IN THE SUPREME COURT OF NEW ZEALAND SC 9/2013

[2013] NZSC Trans 27

BETWEEN **JOHN ANTHONY OSBORNE**

First Appellant

AND **AUCKLAND COUNCIL**

First Respondent

WEATHERTIGHT HOMES TRIBUNAL

Second Respondent

Hearing:	5 November 2013
Court:	Elias CJ McGrath J William Young J Glazebrook J Tipping J
Appearances:	T J Rainey and J P Wood for the Appellant K L Clark QC and C R Goode for the First Respondent M J Andrews and T Hallett-Hook for the Second Respondents

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CIVIL APPEAL

MR RAINEY:

Morning Chief Justice. May it please the Court, my name is Tim Rainey and I'm appearing today with Jonathan Wood for the appellants.

ELIAS CJ:

Thank you Mr Rainey, Mr Wood.

MS CLARK QC:

May it please your Honours, Ms Clark and I appear with Ms Goode for the first respondent, the Auckland Council.

ELIAS CJ:

Thank you Ms Clark, Ms Goode.

MR ANDREWS:

May it please the Court, counsel's name is Andrews. I appear with Mr Hallett-Hook for the Attorney-General as intervener.

ELIAS CJ:

Thank you Mr Andrews, Mr Hallett-Hook.

MR RAINEY:

The main issue in this appeal is whether the Court of Appeal has correctly interpreted the eligibility criteria for accessing the Weathertight Homes Resolution Servicer under the Weathertight Homes Resolution Service Act 2006. In particular the appeal focuses on the requirement in section 14(a) of the Weathertight Homes Resolution Services Act that the dwellinghouse be built before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought.

The Court of Appeal held that a dwellinghouse is built for purposes of section 14(a) when it has been completed to the extent required by the building consent issued in respect of that work and the Court of Appeal concluded that this will happen in all but exceptional cases at a point in time where the dwellinghouse has passed its final building inspection. In doing so the Court of Appeal excluded from the enquiry as to whether a house is built the date on which the code compliance certificate for the building is actually issued by the council or private certifier responsible for overseeing that building work under the Building Act.

ELIAS CJ:

I should know this but I have forgotten, mercifully. The final building inspection, that's an event. Does it give rise to a certificate or is that, is the certificate the code compliance certificate?

MR RAINEY:

Ma'am, the certificate is the code compliance certificate. I mean as Justice Young pointed out in his dissenting opinion in *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 (*Spencer on Byron*), the Council has the power under the Building Act, both the 1991 Act and the 2004 Building Acts, has the power to inspect but it is not required to inspect. What it is required to do is to ultimately be satisfied upon reasonable grounds that thebuilding work complied with or complies with the performance requirements of the Building Code and then issue a code compliance certificate. Now that, under the 1991 Act which we're dealing with here, is an event which is required by section 43 of the Building Act 1991 –

ELIAS CJ:

Yes. No, I'm not really asking about the code compliance certificate. I'm just asking what constitutes passing the final building inspection. Is that simply the fact of the final building inspection having taken place?

MR RAINEY:

It is Ma'am.

ELIAS CJ:

Yes. Thank you.

MR RAINEY:

So what happens is the inspector comes to the property, carries out that final building inspection and, and then will note it as either having passed or failed. And from –

WILLIAM YOUNG J:

It's not a statutory step?

MR RAINEY:

It's not a statutory step.

ELIAS CJ:

No. I see.

TIPPING J:

But it's a factual step which is easily identified.

MR RAINEY:

It is. The council is required to keep a record of the relevant material relating to the building consent.

TIPPING J:

All I'm suggesting, Mr Rainey, is that it's not a sort of at-large event.

ELIAS CJ:

Yes. That's what I, my question was directed at.

MR RAINEY:

It certainly is a step that will in the ordinary run of events be readily ascertainable from the records that the council keeps –

TIPPING J:

It's a bit like the –

MR RAINEY:

– and it will be there.

TIPPING J:

– ordinary architect or engineer's certificate of substantial completion. It's the same idea but in different language.

MR RAINEY:

Well I would disagree with that respectfully, Sir. The, the final building inspection is merely an event. It has no real status in terms of the Act.

TIPPING J:

Sorry. I may have misled you. I mean factually. It's an event which is easily identifiable from the record.

MR RAINEY:

Yes Sir. That is certainly the case.

ELIAS CJ:

Yes. Yes, thank you.

MR RAINEY:

Now, we argue that the interpretation that was applied by the Court of Appeal was wrong for two principal reasons.

Firstly we say that the interpretation is not compelled by the plain meaning of section 14(a). There the Court of Appeal focused on the word "built" and our point is merely this: that as indeed many of the cases bring out, what "built" means is not clear and unambiguous. Many of the cases have applied different points in time by which the house might be regarded as built. Things like habitability, things like the actual completion of the, the building work, the Court of Appeal settled on the final building inspection and other people have advocated, including my clients in this case, the code compliance certificate. Our point is really that the meaning of "built" does not direct us to a specific outcome in this case. We still have to construe what Parliament meant by the word "built" and we do that not – we say that we don't have to do substantial surgery to the Act to get to the result that we urge upon the Court. We say that this simply requires an orthodox approach to statutory interpretation in which the meaning of the word is derived from the context in which it was used. And we say the context in which "built" is used in section 14(a) of the Act merely is that there is some, there is a requirement that the dwellinghouse, that the requirement that the dwellinghouse be built within the period of 10 years immediately before the day on which the claim was brought requires that some part of the process by which the dwelling was built in fact takes place within the specified period. There is no textual reason in the Act why this should not include all of the regulatory steps by which a dwellinghouse is built under the Building Act 1991 including the issue of a code compliance certificate, and that is particularly so when we look at that regulatory regime and the significance that it places on the code compliance certificate. Because if the council when it comes to decide to issue a code

compliance certificate is not satisfied on reasonable grounds that the performance requirements of the Building Code have or are, are or will be met by the building as it has been built under section 42 of the 1991 Act the council would have been required to issue a notice to rectify under the Act calling for further building work to be done to bring the property up to a standard where it did comply with the Code. So the code compliance certificate is a significant event in the life of any building. It marks the point in time when the regulatory steps have been completed, the territorial authority will certify it is satisfied that the work is compliant with the Code, and the possibility of the council coming back and saying, "No, further building work is required to bring it up to code compliance certificate, code compliance standard," has been removed.

ELIAS CJ:

Can –

MR RAINEY:

So as a matter of logic when we look at the regulatory regime under the Building Act the endpoint in the construction of a building comes with the issue of the code compliance certificate and in those circumstances we say "built" as it is used in section 14(a) as a matter of logic must include all of the steps including the issue of the code compliance certificate.

ELIAS CJ:

Now what do you say, how does that argument fit with alterations? When are alterations made on your argument?

MR RAINEY:

Well under precisely the same logic alterations are building work within the definition of building work in the Building Act. It's expressly –

ELIAS CJ:

Is there a –

MR RAINEY:

– in the Building Act.

ELIAS CJ:

Is there a cross-reference to the Building Act in – I haven't looked at the whole legislative scheme in the WHRSA, sorry, the Weathertight Homes Resolution Services Act. Is there?

MR RAINEY:

There is not. So there's no express cross referencing between the two, but, and I will just take you to it briefly, if we look at the bundle which we – volume 1, which contains the legislation. This is the green bundle, and behind tab 1 at page 5 of the bundle is the definition in the Building Act 1991 of building work, which is an extremely broad definition, encompassing all work in connection with the construction, alteration, demolition or removal of the building including site work.

WILLIAM YOUNG J:

That wouldn't include the issuing of the code compliance certificate, would it? Or do you think it does?

MR RAINEY:

Well, I don't think – I think that is a separate regulatory step under the Act.

WILLIAM YOUNG J:

Yes.

MR RAINEY:

That I think the inspections are probably – work for or in connection with and therefore an inspection via council building inspector, may well be within the scope of the definition of building work, but I don't, I think I would have to concede that the actual issuing of the code compliance certificate is the separate regulatory step.

Now, I took you here mainly because I wanted to cross reference what we're talking about when we look at section 14 of the Weathertight Resolutions Services Act and in particular that is behind tab 6 and it is at page 148 of the bundle.

TIPPING J:

Mr Rainey, does your argument involve the consequence or the potential consequence that a building may not be built for months, if not years, after physical activity of the site is ceased?

MR RAINEY:

Well, yes, Sir. That – it may well not be finally built until that – even though all of the physical work was completed some time earlier, the logic of my argument has to be that until the code compliance certificate is issued, the house or dwelling is not finally built.

TIPPING J:

So one could, by delaying applying for a CCC, extend one's limitation period?

MR RAINEY:

Yes, Sir.

GLAZEBROOK J:

Well, you actually have an obligation to apply as soon as practicable.

TIPPING J:

Yes, I know, I saw that, but –

GLAZEBROOK J:

So one couldn't do that without being –

WILLIAM YOUNG J:

But there's also a limitation period anyway.

MR RAINEY:

Yes.

WILLIAM YOUNG J:

There's a back – the limitation period applies anyway.

MR RAINEY:

That's correct, Sir.

WILLIAM YOUNG J:

So, you can't get around the limitation –

GLAZEBROOK J:

No.

MR RAINEY:

No, you can't, and nor can you under the Weathertight Homes Resolution Services Act, because although you may have an eligible claim, you – the ordinary limitation periods that exist at law, apply to the adjudication of all claims under the Weathertight Homes Resolution Services Act and that is specifically dealt with in section 37, I believe it is.

TIPPING J:

Sorry, before you go onto that and taking up Glazebrook J's point, is not your approach going to invite all sorts of arguments over whether people have applied for a code compliance certificate as soon as, whatever the wording is, because say you're delayed for six months, you will say, "Oh, I thought there were a few more nuts and bolts to be put in," whatever. That's a point that you'll have to deal with, from my perspective.

MR RAINEY:

Well, Sir, just to grapple with it directly, the short answer to it is that that is not something that would be dealt with, in my respectful submission, when we're looking at eligibility under the Weathertight Homes Resolution Services Act.

TIPPING J:

Wouldn't it have to be?

MR RAINEY:

I don't believe it would be, Sir, because if a code compliance certificate is in fact issued, that then becomes the date –

TIPPING J:

Yes, I see what you mean. Yes, I agree – sorry, I didn't quite follow. Yes, I agree. If your client's view of the law is adopted, then there's going to be no difficulty in administering it. All I'm wondering is whether it's not going to be apt to undermine the policy of the Act which is obviously to get on with it.

MR RAINEY:

Well, Sir, with respect it isn't and here's why. The – even the Court of Appeal accepted that the effect of the decision is not to prevent such claims being dealt with or brought against the council, all it does it directs which court or where the proceedings are dealt with. So, the broad policy objective of the Act is to provide home owners with access to speed the cost effective means for investigating and resolving claims relating to their leaky buildings. That is in section 3 of the Act.

McGRATH J:

Mr Rainey, just help me with this. Why is the code compliance certificate a better marker, if you like, of when the dwelling house is completed than the – why is it a better marker, sorry, than the earlier step that the Court of Appeal has heard of which is the final inspection?

MR RAINEY:

For two reasons, Sir. One has to do with the Building Act, which I've really already addressed, which is that if you're looking for the point in time at which you can finally say, "all building work in relation to the construction of this property is now complete," that date is the issue of the code compliance certificate, because up until that point in time, the council can, if it is not satisfied, require by issuing – if it is not satisfied that the work complies with the code, it then must not an option but must issue a notice to rectify requiring further building work be done to bring the property up to code compliance standard. So, you can't say that the building work is complete, even though all of the physical work may have been completed from the perspective of the owner, right up until the point, the code compliance certificate and fact issues, the council can come in and issue a notice to rectify, requiring further work be done to bring the property up to compliance.

McGRATH J:

I understand that the regulator is satisfied, it's an indicator when the regulator is satisfied that all the work has been done. Because it's a question of fact, is it not the earlier date, the date of the final inspection, let's say the final inspection clears the property, isn't that equally a marker and a more precise marker at the earlier date?

MR RAINEY:

It is Sir, except for this difficulty, and it's as I was making clear by relying upon Justice Young's comments in *Spencer on Byron*. The inspections are only one of a

number of factors that a council will take into account when it makes the decision that it is satisfied that the building work complies with the code. Other things –

WILLIAM YOUNG J:
Well it may rely on an engineer's statement.

MR RAINEY:
As happened in this case. Now, the engineer's statement was provided to the council in this case on the 13th of February.

WILLIAM YOUNG J:
Was that about foundations?

MR RAINEY:
It was.

WILLIAM YOUNG J:
So what would've happened if the council had said, "Well, we're satisfied about everything but not the foundations and we'll go and inspect them in April," and, yes, they're great, so we get the sign off.

MR RAINEY:
In those circumstances, I think by the Court of Appeal's standard, of course, that inspection itself would have been a step relevant to its approval of the building work and therefore –

WILLIAM YOUNG J:
Have we got the certificates? Have we got the engineer's certificates?

MR RAINEY:
The engineer's certificates aren't in the information that is before the Court.

WILLIAM YOUNG J:
Do we know what, if any, inspections they made?

MR RAINEY:

We don't, other than it seems to be a construction observation inspection of block work.

GLAZEBROOK J:

Before it was completed, effectively, one would expect that because it's difficult to inspect foundations after completion.

MR RAINEY:

Quite, but remember this Ma'am, my point is broader than just this case.

GLAZEBROOK J:

No, I understand that.

MR RAINEY:

It's simply that the inspections are only one of a number of factors that the council will take into account in deciding that the place is code compliant, the building is code compliant. It will also take into account other things like producer statements and if, for example, they produce a statement for the block that was not provided the council would have to somehow be satisfied that that work was code compliant. It would either have to call for the foundations to be inspected again –

TIPPING J:

Yes but would it give a tick in the block work? It's a bit like a warrant of fitness, isn't it, for your car. They go through and they tick all the various things but would you get a tick for the block work on your final inspection, without this producer statement?

MR RAINEY:

No.

TIPPING J:

Well that's the answer, isn't it? If you get a tick in all the boxes at the final inspection –

MR RAINEY:

Oh sorry Sir no, the inspector would not, whether the council is going to be relying on a producer statement, would not at the final inspection stage check all the boxes and

say well I've got the producer statements. That's a step that would happen when they're looking at issuing the code compliance certificate.

TIPPING J:
So it is possible to have a completely clear final inspection record but yet not get a code compliance certificate –

MR RAINEY:
Yes.

TIPPING J:
Is that the point you're making?

MR RAINEY:
That is the point I'm making.

WILLIAM YOUNG J:
But that's because – sorry.

MR RAINEY:
And there may well be other things that happen –

WILLIAM YOUNG J:
That's a clear filed inspection report on the matters that are checked?

MR RAINEY:
Yes. At the final inspection.

WILLIAM YOUNG J:
So say the engineer actually went out and had a look at this between February and April and said I've had a look at it and yes I'm satisfied the foundations are fine, I just wanted to remind myself of what had happened and make sure that the builder had done what I told him to do. When would the final inspection be then?

MR RAINEY:
Well the final inspection would already have occurred.

WILLIAM YOUNG J:

But wouldn't it be the final inspection when it's the final inspection that is the inspection that results in the code compliance certificate?

MR RAINEY:

I think that in those circumstances I would say that the final step in the construction – my position is that the final step in the construction is when the code compliance certificate is issued.

WILLIAM YOUNG J:

Yes.

MR RAINEY:

But the final piece of building work within that broad definition of the Building Act, would also include the inspection by the engineer.

WILLIAM YOUNG J:

Did the Court of Appeal deal with producer statements?

MR RAINEY:

No it didn't.

WILLIAM YOUNG J:

So did it not – okay.

ELIAS CJ:

So you will have to, for my purposes at any rate, demonstrate the connection between these two pieces of legislation because is it the case that with the Weathertight Homes Resolution Services Act a claim depends on non-compliance with the – or compliance with the regulations under the Building Act. In other words if you had a leaky building, and you had a builder who was still standing, does it matter what the status of the compliance of the regulations is? Could you bring a claim under the Weathertight Homes Resolution Services Act?

MR RAINEY:

Well certainly you can and the fact that you can also bring a claim against the territorial authority for its negligence in performance of its regulatory building control function is a, is not required in order to be able to bring a claim.

ELIAS CJ:

No.

MR RAINEY:

But certainly as a matter of practical reality if you've got, you know, my firm regrettably does a lot of these cases and the reality is that if you have the Council as a party to the litigation, there is a much better prospect that the litigation will be resolved earlier, probably by negotiated settlement, or that your final adjudication decision won't end up being an empty shell.

ELIAS CJ:

Yes, no I understand that but it's the necessity of connection between these two regimes that I'm struggling for and it is striking that even the terminology is different, as the respondents indicate in their submissions, that –

MR RAINEY:

Well our argument then is merely this, that the Building Act provides the regulatory backdrop against which this legislation was passed and that when we come to interpreting things like what it means for a dwelling house to have been built within 10 years of the date of the application, which is the section 14(a) question, then that regulatory backdrop helps us to inform what Parliament intended by its adoption of the word "built."

McGRATH J:

I have no problem with the principle on which you're arguing this case. You're really saying that the context goes beyond the immediate statute. We're looking at the Weathertight Homes Act and it extends to prior Acts dealing with some very similar matters and that's where you bring in the Building Act, and so you're just saying it's just a contextual argument, really?

MR RAINEY:

It is just a contextual argument.

ELIAS CJ:

Well, I'm wanting to explore the context closely, so just to flag that.

MR RAINEY:

Yes, Ma'am.

ELIAS CJ:

Thank you.

WILLIAM YOUNG J:

Your guess point is that where does the 10 years come from if it's not from the Building Act?

ELIAS CJ:

Yes.

TIPPING J:

Yes, but I think in application of the Chief Justice's point, which I think is very important. Yes, I think you'll have to deal with the fact that the Building Act is a very generic statute. This is a very specific statute, dealing with one important but very narrow aspect of building problems.

MR RAINEY:

Yes, and –

TIPPING J:

Now does it follow therefore that Parliament must have meant the two to be absolutely lined up?

MR RAINEY:

In terms of the 10 year limitation periods, in my submission, it is abundantly clear from both the text and the legislative history that there was an intention to line up the two. Now, that is not to say that section 14(a) fulfils the same purpose as the 10 year long-stop provision in section 91 and section 393 of the Building Acts 1991 and 2004, respectively.

GLAZEBROOK J:

If you actually look at those sections, can't you argue that they are actually lined up? Because if you accept that the issuing of a code compliance certificate is a regulatory step that's outside of building work, then doesn't the 10 year limitation line up with 91(1)(a) or 393(1)(a) because it relates to the building work?

MR RAINEY:

I understand that argument, but Ma'am, with respect, you'll see that the provision in section 91(1)(a) relates to the Limitation Act 1950. The 10 year long-stop provision comes in, in section 92 and it is keyed to acts or omissions and then in '93 –

GLAZEBROOK J:

Well, it could be less than the Limitation Act period then, in fact.

ELIAS CJ:

Sorry, which section? The section 90 –

MR RAINEY:

So if we look at tab 1.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Well, all I'm saying is that contextually, if you accept that the code compliance certificate is different, then contextually, what you're looking at is the building work in Act or remissions in building work. Now, what they actually do in terms of the 10 year long-stop is move it from the time the building is completed, but if you're looking contextually and you accept that the code compliance certificate is out of that, then it just seems to me that contextually, the argument that built meant built is stronger rather than weaker.

MR RAINEY:

Well, my answer to that point is this, that –

GLAZEBROOK J:

Because the Act or remission on which the proceedings are based, even if you look at it under the Weathertight Homes, is the actual building work that caused the building to be leaky, isn't it? Now the code compliance certificate doesn't have any causative effect on that.

WILLIAM YOUNG J:

Well, it may do, because your loss may be the loss of buying a house on the base of code compliance certificate.

GLAZEBROOK J:

No, I understand that in terms of what might be your loss, but in terms of the act or omission – I suppose it's – I suppose that's right.

WILLIAM YOUNG J:

I think we've discussed and there is a similar discussion about this and that the issuing of the code compliance certificate can be the act of negligence and can be the act or omission which founds liability.

MR RAINEY:

Yes, and that really is the answer to that point –

GLAZEBROOK J:

But that comes under 1(b), not under 1(a) of what I'm putting to you. So, if it is the Act or omission then it comes under 1(b).

MR RAINEY:

And Ma'am, my point there is the 1(a) and (b).

ELIAS CJ:

Sorry, which?

GLAZEBROOK J:

The 393 –

MR RAINEY:

Sorry, this –

ELIAS CJ:
The 393, yes, yes.

TIPPING J
Are they the same as 91?

GLAZEBROOK J:
Yes.

MR RAINEY:
Yes, so my point really in response is if we look at section 91 which is in the green bundle at page 65, so that we're all working to the same document, is that if you look at the structure of the 10 year long-stop provision, we start with section 1 which does draw the distinction between the building work and the regulatory steps, but in the context of making it clear that the limitations provided for in the Limitation Act 1950 will continue to apply. Now, I don't know the extent to which we need to go into the history behind all of that, but it's the issue arises out of the finding in *Invercargill City Council v Hamlin* [1996] AC 624, [1996] 1 NZLR 513 (PC) that in terms of the accrual of the cause of action for negligence, it's when the loss is discovered or becomes reasonably discoverable.

Section 91 has its origins in a decision of the Court of Appeal in the case called *Askin v Knox* [1989] 1 NZLR 248 (CA) which really called for the imposition of a long-stop to deal with the problem that claims could arise many years later and not be time-barred by the Limitation Act 1950. What section 1 is really doing is in that context, making it clear that the imposition of the long-stop does not alter the fact that you still have a limited period of time, six years from the accrual of the cause of action to bring your claim, but it imposes an overall long-stop in (2) on all civil proceedings relating to any building work. So, there is, in my respectful submission, a disconnect if you apply the interpretation that the Court of Appeal has between the 10 year reference in section 14(a) and the 10 year reference in section 91(2), because as is the case here and my friends for the respondent concede this to be the case, on the day that they brought their application for assistance under this Act, the Osbornes had a timely claim, which they could've brought in a Court which wouldn't have been time-barred under section 91(2) and yet they have been denied eligibility under section 14(a).

TIPPING J:
Is that because they could've sued on the CCC?

MR RAINEY:
Correct.

GLAZEBROOK J:
But that's of course unless if the High Court decision is saying that section, what is it, 55, is correct, the Duffy J decision on the Limitation Act.

MR RAINEY:
Yes, Ma'am, although in my respectful submission, that decision which you're referring to, doesn't really and with respect, because I don't think the issues is dealt with, as I understand it, on the strike out before her Honour.

GLAZEBROOK J:
Well, no, all I'm suggesting to you is that if the filing of a claim, even an ineligible claim under the Weathertight Homes Act stops the Limitation Act running, then there isn't a disconnect.

WILLIAM YOUNG J:
Sorry, I don't quite understand that.

MR RAINEY:
The issue is whether when you commence your proceedings in a Court –

WILLIAM YOUNG J:
Yes.

MR RAINEY:
So you later file proceedings in the Court, the fact that you had earlier made an application under this Act for assistance, would stop time running in your later Court proceedings. Now, the High Court has held that it does not and for limitation purposes, time only stops running against your causes of action when you actually file your Court proceedings.

TIPPING J:

Well that must be –

MR RAINEY:

That must be the case.

TIPPING J:

It must be right.

MR RAINEY:

I agree. That is completely the case.

WILLIAM YOUNG J:

So does this turn on section 37 of the –

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

– 2006 Act?

ELIAS CJ:

Of the which?

WILLIAM YOUNG J:

Section 37 of the 2006 Act.

