's report is not an application for adjudication. A separate application under s 62 is required. So, contrary to the Council's submission, the application for an assessor's report is not an election to begin an adjudication proceeding under the WHRS Act. We accept Mr Rainey's submission that the term "claim" is effectively used in two senses in the WHRS Act: to mean both an application for an assessor's report and an application for adjudication. The first claim (for the assessor's report) does not lead inexorably to the second (adjudication).

[43] The WHRS Act contemplates that claimants can progress their claims through means other than an application for adjudication, including by arbitration or the courts, subject to the restriction in s 60(5) whereby adjudication proceedings cannot be brought or continued to the extent the subject matter coincides with the arbitration or other proceedings.[38] However, s 61(2) makes it clear that the other parties to an adjudication are not so limited and are still permitted to submit any matter relating to a claim to other methods of dispute resolution.[39] As a further indication that the WHRS Act is not limited to adjudication, s 12 provides that advice can be given to claimants about other means of resolving disputes and the implications where the case involves issues other than weathertightness.[40]

[44] A full assessor's report provides a cost effective way for a homeowner to find out the matters set out in s 42(2), including the remedial work required and the persons who should be party to the claim.[41] This is of use to owners in whatever forum they choose to resolve their problems with water ingress. Applying for an assessor's report does not require an indication of the elements of any claim the applicant will end up making or constrain the choice of forum. Adjudication, arbitration, mediation or court proceedings are all possibilities at the time of

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38 See above at [13].
39 See above at [16].
40 See above at [24].
41 See above at [11].

application for an assessor's report. In such a context, it would be odd if the clock is stopped for Tribunal proceedings but not for court actions.[42]

[45] We accept Mr Rainey's submission that the purpose of s 37(1) is to "stop the clock" on limitation while the dwelling is assessed, allowing homeowners to make informed decisions about their options without, in the meantime, any legal claim they may have becoming time-barred. To interpret s 37(1) more narrowly risks those with leaky homes falling into procedural traps. This would not accord with the purpose of the WHRS Act as set out in s 3(a) of providing leaky home owners access to speedy, flexible and cost-effective procedures for both the assessment and resolution of claims.[43]

[46] On the Council's interpretation of s 37(1), leaky-home sufferers could face difficult choices. They would have to keep an eye on the passage of time to make sure that they did not let the limitation period for court proceedings expire. When approaching the time limit, they would have to make an assessment of whether or not any processes they were involved in with any potential defendants, including court proceedings, mediation or adjudication, were likely to produce an acceptable outcome. If they were concerned, they would have to ask the Tribunal to transfer the matter to a court (assuming a matter was before the Tribunal) and/or issue court proceedings themselves, which would terminate any Tribunal proceedings or not allow them to be filed until after the court proceedings ended. Where there are delays in any other processes embarked on or in the adjudication process for whatever reason, complexity would be increased for consumers and they would be forced into making difficult choices, with what appear irrationally different consequences if the Council's interpretation of s 37(1) were correct.

[47] We note that, at least in one respect, s 37(1) cannot be limited to adjudication proceedings. It would have to extend to court proceedings where there has been a transfer under s 119 from the Tribunal to a court.[44] There would seem little

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[42] As noted by Mr Galbraith QC for the Council, s 37(1) would not operate to stop the clock for arbitration purposes even on Ms Lee's interpretation. We do not, however, see the choice not to deal with arbitration (which is after all a private arrangement between the parties) as having any bearing on whether s 37(1) applies to court proceedings.

[43] See above at [23].

[44] See above at [15].

difference in principle between the position of a claimant who is granted a transfer of proceedings to court and Ms Lee who started proceedings in the High Court herself. This provides another reason to interpret s 37(1) in accordance with its text.

Legislative history

[48] The Council submits that it is clear from the Select Committee report when the 2006 WHRS Act was enacted that s 37(1) was intended only to have effect within the WHRS Act regime.[45] It also submitted that the Committee accepted the need for certainty for respondents as to when their potential liability would come to an end. In the Council's submission, this is shown by the amendments proposed to what became ss 54 and 141 of the WHRS Act.[46]

[49] These amendments introduced a one-year time limit on bringing new claims when prior claims had been terminated or withdrawn in the circumstances set out in those sections.[47] Had that time limit not been introduced, the Select Committee considered that the provisions would "[provide] open-ended benefits to claimants whose claims would otherwise fall outside the statutory limitation periods, which is unfair to respondents."[48] The one-year limitation period on these claims "would provide certainty for respondents as to when their potential liability will come to an end."[49]

[50] The Council also referred to the fact that the Select Committee rejected submissions to remove or extend the ten year long stop limitation period. The Select Committee noted that this long stop provision applies to all claims with regard to building work and that it was included in s 7 of the 2002 Act.[50] The Committee gave a number of reasons for its view, including that any amendment would affect the

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45 Weathertight Homes Resolution Services Amendment Bill 2006 (75-2) (select committee report). The Council's written submissions also referred to departmental reports but it is not appropriate to refer to this additional material.

46 Prior to this both provisions were contained in one section, s 55A.

47 See above at [18]–[22].

48 Select Committee Report, above n 45, at 3.

49 At 3.

50 The criteria for eligibility of claims for mediation and adjudication required the house to have been built (or alterations made) "within the period of 10 years immediately preceding the date that an application is made to the chief executive": Weathertight Homes Resolution Services Act 2002, s 7.

insurance market.[51] It was noted that "the ten-year provision motivates people to make their claims quickly."[52]

[51] We do not accept the submission that the Select Committee report makes it clear that s 37(1) was limited to adjudication proceedings. Section 37(1) was a carry-over from the 2002 Act and the Select Committee made no comment on it.

[52] We do not see the refusal to modify the ten year long stop as affecting the interpretation of s 37(1), which is directed at the ordinary limitation provisions. We do, however, accept that the Select Committee was concerned about open-ended liability. We address the significance of their comments on ss 54 and 141 below.[53] We also address whether there is open-ended liability with regard to s 37(1).[54]

Significance of ss 54 and 141

[53] The Court of Appeal said that Ms Lee's interpretation of s 37(1) of the WHRS Act would give rise to an inconsistency with ss 54 and 141 of the WHRS Act.[55] We do not consider that to be the case.

[54] Section 54 of the WHRS Act applies where a claim has been made in respect of a single dwelling in a multi-unit complex but is later terminated because other units or common areas in the complex are found to leak.[56] Section 54 extends the application of s 37(1) for the benefit of all units in the multi-unit complex back to the date of the application for the original assessor's report as long as a new claim is filed within twelve months. The same applies to s 141, which is a transitional provision between the current WHRS Act and the 2002 Act.[57]

[55] It is understandable that there is a time limit put on these provisions. What must be remembered is that the earlier claim has either been terminated because it no longer met the eligibility requirements (s 54) or has been withdrawn (s 141). The

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51 Select Committee Report, above n 45, at 7.
52 At 7–8.
53 See below at [53]–[56].
54 See below at [57]–[62].
55 *Lee* (CA), above n 4, at [53].
56 See above at [21]–[22].
57 See above at [18].

effect of ss 54 and 141 is to allow a new claim to be brought with added claimants but, for limitation purposes, benefiting from the time of application of the original claimant.

[56] This is a concession and departs from established limitation principles, whereby filing traditionally only protects original plaintiffs and causes of actions.[58] If there were not a time limit for the filing of new multi-unit claims including other owners, there would have been open-ended liability as the Select Committee indicated. This is because the mechanism set out below for dealing with that problem in the normal run of cases (s 56) would not apply as there would be no extant claim.

Open-ended liability

[57] The Council submits that the benefit to the claimant of allowing an informal application to stop limitation is to the significant disadvantage of prospective defendants who may not know for some years that a WHRS process has been commenced. It is submitted that this means that s 37(1) should not be interpreted as applying more widely than the context of the WHRS Act. The Council submits further that, on Ms Lee's interpretation of s 37(1), potential liability would never come to an end.[59]

[58] It is true that defendants would likely not know of any claim until an application for adjudication is filed or court proceedings have begun. The possible defendants would be identified in a full assessor's report but it is not served on them. However, if a person has a leaky home, delays of some years in informing possible defendants might be thought very unlikely, subject to a possible design fault of the legislation discussed in the next section.

[59] There is a mechanism in the WHRS Act for dealing with those who fail to pursue claims. Under s 56, the chief executive can terminate a claim where there has

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58 The Council referred to *Barrett v Kalaugher & Co Ltd* [1959] NZLR 411 (SC); and *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 (SC) on this point.

59 This was also the reason given by Duffy J in *Bunting v Auckland City Council*, above n 1, at [23]. This was relied on by the Court of Appeal when finding against Ms Lee on this point: *Lee* (CA), above n 4, at [50]–[52].

been no application for adjudication if he or she believes the claimant is not making enough effort to resolve the claim. Used in this section, the term "claim" must be referring to the filing of the assessor's report.[60] Once a claim has been terminated in this manner, it cannot be filed again.[61]

[60] All this means that, if the chief executive is diligent in monitoring the progress of claims and uses this power when necessary, the concern about open-ended liability would be misplaced.

[61] Section 37(1) in any event applies in limited circumstances. To be eligible, a dwellinghouse (or multi-unit complex) must have been a leaky home built prior to 1 January 2012.[62] As Mr Rainey points out s 37(1) is also limited in its application in the following ways:

(a) it is limited to the particular dwellinghouse (or multi-unit complex) that is the subject of the application under s 32(1); and

(b) it is limited to the particular application which must be made by the owner of the dwellinghouse.