MR RAINEY:

Which I think makes it very clear that it only stops time running, or deems the making of an application under the Act, to be the commencement of Court proceedings for the purposes of limitation in a subsequent adjudication.

WILLIAM YOUNG J:

Sorry –

GLAZEBROOK J:

Well it says has effect as if it were the filing of proceedings in a Court.

WILLIAM YOUNG J:

Yes so –

MR RAINEY:

Yes.

WILLIAM YOUNG J:

– you can understand the literal argument saying, well, if you issue proceedings later in the Court then –

GLAZEBROOK J:

You've already – they're a continuation of the proceedings.

ELIAS CJ:

I don't think it's an odd, I don't think it's a forlorn argument at all.

TIPPING J:

Well I haven't had my mind directed to 37 but on the face of it, it says the exact opposite of what the High Court held.

GLAZEBROOK J:

Well exactly.

MR RAINEY:

That's the, if that was the position then I guess the Osbornes could tomorrow file proceedings in the High Court and we wouldn't need to bother you further.

ELIAS CJ:

Well you might because you might need to argue it all the way up again. Can I –

GLAZEBROOK J:

But it is certainly a literal argument to me. I can understand, I've read the decision of Justice Duffy and I can understand the argument because the argument is it can't stop time running for absolutely everything but one would have thought it could stop time running and that was the intention of it for anything that was related to the particular claim that was filed when the – under section 32.

TIPPING J:

One might simply ask themselves what on earth is the purpose of 37(1) if it's not to allow you to –

GLAZEBROOK J:

Well the argument is on –

TIPPING J:

– put your foot through the door.

GLAZEBROOK J:

The argument was if you have to go from a s 32 to a Court case, which you sometimes do because it can be transferred, but it only relates to eligible claims that come under care, but frankly I would've thought that there's a very respectful argument that that's not the case.

TIPPING J:

But even if that were the case that would suit your clients, wouldn't it?

MR RAINEY:

Well –

GLAZEBROOK J:

Well it stops the gap that your, the very gap you're concerned about, because what you've got is people who don't know any better, because the whole idea of this is it's people who are not legally advised, they file a claim and without knowing, which is possibly what happened to your clients, they find themselves, that they should actually also have filed a claim in Court or they get stuck with a limitation period defence.

MR RAINEY:

And that's exactly the problem that we're grappling with –

GLAZEBROOK J:

But in fact if 37 means what it says, then they don't have a problem, they just go on, after having been told it's ineligible, to file proceedings and to carry on in the normal manner.

TIPPING J:

Well perhaps that's what they were trying to do –

GLAZEBROOK J:

Well that's what I wonder myself.

TIPPING J:

– to make sure that you didn't fall into this gap.

GLAZEBROOK J:

Well I must say that was my feeling in respect of this, if they meant "built".

TIPPING J:

What happened below about section 37?

MR RAINEY:

Well we –

ELIAS CJ:

Well you're not at that point I suppose.

MR RAINEY:

We're not at that point. We never filed proceedings in the Court.

TIPPING J:

No, I know you're not at that point, but surely it's a very significant provision from the point of view of the scheme and it maybe that it's designed to avoid this gap.

ELIAS CJ:

And it may bind you closer to the Building Act which is what you want to be.

MR RAINEY:

Yes. Well it would certainly solve the problem for people, or for the Osbornes, and for people who are in that situation because it would mean that there would be no possibility that they would miss out on being able to bring a claim because they went down the Weathertight Homes Resolution Services path instead of filing proceedings in a Court and thereby stopping time.

TIPPING J:

Are we going to be able to avoid giving section 37 its true meaning in this case for the purpose of deciding the whole broad scheme? I wonder whether 37 isn't very much up in lights now. Frankly I've never looked at...

GLAZEBROOK J:

Well that was something that struck me immediately, that if there, because a gap seems to be something that you wouldn't expect Parliament to have. That is a way of filling the gap without straining the meaning of "built" beyond what it can actually mean because it's, because if you accept that there is a different regulatory step and it doesn't come within building work under the Building Act, then it becomes difficult to see how it comes under "built" in the Weathertight Homes Act. It would be a strain. But on the other hand one doesn't expect Parliament, especially with something that's trying to make things easier for ordinary people, to have left a gap that says, "Well you have to file these proceedings as a precaution."

MR RAINEY:

Yes, and that –

GLAZEBROOK J:

But if there isn't a gap –

MR RAINEY:

That's really the heart –

GLAZEBROOK J:

– because of 37 –

MR RAINEY:

That's really the heart of my purpose argument and if there is another way that my clients can ultimately prevail then I'm most happy for that.

ELIAS CJ:

Can I ask –

McGRATH J:

Section –

ELIAS CJ:

Sorry.

GLAZEBROOK J:

37(1).

ELIAS CJ:

Can I ask you though – oh, maybe you should ask your question because my question is, can you show me why the exercise of a function under the Building Act, which is within 1(b), is something that's covered by the Weathertight Homes Resolution Services Act?

MR RAINEY:

Well, Ma'am, the, the way in which...

ELIAS CJ:

Particularly given your acknowledgement that the code of compliance may be –

MR RAINEY:

Sure.

ELIAS CJ:

– outside the building work.

MR RAINEY:

Well let's, let's start then – there's a bit of a progression here. We'll start – I'll take you through the relevant provisions in the Weathertight Homes Resolution Services Act. It, it –

ELIAS CJ:

Well is there just no section you can point me to?

MR RAINEY:

There, there is a clear provision in relation, and it is in section 90 of the Weathertight Homes Resolution Services Act deals with the substance of a Tribunal determination, remembering that the Act simply defines "claim" under the Act as being a claim by the owner of a leaky building, effectively, that the building is leaky. And what the section 90 does is to confer on the, the Tribunal jurisdiction in relation to eligible claims that the Tribunal can make, "any order that a court of competent jurisdiction could make", and of course as this Court has dealt with comprehensively in both the *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289 and *Byron Avenue* cases that were heard together, there is clearly jurisdiction in the courts to deal with claims arising out of negligence in the performance of regulatory steps.

ELIAS CJ:

But why does it– it's just that there is a distinction in 91(1) between building work and the exercise of functions under the Act. Weathertight homes legislation conceivably could simply be about A rather than B. That is a very general provision. Is there something that refers to – and it is – sorry. But is there anything else?

MR RAINEY:

Section 50, which deals with the remedies that can be claimed.

McGRATH J:

Can I just, before we head, move too far away from section 37, you say – it does – what's the significance of it appearing in subpart 4 of the 2006 Act which deals with assessment and the valuation of claims? That is of course claims under the 2006 Act.

MR RAINEY:

Well structurally –

GLAZEBROOK J:

Where's the – what paragraph are you...

McGRATH J:

So we're looking at page, you look at page 160 and then I'm just looking at the heading, "Subpart 4", and section 37 appears in subpart 4.

MR RAINEY:

Well certainly the way in which the High Court approached it was to say that the, the significance of section 37 was limited to adjudication of claims that are found to be eligible following the assessment and evaluation of claims, and so therefore section 37 did not have the broader application that has been suggested this morning might be its plain meaning, and so that is how it has been interpreted to date.

McGRATH J:

So it's been interpreted in the context of its own subpart?

MR RAINEY:

Yes. So as to only apply –

McGRATH J:

And what's the – yes. Thank you, but what's the name of the, that decision of Justice Duffy, you say?

MR RAINEY:

I regret, Sir, I note –

WILLIAM YOUNG J:

Bunting. *Bunting*.

GLAZEBROOK J:

It's...

MR RAINEY:

Butler.

WILLIAM YOUNG J:

Bunting v Auckland City Council HC Auckland CIV-2007-404-2317, 13 August 2008. *Bunting*.

McGRATH J:

Thank you.

WILLIAM YOUNG J:

Can I just –

GLAZEBROOK J:

And it is in the materials.

WILLIAM YOUNG J:

It's in the materials.

GLAZEBROOK J:

I think it's volume – oh well at least I've seen it in the material.

WILLIAM YOUNG J:

No it is in the material. Yes.

McGRATH J:

That's fine. That's all I need. Thank you.

WILLIAM YOUNG J:

Can I just take you to section 91(2) and (3)? Section 91(2) of the Building Act is a long-stop period which applies only to civil proceedings related to a new building work.

MR RAINEY:

Yes Sir.

WILLIAM YOUNG J:

Subsection (3) makes it clear that a claim in relation to a code compliance certificate is a claim in relation to building work.

MR RAINEY:

Yes.

WILLIAM YOUNG J:

So it presupposes, essentially, that a claim against a local authority in relation to a negligently issued code compliance certificate is a claim in relation to building work.

MR RAINEY:

It does.

WILLIAM YOUNG J:

Now that –

ELIAS CJ:

That's in the Building Act?

WILLIAM YOUNG J:

That – that's in the Building Act.

MR RAINEY:

And, and of course that is crucially important for the Council because without it there would be no long-stop on claims against the Council.

WILLIAM YOUNG J:

Because they're not – because they don't do building work.

MR RAINEY:

Quite.

WILLIAM YOUNG J:

In the sense of hammers and nails.

MR RAINEY:

So there'd be a whole lot of my clients and prospective clients who would like nothing more than for this Court to say that there is no long-stop in relation to claims against the Council and it's just back to *Hamlin* but I'm not going to advocate that because it's clearly wrong.

GLAZEBROOK J:

Well what you'd say is claim that it's being permeated by water can be caused by the council not picking up that there'd been something that should have been done by the builder. That's the submission in terms of that –

MR RAINEY:

That is the submission –

GLAZEBROOK J:

– so that it is related –

MR RAINEY:

That is the argument.

GLAZEBROOK J:

– it is related to the aspect of design, construction or alteration because of the councils regulatory function.

MR RAINEY:

Quite right, and, and of course the –

GLAZEBROOK J:

And so that it lines up really with the Building Act.

MR RAINEY:

It does. And the 2002 Weathertight Homes Resolution Services Act was enacted really in the wake of the 2002 Hunn report, which really emphasised the fact that we were dealing with a, with a leaky building problem with a systemic problem that involved all aspects of the building and construction industry from design, materials, building practices and the important oversight role that the regulatory policeman, the, the council or certifier had and poor inspection practices by councils and certifiers.

So the idea that the 2002 and 2006 Building Act, Weathertight Homes Resolution Services Act would exclude claims against a council in relation to poor performance of its inspection and code compliance certificate roles, that's a line that, with respect, doesn't exist in the Building Act.

ELIAS CJ:
Well –

MR RAINEY:
Sorry, in the Weathertight Homes Resolution Services Act.

ELIAS CJ:
I understand that and I do see that it's a very powerful argument that these two Acts must be read together but it is a little maddening that the Weathertight Homes Resolution Services Act isn't a bit more explicit on this. I've been looking for a definition of "claim", for example.

MR RAINEY:
Which does –

ELIAS CJ:
The substantive determination is totally general. There is a reference to Schedule 1 which gives an overview of types of claims by owners of dwellinghouses which is referred to in an earlier... Section 3 I think. But that doesn't make it explicit either.

MR RAINEY:
And, and there is a definition of "claim" in the Weathertight Homes Resolution Services –

ELIAS CJ:
Oh.

GLAZEBROOK J:
Page 141.

MR RAINEY:
– but it's a remarkably unhelpful definition.

GLAZEBROOK J:
Well it's not really because what you're looking at is whether the claim relates to water ingress.

MR RAINEY:
Yes.

GLAZEBROOK J:
So it naturally is more narrow than the Building Act claim because that could be anything.

ELIAS CJ:
But it doesn't –

MR RAINEY:
But it is a subset, definitely, of –

GLAZEBROOK J:
Subset of bad building practices.

MR RAINEY:
Yes.

ELIAS CJ:
But it doesn't refer to section 91(1)(b) matters.

WILLIAM YOUNG J:
Well, it does two ways, one it brings the Limitation Act offences and two arguably in sections – by the reference to 10 years.

MR RAINEY:
Yes.

ELIAS CJ:
Yes. Well, yes, I understand that. But it really is very sloppy.

TIPPING J:

But for the purposes of the Weathertight claim, it doesn't really matter who is it for, does it?

MR RAINEY:

No, it doesn't, it doesn't even matter if there is nobody at fault.

TIPPING J:

No, you just happen to have a leaky house.

GLAZEBROOK J:

Yes.

TIPPING J:

So, I can understand very much why they wouldn't have been focusing on what type of fault or tort or whatever has been committed by whom, but the best argument, I think, that there is no gap, which happens unfortunately to be against it, for the immediate construction of build is section 37. 37 for me, has come as a bolt out of the blue, because no one seems to have been focused very firmly on it in a contextual sense. It's a help to interpret this whole picture.

GLAZEBROOK J:

And just looking at the point made about where the subpart is only to do with claims. The section 32(4) actually has a specific decision in relation to eligibility criteria, so it's not suggesting – so there is a specific decision to be made once someone makes an application as to whether it's an eligible claim, so to argue that subpart 4 doesn't – only deals with eligible claims is actually not right in a strictly narrow sense.

MR RAINEY:

That was certainly not the way I was putting it. All I was doing was explaining –

GLAZEBROOK J:

No, you were explaining the High Court decision, I understand that.

MR RAINEY:

So, in terms of context, it's embarrassing for me that we stand here today and this is simply an argument that we thought was not relevant. We haven't made it in our

briefs and it wasn't advanced below, primarily because if we don't – all that would do is allow us to bring a separate proceeding a non-Weathertight Homes Resolution Services Act proceeding, an ordinary proceeding in a Court and use the date that the application for an assessor's report is made as the date for stopping the clock.

TIPPING J:
Well, if you were in time for that, you'd be in time for your Court proceeding.

MR RAINEY:
Yes, now –

TIPPING J:
Well, without wishing to be unkind, Mr Rainey, the whole foundation of your case, I thought, was because of this gap we've got to tweak it a bit, putting it rather colloquially. Tweak is a bit more than what the Court of Appeal do, but really if there's no gap on the true construction of the whole picture, where does your argument stand?

MR RAINEY:
Well, here is a good point for me to segway into the second limb of my argument, which has to do with purpose and I think, with respect, the answer to your question, Justice Tipping, lies in the purpose of the Act.

McGRATH J:
Just before we move on, you say the section 32 involves the application for the assessor's report, which is at the eligibility determining stage, isn't it?

MR RAINEY:
Yes.

McGRATH J:
Now once it is determined you are eligible, then you bring your claim.

MR RAINEY:
That's right, so –

WILLIAM YOUNG J:

Well it is the claim. You don't need to do anything although you may file a statement of claim, I take it. But you've made your claim, haven't you?

GLAZEBROOK J:

No, you've made your claim because you apply for an assessor's report then the Chief Executive decides whether it's an eligible claim or not and if it's not an eligible claim he or she says, "Not eligible and here are the reasons for that." And then if it is eligible then they just go ahead – that's my understanding is that goes ahead, the Chief Executive then goes ahead and gets an assessor's report, but your application is an application for an assessor's report if you've got a leaky home.

MR RAINEY:

That's correct and that commences your process under the Weathertight Homes Resolution Services Act.

McGRATH J:

I understand that in relation to the section, but I don't want to rely too quickly from the application for an assessor's report and to making your claim, which I think is what's being put to you. The less I can see is statutory provision that equates that.

GLAZEBROOK J:

I don't think you make a claim. You just apply for an assessor's report, is that right or is that wrong?

McGRATH J:

Well, just let him answer the question, I suggest.

MR RAINEY:

Well, the problem is actually the question the Chief Justice asked a minute ago, the Act uses claim in a very loose way that refers to a couple of different things. First, it relates to the making of an application for an assessor's report which is a claim under the Act and there is provision in section 9 –

TIPPING J:

Section 9, section 9.

MR RAINEY:

That's how you make a claim under the Act.

McGRATH J:

Right, I'll just have a quick look at that. Section 9 is the –

MR RAINEY:

Yes.

ELIAS CJ:

There's also the definition of claimant which is helpful –

McGRATH J:

Section 9, I think, excuse me, the length that was alluding the –

GLAZEBROOK J:

And definition of claimant means the person who applies to have an assessor's report prepared.

ELIAS CJ:

I noticed while we're looking at the structure of the Act and before you get onto purpose, that there are provisions for transfer of claims to the Court and vice versa?

MR RAINEY:

Yes.

GLAZEBROOK J:

And that was what the High Court said the purpose of section 37 was.

ELIAS CJ:

Yes.

GLAZEBROOK J:

To deal with when you did transfer it to a Court. That's my understanding of the decision, so that if it was a narrow, it was only eligible claims and it was to deal with the situation where they were transferred to a Court.

ELIAS CJ:

Yes, I –

MR RAINEY:

That limitation or gloss on section 37 is frankly inconsistent with another High Court decision which we have put in the bundle, that's *Kells v Auckland City Council* HC Auckland CIV-2008-404-1812, 30 May 2012 which says that section 37 is effectively for the purpose of bringing existing limitation law into the Act for purposes of adjudication proceedings, so it has that dual function.

ELIAS CJ:

It's just that the transfer provisions do tend also to strengthen the links between this and the Building Act, perhaps, because since the proceedings as such are not identified in the Weathertight Homes Act. They must refer to all negligence claims which might also draw on the statutory regime in the Building Act.

MR RAINEY:

Yes –

ELIAS CJ:

I'm just not sure. I mean that transfer provision makes it quite clear, doesn't it, that the Weathertight Homes Resolution Services Act is not a stand-alone bit of legislation?

MR RAINEY:

Absolutely, Ma'am, and I think we're all agreed that the Weathertight Homes Resolution Services Act does not give anyone any right to –

ELIAS CJ:

A remedy.

MR RAINEY:

– a remedy. It doesn't create any new law. Its purpose is merely to reform procedure and to provide in an alternative forum for resolving existing legal claims arising out of leaky dwelling houses, so it does not add to one's legal armoury in terms of bringing proceedings and getting compensation that way. Of course, with the addition of the financial assistance package which is a later add on to the Act,

there is now this alternative non-litigation based compensation scheme which has been added to the Act, that was something that came well after this claim was dealt with, so I don't, in my respectful submission, it's not really relevant, but in terms of the Act it doesn't add anything to your existing legal rights, nor in my submission, should it be interpreted in a way that takes away from those rights.

So, I did just want to make one final point to follow up from Justice Glazebrook's characterisation of how you bring a claim under the Act and just to make clear that once you've got an eligible claim, you then have the option to apply for adjudication of that claim under the Act and it is through the process of applying for adjudication, that you assert a claim for legal redress against the particular parties and that is a secondary step that is provided for in section 60 of the Act...

And at –

TIPPING J:
If you've got an eligible claim, but you suddenly repent of this legislation if you like, can you then go to the Court and not pursue it?

MR RAINEY:
Absolutely and the provision, the Act actually specifically contemplates this in section, subsection (5).

TIPPING J:
Of section?

MR RAINEY:
Of section 60.

TIPPING J:
Well isn't at least one of the purposes of section 37 to make sure that you're allowed to do that and not be told you're out of time because of the period that's elapsed since you made your claim under this Act?

MR RAINEY:
Well that, I'm attracted to the argument Sir because it does create, it does provide an answer to the lacuna that we have –

TIPPING J:
Mmm.

MR RAINEY:
– and for that reason I would obviously embrace it because it would provide my clients in this case with an ultimate remedy.

TIPPING J:
Well I've just been puzzling as to why on earth they put on section 37(1) in at all if it wasn't to allow you to say to a Court, I know we might be statute-barred otherwise but look, we made a claim within time to the Tribunal, so we're not statute-barred. I mean it seems pretty, with great respect, blindingly clear that that's what they were trying to do.

MR RAINEY:
Well the High Court hasn't seen it that way –

TIPPING J:
Well, maybe I've put it too strongly –

MR RAINEY:
Of course you sit at the top of the pecking order so –

TIPPING J:
That doesn't mean anything, Mr Rainey, at all.

WILLIAM YOUNG J:
We're unencumbered by any prior knowledge of it.

TIPPING J:
As a matter of first impression, let me guard myself by saying that, and subject to some king hit, I would have thought that that was what they were trying to achieve.

MR RAINEY:

Well the way in which it has been construed in the *Kells* case, section 37 has been viewed as having this other dual purpose which is to bring in existing limitation law into the adjudication –

TIPPING J:

Well never mind what other purposes it may have, surely it has this purpose, that if you say I don't want to go anymore down this Weathertight Homes Tribunal route, I'm going across to the Court under section 60(5), you can say, but I'm not statute-barred because I started in time under the WH Act.

MR RAINEY:

Yes and I do want to be very clear in direct answer to the question that you started with here Sir. That this, the fact that you have applied and made a claim under this Act, in no way closes off your right to bring proceedings in the Court and –

TIPPING J:

Well that's why I asked –

MR RAINEY:

– the legislative history is very clear, this Act was seen as providing people with an alternative option if they wished to take it up and they were, at any point they could decide we're not going to pursue this claim in this forum, we're going to now file proceedings in a Court, and so that was, that's the basis of the claim and it's the structure of the Act and the Act itself makes it clear. It does make it clear that you can't do both at the same time.

TIPPING J:

Well that view of it has the sublime advantage of actually reflecting what section 37 actually says which is never a bad start.

MR RAINEY:

Now that perhaps gives me the opportunity, subject to any further questions on the text, to move to purpose and explain why, notwithstanding the possibility of section 37 providing an answer, my suggestion is that this Act should be interpreted in the way in which I have advanced in my submissions.

Firstly, can I start by just explaining my view on what the – or the appellant's view on what mischief the Act was intended to address. Now I know there's a natural reluctance of this Court and others to look at the Cabinet business papers and the underlying legislative history, but whether you look at it or you look just at the structure of the Act itself, I think it's tolerably clear that what Parliament was getting at with this legislation was to address a concern that leaving people with their rights to bring claims in the ordinary Courts, was resulting in claims not being dealt with in a speedy and cost effective manner and that the Courts were taking too long, it was too complicated and so what they wanted to do was to provide people who were affected, homeowners who were affected by this crisis with a cheaper and more cost-effect alternative.

ELIAS CJ:

Well you can take us to the Parliamentary materials. There's no problem with that. you can take us to what the Minister said on introduction, you can take us to select committee reports or anything of that nature, but we don't want to see anything that precedes the Parliamentary material.

MR RAINEY:

Ma'am, and my point here is only a general one. I don't think I need to, unless you want me to, to take you specifically to the Hansard and to the Select Committee reports on the Act. I think it's, I don't think it's really contested that that is the general direction of the Act.

TIPPING J:

But is there anything in the legitimate parliamentary history that helps us with the particular problem that we're facing? I mean, we all know what the general idea was.

WILLIAM YOUNG J:

There are quite a lot of references to this that are in terms that presuppose the speaker thinks it's the Building Act, Limitation Act they're translating across.

MR RAINEY:

Correct, and perhaps the most telling of these is contained in the Select Committee report on the Weathertight Homes Resolution Services Amendment Act which became the 2006 Act, which is the point which the Court of Appeal dealt with, and this is in the tan volume, volume 3, behind tab 6 at page 228.

TIPPING J:

Under the heading – well you can understand immediately why people would see the identity in between the 10 years and the 10 years. But did anyone look at it more subtly than that?

MR RAINEY:

No. In fact it seems – well, my – the appellant's interpretation of the first paragraph of this discussion on the 10 year long-stop limitation period is that Parliament, the Select Committee viewed section 7 of the 2002 Act, which was the precursor to sections 14, which we're looking at in this, this Act, in this case –

GLAZEBROOK J:

When you say "precursors", sorry, I haven't looked back, are they in exactly the same terms?

MR RAINEY:

They are in, to all intents and purposes, exactly the same. They're broken up in a slightly different fashion but the words are, are the same.

This clearly indicates, in my respectful submission, that what Parliament or what the Select Committee saw was that section 7 was an instantiation, a positive enactment within the eligibility criteria of the 10 year long-stop that was pre-existing in section 91 and 393 of the Building Act.

TIPPING J:

Their minds were clearly focused on the argument that it should be either extended from 10 or shortened.

MR RAINEY:

Yes.

TIPPING J:

I don't, with respect, see how this helps much.

MR RAINEY:

Well, what, where it helps, in my respectful submission, is this: that what it shows is that Parliament thought that when it said "built" within 10 years of the date of the claim being brought, they thought that that meant exactly the same thing as within 10 years of the date of the act or omission upon which the claim was based.

WILLIAM YOUNG J:

But they didn't think that they were taking a shorter period of limitation than the Building Act provided.

MR RAINEY:

Yes. And –

WILLIAM YOUNG J:

But that's the most you can say.

TIPPING J:

Yes.

MR RAINEY:

That is the most you can say.

WILLIAM YOUNG J:

If they did it they did it inadvertently.

MR RAINEY:

Yes.

TIPPING J:

Yes. Well that's a fair point. If they did it they didn't mean to do it.

MR RAINEY:

And I think that that, that really belies what the Court of Appeal had to say about that, which was that there was some intention to adopt a different point in time on the part of Parliament. In my respectful submission there was no such intention. If it has happened because of the words they have used it is purely inadvertent and, in my

respectful submission, the Court should find a way to make the Act work as Parliament intended, not to be hide bound by the strict language used.

TIPPING J:
But if section 37 means what's been put to you, then it is going to work in exactly the same way, isn't it?

MR RAINEY:
Well, it won't for this reason Sir. The purpose of the Act was to give people options, that they would have the option of either bringing proceedings in a Court, if that's what they chose to do, or the option of a speedier and more cost-effective procedure for the assessment and resolution of the claims by making a claim and seek an adjudication under the Weathertight Homes Resolution Services Act. The effect of the interpretation of "built" which has been applied below, is that people in the category, my clients, are denied that option, even though they meet all of the other relevant statutory eligibility criteria. So, for some reason they are put into a class who are denied access to those speedy and cost-effective procedures from resolving their claim, when Parliament clearly, has as its purpose in the Act, giving people that option so that they can still make a choice, Court or Weathertight Homes Tribunal, but here the interpretation below denies them that action and forces them to bring proceedings in a Court.

Now, in my submission, Parliament – I agreed with my friends for the respondents and the interveners, that Parliament did not make the Weathertight Homes Resolution Services Act available to all claims or to all owners of legal claims that people who owned leaky buildings may wish to bring, but all of the delimitations on that are linked directly to the purposes provision in section 3 of the Act. So, for example, and this I put in a table in my written submissions, the Act is limited to people who are, well, first of all it's limited to dwelling houses as this Court well knows. Leaky building claims affect a wide range of properties, including commercial buildings. Those buildings are outside the ambit of this Act. It's limited to dwelling houses. It is also limited to people who are the owners of dwelling houses. So, former owners of dwelling houses who had sold their property –

ELIAS CJ:
Sorry, what's the submission that you're making? That it's tailored to the cases that require some speedy and cheap mechanism?

MR RAINEY:

No, it's this Ma'am, it's that the – although the Act draws lines as to who may bring a claim, the Osbornes fit clearly within the four corners of the people that this Act is intended to help, yet for some reason they are not able to have access to the speedy and cost-effective procedures provided for in the Act and for resolving their claims, because of the interpretation built, that is being applied by the Court below. They still have a claim which they could bring in a Court, yet they're denied the opportunity or the option of having the claim dealt with under this Act because of interpretation, not because of any policy choice that Parliament made to – that there was something special about claims arising out of the code compliance certificates, which meant that those claims should not be dealt with in this Act. There is nothing in the Act in its text purpose or legislative history that supports that proposition and it isn't a proposition that my friends for the respondents and interveners advance either. There's nothing special about these claims which mean they should go to a Court and only to a Court. In my submission the Act is intended to provide assistance and as section 3 makes clear, the speedy flexible and cost-effective procedures for the assessment and resolution of claims relating to those buildings.

Now, this claim is a claim that is relating to the building and the effect of the interpretation below, notwithstanding the possibility of section 37, means that they will be denied the opportunity to access those speedy cost-effective procedures.

WILLIAM YOUNG J:

But other people obviously who have common law claims are excluded by section 14?

MR RAINEY:

They are, Sir, but as – my point is that where Parliament has done that, it has excluded them completely from accessing the Act through the adoption of eligibility criteria that excludes them clearly. So, for example, you've got to be the owner of the dwellinghouse.

WILLIAM YOUNG J:

Yes, but I mean a point against your appeal, has always seem to me to be that for some reason the Weathertight Homes Resolution Services legislation has been

drafted more narrowly than the corresponding principles of common law and that might support a view that the limitation period might be a bit tougher too.

MR RAINEY:
Correct, it might do, except that there's no real – there's nothing in the legislative history or the text or purpose of the Act that suggests Parliament saw the need to impose a special limitation period.

WILLIAM YOUNG J:
One that's fractionally smaller, shorter than the other one.

MR RAINEY:
And there doesn't seem to be any real justification in terms of the policy of the Act for doing that. The Act is intended to provide all people who have claims relating to the leaky buildings who meet the other criteria with access to the speeding cost-effective procedures and the interpretation below, even if they have still got some way of bringing a claim in the High Court because section 37 gives them a lifeboat that allows them to carry on. That is nevertheless inconsistent with the purposes of this Act, because they still don't have access to the speedy and cost-effective procedures provided for in this Act for resolving claims relating to the building.

And I know my learned friends place an awful lot of emphasis, in their submissions, on the speedy and the need for speed in terms of dealing with the Act, but it's the speedy resolution of claims relating to the leaky buildings, which is the purpose of the Act. It's not speed at all costs. It is to speedily resolve claims relating to the building. The interpretation below means not that you can't bring such claims arising out of the code compliance certificate, it merely directs them to the ordinary Courts, which we know Parliament has said it's not providing speedy and cost-effective means for resolving –

TIPPING J:
But it doesn't direct all code compliance certificate claims to the ordinary Court. It only directs them in these particular, rather narrow, circumstances, but you'd say by accident.

MR RAINEY:
By accident.

TIPPING J:
So you can't say it's directing all of them.

MR RAINEY:
It certainly doesn't make that policy choice to direct all of them to the Courts, correct.

GLAZEBROOK J:
So it is slightly odd that councils can be under the Weathertight Homes for the final inspection issues, code compliance issues where you're within the long-stop but somehow not where you've got this gap?

MR RAINEY:
That's my point.

GLAZEBROOK J:
So you say it's just a slightly odd – it may just be that they did it by mistake.

MR RAINEY:
Well, it's certainly – there is nothing in the legislative history to suggest that there was anything deliberate or that there was any understandable or cognisable policy reason for why they would view those claims as different and requiring resolution in the ordinary Courts and there alone.

TIPPING J:
Well, that's your best case. There's no logic in it, there's no policy reason for it, please fix it up by interpretation. Forgive me for putting it so colloquially, but that's it in a nutshell isn't it?

MR RAINEY:
Yes, and I supplement that by all of the points I made earlier by saying that there is no reason why this flexible term "built" cannot be interpreted when we look at the backdrop of the Building Act, no reason why "built" within 10 years can't be interpreted in context to encompass all of the steps associated with the construction of the building.

WILLIAM YOUNG J:

Well, you have a little bit of support because section 91(3) contemplates that the issue in code compliance certificate is building work?

MR RAINEY:

Yes, it does.

GLAZEBROOK J:

This isn't really a question for you, but from the council's point of view, why would you want to force people into the Courts rather than into this resolution? I suppose the only answer to that might be because if section 37 doesn't extend the limitation period then that means that you've not got a claim at all.

MR RAINEY:

That's right.

GLAZEBROOK J:

So that would be the only reason you would want to force people away from this, because I would've thought that this procedure is probably just as much to help the defendants as it is to help the claimants.

MR RAINEY:

That's right.

GLAZEBROOK J:

That's the idea behind it, because you get things sorted out quickly and in a better forum than going through the Courts. It would be – if you wish to avail yourself of it.

MR RAINEY:

If you wish to avail yourself of it and certainly the Weathertight Homes Tribunal is an effective body for resolving these claims quickly. It achieves its purpose and to that end I think it has helped both claimants and respondent parties including the council.

TIPPING J:

Is there a point, Mr Rainey, that if the code compliance certificate falls within the concept of building work, admittedly under the Building Act, it would be a little odd if the concept of "build" didn't also include code compliance certificate? And that may

be where the best linkage is between the Weathertight Homes Act and the Building Act?

MR RAINEY:
And I –

TIPPING J:
I'm saying no more than I think what you've effectively been saying, but I thought I'd just put it to you in that direct way.

MR RAINEY:
And I will adopt completely that as a next summary of our argument in terms of linking the two Acts together.

ELIAS CJ:
Well, I understand the force of that. I'm still left in some doubt about whether building work does include code compliance, because I don't understand why it's dealt with distinctly in section 91.

WILLIAM YOUNG J:
91(2) and 91(3).

ELIAS CJ:
91(3) maintains that distinction.

WILLIAM YOUNG J:
(2) only applies in relation to building work.

MR RAINEY:
Yes –

ELIAS CJ:
(2) doesn't refer to building –

WILLIAM YOUNG J:
Yes, it does.

ELIAS CJ:

I see, civil relating to any building work.

WILLIAM YOUNG J:

So (3) is a subset of (2).

MR RAINEY:

Yes, and it just makes clear that there isn't room to argue that the regulatory steps are somehow not caught by the 10 year long-stop.

GLAZEBROOK J:

And of course your argument in relation to section 91(1) is that that is specifically Limitation Act, which I must say when you said it before I didn't understand the significance of, but I think now I can see why you make that point, because you're saying that's Limitation Act and long-stop is actually (2) and (3) and for the (2) and (3) purposes building work does include the code compliance and any regulatory steps.

MR RAINEY:

Correct.

GLAZEBROOK J:

Was that the argument that I missed before?

MR RAINEY:

That was the one you missed before Ma'am.

GLAZEBROOK J:

Thank you.

MR RAINEY:

My fault for not making that sufficiently clear.

ELIAS CJ:

Well, she doesn't miss much.

MR RAINEY:

So, I did just want to finish by making a couple of observations regarding firstly the purpose of section 14 within the broad scheme and this is really to reinforce the earlier submissions I've made. I think that we are all clear that the function that section 14, the other eligibility criteria provide in the scheme of the Act, is to target the additional resources that are provided under the Act to the people that the Act was intended to help and to that end, I think once you understand that, then the purpose of section 14(a) becomes clear. Section 14(a) along with the other criteria are really intended within the scheme and structure of the Act, to filter out, at an early stage, those people who are not within the grouping of people that the Act is intended to help and 14(a) is intended really to operate as a filter to take out of the Act all claims that would clearly be time barred under the long-stop and that really it should've been interpreted in a way that any claim that arguably would fallout within the long-stop would pass through that filter and then be dealt with, whether or not the long-stop actually provided, applied or not, would be dealt with in the context of the adjudication by application of section 37.

So, the way the appellants view the interpretation below is that effectively the Court of Appeal has wrongly calibrated the filter that section 14(a) was intended to provide, that it has excluded some claims that are not time barred under the long-stop when Parliament intended it to operate only as a broad filter to take out those claims which clearly would be time barred under section 393 of the Building Act because the building work or the alterations clearly took place more than 10 years before the claim was brought.

So, in effect what has happened in the Courts below, is that they have adopted an overly rigorous application of section 14(a), which was not what Parliament intended when it adopted the word "built" or the alterations wording.

WILLIAM YOUNG J:

Can I just ask you a question relating to what would've happened if events panned out differently? Say the Chief Executive said, "Yes, this is an eligible claim."

MR RAINEY:

Yes.

WILLIAM YOUNG J:
There's no appeal.

MR RAINEY:
No.

WILLIAM YOUNG J:
The council would've had available whatever limitation defences were available but that's it.

MR RAINEY:
Yes.

WILLIAM YOUNG J:
Unless perhaps it issued judicial review proceedings?

MR RAINEY:
Correct, and that brings me to –

McGRATH J:
But isn't it the case that the respondent's submissions say there is a right of appeal?

MR RAINEY:
It is the case that they say that, with respect they're clearly wrong in my respectful submission, because the, and this is a point that I was intending to come to to address the question, but they're wrong because the decision on eligibility, which is initially made by the Chief Executive and can then be reviewed and then a decision is made by the person who holds the officer and chair of the Tribunal –

McGRATH J:
Yes.

MR RAINEY:
That does not make the eligibility decision a determination of the Tribunal, which is the only thing which can be appealed under section 93 of the Weathertight Homes Resolution Services Act.

WILLIAM YOUNG J:

Well, just pause there. I'm actually upstream of you, say the Chief Executive had said, "It's an eligible claim," there's no appeal from that decision at all?

MR RAINEY:

Correct.

WILLIAM YOUNG J:

There's no right of review of it, is that right?

MR RAINEY:

No. Except you can bring judicial review –

WILLIAM YOUNG J:

Yes.

ELIAS CJ:

Yes.

MR RAINEY:

A respondent who is affected by it can bring judicial review proceedings.

WILLIAM YOUNG J:

Yes, that's why I excluded that before, but there's no statutory right of review.

MR RAINEY:

Correct.

WILLIAM YOUNG J:

That the process of the Act is that it's simply something that is dealt with between the claimant and the Chief Executive?

MR RAINEY:

That is correct.

WILLIAM YOUNG J:

So absent judicial review, the respondent is required to, can only rely on the Limitation Act?

MR RAINEY:

That's correct. So, what I did want to just finish with in terms of the first question was why this matters, why it is something that should concern you. Now, obviously the reasons that it concerns my clients in this case are clear. If they are not able to – do not have an eligible claim, subject to the section 37 issue that we have discussed earlier, they would be denied the opportunity to litigate their otherwise timely claim against the council. We'll understand that. But more broadly, the two cases which have been decided subsequent to this, the *Osborne* decision in the Court of Appeal which are in the materials, in the authorities, these are the *Christchurch City Council v Attorney-General* [2013] NZHC 2447 (*Oorschot*) case which is at tab 6 and the *Auckland City Council* case which is at tab 3.

Now what both of these cases have to do with is this, this is exactly the situation that Justice Young, you raised, which is where the council, after commencement of adjudication proceedings under the Act, brings judicial review proceedings to challenge the eligibility decision on the basis that the physical construction took place earlier in time and the eligibility decision was wrong. Now, in both of these cases both of them were decided against the applicant counsel, one of the applicants in the *Jones* case which is at tab 3, was the council that is the first respondent here and the *Oorschot* decision, the applicant was the Christchurch City Council represented by Heaney & Partners, who are of course the solicitors for the Council in this case.

Both of them highlight, I think, a fundamental concern about the possibility of challenge through judicial review proceedings to the eligibility question. In effect, this process that was intended to be speedy and cost effective is now being subject to this –

WILLIAM YOUNG J:

The use of herniating satellite litigation, if I could double the metaphor.

MR RAINEY:

Correct. All because there is this distinction between the 10 year limit and the section 14 and the other eligibility provisions and the long-stop. Now, if there is a

way in which the two can be made the same, the council will never be better off. It will be clear for everyone and all of the satellite litigation over judicial review will be at an end. Certainly in those cases where there is a code compliance certificate issue, because in those cases the answer will be clear, unambiguous, it will be on the code compliance certificate. You will just look at the date on that certificate and if that date is within the 10 years, that will be it, and in my respectful submission, that is a very good reason to interpret the legislation as we had suggested, because that would bring an end to that.

Now, on question 2 –

ELIAS CJ:
Shall we take the adjournment now or is that convenient?

MR RAINEY:
That is convenient.

ELIAS CJ:
You'll be a few minutes on questions –

MR RAINEY:
I'll be a few minutes, but not that long.

ELIAS CJ:
Yes, all right, we'll take the adjournment.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.54 AM

MR RAINEY:
Now just briefly addressing the second issue on which leave to appeal was granted, the question of whether section 95 of the Act precludes relief being granted in this case. Upon receiving my friends for the Council's submissions, I confess to being somewhat confused by their first point which was that there was a right of appeal under section 93, from the decision of the Chair of the Tribunal reviewing the eligibility determination.

ELIAS CJ:

Sorry, where do we find this? I'm sorry, I was looking at the wrong one, sorry, yes, thank you.

MR RAINEY:

Now I had apprehended that their argument was that because there was a right to appeal under section 92 of that decision, which has not been exercised and it's common ground that we did not seek to appeal, that that meant there was no jurisdiction for the High Court to entertain the judicial review proceedings and us having gone down the wrong path, there was no ability to get relief. My friends tell me that that is not their position and that they accept there was jurisdiction to bring the judicial review proceedings and that the decision of the Chair was a reviewable decision and from there our argument is simply, well, if the decision which is the subject of the review was based on an error of law, we should ordinarily be entitled to relief in respect of that error and because that was not an appeal under section 93, section 95 does not restrict or constrain the granting of relief either in the High Court or the Court of Appeal or this Court.

More fundamentally, of course, the position that was taken by the council and by the Weathertight Homes Tribunal and the High Court in considering the Council's application to be removed as a party from the adjudication proceedings, that was the decision that was the subject of the appeal, which the Court of Appeal subsequently made clear we had no right to seek leave for further appeal to the Court. That decision was made on the basis that the eligibility decision was correct as a matter of law and that we had no right to go behind it in the removal application or in considering the appeal on the removal application and accordingly, that decision which was the subject of the appeal, was – and the restriction in section 95(2), that decision was made on the basis that the eligibility decision was correct. If it turns out that it is wrong, then we should be entitled to unwind the situation to have the correct eligibility decision substituted by a decision of the Chair of the Tribunal and we start again in the adjudication proceedings.

ELIAS CJ:

Is it? I haven't looked at the text of 95(2) properly, when reading the respondent's submissions, is it suggested that (2) itself excludes appeal or where does that come from?

WILLIAM YOUNG J:

In a nutshell, the argument is that the High Court decision on the removal decision is final under section 95(2)(a) and can't be the subject of appeal as the Court of Appeal has held and that you have tried to do a run around that by issuing judicial review proceedings of the upstream decision in relation to eligibility.

MR RAINEY:

That seems to be the nub of the argument.

McGRATH J:

Was this point taken in the High Court?

MR RAINEY:

No.

McGRATH J:

And how firmly was it taken in the Court of Appeal?

MR RAINEY:

It was not raised at all in anyone's written submissions, it was an issue that was raised by the Court of its own motion. It was a question directed to me at the end of the hearing when I was doing my reply submissions in the Court of Appeal and I provided an answer to the submissions or the question on the fly – it seems that I might have made a slight error in how I expressed myself, because the Court of Appeal records me as saying that the eligibility decision, there's no ability to review the eligibility decision made by the assessor, the Chief Executive and the Chair of the Tribunal. Now, of course the assessor does not make a decision on eligibility. It merely makes a statement that whether in the assessor's opinion the claim is eligible. If I said that I misspoke what I meant to say was that there was no ability to appeal or in the removal application, challenge the eligibility decision made by the Chief Executive or on review by the Chair of the Tribunal, but I certainly, and that certainly is the approach that the Tribunal has taken and this is recorded in Justice Lang's decision in the *Auckland City Council v Attorney-General* HC Auckland CIV-2009-404-1761, 24 November 2009 (*Garlick*) case at paragraph 31 of that decision, if you want to –

ELIAS CJ:

Sorry, what does that say?

MR RAINEY:

That says this and it's in the orange bundle –

ELIAS CJ:

Justice Young says quite rightly that this is a matter that could be dealt with in reply, but I'd quite like to have an indication of your position on it before then.

MR RAINEY:

Yes, well, our position is simply this, that there is no right to appeal under section 92, determination by the Chair of the Tribunal, what is able to be appealed under section 93 is a determination by the Tribunal, determination of the Tribunal means determination under sections 89, 90, 91 and 92 and that's a, effectively decision of the Tribunal after adjudication. That is all that can be appealed. There is no right of appeal against a decision of the Chair of the Tribunal in relation to eligibility. The only way to challenge that is by bringing judicial review proceedings and those judicial review proceedings are not caught by section 95(2).

TIPPING J:

Isn't your best case put simply in advance of whatever the other side say that absence some clear statement which the Court is always reluctant to see it in this way, the judicial review is not open. The judicial review is always open in relation to a person who's made an eligible – a decision that's amenable.

MR RAINEY:

Yes.

TIPPING J:

And I wouldn't have thought, with great respect, this business about it being final comes anywhere near it.

MR RAINEY:

And my friends even conceded that there is no privative clause in this Act.

TIPPING J:

No, well how is it then that –

MR RAINEY:

Which would exclude judicial review.

TIPPING J:

– you're barred from judicial review? I just don't understand what –

WILLIAM YOUNG J:

I think I know the answer to that. I think the answer is that there's a judgment in favour of the council on the removal of the council as a party that that judgment is a final and unable to be appealed and that these proceedings are and effectively a way around and therefore an abuse in relation to section 95(2). Not because you can't judicially review on eligibility decisions, but because you have in fact got a decision in favour of the council which you are trying to undermine.

MR RAINEY:

The answer to that is, of course, we aren't trying to undermine that decision at all, because that decision is predicated upon the only claim that can be adjudicated being the eligible claim which is the claim arising out of the further work that was done to the property and excluded any claim in relation to the original construction and so that's why we say there is no bar on relief. So, if there are no further questions, I'll reserve my time later for a reply.

ELIAS CJ:

Thank you Mr Rainey.

MS CLARK:

Your Honours, subject of course to the Court's view on this. I have discussed with counsel for the intervener, because I have come into the case late, I am uncertain of the role that the intervener has and whether it is intended to hear from the counsel for the Attorney-General and if it is, your Honours, I was going to suggest that the submissions from the intervener on the test of built might precede mine, because mine are essentially encapsulated in the interveners and I would only then address the Court on matters – I see that doesn't find favour with your –

ELIAS CJ:

Well, we don't normally necessarily hear the intervener. I had intended really, subject to direction from the bench, to simply ask Mr Andrews if he, having heard the argument, if there was anything additional that he wanted to add.

MS CLARK:

Thank you, your Honour –

ELIAS CJ:

But are you saying, Ms Clark, you're not in a position to argue the "built" point?

MS CLARK:

Not at all, not at all.

ELIAS CJ:

No, no, no.

MS CLARK:

And I will proceed to do that, if I could just take 10 seconds –

ELIAS CJ:

Yes, I think we would be assisted by hearing you first and then we'll be able to ask Mr Andrews if there's anything he wants to add and we may have some questions for him after we've heard all counsel.

MS CLARK:

Thank you your Honours. I'll just take – your Honours, before speaking to my written submissions, I would like to make this point, that the appellant's argument and position with respect to the interpretation of "built" depends on an analysis which is beyond, in my respectful submission, the legitimate scope of the – of a statutory interpretation approach. The arguments seek precise consistency with the Building Act, but in doing so, those arguments overlook the fundamentally different purpose of the Building Act 1991 and 2004 and the Weathertight Homes Resolution Services Act. It is clear in my submission that there was no legislative intent whatsoever to align section 14(a) with section 393, none of the very elaborate provisions of section 393 have been carried over to the eligibility criteria in section 14(a).

The consequence and the logic of the appellant's argument which depends and would commend to the Court a test relying, a test for "built" relying on the code compliance certificate, is that a dwelling will not be built, despite being constructed, in conformity with a building consent that was issued in respect of it, possibly for years and possibly not at all and I say that, your Honours, because as was recorded by his Honour Justice Woolford in the High Court decision, there are thousands of constructed homes out there, in respect of which no code compliance certificate has been issued.

WILLIAM YOUNG J:
But does that really matter? Because if you sue someone and you can't get within the limitation period, then it's tough luck and why should there be a different rule for the Weathertight Homes Resolution Services from that applied by the Court?