[62] Finally, once a claim is before the courts, there would be the normal process for dealing with dilatory plaintiffs (or defendants). The same applies to a claim before the Tribunal, which has wide powers to control its own procedure.[63] It may also determine a claim in the face of any failures of the parties to provide submissions or participate in the hearing.[64]

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60 See above at [42].

61 See above at [20]. It may be that court proceedings could still be filed if they were within time under the relevant limitation legislation but, as that does not arise in the current case, we leave it for future consideration.

62 WHRS Act, ss 14–18.

63 Section 73.

64 Section 74.

Effect on the Council

[63] In this case the Council has known about the claim against it since March 2010 when Ms Lee filed an application for adjudication against it.[65] This was well within time for limitation purposes. Ms Lee should not, however, have commenced or continued those adjudication proceedings while she was involved in proceedings outside the WHRS Act dealing with the same subject matter. Her adjudication was thus terminated by the Tribunal.[66] This may point to a design flaw where the proceedings outside the WHRS Act do not involve all the possible responsible parties, as in this case. If Ms Lee had not filed an application for adjudication until those other proceedings had been completed, it would indeed have been many years before the Council had been aware of the claim against it. But this is a function of the legislative scheme.[67]

Effect of termination

[64] It is submitted on behalf of Ms Lee that, although the adjudication proceeding commenced by Ms Lee was terminated by the Tribunal on 7 March 2013 her "claim" relating to the assessor's report has not been terminated by the chief executive under s 56 and thus she still has an eligible claim under the WHRS Act.[68] In Mr Rainey's submission, there would be nothing to prevent Ms Lee from applying to adjudicate her eligible claim even today. The only difference for a respondent such as the Council on Ms Lee's interpretation of s 37(1) is where they face the "stale" claim (the courts or the Tribunal) and not whether they face that claim.

[65] Mr Galbraith QC, for the Council, did make a half-hearted attempt to argue that, once the adjudication had been terminated, this meant that there was no longer a

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65 Under s 124 of the WHRS Act the Council received notice of Ms Lee's claim from the Chief Executive for Land Information Memorandum purposes when she applied for an assessor's report in 2008: see above at [27]. This was, however, for a different purpose.

66 *Lee* (Tribunal), above n 28. We assume for the purposes of this judgment that the decision to terminate Ms Lee's claim against the Council, as against to merely adjourn for example, was correct.

67 For completeness, we note that any attempt to file an adjudication claim after court proceedings involving the same party had been determined (or vice versa) would be faced with a plea of res judicata or issue estoppel.

68 In this regard, we understand that the Ministry of Business, Innovation and Employment has approved Ms Lee's dwelling for a contribution to the repair costs under the Financial Assistance package provided for in Part 1A of the WHRS Act.

claim under the WHRS Act and it could not be revived. We do not accept that submission. The claim against the Council has never been adjudicated. Section 60(5) prevented it being adjudicated while other proceedings were extant. There is nothing in the WHRS Act or the policy behind it to suggest that a claim cannot be revived once the other proceedings against a different party have been completed.

[66] We thus accept Ms Lee's submission that the only difference between the position of the parties in this case is where the Council faces the claim: in the court proceedings or in adjudication. This provides yet another reason for interpreting s 37(1) in light of its text.

Conclusion

[67] For all of the above reasons, we consider that the clock was 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. This means that the order for summary judgment must be set aside.

[68] We make some final comments. The process for Ms Lee has been tortuous and fraught with procedural difficulties. For many of the above proceedings she was unrepresented. This includes the initial application for the assessor's report, the dispute with the cladding company and all proceedings from March 2013 to August 2016. Apart from some relatively minor periods of inactivity, she has since 2008 been actively pursuing her legal options, including adjudicating for some three years with the Council before her claim was terminated.

[69] The procedural quagmire has not been of her making. In the proceedings she was involved in outside of the WHRS Act she was responding to demands for payment by the builder and the cladding supplier for work on her leaky home. She was naturally reluctant to pay those who could have borne responsibility for her predicament without the issue of liability having been determined. She was obliged by contract to go to arbitration with the builder.

[70] In Ms Lee's case the WHRS Act has not lived up to its purpose of providing "speedy, flexible, and cost-effective" (or indeed even readily understandable) procedures for the resolution of her leaky home problem.

Result and costs

[71] The appeal is allowed. The order for summary judgment is set aside.

[72] Costs of $25,000 plus usual disbursements are awarded to the appellant. We certify for second counsel.

[73] If they are not agreed, costs are to be set in the High Court and the Court of Appeal in the light of this judgment.[69]

Solicitors:
Rainey Law, Auckland for Appellant
Heaney & Partners, Auckland for Respondent

[69] Any costs award would be limited by the fact that Ms Lee was not represented in those courts. She was assisted only by a McKenzie friend.