MS CLARK:
It matters for two reasons, your Honour, the first is that if the test is to be, if the limitation period is to run from the issue of a code compliance certificate and one does not exist, how can those home owners –

ELIAS CJ:
It doesn't run for all purposes.

WILLIAM YOUNG J:
It runs from the date of the error or remission and if the error or remission is the code compliance certificate, when it runs from, if the error or remission is something else, then it runs from there.

MS CLARK:
But Your Honour, the –

WILLIAM YOUNG J:
Sorry, I don't want to talk over you. I don't accept, for the moment anyway, that section 14 is a limitation period. I see it as an eligibility criteria.

MS CLARK:
It is, your Honour, a screening, it's a screening process.

WILLIAM YOUNG J:

Yes, so perhaps if we talk about limitation for limitation and screening or eligibility for –

MS CLARK:

That was going to be my second point, your Honour, if we are talking about alignment with the Building Act, then alignment in terms of the same 10 year limitation period, is understandable. If we're talking about alignment in the sense that building work and all that it encompasses under section 383, I'll just take out my statutory – there does not need to be alignment in respect of what "built" means for the purpose of accessing the Weathertight Homes Resolution processes and alignment with what building works means in the Building Act and that is why, at paragraph 5 of my submissions, I say that arguments that seek precise consistency overlook the fundamentally different purposes of the Act and where the Courts below have commented that there is an initial attractiveness about the consistency, that is not explained, but in my view, it is a reference simply to recognising that claims in respect of leaky buildings, take place in a broader context governed by the Building Acts.

TIPPING J:

If there are thousands of homes without CCCs and it was presumably then has to be deemed for the purposes of 14(a) that they haven't yet been built, then in respect of such a situation, you wouldn't fulfil the criterion in 14(a), would you?

MS CLARK:

Well, that's my point, your Honour, that is what –

TIPPING J

You're in a sort of a circular conundrum.

MS CLARK:

Well –

TIPPING J:

I just wanted to test whether I'd understand your point correctly because my brother Young rather suggested it wouldn't matter because you wouldn't always be suing on

the CCC, but it's not so much suing on the CCC, it is that you wouldn't yet have a house that would be built within the definition.

MS CLARK:

And you wouldn't therefore be able to access, you couldn't become an eligible claimant under this legislation.

TIPPING J:

No, you wouldn't have a claim.

ELIAS CJ:

Well you're eligible because you're excluded by 14(a). You can –

MS CLARK:

But you would be excluded, your Honour, if in applying 14(a) the determination –

WILLIAM YOUNG J:

House isn't finished –

MS CLARK:

The house is not built because there's no code compliance certificate.

WILLIAM YOUNG J:

That would be a slightly perverse –

ELIAS CJ:

Why are you excluded?

GLAZEBROOK J:

Does it have to be built before you can say it's leaky, is that –

TIPPING J:

Yes, 14(a) is one of the criteria to which you have to establish before you have a claim.

MS CLARK:

If the house is built and we are to judge the period, I'm sorry, I have phrased that rather unclearly. If the house is built, yes, we need to then look at the period at which it was built and if the purpose or the test runs from the issue of a code compliance certificate, then those claimants, all of those claimants are excluded, by the 10 year timeframe.

TIPPING J:

Well say the last nail goes in on the 31st of December 2011 but the CCC is not issued until the 31st of January 2012 –

GLAZEBROOK J:

Well even the final inspection doesn't occur.

TIPPING J:

Yes, but I'm being a little dramatic there, but that's been my worry all along. That's why I raised with Mr Rainey right at the very start about the fact that you have long delayed and sometimes absent CCCs.

MS CLARK:

All of which has the unintended and undesirable effect of essentially eliminating the 10 year period and it expands it into one which could be many, many years, for example –

TIPPING J:

Well it has an expansive effect and, in some cases, an exclusionary effect –

MS CLARK:

Exactly.

ELIAS CJ:

But if it's not a limitation provision and I thought we'd got to that point, but it's not a limitation provision itself, the limitation defence in section 91 puts paid to that. I'm not quite sure why for eligibility reasons the building work has to be complete. It – as long as you're not outside the period why can't you bring your claim? Why aren't you eligible?

WILLIAM YOUNG J:

But it would be a perverse interpretation in terms of section 14(a) that the worse job a builder did, the less complete the house was left, that the more ineligible the claim is for compensation.

ELIAS CJ:

More ineligible.

WILLIAM YOUNG J:

The more – the worse the building is –

GLAZEBROOK J:

Yes, yes.

WILLIAM YOUNG J:

Say, for instance, there are no flashings, well, you issue proceedings, "Oh, it wasn't finished because there are no flashings," well, therefore it's never been built and the alternative course to that is okay, we'll finish the flashings and then we'll see. So, I mean it's a sort of a slightly perverse argument, isn't it? You probably won't agree with that.

TIPPING J:

It's a literal argument, but it's a fairly awkward one to, you know, you're going to have degrees of having been built.

MS CLARK:

Well, we don't have degrees of having been built –

TIPPING J:

Well, I'm not saying that your argument involves that. Your argument is that until it's completed you're not eligible.

MS CLARK:

Until it's completed in – to the extent envisaged by the building consent and so, for example, as the decision –

WILLIAM YOUNG J:

Just pause there, what about a building without flashings?

MS CLARK:

Well, a building without flashings is likely not to be compliant with the building consent.

WILLIAM YOUNG J:

So it's never been built?

MS CLARK:

Well, it won't have a code compliance certificate under the 2004 Act.

WILLIAM YOUNG J:

So you can't sue. You can't issue proceedings under this Act?

MS CLARK:

If that was the test. Code compliance certificates have been denied in cases where and His Honour Justice Lang I believe touched on this, where quite simply the top of the railing in a stairwell needed to be replaced with something a little more substantial, there was no question that that building was not constructed and built at the time of the final inspection, that a code compliance certificate was not issued because of that minor defect and that's the trivial respect in respect of which the Court of Appeal said. It might amount to an exception to the test.

But there is a misconception, your Honours, that I wish to address. The misconception is this, that code compliance certificates will issue and will issue in a timely way, because that is required by the 2004 Act. The fact is that most of the buildings that come before the Resolution Service, have been constructed under the 1991 regime and that Act had no such requirement which is why there are many thousands of homes without code compliance certificates.

WILLIAM YOUNG J:

Can I ask you a general question about section 14? Wouldn't it be sensible, given its place in the process to construe it, as permitting claims to proceed if they cannot, on the preliminary examination that's possible under section 14, be excluded on limitation grounds and allow all other claims to go forward and to be tested, if

necessary, against the Limitation Act and the Building Act? So, you're just having a quick look at it, crikey, everything that had to be done to this house was done more than 10 years ago, it must be a claim, therefore which will be defeated by limitation, therefore it's not eligible. On the other hand, oh, well, it's possible some work was done after the limitation period, within the limitation period or perhaps there was an act or remission or whatever, therefore it's eligible, therefore the case can proceed on that basis.

I think if I was designing section 14, that's what I would try to do. I'm not sure that –

ELIAS CJ:
Well, I think it's capable of being read like that.

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
It's only not capable of being read like that if the building has to be completed before you can be admitted as eligible.

GLAZEBROOK J:
I must say I have difficulty as well with it all being linked to the final inspection even.

ELIAS CJ:
Yes.

GLAZEBROOK J:
Because the thing might be built, somebody might be living in it, somebody might even buy it without realising that it's not in accordance with the building consent, there's so many alterations that are made without building consents and so tying it to the regulatory functions seems to me to go against the function of the Act in any event. Doesn't "built" mean built as one would think of normally? And if somebody is living in it, then presumably they think it's built and especially if they don't know that it should have flashings, then –

MS CLARK:

That does seem to be an attractive comment – when it's inhabitable, when there is electricity running, when there are phone lines, when there is gates, but because the screening process is necessarily to be fairly simple and fairly speedy, those sorts of enquiries are going to possibly be time consuming and uncertain –

WILLIAM YOUNG J:

Why would you exclude? Why would you want to screen out claims that are within the limitation period?

MS CLARK:

I'm sorry, your Honour, I missed the –

WILLIAM YOUNG J:

Why would a designer of this system wish to screen out claims that are in fact within the limitation period?

MS CLARK:

The designer of the system is wanting to achieve two things. Resolution, resolution for the claimants but without prejudice to defendants who over time may not actually, after 10 years, be around –

ELIAS CJ:

That's the limitation policy.

WILLIAM YOUNG J:

That's a limitation period –

MS CLARK:

That's the limitation.

WILLIAM YOUNG J:

That's the limitation period, but why would a designer of a statute want to exclude some claims which are within the limitation period? Where the policy of the law generally is a claim that can proceed, why would you design a screening criterion that excludes claims like that? There's no reason is there?

MS CLARK:

Your Honour, there is no policy designed to exclude homes which come within the criteria, the policy –

WILLIAM YOUNG J:

No, no, why would you want criteria that exclude claims that are within the limitation period? Because your argument is that effectively some claims which are within the limitation period will not be eligible. Why would anyone want to design a system that has that outcome?

MS CLARK:

The claims that are within the limitation period will be eligible. It's calculating –

WILLIAM YOUNG J:

No, Mr and Mrs Osborne's claim is within limitation period when they commence it –

MS CLARK:

The limitation period in –

WILLIAM YOUNG J:

I'm talking about a limitation. I'm not talking about eligibility, no, I'm talking about the limitation and the Building Act. So, to be specific to them, their claim is within the Limitation Act when they lodge it with the – when they seek an assessor's report.

MS CLARK:

Yes.

WILLIAM YOUNG J:

Okay, on your argument, the affect of section 14 is that this claim, although within the limitation period, is to be excluded, that's right isn't it?

MS CLARK:

Yes, it is, your Honour.

WILLIAM YOUNG J:

All right, why would a designer of the system set out to put forward or come up with screening criteria which operate so as to exclude good claims?

MS CLARK:

It didn't screen and exclude the – it is not designed to exclude good claims. It's designed to respond only to those claims that come within the 14(a) eligibility criteria.

WILLIAM YOUNG J:

Yes, I understand that, but why would you want to have, design section 14 so that it excludes claims that are good in the sense of they're within the limitation period. I mean I've put this question to you three or four times. I don't think you've answered it actually.

MS CLARK:

Well, it's because I don't think there's a legislative design, your Honour.

WILLIAM YOUNG J:

So it's a mistake?

MS CLARK:

If the – I don't think it's a legislative design. There are good quid pro quos, this legislation is in some respects not particularly well drafted but in others it's clearly in response to a particular type of building. The legislation itself will be come unnecessary when constructions that were built before January 2012 but after 10 years, and the crisis and the phenomenon of leaky buildings has passed, this legislation will no longer be necessary. It is a response to a particular type of dwelling and as my friend said, it provides claimants – it doesn't – it provides claimants with a choice. They can take their proceedings to court that are not barred.

WILLIAM YOUNG J:

But why do you have the gap? Or do you just say it's in effect that the reasons don't matter and it's probably a mistake but it's the text governance. Because I suspect that probably is the argument, isn't it?

MS CLARK:

It's not just the text, your Honour, it's the text and purpose.

WILLIAM YOUNG J:

But what purpose is there? You know, please answer me in a sentence. What purpose is there in excluding claims on time grounds when they are within the limitation period?

MS CLARK:

The purpose is this. There will be strict application of the criteria if one wants to access the substantial benefits available under this legislative regime. If one does not wish to access those substantial benefits, the mediation, the less costly resolution, the fact that there can be a final determination in the District Court –

ELIAS CJ:

So it really is in answer to Justice Young, that it's a strict and literal interpretation of the eligibility criteria that you are contending for?

MS CLARK:

Yes, your Honour, if that is the answer to the question.

GLAZEBROOK J:

Can I – sorry –

WILLIAM YOUNG J:

Sorry, can I just – one last question. Why is the Weathertight Homes Resolution Services Act such a good thing for all parties in relation to claims virtually all claims but not in relation to some claims that are within the limitation period? What is it about the Osborne's claim that makes it less suitable for Weathertight Homes Resolution Services resolution than it would've been if it had been issued some months before?

MS CLARK:

I really am having trouble understanding your Honour's question.

WILLIAM YOUNG J:

Well, I'm just trying to understand if there's a policy about it. You say there are great benefits under the Act and therefore people who want to access these great benefits should do so in a particular way.

MS CLARK:

Well, I haven't described them necessarily as great, but they are certainly tangible and meaningful in the sense that a defendant, for example, at the very first step –

ELIAS CJ:

I'm sorry, could you just pause a moment? Madam Registrar, could you close the – you're a bit blinded aren't you?

TIPPING J:

I'd prefer to have a little bit of –

ELIAS CJ:

Yes, thank you, I'm sorry about that.

TIPPING J:

I don't wish to be illuminated to such an extent.

ELIAS CJ:

Illuminati.

TIPPING J:

Thank you Chief Justice.

MS CLARK:

Your Honour, I'm sorry if I haven't answered your question more readily, I've been impeded in my answer, because your Honour has framed it as legislative design, to the extent that it was a legislative design it is this, and that benefits accrue to those who enter the system who are eligible. The screening process itself is very claimant friendly. The only person who has any ability to provide any information in support of the claim is the claimant. The decision about eligibility will be informed only by information provided by the claimant, even if the claimant names "respondents" and there is no requirement to do that. There is no requirement, unlike Court proceedings, to identify those who are at fault. And in, in no respect is the adjudication process, if one gets that far, like a District Court or High Court hearing. Those are the benefits to the claimant which ultimately mean that it is a much less costly process. Therefore it is reasonable to for, for the, for the legislation to be construed as requiring eligibility to be strictly enforced.

ELIAS CJ:

Well it may be strict, but what is wrong with construing the eligibility requirements as Justice Young as suggested so that (a) is simply an exclusion of the claims which are outside the limitation period? Because the main criterion is that it's a dwellinghouse owned by the claimant. Why cannot (a) be simply construed to allow you to exclude those claims which are clearly outside the limitation period?

MS CLARK QC:

It needs to be a dwellinghouse, your Honour, because this is a response to a –

ELIAS CJ:

I'm not disagreeing with that.

MS CLARK QC:

Yes. It, it – because this is a legislative response to a type of dwellinghouse and the type of dwellinghouse that it responds to is one that will manifest its defects within a certain period of time and in a certain way. And therefore the beginning of that period, of what, what I referred to in my submissions as this period of gestation, of leakiness, has to commence at a time which is both reflects what is going on with that home, the way it performs, that it will start to show signs of weathertightness defects after around five to six years, there is evidence on that, that we need to therefore have a constructed completed home, and, and that needs to be the first part of the criteria, not simply that the claim, claims will be excluded because they are beyond the 10 year period.

GLAZEBROOK J:

Can I – I actually am now slightly worried about excluding claims before 1 January 2012 because either someone hasn't bothered getting a final inspection. So this idea that you have to have completed it in accordance with the building consent, because half of the reason it may be leaky is because you haven't finished it in terms of the building consent so you may have been living in there being rained down upon and suddenly you're excluded on the –

MS CLARK QC:

Your Honour, it's not –

GLAZEBROOK J:

– on the definition of "built" that you're actually wishing us to – because everyone seems to wish to be able to have a definition of "built" that has a certificate. So you're saying final completion certificate and they're saying code compliance certificate. But if somebody has been so slack and not got either of those then it's not built. And the poor people are stuck with, with no remedy under this Act.

MS CLARK QC:

The, the –

GLAZEBROOK J:

Is that the submission?

MS CLARK QC:

Well, did your Honour, did I hear your Honour suggest that 14(a) requires the claim to be filed before 1 January?

GLAZEBROOK J:

No, no, no.

MS CLARK QC:

Oh. That's fine.

GLAZEBROOK J:

It would require a certificate of some sort on either argument –

MS CLARK QC:

Yes.

GLAZEBROOK J:

– before it's built and I'm postulating a situation where you have somebody who doesn't get that certificate –

MS CLARK QC:

The –

GLAZEBROOK J:

– and yet manifestly somebody is living in an uncompleted building, say without flashings.

MS CLARK QC:

If there was evidence that it was completed then in my submission that...

GLAZEBROOK J:

Oh, so you say it's either the final completed certificate because that's an easy way of saying it's built?

MS CLARK QC:

That is what the Court has indicated.

GLAZEBROOK J:

Or alternatively if you can say it was built beforehand and either they didn't bother getting a final completed certificate or...

MS CLARK QC:

If it was built to the –

GLAZEBROOK J:

So – but on your argument that would still apply with the code compliance certificate?

MS CLARK QC:

Exactly your Honour. My argument does, does not –

GLAZEBROOK J:

So you're still eligible?

MS CLARK QC:

– exclude the code compliance certificate. My argument is not certificate based. The argument reflects –

GLAZEBROOK J:

Is built. Okay. That's, that's fine.

MS CLARK QC:

Yes. Yes.

McGRATH J:

It's evidence really, isn't it?

GLAZEBROOK J:

That's evidence is built rather than –

MS CLARK QC:

It's – yes. It may be.

McGRATH J:

And the Court of Appeal did actually acknowledge that I think.

MS CLARK QC:

It did, your Honour.

McGRATH J:

Yes. Yes.

MS CLARK QC:

Yes.

McGRATH J:

It said that in some cases you'll be able to establish –

MS CLARK QC:

Yes.

McGRATH J:

– that the dwellinghouse had been built prior to or even, I suppose, without –

GLAZEBROOK J:

Afterwards.

MS CLARK QC:
Exactly.

McGRATH J:
Yes. So –

MS CLARK QC:
And of course where a code compliance certificate is issued at around the same time then of course that's, that also can provide evidence.

WILLIAM YOUNG J:
So the point is that the certificates are evidentiary, not mandatory?

MS CLARK QC:
Yes, your Honour.

WILLIAM YOUNG J:
It's possible to, I mean it's possible to construe "built" as meaning the completion of everything material in respect of the building occurred before January 2012 and within 10 years. And so that means that the absence of the building certificate or whatever doesn't matter because you're really looking at what did happen, not what didn't happen. Look at –

MS CLARK QC:
Yes.

WILLIAM YOUNG J:
Look at the building, look at the building works, look at everything relating to it. Did it happen within a certain period? If it did it's okay. If not it's not okay, and then that brings us back to the debate as to what is the everything that has to happen –

MS CLARK QC:
Yes.

WILLIAM YOUNG J:
– to be "built".

TIPPING J:

I think it is helpful to insert in one's mind before "built", "relevantly".

WILLIAM YOUNG J:

Yes.

TIPPING J:

Because in the case of alterations it's specifically alterations giving rise to the claim and it's therefore the building that gives rise to the claim. It must logically be that. So you have implicitly it was relevantly built. Now that would allow you to focus on what it was that was the problem and say, "We can prove that occurred within the time.

WILLIAM YOUNG J:

Yes, what happened rather than what didn't happen.

MS CLARK QC:

Yes your Honour, and that also is, that aligns with the potential issues that arise in respect of alterations where no consent was given or was necessary and thus no certificate exists.

TIPPING J:

Now, if you can produce your CCC within time then obviously everything else will be within time. If you can't then simply production of a CCC may not get you home.

MS CLARK QC:

Well, no your Honour – that's exactly right.

TIPPING J:

Because it won't be evidentiary, necessarily –

MS CLARK QC:

Of, "built".

TIPPING J:

– of what was relevantly built and when.

MS CLARK QC:
That is right, your Honour.

TIPPING J:
That, I think, is really the best position for the respondents to take. We've tended to get, and skilfully portrayed by Mr Rainey, we've tended to sort of regard these certificates as mandatory, if you like, or as giving rise – as the only thing that you focus on.

MS CLARK QC:
Yes.

GLAZEBROOK J:
Well they certainly should be, but the worst offenders will not have.

TIPPING J:
Yes.

WILLIAM YOUNG J:
Well you may – sorry.

TIPPING J:
But it seems to me that the key point is this: it's can you say that a CCC within time automatically brings the claim within time? And I have difficulty with that.

MS CLARK QC:
No. You cannot say that your Honour. Because in many cases there are considerable delays.

TIPPING J:
That's been my worry in this case.

GLAZEBROOK J:
Well certainly if you have a –

ELIAS CJ:
But you'd say –

MS CLARK QC:
And –

GLAZEBROOK J:
– CCC before 1 January.

MS CLARK QC:
I'm sorry your...

GLAZEBROOK J:
If you had a CCC before 1 January 2012 then clearly it was built before 1 January 2012.

MS CLARK QC:
That's all that means.

GLAZEBROOK J:
Yes.

MS CLARK QC:
Yes your Honour.

GLAZEBROOK J:
But it doesn't say anything about the 10 years.

MS CLARK QC:
It doesn't.

WILLIAM YOUNG J:
But the relevantly built may actually help, I think perhaps helps the appellants as well because if you're looking at what has happened rather than what hasn't happened, the spectre of the unapplied for code compliance certificate or whatever, it doesn't matter because it's irrelevant. All you're looking at is the real building work that –

MS CLARK QC:
Yes.

WILLIAM YOUNG J:

– that happened and the question then is, on which the appeal turns, whether "building work" includes the issuing of certificates in relation to it or not. And I think it is simple as that.

TIPPING J:

Exactly. Exactly. And the difficulty is that if you say "building work" includes certificates then you're at some variance with the formulation in the Building Act which is in relation to building work. Certificate in relation to building work almost by definition isn't itself building work.

WILLIAM YOUNG J:

But so are – the Building Act also treats the work of the builders as being in relation to building work.

MS CLARK QC:

Well that's right, your Honour, and it's, there's simply no requirement, it doesn't need to be that complicated. The Building Act is elaborate and there are good reasons for that. This is not an –

ELIAS CJ:

This is an Act for laypeople to be able to understand as much as possible.

MS CLARK QC:

Yes, in respect of those laypersons' homes in respect of which, again, time is running. There is a latent –

ELIAS CJ:

But doesn't that suggest that "built" is not a technical term here? I mean it's not a...

MS CLARK:

It's a physical term, your Honour, especially when one reads it with all alterations were made to it, it's – whereas building works under the Building Act embodies or contemplates all of the regulatory steps around buildings, this does not.

TIPPING J:

Well, if a certificate is given outside the 10 years, then it may be building work, but it's not qualifying building work.

WILLIAM YOUNG J:

Within the 10 years, within the 10 years.

TIPPING J:

Sorry, within the 10 years. I'm just struggling to see –

MS CLARK:

We don't need building work, your Honour.

TIPPING J:

I'm with you to the point that with this relevantly built and so on, but I've moved to the point of is the issue of a certificate itself building work?

MS CLARK:

No, your Honour, it is not –

ELIAS CJ:

Does that mean –

MS CLARK:

No –

ELIAS CJ:

Does that mean that liability based on certification under the Building Act is not within the Weathertight Homes Resolution Services?

MS CLARK:

I don't think there is a bar to that kind of claim, providing, providing the building is a leaky building and the eligibility criteria are met.

TIPPING J:

If you claim on the basis of a regulatory step, on the basis that that regulatory step is building work, then it has to be within the period of 10 years backwards. I don't think it's that difficult.

MS CLARK:

Yes, yes, it does, your Honour.

TIPPING J

So the answer to the Chief Justice is, yes, it will be within the scope of the Act unless it's outside the eligibility criteria. Is that –

MS CLARK:

Yes, yes.

WILLIAM YOUNG J:

Can I just ask you, there was a reference I think in one of the judgments and I've lost it, to the pamphlet that explains to potential users of the services that the effects of the limitation stopping a provision –

MS CLARK:

In one of the *Osborne* judgments, your Honour.

WILLIAM YOUNG J:

Yes, it may have been in Justice Lang's judgment, that they've had to change the –

MS CLARK:

There was a reference to assessor's guidelines.

WILLIAM YOUNG J:

We don't have the material that's sort of put out to the public as to issuing, seeking an assessor's report and what happens when you do it and how that stops limitation.

MS CLARK:

Not on the case on appeal, your Honour, no.

WILLIAM YOUNG J:

You've got one?

MS CLARK:

There's a lot of information on the Department of Building and Housing website for the public.

WILLIAM YOUNG J:

Well now it presumably alerts people to this trap.

MS CLARK:

There's been a lot of publicity around exactly – around the need to move speedily, yes.

WILLIAM YOUNG J:

No, but around this particular trap.

ELIAS CJ:

"Built" –

WILLIAM YOUNG J:

The trap that the Osbornes, on your case, have fallen into, that's now – I refer – it's on the website, I take it?

MS CLARK:

I don't, I can't answer that question, your Honour.

WILLIAM YOUNG J:

And do you know if before that people – the website was saying apply and you stop limitation running?

MS CLARK:

I don't know the answer to that, but it is not necessarily – it isn't a trap, your Honour –

GLAZEBROOK J:

Well, it has been for the Osbornes because if they'd issued proceedings rather than asking for an assessor's report, then they would be having their case heard presumably about now, rather than being in the Supreme Court on a –

WILLIAM YOUNG J:

It has been for the Osbornes.

MS CLARK:

Well, just –

GLAZEBROOK J:

Subject to section 37, which we need to get to.

MS CLARK:

Well, your Honours, I reduced to a one-pager, approximately six pages of my submissions on the procedural history and I wonder if I could talk to that with your Honours having a copy of that in front of you, because it certainly helps clarify the confusion that has arisen over what the position is regarding appeals, judicial review and so on.

ELIAS CJ:

But are you onto that yet or are you still dealing with this question?

MS CLARK:

Well, it arises because of the suggestion that the Osbornes have fallen into a trap.

WILLIAM YOUNG J:

But can you deny they've fallen into a trap? If they'd issued proceedings instead of seeking an assessor's review, they wouldn't have limitation problems.

MS CLARK:

They issued proceedings, your Honour, on 24 March following the Chair's final determination in October 2008.

WILLIAM YOUNG J:

No, no, I'm talking about what happened in 2007, if instead of applying for an assessor's report which they might have expected would stop limitation, they had issued proceedings, the wouldn't have limitation period?

MS CLARK:

Well, that has been the case for many claimants, your Honour.

WILLIAM YOUNG J:

Yes, so that's the trap.

MS CLARK:

It means that they simply don't – they no longer have a choice, they bring their proceedings elsewhere.

WILLIAM YOUNG J:

But they can't because the limitation period has expired, that's the trap.

MS CLARK:

No, no, no, no, your Honour, it's only expired in terms of this provision. They're still able to –

WILLIAM YOUNG J:

No, they can't, because by the time that they're –

GLAZEBROOK J:

Well unless section 37 extends it.

WILLIAM YOUNG J:

Yes, unless 37 extends it, which you –

MS CLARK:

Which, in my view, is that provision exists for the benefit of payments. I don't have submissions on that, but that had been my understanding when I read it.

WILLIAM YOUNG J:

So is your position that they are entitled to sue in the Court and they don't have a limitation problem?

MS CLARK:

I haven't considered precisely the issue with regards to these appellants, your Honour, but my approach to section 37 was that it did not prejudice claimants who brought proceedings in the Tribunal, from bringing proceedings in the Court.

TIPPING J:

In other words, time stops running?

MS CLARK:

Yes.

GLAZEBROOK J:

Homeowners close to the 10 year limit can stop the clock by lodging a claim now, just on the building –

WILLIAM YOUNG J:

Well, if that's the case there's no trap, I agree.

GLAZEBROOK J:

Stop the clock, a 10 year limit –

WILLIAM YOUNG J:

But this can't really be what the Auckland Council wants because they've sort of got out of the frying pan but they're back in the fire.

GLAZEBROOK J:

Yes.

MS CLARK:

Sir, this isn't about being back in the fire, with respect, to these particular – this is about a point of principle and the approach to section 14(a) for other cases.

GLAZEBROOK J:

But why would the council not want to be within the Weathertight Homes Resolution where you get an assessor's report done for you, where you don't have to fiddle around with experts, why would the council want to be in Court rather than this process?

MS CLARK:

As it has turned out –

GLAZEBROOK J:

Well, no, even just leaving – whether it's turned out or not, why would a council as a matter of principle prefer to be in Court rather than under this proceeding?

MS CLARK:

It would not, your Honour, the council would only wish to be either before the Tribunal or before a Court –

GLAZEBROOK J:

But this way you're saying – the position of Mr and Mrs Osborne have to go before the Court and that means the Council has to go before the Court. I can see why the council would say, "Well, you're outside the limitation period and you can't go to Court," therefore it's good for the Council because they've got rid of a claim altogether. But I can't see why the Council would prefer to go to Court rather than this proceeding.

MS CLARK:

It wouldn't prefer to go to Court, your Honour, and that is not the choice that the council is making at a point when it's simply raising an objection to be a named party in proceedings before the Tribunal and that was the adjudication proceedings –

GLAZEBROOK J:

All I'm suggesting is –

MS CLARK:

– when they can only be brought if the claimant is eligible in the first place.

WILLIAM YOUNG J:

But what's the point of it though? I mean the case – what's the point of an argument that they should have to go to Court rather than before the Tribunal. I mean presumably the Council would be as happy to go before the Tribunal as a Court, possibly happier.

MS CLARK:

The Council only wish to be a named party to proceedings that are properly brought against the Council in the Tribunal that –

WILLIAM YOUNG J:

I sort of understand that, but there is a practical consideration here. I mean this case has come up through the system. The short answer to it was that the Osbornes should issue Court proceedings then, you know, it's a great pity that wasn't taken earlier, but has it ever been suggested by the Council that there's no limitation issue if they issued Court proceedings?

MS CLARK:

I don't think the – I don't understand that the issue has come up, your Honour.

WILLIAM YOUNG J:

Hasn't the assumption been throughout that the limitation period excludes a civil claim?

MS CLARK:

That's not the assumption. That was the agreed position but that was without any consideration of section 37.

ELIAS CJ:

Sorry, when you say that was the agreed position –

MS CLARK:

That position has been recorded in one of the judgements that parties accepted that limitations –

ELIAS CJ:

Can you give us that reference?

MS CLARK:

Yes, your Honour. It's not a contentious proposition, your Honour. The concern of the Osbornes is that they are time-barred and the Council acknowledge that that was the case, and that was recorded in – can I come back to your Honours with –

ELIAS CJ:

They are time-barred if not eligible.

MS CLARK QC:

Yes your Honour.

ELIAS CJ:

That is the basis on which everyone has proceeded.

MS CLARK QC:

Yes your Honour.

ELIAS CJ:

Yes.

MS CLARK QC:

And I, and I will find the recording of that position.

GLAZEBROOK J:

But without any consideration of what section 37 –

MS CLARK QC:

Yes.

GLAZEBROOK J:

– means.

MS CLARK QC:

Yes.

GLAZEBROOK J:

Or maybe a consideration but an acceptance of the High Court decision in another case. Which I'm not entirely sure whether the Justice Duffy case was actually trying to do something wider than merely deal with a leaky home claim. Because it may have been, some of her remarks sounded as though it might've been trying to deal with something wider –

MS CLARK QC:

Yes.

GLAZEBROOK J:

– than a leaky home, which of course one would've thought you could only deal with the leaky homes and it could only stop the run, the time running in respect of the relevant claim I think, as Justice Tipping has called it. Or the relevant building. I –

MS CLARK QC:

That, that –

GLAZEBROOK J:

I have to say I read it fairly quickly, her decision, so...

ELIAS CJ:

I wonder really whether we can go much further than this. The parties haven't argued it. The whole case has proceeded on this basis. From what you're saying – well are you saying that you're not really in a position to argue what the effect of section 37 is?

MS CLARK QC:

I have not turned my mind to it before the questions from your Honours to my friend. I would prefer –

ELIAS CJ:

Well you might reflect on that over the adjournment in case you can clarify the position. If you can't that's understandable but we may make further enquiry of you later.

WILLIAM YOUNG J:

I might just say I for myself, I'm not sure that section 37 can be parked because a very significant issue in the case, on my way of thinking, is whether there is a trap –

McGRATH J:

Mmm.

ELIAS CJ:

Mmm.

WILLIAM YOUNG J:

– of the kind postulated by the appellants. If there is a trap then that would make me somewhat bolder in my interpretation of section 14 than if there isn't a trap.

MS CLARK QC:

I understand that your Honour. And I, I wonder whether perhaps the Council may file further submissions on just that point.

ELIAS CJ:

Well what I think would be helpful is if you can reflect on it over the luncheon adjournment and perhaps take some instructions. If you can't get them because it's too rushed that's entirely understandable and we may need to make that further enquiry of you. That's what I was suggesting in fact.

MS CLARK QC:

Thank you your Honour. I will certainly do that.

GLAZEBROOK J:

Can I – being bolder on section 14 could, however, I think, as you were pointing out, actually exclude people. Because if in fact you need a code compliance certificate before 1 January 2012 in order for a house to be built, then that could exclude people who actually under the 1991 Act didn't even need a code compliance certificate. And so the practical view of "built" as in evidence means that you're not excluded because you came before 1 January 2012.

MS CLARK QC:

Yes your Honour. Is that –

GLAZEBROOK J:

Or it came after 1 January 2012.

WILLIAM YOUNG J:

Yes. Unless "built" means, "everything that has actually happened relevantly in relation to this building." So you worry about what has happened, code compliance certificates that were issued, things that did happen.

GLAZEBROOK J:

All right.

WILLIAM YOUNG J:

Don't worry about things that haven't happened.

GLAZEBROOK J:

I understand. I understand that submission.

TIPPING J:

Yes.

ELIAS CJ:

Well what is the 1, I've forgotten, what is the 1 January significance? What –

GLAZEBROOK J:

Well they changed Building Codes and matters of that kind didn't they?

MS CLARK QC:

Beyond that time houses are not, dwellings are not expected to display the same construction defects as leaky buildings, as –

TIPPING J:

Anything built after that date is out.

ELIAS CJ:

Oh. Sorry, yes, of course, yes. Yes.

TIPPING J:

I must say, the more one thinks about it the more, I think, the answer may lie in the fact that these, this certificates are in a sense a red herring. They may have evidentiary significance and if they are the subject matter of the claim then they will be of direct significance. But I can't see them as being preconditions.

MS CLARK QC:

They're not preconditions, your Honour, and I think –

TIPPING J:

So – I'm not disagreeing with you.

MS CLARK QC:

Yes.

TIPPING J:

Okay, I'm just saying that, and we'll need some further assistance from Mr Rainey on that.

MS CLARK QC:

Yes. your Honour, and, with respect, I completely agree with your Honour's proposition. They, they are useful indicators of –

TIPPING J:

Well they may have conclusive evidentiary force.

MS CLARK QC:

And they may have.

TIPPING J:

And they may have some evidentiary force. They may have no evidentiary force.

MS CLARK QC:

But to focus on the issue of the certificates as the time and the only time from which the 10 year period starts to run is simply incorrect. It's not required or mandated.

TIPPING J:

I thought you were actually adopting the Court of Appeal's view that this final inspection. But are you resiling from that slightly, Ms Clark?

MS CLARK QC:

No I'm not, your Honour.

TIPPING J:

I must have misunderstood.

MS CLARK QC:

I'm, I'm not.

McGRATH J:

I think it might help if you took us to the Court of Appeal. Because the Court of Appeal did have that qualification we discussed earlier.

MS CLARK QC:

I'm looking at, your Honour, tab 20.

GLAZEBROOK J:

Tab 20 of?

MS CLARK QC:

Of the case on appeal volume 1. Which is blue.

TIPPING J:

And it starts at paragraph 42 I think.

MS CLARK QC:

Well...

TIPPING J:

Or does it go, start earlier? On this point.

GLAZEBROOK J:

See, it still slightly worries me that it's completed to the extent required by the building consent even. Because the less it's actually in conjunction with the building consent may actually mean that it's more likely to be leaky and one would actually expect that you would be able to come within it. So I know the Court of Appeal didn't make it quite so definite as being the building consent, the final inspection itself, it does imply that everything's been done properly. Whereas – and of course with many of these leaky buildings everything was done properly in the sense of complying with all of the steps. But one doesn't want to exclude from consideration those where they just didn't comply with the steps because that would mean that the council has not got responsibility for it but the builder certainly would have. Or the architect depending upon...

MS CLARK QC:

I understand, I understand what your Honour is saying. Not complying with all the steps may, may be, for example, not complying with the way in which the, the flashings are present. The construction appears to be in accordance but it isn't apparent that it hasn't been done to a proper standard. So I understand what your Honour is saying. But nevertheless, as the Court of Appeal said, the –

ELIAS CJ:

Where are we in the Court of Appeal judgment?

MS CLARK QC:

I'm looking at paragraph 48 on page 171. And this is just in respect of the argument that there should be alignment with the Building Acts. Following from 47, "we do see merit in the view that a dwellinghouse should be regarded as built when it is completed to the extent required by the building consent" because "That point is a significant milestone in the construction process and coincides with statutory obligations under the Building Acts." Now "an owner is obliged to apply for a" certificate "as soon as practicable".

TIPPING J:

I think the difficulty with this is that this appears to be mandatory. Whereas in fact it is a possible way of demonstrating something has been built within time, but it should not be the sole way of demonstrating for the purposes of the Act that it's been built within time.

WILLIAM YOUNG J:

Yes.

MS CLARK QC:

Well, the, the Court, I think, I – your, your Honour is correct and at paragraph 52 the Court of Appeal's conclusion really touches on that.

TIPPING J:

Does it?

MS CLARK QC:

That a house will be "built" "when it has been completed to the extent required". There's no reference to a certificate.

WILLIAM YOUNG J:

But why – isn't it all far too complex? Why don't we just say, "When was this structure that's there built?"

TIPPING J:

Yes.

WILLIAM YOUNG J:

Don't worry about what didn't happen. Don't worry about whether the flashings weren't on. And then you don't have to worry about whether, think about what didn't happen. And then as a subset, going back to what I think is the real question in the case, does the concept "built" include certification? Now that's a separate issue but why do we have to worry about when inspections occurred and all of this other stuff?

MS CLARK QC:

The –

WILLIAM YOUNG J:

Perhaps –

MS CLARK QC:

The –

WILLIAM YOUNG J:
Particularly if they didn't.

TIPPING J:
Yes, quite.

MS CLARK QC:
Another concern, your Honour, is –

GLAZEBROOK J:
Yes. So somebody's living in this thing and has been for 10 years without, without anything having occurred.

MS CLARK QC:
The, the real concern is when your Honour suggests that the question might be, "When was this structure built?" it needs to be a structure that if performing –

WILLIAM YOUNG J:
Why? But was that –

MS CLARK QC:
– as, as a leaky, as a leaky building.

WILLIAM YOUNG J:
But why? I mean that's –

MS CLARK QC:
Because that's what this Act responds to.

WILLIAM YOUNG J:
Yes, but that comes down to, that's a separate criterion. What –

ELIAS CJ:
It needs to be leaking.

MS CLARK QC:

It needs to be one that, that is in the –

WILLIAM YOUNG J:

Built well enough to leak?

MS CLARK QC:

– that is in the, in the process, that is in the process of experiencing weathertightness defects which will manifest at some point, usually around six years after construction, which is why the construction point. So it's not – people may be content to live in a, in a construction which is simply enclosed.

WILLIAM YOUNG J:

But –

MS CLARK QC:

It won't yet be manifesting, it won't yet –

WILLIAM YOUNG J:

But it may be built though. It's still built.

MS CLARK QC:

But, but, your Honour –

WILLIAM YOUNG J:

It's still sitting there on the ground.

MS CLARK QC:

– the, the leaky building has the, has the particular defect of the ingress, if I can use that word, of water permeating the building. If it isn't constructed in a way where, that that has even been able to start –

WILLIAM YOUNG J:

Well, no, I think all that's obvious. But –

MS CLARK QC:

– it's not a leaky building.

WILLIAM YOUNG J:

But that's all obvious though. What I'm just suggesting is that we look at what has happened rather than what hasn't happened.

MS CLARK QC:

Yes.

WILLIAM YOUNG J:

Decide – look at the situation as it is, decide where, when was it that everything material to the structure as it exists concluded.

TIPPING J:

Everything material to the problem.

WILLIAM YOUNG J:

Yes. Well I mean –

MS CLARK QC:

Yes. It has to be also material to the problem.

TIPPING J:

Yes, well, I think the two will normally march together but I think that may in part be the answer to my brother's point, that, or in sympathy with my brother's point, that the thing may be built but all sorts of things, some things have yet to be done that are irrelevant –

MS CLARK QC:

Yes.

TIPPING J:

To the issue that is causing the problem, the leak. Now, surely that can't be...

MS CLARK QC:

Exactly, your Honour. And that is why – and those irrelevant aspects may be the reason why a code compliance certificate is not yet issued.

TIPPING J:

Yes.

GLAZEBROOK J:

Well it may be the reason why a final inspection certificate's not given, because...

TIPPING J:

Mmm. I think if we read in –

MS CLARK QC:

Yes.

TIPPING J:

– "relevantly built", without trying to beat my own drum, then we've captured it.

ELIAS CJ:

Well "relevantly built" then ties back into the Building Act limitation provision, which is an act or omission, doesn't it?

GLAZEBROOK J:

Well –

ELIAS CJ:

So why is section 14 in terms of eligibility not simply a quick way of excluding those that are outside the limitation period? Think about it perhaps. We'll take an adjournment now.

MS CLARK QC:

Yes. I, I would like to give your, your Honour a very precise response to that question, which has been asked many times.

McGRATH J:

Ms Clark, I'd be interested to know from the – in paragraph – how your argument stands with paragraph 52 and the exceptions being contemplated there. Perhaps you could let us know that after lunch.

MS CLARK QC:

Yes. Yes I will your Honour.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.16 PM

MS CLARK:

I would wish to, before I answer the three questions I have been asked, the opportunity to provide the context for those answers by going to two decisions which are completely relevant to this appeal, and they are the Court of Appeal decision, under appeal, of course, but also the decision of his Honour Justice Lang in *Garlick*, which was the genesis for the *Osborne v Auckland City Council* HC Auckland CIV-2010-404-006582, 9 September 2011 and *Osborne v Auckland Council* [2013] 3 NZLR 182 (CA) decisions. I do not seek in any way to evade the question.

ELIAS CJ:

No. In fact, it would be helpful to have that context.

MS CLARK:

Thank you, your Honours. If your Honours could take up the orange bundle volume 2 at tab 2, this is a decision of the High Court on an application for judicial review by the council of the Tribunal's eligibility decision. The panel had erred, the Judge ultimately found, in its approach to eligibility, and if I could ask your Honours to turn straight to page 32 at paragraph 60, the Judge is referring to the affidavit of Mr Allan, who was one of the Tribunal panel members. The extract from paragraph 24 of the affidavit two lines down says, "At this time, I would err on the side of the claimant," and half way down that extract from his affidavit, "I clearly expected the issue of the built date to be further explored through the process to follow, that is, once the claim was determined to be eligible the claimant would have access to the mediation and adjudication services under the Act. I would not have considered it appropriate to rule it ineligible where there was a legitimate argument that it was, in fact, eligible. I expected any information subsequently made available would be made available in any mediation or adjudication under the Act." Then, your Honours, if you could turn to page 34, the top of 34 has an extract from the affidavit of the other panellist. His paragraph 29, which is the last inserted quote, "I was aware that the critical date for eligibility was 12 October 1995." Then the last sentence of that, "I assumed this

would be presented as part of the substantive case before the Weathertight Homes Tribunal." So the panel allowed the claim to proceed even though it was likely out of time because it understood it could be sorted out in the actual adjudication process. His Honour Justice Lang said that it was an incorrect approach over at page 35 paragraph 64. His Honour says half way down, "Section 7(2)" – the predecessor to section 14 – "required Mr Allan to form an opinion as to whether or not the claim was eligible. He could not determine that issue by concluding that there was a legitimate argument that it was eligible. He needed to reach his own conclusion that the house had been built within the 10 year timeframe." The next paragraph, this really contains the proposition that it's for the claimant to establish eligibility. Then I go over to –

GLAZEBROOK J:
This is at the second stage, is it, of adjudication?

MS CLARK:
This is judicial review of the eligibility decision.

WILLIAM YOUNG J:
That's under the old Act, isn't it? We don't have a panel now.

MS CLARK:
That's right. Yes. And the Judge considered that the errors in the approach amounted to errors of law and rendered the panel's decision amenable to review. But the point that I – that might have been an end to the matter, but at paragraph 77 his Honour notes that he cannot remit the matter back for determination on eligibility because that Act has now been repealed. The provisions no longer exist and for that reason he now must determine – he must himself conclude the issue of eligibility, and that is what he proceeds to do.

At paragraph 78, "I consider that it is appropriate as a first step in considering the issue of relief to revisit the decision. I now will form my own opinion as to whether or not the house was built prior to or after 12 October 1995," and that is what his Honour proceeds to do, and if I could just go through a couple of the steps which we then find carried over into all of the decisions subsequently, including the Court of Appeal decision under appeal, at paragraph 80, "Self-evidently, the Act does not define the point at which a house is to be regarded as built for the purposes of

section 7(2) and that issue has not yet been the subject of judicial consideration by this Court. It is therefore necessary to approach the issue from first principles." Down at paragraph 83, his Honour had the benefit of many affidavits from experts within the industry regarding the point at which they believed a house can be properly regarded or described as having been built." Some, he notes, favoured reliance on the date when a final inspection is sought or a code compliance certificate is sought.

Then over to page 41 at paragraph 88, his Honour refers to the Department of Building and Housing guidelines to assist evaluation panels and considered and drew some assistance from those guidelines into the test, which he eventually – sorry, when he formulated the test. A house, "A dwelling house will generally be ready for occupation when it is" – and I'm quoting from almost half way down paragraph 88 – "functional to the extent necessary for it to be occupied."

At paragraph 89, "Perhaps the most important advice that the guidelines provide is contained in the final paragraph, which is as follows. This type of information should not generally be regarded as conclusive evidence that a dwelling house was built on a certain day." By "this type of information" the Judge is referring to building consents, dates and records of building inspections, code compliance certificates, certificates of completion for contractors, records of payment, and so on. "When a dwelling house has been built or subject to the alterations to give rise to the claim is a matter for the panel's judgement on all of the information available to it. The guidelines provide practical, useful, and sensible assistance but they cannot and are not intended to supplant the exercise of the judgement of those who must determine eligibility." That's from paragraph 90.

The Judge at paragraph 91, top of page 42, considered, "A house is to be regarded as having been built for the purposes of section 14(a) when it has been completed to the extent required by the building consent." At that point, I'm referring your Honours to section 43 of the 1991 Act and I must correct a submission that I made before the lunch adjournment. I indicated to the Court that there was no requirement to apply for a code compliance certificate, thus thousands of houses had been built and certificates do not exist. That is not the case. There was a requirement. It simply was not enforced, and that is why we have that situation.

Paragraphs 92 to 94, what the Court of Appeal in the decision under appeal regarded as stating the preferred approach. I'm reading from the last half of 92, "A dwelling

house may also be regarded as having been built for the purposes of section 14(a) when the construction process has been completed to the extent required by the building consent in respect of that work. Under this test, the owner will need to have completed all work prescribed by the plans and specifications in relation to the physical construction of the house."

94, "I accept that very minor omissions or deviations from the plans and specifications should not operate to prevent a house from being regarded as having been built. Where they are sufficient to result in a house failing its final inspection, I consider they will have that effect." Then his Honour gives an example of paintwork, which might be thought to be unimportant, as sometimes being a part of construction and therefore properly regarded as forming part of the construction work.

In this case, his Honour referred to the final inspection notes at paragraph 99. The house failed the final inspection on six grounds. Those six are set out in paragraph 100. At paragraph 101, his Honour considered that at least some of the defects would have had to have been corrected in order for the house to have been regarded as built.

Your Honours, what I would like to do now is take up the Court of Appeal decision at tab 20 of the blue folder, the case on appeal. The Court of Appeal was deciding two appeals. One was allowed and one was dismissed. The *Sharko v Weathertight Homes Tribunal* HC Auckland CIV-2011-404-3968, 7 October 2011 appeal involved the issue of a code compliance certificate two years after inspection, but applying the test that was first formulated by Justice Lang, the Court of Appeal considered that the *Sharko* homeowners met the eligibility criteria but the Osbornes did not.

Paragraph 52 was the conclusion I took your Honours to just before lunch. A house will be built for the purposes of section 14(a) when it has been completed to the extent required by the building consent issued in respect of that work. In all but exceptional cases the point will be reached when the dwelling house 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 the purposes of the eligibility provision. At that point, your Honour Justice McGrath, I believe, asked me if I could give an example of a situation where there may be a failure in a trivial sense.

There was one such failure which was in the judgment of *Auckland Council v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 1108 (*Jones*), a decision of her Honour Justice Katz. I won't take your Honours to it. It's at tab 3. That home failed its final inspection because of a handrail defect. Her Honour considered that that was exactly the kind of trivial way in which an inspection might be failed and yet the house was nevertheless built in terms of section 14(a).

But other examples, your Honour, really are if a hot water cylinder has not been strapped down, if a pool fence gate, for example, does not have a spring back. Those sorts of trivial –

GLAZEBROOK J:
What do you actually think the significance of "built" is? I can understand eligibility criteria here, but the 10 years limitation period in long-stop under the Building Act, won't have anything to do with when the building was built. It has to do with when the acts or omissions that are the subject to the claim apply. Now, either that applies under here or it doesn't, so you're not suggesting, are you, that because something might've been built, because it failed its final inspection because of some quite major things that had absolutely nothing to do with it being leaky, that you extend the limitation period under the long-stop provision in the Building Act, are you?

MS CLARK:
No, your Honour, I –

GLAZEBROOK J:
In which case, why on earth are we worrying about the section 14 in that way?

MS CLARK:
The, the – any aspect of the construction affects the –

GLAZEBROOK J:
And why are we perhaps getting rid of – because what we've got is 1 January 2012. Well, what's say it failed its final inspection on the 31st of December in respect of things that had absolutely nothing, whatsoever? Major, but had absolutely nothing whatsoever to do with it being a leaky building. Why would those people be ineligible to use this procedure?

MS CLARK:

If, if –

GLAZEBROOK J:

Quite clearly not finished, because the – and quite clearly didn't meet the criteria, but with absolutely nothing to do with the reason it's leaky.

MS CLARK:

Yes, and in that regard, trivial may be seen as perhaps rather than trivial, because some of those matters may be very major, they could have to do with the grounds or retaining walls, so they're not trivial in themselves. I would answer your Honour's question by saying that aspects of a construction which impact on or have to do with the performance of the building will be matters that will have to have been completed before it can be said –

WILLIAM YOUNG J:

I would have thought a better word would "irrelevant" than "trivial."

MS CLARK:

We can understand what – yes, your Honour, in that context, yes, in a relevant way.

TIPPING J:

I think this is what Justice Glazebrook is inviting you to address, unless I'm mistaken.

GLAZEBROOK J:

Well, it's basically I can't see why you're going to get rid of people under this, in terms of eligibility, when in fact there's a long-stop provision that's going to get rid of claims that are 10 years after the Act, or the relevant act or omission.

MS CLARK:

Yes, and relevant would –

GLAZEBROOK J:

But we're already reading in whole piles of stuff there then.

MS CLARK:

I'm sorry, your Honour?

GLAZEBROOK J:

Well, it's just I've never really understood why it's anything to do with the building consent, because in some of these cases you won't even have building consents. Usually with alterations, frankly, people don't get building consents. That's the whole problem with alterations.

MS CLARK:

Yes.

TIPPING J:

You seem to be shying away from an argument that's being fed to you. Maybe I'm anticipating you wrongly, Ms Clark. It may be that there's a flaw in it which you're about to expose.

MS CLARK:

I don't shy, your Honour, I do accept that the exception formulated as it is, in paragraph 52 of the Court of Appeal judgment, is probably unhelpful. It doesn't really deal with the kinds of situations that her Honour Justice Glazebrook is raising.

TIPPING J:

Could I ask you very bluntly, to state in a sentence or two, what your submission is as to the proper meaning of the word "built."

MS CLARK:

I certainly don't –

TIPPING J:

Because at the moment it's my fault that I'm confused.

MS CLARK:

I certainly don't resile from the test which is proposed in section 52, that it will be built for the purposes of section 14(a) when it has been completed.

WILLIAM YOUNG J:

But say it hasn't been completed? Can't it be built to the point to which it's reached?

GLAZEBROOK J:

Well, what I actually –

MS CLARK:

For the purposes of?

GLAZEBROOK J:

What I think, in terms of that land, it was completed to the stage that somebody has a physical presence in it, so wherever we had it – it will generally be ready for occupation when it is functional to the extent necessary for it to be occupied.

MS CLARK:

Yes.

GLAZEBROOK J:

So it's built when it is functional to the extent necessary for it to be occupied. Question of fact can be evidenced by matters such as a code compliance certificate or a final inspection or a certificate of an architect or the fact that you've turned on the electricity and the power and the water and someone is living in it.

MS CLARK:

Yes, I – in those circumstances, one could say that the building has been physically constructed, it's habitable and it's difficult to see why time doesn't start when I talked to it earlier about the gestation period of a leaky building, why that isn't the beginning of that period.

WILLIAM YOUNG J:

But it isn't under the Limitation Act.

MS CLARK:

That's a different issue, your Honour.

WILLIAM YOUNG J:

Well you said times begins to run, it sort of made me think it was the same issue –

MS CLARK:
Well, I suppose –

GLAZEBROOK J:
Well, it is a screening, the time runs in terms of the screening.

MS CLARK:
The limitation, the limitation defences, if that is what Your Honour is referring to, will still be raised and run, but times run back from the date the time – it had – the building had to be physically constructed within a period of 10 years from the day before the claim was filed.

TIPPING J:
I think part of the problem is that the word "built" is being assumed to mean completed and I do not think it necessarily means that. I think it means "built" in the sense of the work, the act or omission constituting building work that is the subject of the problem, the leak, has been effected or has occurred. You don't seem to be wanting to adopt that proposition. There may be very good reason why you're not.

MS CLARK:
There is not a good reason, your Honour, I think that is –

ELIAS CJ:
Well, except that you're arguing, you're arguing that Justice Lang's approach about habitability is correct.

MS CLARK:
In content – in wishing to uphold the Court of Appeal decision, I suppose I have been a little inflexible in aligning my submissions with its test, but it seems to me that the kinds of tests and examples that have been proposed from the bench are completely consistent with the purpose of the Act and the purpose of the section 14(a) eligibility criteria.

ELIAS CJ:
Which test are you talking about there? Because Justice Glazebrook has spoken about habitability.

MS CLARK:
Of habitability.

ELIAS CJ:
And I understand Justice Tipping to be putting to you the material act or omission.

GLAZEBROOK J:
And I think Justice Young, just to complete that, may have been saying that "built" can also include matters such as code compliance certificates and analogise to what happens on section 91(2) and (3) of the Building Act. As long as I'm not putting words in –

WILLIAM YOUNG J:
Yes, no, I'll tell you what I'm inclined to think, that "built" in –

ELIAS CJ:
I'm sorry to do this, but I just really wondered whether on the bench we might put the questions to counsel, because it's getting extremely diffuse and she's not getting a fair opportunity to respond.

WILLIAM YOUNG J:
It seems to me that "built" is a reference to when the building work that is in place, was finished. It's as simple as that. Secondly, not so fortunately from your point of view, I'm inclined to think that building work, given section 91(2) and (3) encompasses certification of building work.

MS CLARK:
Building work does, Your Honour, but building work is not the term used in section 14(a) and that cannot be ignored in my respectful view. There have been two pieces of Weathertight Home legislation, two opportunities for Parliament to have enacted an eligibility provision which mirrors or draws on the building works definition in the Building Act, it did not do so and it did not do so for reasons which are canvassed in the written submissions and the submissions of the –

GLAZEBROOK J:

There's no suggestion that it knew that there was this problem in this possible gap when it re-enacted the same provision as that. So, there's no – and we still haven't really had a reason why it might've left a gap.

MS CLARK:

Two responses, your Honour. You're clearly – this really demands or invites a submission on section 37 and in that regard –

GLAZEBROOK J:

No, I don't think it does. Leaving that aside –

MS CLARK:

Leaving that to one side.

GLAZEBROOK J:

It was just a – that this problem seems to have arisen after the re-enactment, not before, so Parliament didn't say, "Ah, we know there's this problem, but we don't care, we're going to re-enact exactly the same provision." That was the first proposition.

MS CLARK:

Your Honour, what problem is your Honour referring to?

GLAZEBROOK J:

Well, the Mr and Mrs Osborne problem.

MS CLARK:

Mr and Mrs Osborne are in the same position as the Sharko Trust, the *Sharko* litigants, there is a different outcome because of the application of the test. There is no particular problem for applicants who are on notice to get there, on notice I understand because this is very well publicised on the website to, if they suspect a leaky issue is the –

GLAZEBROOK J:

Well, it's not very well publicised on the issue, because the website actually says if you get your assessor's claim in, it stops the clock. It now said that because I've just looked at it now.

MS CLARK:

I was operating on the understanding that that's what the website did, your Honour, I apologise if that is incorrect.

GLAZEBROOK J:

Well, all I can say is that if you look at it, it says, "Put in your claim and it stops the clock," and then it repeats some sort of stuff about what stops the clock but not in any way that says, "And if you don't come outside of that you've got to immediately get your..."

MS CLARK:

Mr and Mrs Osborne were first put on notice in –

GLAZEBROOK J:

Well, all I'm just – have I got the timing wrong? When they re-enacted section 14, did they know about the Osborne problem and then said, "We don't care, we're re-enacting it anyway," Parliament?

MS CLARK:

No, your Honour, that isn't what happened. The reason for the –

GLAZEBROOK J:

Well, then the fact that they've re-enacted exactly the same provision doesn't mean that they decided consciously that they didn't care about the Osborne issue, does it? That was the only point I was making.

MS CLARK:

We're only at odds, your Honour, because where you refer to the Osborne problem and Osborne issue, my response is they, like any other claimant, were simply obliged to make their claim earlier and then there wouldn't be an issue.

WILLIAM YOUNG J:

Yes, but Ms Clark, that's not what we're talking about. You must know what we're talking about, that the problem is that they issue proceedings, issue a claim under the legislation, which on the face of it, stops time running, but in your interpretation and leaving aside section 77, although in time for the purposes of the Limitation Act, it's out of time for the purpose of eligibility. So, they are lured if section 37 means what Justice Duffy thinks it means into a false sense of security and they allow the time to tick over and they get the statute-barred, that's the problem.

Now, if section 37 doesn't mean what Justice Duffy thinks it means, then it's a bit of a problem but it's not such a big problem.

MS CLARK:

Well, we are back to section 37, Your Honour, and the trap, which is what I have been trying to resist and I do not have instructions on section 37, it has arisen for the first time in the proceedings today.

GLAZEBROOK J:

But I think your submission was, Parliament meant to do this, it re-enacted it. All I was saying was you could only make that as a submission if in fact Parliament knew there was this problem and then consciously decided it didn't care about it.

MS CLARK:

I don't accept that, your Honour, when you say Parliament knew about this and nevertheless re-enacted, you're referring to the gap that litigants, such as the Osbornes have fallen into. Is that what your Honour refers to by you about this?

GLAZEBROOK J:

Well, I might've misunderstood you. You just said that there was a conscious re-enactment of this and this therefore means that that's what Parliament wanted to do.

MS CLARK:

What I was saying your Honour was that Parliament re-enacting the eligibility criteria in exactly the same form that it was enacted in 2002 and what I was saying that it had the opportunity at that point to incorporate the references that are – that we find in the Building Act to building works, which is very, very broad. It includes not just building but all of the regulatory steps surrounding building. That was what I was

referring to, your Honour, when I said Parliament chose to re-enact it in the same way. It's not aligned.

GLAZEBROOK J:
Well I'm not sure actually building works does do that, but anyway I understand the submission.

MS CLARK:
The question that the Chief Justice asked me before lunch, I hope I remembered it correctly, it wasn't written down.

ELIAS CJ:
Well, I certainly haven't.

MS CLARK:
This is the question that I was proposing to answer, your Honour.

ELIAS CJ:
Yes, yes.

MS CLARK:
Why can section 14(a) not be approached simply as a provision which excludes claims in respect of dwellings built more than 10 years ago. In other words, just forget all the references –

ELIAS CJ:
Well I meant excludes those which are barred by the limitation provision.

MS CLARK:
All right, barred by – so one would approach, your Honour is asking why we don't just approach section 14(a) as one that excludes claims that are out of time?

ELIAS CJ:
Yes.

MS CLARK QC:
And my response to that is that...

... that excludes claims that are out of time?

WILLIAM YOUNG J:
Yes.

MS CLARK QC:
And my response to that is that that approach to section 14 would see it as a provision whose primary purpose is to exclude claims and not section 14's primary or only purpose. It has an inclusory function. The claimants have an onus to bring themselves within the eligibility criteria and they do that without reference to any other party and they do it in this claimant friendly environment where they have the only say about their understanding of their eligibility. The point really is we need to be able to calculate with some degree of certainty whether the period of 10 years within which the dwelling has been built begins to run and the analysis around whether a dwelling has been built is aimed to fix that period, the beginning of that period.

WILLIAM YOUNG J:
But why do we want to care, why do we really care, as a standalone fact of when the house was built? Aren't we more interested really in whether there's a limitation defence?

MS CLARK QC:
We're interested in –

WILLIAM YOUNG J:
And isn't this word "built", can't it be most sensibly construed as just being a proxy for limitation period? If the claim is hopeless, if the claim is absolutely hopeless, don't declare it ineligible but if the claim might be a starter, let it be adjudicated on.

MS CLARK QC:
I would prefer your Honour, Justice Courtney's approach to the provision, which is that it's not simply a limitation period, it is also – it also has a purpose of – it has the purpose of reaching out to a class of claimants who all have something in common and that is that they have – they own a dwelling that has the peculiar defect of a water tightness problem.

GLAZEBROOK J:

But there isn't much point in adjudicating something where the act of omission happened two years before the house was built and you're at the end of the 10 year period after the house was built, is there? Because if the act or omission – so say the act or omission happened two years before the house was actually finished, then there's not much point in saying well you can go for the 10 years, go all through the adjudication process and then be met with a limitation defence.

MS CLARK QC:

That is precisely what can happen, your Honour.

GLAZEBROOK J:

But why would you go through the State paying for an assessor's report and the State paying for an adjudication process which is hopeless? What's the sense in it? So for either party, claimants included. Now it might be that's just what happens to be said.

MS CLARK QC:

No.

GLAZEBROOK J:

But it's no – it doesn't make any sense.

MS CLARK QC:

It is difficult to conceive of a statutory framework which would accommodate all of the vagaries and variations in fact and in defences that we can possibly think of and that do arise. It is really a swift and when we can have a final determination in the District Court on the adjudication of a claim then it's – we can see why, well I don't want to be too critical of the way in which the legislation was formulated. It's formulated with an end purpose and that's to enable claimants to make a claim, access mediation, there may not even be a determination. To get everybody who was involved in that construction into the room and see if in the first instance it can be mediated and if not the payment can institute adjudication.

ELIAS CJ:

Can I just ask you, because first is there a provision that retains, you know, normal defences and causes of action in this – just tell me if there is? Is the answer yes or no?

MS CLARK QC:

I believe there is your Honour, yes, if I've construed it –

ELIAS CJ:

Well now that I, and it may be just exhaustion setting in, but looking at section 14, I am wondering in the context of this quick and ready access, whether in fact section 14 is not best interpreted, contrary to some of the arguments that I too have been putting as being concerned ineligibility with completion, leaving the defence that it's outside the limitation period to be run in the substantive hearing and that would overcome, this is not necessarily for you I think Ms Clark, but that would overcome a lot of the problems we've been wrestling with and it may fit with the language of it being built before 1 January 2012 which is the – it must be within that. If it's within, if it's completed before 1 January 2012 and it's completed within the period of 10 years immediately before the date on which the claim is brought, is it not conceivable that that is what eligibility is, leaving the defence that it's outside the limitation period to be run at the substantive hearing?

MS CLARK QC:

I don't see that as antagonistic, your Honour, to my position. I – that is how it operates. The limitation –

ELIAS CJ:

Well it may be antagonistic to your position if completion includes certification I suppose. It still leaves the question that you've been addressing about physical completion as a matter of fact.

MS CLARK QC:

Physical completion as a matter of fact is necessary because without that it's arguable that the building doesn't begin to have the quality of a leaky home.

ELIAS CJ:

Well just leave that aside for the moment and just concentrate on whether this is an attempt to pull in the limitation period. Is – I just wonder whether it is the case that completed really fits within this and doesn't preclude the limitation period being given full effect. So that for a quick assessment it may be the best policy, of which procedure, what procedural track you go down.

MS CLARK QC:

Yes. The focus on steps taken around construction are, while they may be part of the cause of action, they are not going to be decisive of the eligibility criteria.

ELIAS CJ:

I think I'm agreeing with that.

MS CLARK QC:

Well if your Honour is agreeing with that, it is difficult to see that what your Honour proposes would cause difficulties for the council. If we still –

ELIAS CJ:

Well, that then turns on whether completion requires completion in terms of the regulatory requirements or whether it's – or something else.

MS CLARK:

In my submission, it is clear that that is not what is contemplated by "built". It is physical completion.

ELIAS CJ:

Well, what's the harm in it? What's the harm in saying, "You're entered in on this track and now we're going to decide the substance of the claim, which will include whether you're within the limitation period"? So we don't have a different inquiry to go into. This is just letting you in the door.

MS CLARK:

Yes, and letting the claimant in the door impermissibly, if it was impermissible, isn't just letting the claimant in the door. It's letting potentially many respondents and defendants in the door.

ELIAS CJ:

Well, they're either in this door or they're in that door. Does it really matter, particularly if there is the ability to move them between the two, as the Act provides for?

MS CLARK:

What your Honour is proposing runs the risk, in my respectful submission, that there is a failure to determine eligibility criteria at the outset.

ELIAS CJ:

No, not on the basis I'm putting it to you, but I think we've probably taken that far enough. Because on what I'm putting to you, there would be a determination that it was completed. As to whether it's – well, and why not the certificate of completion as a mechanism of letting you through the door?

GLAZEBROOK J:

The only problem is that it might not let you through the door if it wasn't in time the certificate of completion, even though the physical completion of the dwelling house had occurred before 1 January 2012. But then the other way of reading it, which I understood Justice Young to be suggesting, was that the relevant steps had been completed, whatever they happened to have been before then. If the relevant steps were afterwards and the code compliance certificate was after that period then you couldn't bring the claim in respect of the code compliance certificate but you could bring the claim in respect of the building, so that you have a certain number of steps. You've got the physical completion and, as I say, I rather like – which isn't Justice Lang's words, I think it's the Department of Building and Housing, the date, when it's ready for occupation.

ELIAS CJ:

Why is that, however, a policy of this Act, which is to help people who need to have speedy and inexpensive resolution of their claims for economic loss, effectively?

MS CLARK:

It clearly has that as its primary purpose, your Honour, but it doesn't have that at the expense of all of the potential defendants. The purpose of the Act is to gather in, I suppose, a little like the asbestos claims from the '90s, is to gather in all potential

claimants as soon as possible so that resolution of the issues arising in this period in New Zealand's building history can be resolved.

GLAZEBROOK J:
But isn't it quite nice for defendants not to be brought in at that initial stage? Because you get an assessor's report which could actually knock the whole thing out without the respondents having to do anything at all. So they don't have to get a report or pay for a report, so they could have all the ones that are nothing to do with leaky buildings knocked out.

MS CLARK:
That is – yes, they can, your Honour.

GLAZEBROOK J:
So then they get up to an adjudication and again it's a fairly rough and ready mechanism.

MS CLARK:
Well, once you're at adjudication then there's the ability for any respondent, defendant party to have themselves removed, yes, in that rough and ready way. I'm not suggesting that – when I say it's claimant-friendly I'm not suggesting that there is an issue with other parties not being able to contribute to this process. It's just an example of how simple and streamlined it is, but it nevertheless –

GLAZEBROOK J:
Which is good for respondents as well, in fact, isn't it?

MS CLARK:
Well, it may well be, your Honour, yes. As it's turned out in this case, it's become very complex, but that's...

GLAZEBROOK J:
So you let them all in, then if it turns out to be a leaky building then someone comes along and says, "Well, I want out because the limitation period is gone, because my act or omission was 11 years ago. Don't care when the thing was built, but my act or omission was 11 years ago so it's nothing to do with me."

MS CLARK:

Well, that may depend on what the answer is to the meaning and the purpose and function of section 37, your Honour.

GLAZEBROOK J:

No, no. This is absolutely clearly – it was 11 years ago. The longstop has gone. That's nothing to do with section 37, I don't think.

MS CLARK:

No, that doesn't, that doesn't have anything to do with section 37 but if the longstop is gone, it's past, then the claim can't run. It's not an eligible claim in the Tribunal.

GLAZEBROOK J:

Well, it may be an eligible claim because if completion happens after the act or omission that was the example I was giving before. Because completion is bound to be after the act or omission, isn't it? Usually.

MS CLARK:

It's hard to think of a situation where it won't be.

GLAZEBROOK J:

Yes. So the Limitation Act will always be earlier than the eligibility criteria.

MS CLARK:

I'm just finding it difficult, your Honour, to respond in the round to the potential claims that there might be based on a hypothetical event or act or omission prior to completion of a construction. That's all. We are not...

GLAZEBROOK J:

Well, I think the point I was making is that I don't think section 14 extends the criteria because the limitation longstop under the Building Act will still apply.

MS CLARK:

It will, your Honour. It doesn't extend the criteria, no. You mean the eligibility criteria? Yes.

GLAZEBROOK J:
Well, they don't extend the limitation period.

ELIAS CJ:
Eligibility doesn't determine the application of the limitation period.

MS CLARK:
It doesn't, your Honour, no.

ELIAS CJ:
That remains to be invoked by a defendant in the substantive determination.

MS CLARK:
Yes, it does, your Honour, and that is why I say that the purpose – that the provision has a purpose beyond simply being able to say, "10 years you're out." That isn't the way it can be approached. It can't weed claimants out in that way.

ELIAS CJ:
Well, I think that we probably – unless you've got anything further to say on that – we've probably thrashed it out about as far as we can.

MS CLARK:
Yes, your Honour. I should move on to question 2.

If I could provide the flow diagram.

ELIAS CJ:
Remind me what question 2 is.

MS CLARK:
Question –

ELIAS CJ:
It's our question, I suppose. I've forgotten what it is.

MS CLARK:
Question –

ELIAS CJ:

It's the collateral challenge issue, is it?

MS CLARK QC:

Yes, and your Honour it is at, so that your Honour's – I did look at it for some time before I considered the response. It's at tab 3 of the case on appeal.

ELIAS CJ:

Thank you.

MS CLARK QC:

Given the dismissal by the High Court of the appeal against the removal order, does section 95(2) –

ELIAS CJ:

Oh yes.

MS CLARK QC:

– preclude the granting of any remedy?

ELIAS CJ:

And that's the removal of the respondent, it's a strike out effectively is it?

MS CLARK QC:

The effect of 95(2)?

ELIAS CJ:

No, no just this term, "The removal order". That was the removal of the –

MS CLARK QC:

Ah, yes it was your Honour, yes.

ELIAS CJ:

– on the respondent.

MS CLARK QC:

Yes, it was procedural –

ELIAS CJ:

Is a removal order something that's referred to in the legislation?

MS CLARK QC:

Yes.

ELIAS CJ:

Do you know what section that is?

MS CLARK QC:

Section 112 your Honour.

ELIAS CJ:

Because it seems again to indicate that in this legislation they have tried to use ordinary English.

MS CLARK QC:

Removal applications are made pursuant to section 112 and –

TIPPING J:

It actually uses the word "struck out".

ELIAS CJ:

It does, "struck out" yes, yes.

MS CLARK QC:

Yes and if your Honours refer to tab 8 of volume 1 which is headed "Procedural Order 7", that is the Tribunal's removal order and you will see that it has in a sense applied the principles that might be thought to be analogous to a strike out.

TIPPING J:

Is there a clear unequivocal privative clause? The answer I understand is no.

MS CLARK QC:

No your Honour, not at all, no.

TIPPING J:

Well it's unconventional then, isn't it? Even if there were, I think the case of *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153 even though there was a difference of view as to the approach would suggest that you only preclude judicial review in extreme circumstances.

MS CLARK QC:

There's no suggestion, the suggestion is in fact my submissions, I had hoped they were clear, they're clearly not clear enough. In two places in my written submissions I say at paragraph 99, for example, "There is no suggestion that section 95 operates as a privative clause.

TIPPING J:

Yes but what I can't understand is how section 95(2) could act as a prevention of judicial review.

MS CLARK QC:

It doesn't, your Honour and I don't suggest it does.

GLAZEBROOK J:

It just means you can't get a remedy if you succeed in judicial review, is that the submission?

MS CLARK QC:

No, no your Honour. I don't, I don't say you can't get a remedy in that blanket way at all. What I thought it might be useful for your Honours to see is that if you track the top line which all the steps taken prior to –

TIPPING J:

Because I thought we were dealing here with a matter of principle, not with a matter of whether in the particular vagaries of the facts of this case there might be a problem or is that not right.

MS CLARK QC:

Well your Honour, the reason that I think there is confusion is this, I accept that it is unlikely that section 93, which is the appeal provision, can be used to challenge an eligibility decision but in this case that is not what happened. In this case there was the initiation of adjudication proceedings and that was with the filing of a statement of claim and then an amended statement of claim and an affidavit of Mrs Osborne refers to the fact that they applied for adjudication and once one is in that part of the Act, the adjudication sub-part of the Act which is Act sub-part 7, the Tribunal's determinations in that area can be appealed.

WILLIAM YOUNG J:

Yes where are you going to? Are you saying we should dismiss the appeal because of section 95(2).

MS CLARK QC:

I'm simply trying to respond to the question your Honour that was raised by – that was the approved question.

WILLIAM YOUNG J:

Well the approved question should we dismiss the appeal because of section 95(2) or something to that effect isn't it?

MS CLARK QC:

Well it wasn't that simple. It didn't strike me, your Honour as simply raising the point of principle, it seemed very much focussed on this case.

WILLIAM YOUNG J:

Yes I know, should we dismiss this appeal, sorry given the dismissal by the High Court of the appeal does section 95(2) preclude the granting of any remedy to the applicants? So what's your response to that question?

MS CLARK QC:

My response to the question is that section 95(2) doesn't apply to judicial review proceedings and appeals from High Court determinations of judicial review.

WILLIAM YOUNG J:

So we don't really need to worry about that?

ELIAS CJ:

We don't need to get into it.

MS CLARK QC:

This was a – no but this was a combined judicial review and appeal proceeding all bound up.

GLAZEBROOK J:

Well how could it be because if it wasn't an eligible claim then there's no right to apply for adjudication?

MS CLARK QC:

Exactly your Honour.

GLAZEBROOK J:

Well if there isn't any right to apply for adjudication, there can't be an appeal against an adjudication.

MS CLARK QC:

But your Honour the claimant's position was that we are lodging this statement of claim and we are doing so because our case is that although it has been determined, the original construction has been determined to be ineligible, the remediation and alterations, sorry the remediation aspect is eligible and that therefore has the effect, in the appellant's argument, of making the entire claim eligible so they applied for adjudication.

WILLIAM YOUNG J:

Well I think we understand that, well I understand that but what I really want to know is do we have to worry about question 2? Because if you're not relying on it.

ELIAS CJ:

Question 2 strikes me as misconceived.

WILLIAM YOUNG J:

Well it was I think responsive to a submission in the leave submissions wasn't it? A complaint in the respondent's leave submissions.

GLAZEBROOK J:

But I think you're still saying this was actually an appeal against an adjudication and therefore the strike out is final but that can't be right because they didn't have an eligible claim except in relation to the alterations. If in fact your argument's right on number 1. If their argument's right then they had an eligible claim right through.

MS CLARK QC:

Their argument was that they had an eligible claim that was then found not to be so in two decisions of the High Court.

GLAZEBROOK J:

But you only have a right of appeal from an adjudication and you can only have an adjudication if it's an eligible claim, if it's not an eligible claim then you can't have an adjudication, therefore you can't have an appeal so it doesn't matter what the High Court said about an ineligible claim because they're not saying in the context of an adjudication.

MS CLARK QC:

Well the adjudication – the other approach to it, your Honour, is that this was a determination. It was a determination which had the effect of removing the Council and therefore undermining the claimant's proceeding.

GLAZEBROOK J:

Where's the – so what's the determination?

MS CLARK QC:

A determination is –

GLAZEBROOK J:

Their determining a claim which must be on an adjudication which must get you back to section 60 doesn't it? They can't determine anything other than a claim.

MS CLARK QC:

The right to appeal is in respect of a claim that has been determined by the Tribunal and I suggest that that means that it's a determination under section 89, the Tribunal must determine a claim.

GLAZEBROOK J:
Well it's a determination of a claim in an adjudication proceeding.

MS CLARK QC:
Yes.

GLAZEBROOK J:
It can only be an adjudication proceeding under section 61 if it's an eligible claim, 60 sorry, 60 subsection (1), not 61.

MS CLARK QC:
What it says your Honour of course is that a claimant can only bring an eligible claim to adjudication but it seems that once the Tribunal and the High Court sees jurisdiction in respect of it and there was a determination and an appeal.

GLAZEBROOK J:
But the Tribunal can't decide it's got jurisdiction when it hasn't.

MS CLARK QC:
But, your Honour, the High – no it can't. But the, but the High Court went on to determine the appeal as though it were a determination that it could –

GLAZEBROOK J:
Well the High Court can't give the Tribunal jurisdiction if it doesn't have it can it?

MS CLARK QC:
It didn't give the High Court jurisdiction, your Honour, no. Of course not. It simply determined the appeal from the Tribunal's decision.

ELIAS CJ:
But that's the eligibility –

MS CLARK QC:
And that's the – that was the removal and eligibility, both.

ELIAS CJ:

Oh, the removal and eligibility.

MS CLARK QC:

They were both, your Honour.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Well – but I'm not sure the Tribunal –

ELIAS CJ:

But the removal followed on from the eligibility decision –

MS CLARK QC:

Yes it did.

ELIAS CJ:

– which is challenged in the judicial review proceedings and for my part I can't see how on earth that wasn't the correct way to proceed.

MS CLARK QC:

I, I completely agree your Honour. So –

ELIAS CJ:

So – yes.

MS CLARK QC:

And, and the matter of principle that I raise and I, the matter of principle that I raise is that the, the Courts have indicated that they will carefully scrutinise the statement of claim and the judicial review proceeding to ensure that it isn't a device to circumvent section 95 –

ELIAS CJ:

But it can't –

MS CLARK QC:

– and that's –

ELIAS CJ:

– possibly have been because it was predicated on there not being an eligible claim. That's why the party was struck out in these proceedings. There's not been an adjudication on the merits here.

MS CLARK QC:

No your Honour.

ELIAS CJ:

No.

MS CLARK QC:

No. But there, but both his Honour Justice Asher – appeal – it has been accepted that section 93 can apply to interlocutories, interlocutories before the Tribunal. And that decision is in –

ELIAS CJ:

But there's no right of appeal in respect of that.

MS CLARK QC:

But section 93 seems to have been rather more broadly construed.

ELIAS CJ:

Well I don't think we will want to get into that at all.

MS CLARK QC:

All right. Thank you your Honour.

ELIAS CJ:

But – so if you're content that the Court is seized of the question of eligibility and that's all that needs to, that the appeal turns on –

MS CLARK QC:

Yes.

ELIAS CJ:

– for myself I can't see that it's necessary for us to bother ourselves about whether the strike-out – I just don't see that it enters into things really.

MS CLARK QC:

I, I accept that, your Honour, and the submissions were simply addressing that approved question.

ELIAS CJ:

Yes. Yes, no I understand that.

GLAZEBROOK J:

Well do you accept though that if you lose on eligibility then we can give a remedy?

MS CLARK QC:

I would like to –

ELIAS CJ:

You must. You must accept that, surely.

MS CLARK QC:

That if I lose on eligibility?

ELIAS CJ:

Yes, because it all turns on eligibility.

MS CLARK QC:

Well, because that will then – if, if I lose on eligibility then that's raised by the judicial review and the appeal and clearly the response from the Court needs to be the same to both.

ELIAS CJ:

And the response must be, "Hear and determine according to law."

MS CLARK QC:

Yes.

ELIAS CJ:

Yes.

GLAZEBROOK J:

So you're not now saying, despite the discussion we've just had, that it was a determination and therefore final?

MS CLARK QC:

I – that, that is my submission, your Honour, but if your Honours don't accept that – in a sense it doesn't matter because there is –

GLAZEBROOK J:

So – all right. Can I just ask you, so you say because the removal has been determined by the Tribunal and upheld on appeal that that's final? That's your submission? And that this Court therefore can't give a remedy because of section 95(2)?

MS CLARK QC:

I'm not saying the Court can't give a remedy in the judicial review proceeding.

GLAZEBROOK J:

All right, so what would the remedy be in the judicial review proceedings? Go back and do it again?

MS CLARK QC:

It would, it would depend, your Honour, on how, on how your Honours viewed the judicial review application. If your Honours were...

ELIAS CJ:

Ms Clark, if we decide that – there hasn't been a substantive determination. It's been choked off on the basis that there is no jurisdiction to entertain the application that was made. If we form a view that that was wrong surely we have to send the matter back to be determined.

MS CLARK QC:

According to law. Yes, your Honour, you, you do.

TIPPING J:
And that means the process must then follow the path of an eligible claim.

ELIAS CJ:
Yes.

GLAZEBROOK J:
And start again.

MS CLARK QC:
Well it would need to start again.

TIPPING J:
Yes.

GLAZEBROOK J:
With the Council as a respondent.

TIPPING J:
Mmm.

MS CLARK QC:
If your Honours, if your Honours, depending on the test that your Honours approve for admission under the eligibility criteria, your Honours may say it, that, that the "built" test is that which the Court of Appeal proposed, in which case the appeal is dismissed and so is the judicial review appeal.

WILLIAM YOUNG J:
There's only one appeal. It's only the judicial, only an appeal from the Court of Appeal to this Court on the judicial review application.

MS CLARK QC:
Yes, that's right your Honour. Yes. Tab 20.

WILLIAM YOUNG J:

Look, I'm sorry, I mean you've got to run the circle. In the submissions on behalf of the respondent it was argued that the present proceedings were an abuse of process because they were effectively an illegitimate way around section 95(2), which is why question 2 was stated in the way it was. Now, I take it from what you say but I'm not 100% certain that you are not relying on that argument.

MS CLARK QC:

I am saying that the appeal determined, had the effect of, it had a final effect on the claimants and therefore, and therefore, regardless of the – it had an eligible aspect to that claim. It can't be said that the whole claim was ineligible. On the claimants' own case, the appellants' own case.

WILLIAM YOUNG J:

Well just – I mean all I really want to know is, can I put a line through question 2 and just look at question 1? Or do I actually have to grapple with question 2 to decide in my own mind whether this appeal is an abuse of process?

MS CLARK QC:

Well if your Honours are concerned with the point of principle –

WILLIAM YOUNG J:

I'm – look, I'm just concerned with what your case.

MS CLARK QC:

Well, my, my case is that there was an appeal from the Tribunal's determination.

WILLIAM YOUNG J:

Can you just –

MS CLARK QC:

That's my case, your Honour.

WILLIAM YOUNG J:

I know, but are you saying that precludes relief? That's all I – you know, is this something we have to take into account when we make our decision?

MS CLARK QC:

I'm saying it's relevant. It doesn't preclude. I've said it's relevant to relief.

GLAZEBROOK J:

So that it may be a discretionary reason –

MS CLARK QC:

Yes, your Honour.

GLAZEBROOK J:

– for not giving relief? Is that the submission?

MS CLARK QC:

That is what I have said in my submissions from, in section E.3 –

TIPPING J:

Without wanting to prolong the agony, Ms Clark, but why would it be, incline us, if we were satisfied that there's, that the Tribunal at the stage it were at erred in law about being an eligible claim, why on earth would we not send it back along the lines that have been discussed? What is it about this section 95(2) that would encourage us not to?

ELIAS CJ:

I think your argument –

MS CLARK QC:

There's –

ELIAS CJ:

– has nothing to do with section 95(2). I think it is simply that you say, and it's a reversion to your view that "built" means "habitable", that if one looks at the material before the Court they can't possibly succeed. So even if we were of the view that the Tribunal was wrong we should decline to send it back. I think that's your argument, isn't it?

MS CLARK QC:

No your Honour. Because you must send it back – if you consider the Tribunal was wrong you must send it back under the judicial review claim and the, and the –

ELIAS CJ:

Well we wouldn't have to, Ms Clark, if we thought it was forlorn, and I had thought your argument was it is forlorn on the facts.

MS CLARK QC:

But, I'm sorry, your Honour put to me that if you considered it was wrong –

ELIAS CJ:

Well...

MS CLARK QC:

– actually wrong.

ELIAS CJ:

That it was eligible.

TIPPING J:

It was eligible but say it was clearly statute-barred –

ELIAS CJ:

Yes. Yes.

TIPPING J:

– or something like that.

MS CLARK QC:

Well that's...

TIPPING J:

But that's, I think that's not really what's being put to us. You seem to be saying in your submissions that somehow or other section 95(2), and I'm sorry, there is a reference to 95(2) there, precluded this judicial review exercise. It's as simple as that. I understood it. For which I couldn't see for the life of me how that could be so.

MS CLARK QC:

I, I did not, I did not intend and I'm not certain that my submissions do say that, your Honour, that 95(2) precludes judicial review, not for a moment. It can't do that.

TIPPING J:

Well could you please –

MS CLARK QC:

What I do say is that if judicial review – if, if the appeal rights have been exhausted and if, if a Court were satisfied that the judicial review was brought to sidestep the inability to appeal, then –

WILLIAM YOUNG J:

But is that your argument? I mean we don't normally sort of engage in an inquisitorial exercise. I'm looking at 104 of your submissions and you say bluntly, "The further appeal of the eligibility decision, as with the further appeal against the removal of the Council, is barred by section 95(2)(b)."

MS CLARK QC:

That's not the judicial review, your Honour, that's the appeal of the removal. That the –

WILLIAM YOUNG J:

Oh I see.

MS CLARK QC:

– procedural order in the Tribunal.

WILLIAM YOUNG J:

Go on a bit, "Even if one of the proceedings was instituted under the Judicature Amendment Act the objective is the same for all: for their claim to be declared "eligible" and for their (ineligible) claim to be reinstated in the Tribunal."

MS CLARK QC:

And, and that's the point Your Honour. And, and the Courts will scrutinise pleadings to –

WILLIAM YOUNG J:
And you go on to say that, "the proceeding amounts to an abuse of process."

MS CLARK QC:
If, if that is the case, yes. If the appeal rights have been exhausted and if the Court is satisfied that the judicial review is brought for exactly the same purpose, and it appears to be because the remedy sought is an injunction that the Tribunal determine that the appellants are eligible, which is precisely what was sought in the statement of claim in the adjudication proceeding.

WILLIAM YOUNG J:
So you are saying it's an abuse of process and that we should dismiss it, dismiss the appeal even if satisfied that the claim, that they were eligible?

MS CLARK:
If the Court finds that it was an abuse of process, then I say that that is relevant to the remedy to be granted and yes, in my submission it would be, the appeal would be dismissed.

WILLIAM YOUNG J:
Right, thank you.

MS CLARK:
Your Honours, I have no further submissions.

ELIAS CJ:
Thank you, Ms Clark.

Mr Andrews, you've heard the exchanges. If there's anything that you want to add to your written submissions on those, we'll hear you on those.

MR ANDREWS:
Thank you, your Honour. There are a few limited matters.

ELIAS CJ:
Yes, thank you.

MR ANDREWS:

Firstly I'm really talking about the Crown's position in terms of the Ministry of Business, Innovation and Employment, which administers the legislation. This case is important for them, both in terms of the administration of the eligibility provisions, and it's relevant not just to the claims resolution process but also the financial assistance package, which we haven't heard much about today. So I want to briefly address you on that.

So where the line is drawn makes a difference, obviously, about what claims come in to be considered for the claims resolution process, but also for potential Crown and territorial authority contributions of up to 50% of agreed repair costs.

I mention that because the focus is –

ELIAS CJ:

It would have to be a substantive determination, presumably, before that gets triggered, wouldn't there?

MR ANDREWS:

No. Under the financial assistance package, which is in Part 1A of the Act towards the tail end, if it's an eligible claim, you have to meet two criteria, it's an eligible claim. Then there are contribution criteria, which are currently in the *Gazette* notice, and those are not before the Court today, but eligibility is relevant for that and when you look at Part 1A the gist of it is that if you're an eligible claimant and you meet those criteria in the *Gazette* notice, then the Crown will toss in 25% towards your agreed repair costs and depending on certain circumstances and conditions the territorial authority as well. So I mention that because there is a financial aspect to the Crown's role in this.

TIPPING J:

So that is irrespective of a finding against any party, is it?

MR ANDREWS:

Irrespective of that.

TIPPING J:

It's irrespective of adjudication, if you like.

MR ANDREWS:

It sits outside adjudication. There are duty of care issues that arise under the contribution criteria. We would say not liability issues, but duty of care issues. I don't propose to take –

ELIAS CJ:

So what about Limitation Act defences? They don't get – they don't arise?

MR ANDREWS:

Essentially not, no. There's a distinction made in the contribution criteria between duty of care issues and liability issues, so you might be, as I would understand, the Limitation Act matters or the longstop matters, those would go to liability, not necessarily to whether a duty of care is owed in the first place.

ELIAS CJ:

And does the Ministry or whoever is the person have the ability to require adjudication rather than...

MR ANDREWS:

Well, it's quite complicated, unfortunately, and it may be that the Osbornes, were this to be an eligible claim or others who at least have eligible claims they have some alternatives, but you can walk – if you're an eligible claim, you can walk into the process of essentially – you may have three choices depending on how the limitation periods outside the 2006 Act exist. You obviously have your civil proceeding option. There's the ability to have your claim facilitated under the 2006 Act, and that includes mediation and then tracking through to adjudication if mediation doesn't resolve it. There's also this alternative of – and mediation and adjudication are essentially an alternative to a full-blown civil proceeding where there's a sort of an economic loss that you're seeking to recoup. The financial assistance package was the Government, was the state reaching into its pocket and saying, "Things are not necessarily moving as fast as we would have liked. There are people who have not remediated their homes to facilitate and expedite that." The Crown is going to contribute 25% and depending on where the TA, the territorial authority, sits on this may also contribute 25% of agreed repair costs. So it's a different focus. The

economic loss in a standard civil proceeding might overlap with those agreed repair costs or it might not, depending on where things go. So the eligibility issue is important for the FAP as well.

TIPPING J:

Is that because, Mr Andrews, that under section 125A, which is the first section in this Part 1A, there's a reference to financial assistance to qualifying claimants and you are a qualifying claimant if you have an eligible claim?

MR ANDREWS:

Then the second part, your Honour, is the reference to the contribution criteria.

TIPPING J:

Yes, of course that follows, but you have to jump through that gate first?

MR ANDREWS:

Yes. That's right.

ELIAS CJ:

But the qualification referred to in 125A from what you've said is both eligibility and also coming within the criteria in the *Gazette* notice.

MR ANDREWS:

Yes.

ELIAS CJ:

Give me an example of what's in the *Gazette* notice. Not running through them all, but...

MR ANDREWS:

Well, the *Gazette* notice, and I said it was complicated, it's essentially, it does require someone, an eligible claim or a qualifying claimant, to make a choice about whether or not they're going to go down essentially the litigation route, whether that's within the Act or outside the Act, or to sort of say, "Okay, I've had enough of this and those litigation outcomes are too uncertain for me. I'd prefer to take some money now as a contribution towards my agreed repair costs."

ELIAS CJ:

And there's a 50% cap, is there?

MR ANDREWS:

It's 25% Crown and 25% territorial authority, but they don't necessarily coincide. It may be that the Crown might make a contribution but if there isn't a duty of care owed then the territorial authority might say, "Well, there is no duty of care," and there is some criteria that address some of those specific circumstances.

ELIAS CJ:

So if the territorial authority, if it's implicated, does have the opportunity to say there's no liability.

MR ANDREWS:

Well, the Crown would say no duty of care, not no liability. The limitation issues don't necessarily arise in that context.

GLAZEBROOK J:

Where's this duty of care? Which section?

MR ANDREWS:

That isn't the Act itself, your Honour. It's in the contribution criteria. It's in volume 3 tab 7. And you'll see clause 1, so that's page 234...

GLAZEBROOK J:

Volume 3 of what?

MR ANDREWS:

Volume 3 of the bundle of authorities your Honour.

GLAZEBROOK J:

Thank you. Tab 7?

MR ANDREWS:

Tab 7 and it's only two pages, page 234 is the first page. Clause 1, "Crown contribution criteria", so that's the left-hand column, through to the right-hand column

and then over on page 235, clause 2, “Participating territorial authority contribution” and you’ll note B there, “The territorial authority must owe a duty of care to a person.”

WILLIAM YOUNG J:
Who decides that?

MR ANDREWS:
The Crown determines whether the criteria for its contribution apply and the territorial authority essentially determines its – whether it is bound by those criteria but those matters themselves have been subject to judicial review. So there is that objective gloss.

WILLIAM YOUNG J:
So that’s judicial review under the Judicature Amendment Act 1972?

MR ANDREWS:
Yes.

WILLIAM YOUNG J:
Not an intra-statute review.

MR ANDREWS:
No.

ELIAS CJ:
With what result?

MR ANDREWS:
Well for example if there was –

ELIAS CJ:
No, no sorry, you say that they’ve been subject to judicial review.

MR ANDREWS:
Well there is, sorry I should say that there are currently judicial review proceedings in relation to aspects of this notice on foot at the moment I should say, but the point I was making if you look on page 235, under clause 2, the B I referred to, the duty of

care point and then over on the right-hand column, paragraph numbered 3, “A participating TA will not be required to contribute in circumstances where...” and so A there, the relevant territorial authority didn't actually inspect the dwelling house. If they didn't do that then it’s not even a liability issue, there’s no duty of care because they didn't assume a role in relation to that particular dwelling house.

GLAZEBROOK J:
But what's this done under?

MR ANDREWS:
It’s issued by the chief executive under the 2006 Act.

GLAZEBROOK J:
Yes but under what?

MR ANDREWS:
Yes it’s the – it is that definition of qualifying claimant on page 211. There is no – it’s simply reference there that B meets the contribution criteria that is specified by the chief executive by notice in the *Gazette*.

GLAZEBROOK J:
I can understand that, I just can't understand how it can make a territorial authority pay, that’s all.

MR ANDREWS:
Well there’s a separate relationship agreement whereby a territorial authority can become a participating territorial authority for the purposes of inclusion in the scheme. So it’s a –

GLAZEBROOK J:
So it’s outside of the Act effectively?

MR ANDREWS:
Well the, yes the criteria issued under the Act but whether or not a TA wishes to participate is outside the Act.

GLAZEBROOK J:
All right.

MR ANDREWS:
It's a conceptual matter.

ELIAS CJ:
Does it have to decide whether it wishes to participate in each case or on a global basis?

MR ANDREWS:
On a global basis but it can then look at whether the criteria apply to a particular claim.

GLAZEBROOK J:
And it might do that because it's better than being fully liable.

MR ANDREWS:
Yes, yes that's right. So –

TIPPING J:
Look one of the criteria is that in certain circumstances the claimant has to abandon all Court proceedings?

MR ANDREWS:
Yes that's right, yes.

TIPPING J:
So you can't have your cake and eat it in other words.

MR ANDREWS:
That's the choice and that is a matter that's currently being considered informally. But I mention that because the FAP is this alternative, as your Honour's noted, it's sort of well if litigation isn't necessarily going to get there for whatever particular reason for an eligible claimant, at least there is this potential alternative but it's being eligible in and of itself doesn't get you there in terms of agreed – contribution to agreed repairs costs other than matters need to follow.

GLAZEBROOK J:

For the Crown wouldn't it better if this only applied to those who weren't limitation barred? So who didn't come within the longstop? Because then the Crown would only be paying out albeit 25% of claims that might succeed rather than claims that might be limitation barred if they went further.

MR ANDREWS:

Well of course –

GLAZEBROOK J:

On the other hand you might say well it's just easier to administer if we do it this way and we don't really care because it is only 25%.

MR ANDREWS:

Which still a significant, when you look at the number of claims and the tail of claims, literally thousands of claims that it's potentially a very big liability for the Crown.

ELIAS CJ:

And in any event your argument, isn't it, that there an equivalence, so that you're not eligible, you don't get through this, into this path unless you are within the limitation period?

MR ANDREWS:

Well we certainly support the Court of Appeal's interpretation, Your Honour, by reference to the meaning of "built". I think there's possibly been – there's been a focus in the appellant's argument on the limitation period in the Building Act by reference to the first respondent's acts of omissions but you could argue that of course in any negligence claim, there could be a variety of actors who have actually been negligent, whether that's contractually, tortiously or both and we're fixing on today the local authority which will always be the lasts actor in time whose conduct is allegedly negligent but you could argue that the built interpretation that the Court of Appeal adopted is actually in some respects more favourable to claimants because if it was the builder's negligence –

WILLIAM YOUNG J:

Well it's not, it still leaves a gap. Unless section 37 means what perhaps it does mean, it still leaves a gap between those who are eligible and those who have good claims that aren't by the Limitation Act.

MR ANDREWS:

Only in relation to those where the last person standing is –

WILLIAM YOUNG J:

Yes I know but don't say "only" because that's all I'm saying there's a little gap and I don't think I ever got an explanation as to what the purpose of it might be.

MR ANDREWS:

Yes.

WILLIAM YOUNG J:

Do you have theory as to what the purpose of that gap might be?

MR ANDREWS:

Well I hope not a theory Your Honour but it is in my written submissions so I did want to briefly address you on that and of course I acknowledge that if the Parliamentary history were clear this task would be easier but if I could, in my written submissions I refer at paragraphs 20 and 21 there and at paragraph 20 I cite the explanatory note. That's at the top –

WILLIAM YOUNG J:

Yes I've read this. It doesn't really address why you would permit 99% of people to pursue claims that are not statute barred but preclude say 1%.

MR ANDREWS:

Well Your Honour there's always – I mean whenever –

WILLIAM YOUNG J:

If you've got to pick a bright line, why not pick the existing bright line?

MR ANDREWS:

Well, and I've urged a bright line in our written submissions and I suppose one could say well why not the CCC.

WILLIAM YOUNG J:

No, no I'm not saying the CCC, the bright line I'm suggesting is what the Limitation Act provides.

MR ANDREWS:

Yes but the reason I refer to the Parliamentary history there is because the consistent purpose of first the 2002 Act and the 2006 Act and in the 2011 amendments, has been let's get people into the scheme, this is a massive problem and try and help them get their claims resolved and then through the FAP some contribution to the agreed repair costs and –

WILLIAM YOUNG J:

But why – none of this answers the question, why exclude some people who can have their claim resolved by the Court, why exclude those people from this service?

MR ANDREWS:

Well I think the answer to that, your Honour, is that if you take as – if you accept as a purpose of the 2006 Act, the need to remediate as quickly as possible leaky building claims, then there has to be a cut-off which focuses on built, because that will, like hopefully incentivise owners to act more quickly to have their buildings, their homes remediated. It's probably I think relatively obvious that for most people their home is their single biggest asset. One could – one of the benefits in my respectful submission of the Court of Appeal's test is that the final inspection actually is, at least evidentially, a helpful indication of built, it's something that can be discovered relatively easily.

WILLIAM YOUNG J:

Say there isn't a final inspection, there's just a producer statement?

MR ANDREWS:

But there is still that evidence, your Honour, whereas there was some discussion earlier today of "built" meaning "built" as at possibly an earlier date and the bright line that the Ministry is certainly comfortable with, even though it may mean more eligible

claimants, is that as non-judicial and not even quasi-judicial officials having to administer this, you know, a large volume of claims. There shouldn't have to be a relatively involved evidential investigation, and that's where that producer statement or that financial inspection evidence takes us to the "built" means "built" and possibly when you move in. Very hard for a subsequent purchaser, as the Osbornes were, and the *Sharko* trustees were, I think, the fourth owner of the property but the third after the, during the process of the consent, to try and work out or verify when it was that people moved in and all of those sorts of things happened, so in our respectful submission the Court of Appeal's approach is attractive whether it's alignment in most cases.

TIPPING J:

When we're talking about the purpose of this, what do you say to the proposition that the select committee, by inference, not direct statement, but by pretty strong inference, was appearing to be endeavouring to line up the two periods, the Building Act period and the Weathertight Homes eligibility period? Therefore, if the language allows it, we ourselves should endeavour to line them up.

MR ANDREWS:

Your Honour, as I read what the select committee did, it really said three things. Firstly it said, "We want to align the 10 years in the Building Acts with the Weathertight Home Act," but that doesn't answer the when from question. It then – the last point that it makes is that it talks, there's material in there which, in my submission, supports that extract from the explanatory note that I've given you about the need to remediate quite quickly. It's probably the middle bit which in some ways is most supportive of the appellant's position when it talks about the selection of 10 years as being essentially a compact, a politically imposed compact, for the benefit of the entire sector including insurers to help them manage their tail of claims. And it's probably that, their apparent endorsement of that, that maybe is most supportive of the appellant's position because that would tend to indicate, given that local authorities probably have some of the greatest need of insurance.

TIPPING J:

The Court of Appeal's reasoning seems to me to have been well-built means built, but we've got to have a bright line so the best one we can find is final inspection.

GLAZEBROOK J:

Which may or may not take place.

TIPPING J:

Yes. I'm perfectly comfortable with the first step. I'm not so comfortable with the second step, this striving for bright lines, for ease of administration.

MR ANDREWS:

Certainly I've cited, albeit from a different context, the Court of Appeal decision which indicates sympathy for quasi-judicial officers in the immigration context and of having relatively straightforward tests to apply and in my submission that applies with greater force, where we're dealing with officers, albeit qualified officials, having to apply this with the volume of material, trying to select a date and not engaged in a detailed fact-finding investigation at that stage. That is more appropriate.

WILLIAM YOUNG J:

It would be very easy – the appellant situation, proposition, would be very easy to apply that the decision maker would simply look at the local authority file and say, "Well, look at this. What's the last possible date that something happened in respect of this building that could give rise to liability?" And almost always that'll be the code compliance certificate. It's simple as that. I mean, that would be the simplest system administration.

MR ANDREWS:

Well, it is a date, although it might not necessarily be a date that's relevant as to when the defect –

WILLIAM YOUNG J:

Absolutely, and that then can be dealt with not ex parte as section 14 is, but inter parte on an adjudication.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

Isn't that the most sensible way of looking at the statute?

MR ANDREWS:

Well, in my submission "built", I would endorse the Court of Appeal's interpretation of that.

ELIAS CJ:

Isn't it also consistent with this being above eligibility for admission to a process in which substantive determinations will be made? We're not determining – it doesn't determine the substantive outcome, the question of eligibility.

MR ANDREWS:

No, it doesn't. I mean –

ELIAS CJ:

Even, so far as I have been able to follow it, in relation to this financial assistance package.

MR ANDREWS:

That's right. But when a claim is determined, assessed for eligibility and you see this in the case on appeal here, and it's certainly a point which we make quite forcefully in our submissions or emphasise in our submissions, eligibility is not about liability. It, it might be.

ELIAS CJ:

No. No, I know.

MR ANDREWS:

But I think that's probably the point that your Honour's making, that the –

ELIAS CJ:

The point that – I think we're on the same page in that and probably don't need to discuss it further. The point that exercises me is the one that Justice Glazebrook keeps raising, which is that if it is the certificate of compliance which is nice and easy and doesn't preclude the substantive issues because you're just then admitted to the process, you will then exclude those who don't have a –

MR ANDREWS:

Yes.

ELIAS CJ:

– certificate of substantial completion or whatever it is by January 2012.

GLAZEBROOK J:

Unless you do it on a, on whatever the claim is.

WILLIAM YOUNG J:

Yes. You'd issue your proceedings on the – if there isn't you'd just issue your proceedings on the 31st of December in relation to the state of the building as it then is.

ELIAS CJ:

Yes. Yes.

WILLIAM YOUNG J:

And you would look at what the last thing that happened.

GLAZEBROOK J:

What has been built –

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

– before that period, giving "built" a relatively – and from the Government's financial assistance my understanding is that what they really want had to happen is for these things to be fixed.

MR ANDREWS:

Yes.

GLAZEBROOK J:

Because really doesn't matter whose fault it was, they just want it done because then it's going to get rid of the problem –

ELIAS CJ:

So admission –

GLAZEBROOK J:

– for future, which has all sorts of health problems as well as social problems.

ELIAS CJ:

Admission to the process is something that must be consistent with that policy.

MR ANDREWS:

Well, that's right, but within the, the constraints of what the language –

ELIAS CJ:

Yes. Yes.

MR ANDREWS:

– actually says. And the, the 1 January 2012 point is certainly addressed, albeit in a footnote, in our submissions that about 18% of claims don't have one of these code compliance certificates, so I mean there is –

WILLIAM YOUNG J:

But then you look at the last thing that's happened.

MR ANDREWS:

But –

GLAZEBROOK J:

What was built? anything that was built, ie done, including alterations before that particular time and the 10 years hasn't passed comes within it and then later on adjudication the council can say, "Well, look," well actually probably unlikely the council because that would be the last date, but the builder can say, "Well look, I actually did that 15 years ago so I'm out."

MR ANDREWS:

Yes. It's – but the – that's quite a big, that 18%, I'm not suggesting it's sort of the tail which wag the dog, but it's quite a, it's quite a large proportion –

WILLIAM YOUNG J:

But it's not a problem on the hypothesis that's being put to you.

MR ANDREWS:

Well...

WILLIAM YOUNG J:

You just look at the last thing that's done.

GLAZEBROOK J:

Because you just look at what has been done.

MR ANDREWS:

But, but then, then you're asking the Chief Executive's delegate to sort of, to, to engage in a more detailed fact-finding process aren't you?

WILLIAM YOUNG J:

Isn't it easy to look at what the, when the last thing was done? Which will probably be by reference to the council file. It will probably be the last inspection.

MR ANDREWS:

But then, then I come back to that's, is that "built" and in my respectful submission it's, it's not and –

WILLIAM YOUNG J:

We're just, we started off this aspect of the discussion on ease of administration.

MR ANDREWS:

Well we, we would say – I, I did and I'm, I'm urging a bright line, but we would say that the Court of Appeal's approach in most cases is more likely to lead to that.

TIPPING J:

I have a problem merging concepts of "built" with "proof of built". Now, this is no doubt more your way than the way that's being put to you at the moment, but is that sort of part of what lies behind your argument on the law? Although you want a bright line there has to be some distinction I would've thought between the evidence

you've produced to show the bright line and what the bright line actually is. I'm not sure that we can get a bright line.

MR ANDREWS:
Well...

TIPPING J:
I make that quite clear now. I may be in the minority but I'm not sure that that's what's intended or that it can be achieved.

MR ANDREWS:
Well I think there are currently three interpretations which have been offered for the Court today. The first is obviously the appellant's, essentially aligning it with the code compliance certificate.

TIPPING J:
Well that's the brightest line.

MR ANDREWS:
Well in our submission it, it is the last step in the process but it isn't the brightest line because there are 18% of cases where there isn't one, for example. The, at the, at the other end of the spectrum is that "built" means looking at, at the meaning of "built", physical construction and, and looking at indicia for that, and that really takes you into a fact-finding investigation which I think, in my, in my submission, is, is going, is difficult and would take time.

It's the Court of Appeal's option which we, we say is that, is the brightest of lines and best aligns with the meaning of "built". It's closest in time to the physical construction interpretation.

GLAZEBROOK J:
What about alterations that are done without even a building consent that cause a leaky building?

MS CLARK QC:
Then I'd accept in that situation that is probably going to require a more detailed fact-finding investigation.

McGRATH J:

The Court of Appeal did –

GLAZEBROOK J:

Well why that rather than the "built" – sorry.

MR ANDREWS:

Well, well, the, the – because at that, because there isn't a sort of almost a default or most likely built –

GLAZEBROOK J:

Well there should be.

MR ANDREWS:

– built event.

GLAZEBROOK J:

Because people should go for building consents for alterations. It's just that I think everybody knows they don't necessarily.

MR ANDREWS:

Yes. But I think in –

GLAZEBROOK J:

And then subsequent buyers don't even know there are alterations often because they don't go and check the plans.

MR ANDREWS:

Yes. Well in my submission there, I mean it is going to – well unless it's the CCC date then there is going to be a more detailed –

GLAZEBROOK J:

Well there won't be a CCC date if there had to be –

MR ANDREWS:

Oh sorry, if there hasn't been a – sorry, if there hasn't been a building consent. So there will almost inevitably have to be quite a detailed factual investigation.

GLAZEBROOK J:

All right.

McGRATH J:

If you rely on the inspection as being the bright line in most cases, as far as the Court of Appeal was concerned we're still prepared to allow for exceptions where there would have to be a specific inquiry. Now is that part of what you accept from the Court of Appeal?

MR ANDREWS:

Yes, I – because clearly, and the, and the case law's already showing this, the post-Court of Appeal decision case law is showing this, that there is, that different factual situations are thrown up. So the *Jones* decision that Ms Clark referred to earlier and the, and the *Oorschot* decision as well where, where there is, there's a non-compliance, albeit an irrelevant non-compliance, meaning that the final inspection has – the building has not been given its sort of pass with flying colours, but the Courts have been prepared to say well that, it's still "built" in terms of the relevant defect. So, yes, the, the bright line is not, the bright line that I'm urging isn't going to solve every case but it's likely to solve or be relatively easy, straightforward to apply in the majority of cases.

McGRATH J:

Isn't that the same as saying it's clear evidence, to come back to Justice Tipping's distinction? It's clear evidence where you have it.

MR ANDREWS:

Yes.

McGRATH J:

But if you don't have it you can still go on and make your actual factual inquiry.

MR ANDREWS:

Yes.

McGRATH J:
If you're an applicant.

MR ANDREWS:
I think that, that's an entirely sensible nuance, your Honour.

McGRATH J:
So in the end the – on that basis the final inspection is only like a convenient tool which, where you have it, is likely to be determinative?

MR ANDREWS:
Yes.

McGRATH J:
But otherwise you're basically entitled to have a factual determination in all the circumstances.

MR ANDREWS:
Yes.

McGRATH J:
Which is getting a bit back towards what Justice Lang was saying.

MR ANDREWS:
Yes, yes, that's right. Yes.

Well that was, those were my submissions on, on the "built" issue. I don't know whether you want to hear me on section 37 but I, I confess I find that, that provision somewhat difficult. But I can try and shed a small amount of light on that if that's of any benefit to the Court.

ELIAS CJ:
Well, yes, let's have a small amount.

MR ANDREWS:
Yes. Thank you. I think that's all I can do.

TIPPING J:

Any light would be helpful.

MR ANDREWS:

Well as I understand the High Court, not the High Court decision here but the, the decision of her Honour Justice Duffy, section 37 really only stops the clock where there is an eligible claim. If it, if it's ultimately determined as an ineligible claim then the clock isn't stopped. And in that respect I guess I, I come back to the submission I made a few minutes ago about what eligibility is. It's not about liability. And, and so when a claim is made a claimant may or may not articulate who they think is liable and, and that, whatever they think and whatever the assessor's report recommends or states is not shared with the, with the potentially liable parties.

WILLIAM YOUNG J:

Yes, I think we know that but the claim is like a thing in rem to start with. But is it any of your business or concern as to whether section 37 stops time for all purposes or just the adjudication purposes?

MR ANDREWS:

I, I – it's not directly relevant to the Ministry's role –

WILLIAM YOUNG J:

Okay.

MR ANDREWS:

– to, to comment on that because it's obviously part of, of the machinery. But so, so the claims against a particular respondent may not – so a claim may not identify a particular respondent or a cause of action and that's consistent with sort of this being, attempting to be laypeople-friendly in terms of and, and encouraging access. And, and so as we understand the Act it's really when matters move towards that more formal litigation if it's adjudication under the Act, for example, that section 37 might no longer apply if it was... But I, I, as I say, on the face of it it's not the easiest provision to, to understand in terms of how that's been applied by, by Justice Duffy, so that's really as far as I can take it.

ELIAS CJ:
Does that conclude the points you want to make Mr Andrews?

MR ANDREWS:
Yes thank you Your Honour.

COURT ADJOURNS: 4.06 PM

COURT RESUMES: 4.20 PM

ELIAS CJ:
Yes Mr Rainey.

MR RAINEY:
Thank you Madam Chief Justice. Just a couple of points in reply. The first deals with my friend for the intervener's submissions regarding the financial assistance package, just two points regarding that. The first is that the amendments that introduced that came after the eligibility criteria were written into the legislation in the form in which they appear in this case. So I don't believe in my respectful submission that the application of the financial assistance really should inform how those provisions are interpreted, although obviously your interpretation will have consequences for the application of that assistance package.

ELIAS CJ:
Well we generally do try to construe statutes as a whole too.

MR RAINEY:
Oh you do but all that I'm saying is that whatever meaning section 14 had before those amendments were introduced, I think it's unlikely that that was changed by the introduction of the financial assistance package which really assumed the existence of the pre-existing statutory wording as a criteria for eligibility.

The second point is just really to explain a little further the role of the decision a Council makes in terms of eligibility for assistance under the financial assistance package. The judicial review proceedings that my friend referred to is in fact a decided case now, a decision of Justice Heath in *Townscape Akoranga Ltd v Auckland Council* [2013] NZHC 2367, and in that case Justice Heath explained that

the Council can, notwithstanding the eligibility criteria in the *Gazette n*otice make a decision not to contribute and it makes that decision based purely on a litigation judgment about whether it would better make contribution or can do better in an adjudicative process and it is free to make that decision.

GLAZEBROOK J:
Is that each individual case is it?

MR RAINEY:
Each individual case. Case by case basis. It makes its decision and if it decides that it will do better at adjudication, not only do you miss out on its 25%, you also miss out on the Crown contribution of 25% because they won't contribute unless the Council also contributes. So it's not quite the be all and end all in terms of resolving these cases unfortunately.

TIPPING J:
Is the Crown's position dictated by the criteria is it?

MR RAINEY:
Yes. So the next point that I wanted to deal with and it really is the nub of this case in my submission. There have been a lot of questions relating to whether "built" is a proxy for completed or finished and whether that's really what "built" is saying. I think that there are a lot of problems with viewing it in that way. Some of which have been explored by the Bench in questions. "Completed" begs the question to what standard and whether the house has all of its flashings, whether the work was ever completed, whether a consent was obtained for it. There are a whole lot of difficult questions and in my respectful submission searching for some magic date where a building goes from being not built to being built, like somebody goes from being in utero to being born, is an exercise in futility because every house will be different, every dwelling will be different, its journey, the process it goes through from start to finish will be different and in my submission section 14(a) isn't looking for that at all. What it's looking for is some act or omission relating to the building work that was necessary for it to be built or altered which occurred within the period of 10 years and if that act or omission is construction or certification, it will still meet the quality of having been built. So in my submission and this really is something that is at the heart of our argument and it's at paragraph 94 of my submissions, where I summarise what our position on what "built" means is, "that a dwelling will meet this

eligibility requirement if there is an act or omission relating to the building work that was necessary to build or alter the dwelling" "within the period of 10 years immediately before the day on which the claim was brought." And we don't run into the problems that Justice Glazebrook rose, raises relating to the cut-off of the 1st of January because if you're within the act or omission occurs earlier you can still meet the eligibility criteria. And in cases where there is a code compliance certificate it will be easy to administer. You just simply look at the date on that certificate and it will be clear.

TIPPING J:
Now, can I just have clear – it doesn't have to be a relevant act or omission on your submission does it?

MR RAINEY:
Well I'm actually content for it to be relevant.

TIPPING J:
All right.

MR RAINEY:
I, I think that your Honour is quite right, when you look at the, the part in parentheses, "or alterations giving rise to the claim", I think you can infer from that that the "building work" should also be construed or the "built" should be construed as giving rise to the claim as well.

TIPPING J:
So you would permit me to add to your 94, "if there is an act or omission", "if there is a relevant act or omission"?

MR RAINEY:
I would permit that Sir.

And of course in cases where there is a code compliance certificate that will be a relevant act or omission, consistent with the, the way in which that is defined in section 393 or 91 of the Building Act composing the long-stop.

TIPPING J:

Is the effect of this argument effectively to translate the Building Act limitation provisions into the Weathertight Homes?

MR RAINEY:

Only to this extent. What it does is it says you will meet the eligibility criteria if there is an arguable case that the 10 year long-stop can be met in relation to some act or omission. But as Justice Glazebrook was pointing out, and this is, I think, an important point, it doesn't mean that you can't raise a long-stop limitation defence in the subsequent adjudication proceedings. You can. And I have in fact acted for parties, respondents in these proceedings, where we had clearly established that the act or omission upon which the claim against them was based took place more than 10 years prior to the claim being lodged with the Tribunal and those parties were successfully removed from the adjudication proceeding. The adjudication carries on in relation to any acts or omissions that are within time against other parties, but there's no difficulty in, in the application of limitation in that way. I think the interpretation I'm urging upon you, in my respectful submission, then synthesises, is consistent with the broad purposes of the Act, as we have discussed. It's also consistent with the function that the eligibility criteria and in particular section 14(a) fulfils within the purpose of the Act to target matters to those claims that the Act is intended to deal with and assist. If there is clearly no act or omission which occurred within 10 years, as I think Justice Glazebrook was the one to point this out, there would be no point in allowing precious taxpayers' resources to be spent further upon investigating that matter, but in my respectful submission that is all section 14(a) is intended to take out.

Unless there are any other questions those are the submissions for the appellants.

ELIAS CJ:

Thank you Mr Rainey.

Thank you counsel. We will take time to consider our decision in this matter. Thank you for your assistance.