

Legal update - Clarifying the law regarding leaky buildings

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Leaky building claims have played a major part in New Zealand's litigation over the last 10 years. Our appellate courts have recently clarified the law regarding:

- Limitation periods
- The measure of damages to be applied
- Contributory negligence.

Aligning the limitation periods under the Building Act 2004 and the Weathertight Homes Resolution Services Act 2006

Eight years on from the enactment of the Weathertight Homes Resolution Services Act 2006 (WHRSA), the Supreme Court has overturned existing jurisprudence to ensure that there is consistency between claims brought under the WHRSA and those brought pursuant to the Building Act 2004.

Section 14(a) of the WHRSA provides that a homeowner may only claim in respect of a dwelling that "was built... within the period of 10 years immediately before the day on which the claim is brought". In *Osborne v Auckland Council* [2014] NZSC 67, Council argued that section 14(a) operated as a separate and more restrictive limitation period than that provided for by section 393 of the Building Act, under which the 10 year period runs from the date of issue of a code compliance certificate.

The Osbornes' house was largely complete by 15 August 1996. Code compliance certificates were issued on 19 February and 18 April 1997. On 14 February 2007, the Osbornes applied under the WHRSA for an assessor's report. Council claimed, and the lower courts agreed, that the Osborne's claim was ineligible under the WHRSA as their house was built more than 10 years prior to 14 February 2007 ("was built" meaning when the house was completed to the extent required by the building consent and not when the code compliance certificates were issued).

Had the Osbornes issued a claim in the High Court under the Building Act in February 2007 instead of electing to invoke the processes and remedies available under the WHRSA, no limitation issue would have arisen as the High Court claim would have been within 10 years of the code compliance certificates having been issued. By the time the Osbornes' claim under the WHRSA was declined, more than 10 years had passed since the issuing of the code compliance certificates, meaning that the Osbornes could not commence a High Court claim, thereby leaving them without a remedy.

The Supreme Court, reversing the decisions of the lower courts, confirmed that section 14(a) of the WHRSA should be appropriately interpreted as being a paraphrase of section 393 of the Building Act. Accordingly, a claim which falls within the long-stop limitation period provided by the Building Act will meet the section 14(a) eligibility criteria.

Having found in favour of the Osbornes on this point, the Court left open the issue of whether the Osbornes' application for an assessor's report stopped the running of time in respect of the limitation provided by section 393 of the Building Act.

Measure of damages to be applied and contributory negligence

The Court of Appeal judgment in *Johnson v Auckland Council* [2013] NZCA 662 was delivered late last year. The decision provides helpful judicial precedent on the proper measure of damages to be applied in leaky building cases and on the extent that damages may be reduced where there has been contributory negligence by the homeowner.

In leaky building cases, the Courts have generally applied the contractual measure of damages (being the cost of repairs) as the default position. However, the High Court decision in *Johnson* reversed that approach and signalled a return to a focus on the fundamental principles of damages. Subsequently, the Court of Appeal has reconfirmed that the contractual measure of damages will normally be applied in leaky building cases.

The High Court decision also provided a precedent, where leaky home owners, who failed to protect their own interests, could end up being responsible for the majority of damages as a result of a finding of contributory

negligence. The Court of Appeal weakened the effect of that decision by reducing the discount for contributory negligence based on the facts of the case from 70% to 40%.

Proper measure of damages

In the High Court, Woodhouse J held that the normal measure of damages in a leaky building claim based in tort should be the tortious measure of damages, known as the diminution in value. This is the difference in value between the cost of the house at the time of purchase and the value of the house in its defective state at the time of purchase.

Woodhouse J clarified his departure from the previous authorities on this point by explaining that in a number of cases it was not necessary for the Court to give any consideration to the correct measure of damages simply because it was not in issue. He went on to say that "the weight of numbers of cases where a particular measure has been applied does not assist on questions of principle if principle has not been considered in any of the cases". Indeed, Johnson is one of the first leaky building cases where the Court has examined, in detail, the issue of the measure of damages.

On appeal, the Court of Appeal preferred to adopt a more flexible and pragmatic approach to the measure of damages; it found that the authorities support the proposition that in these types of cases the measure of loss will be "the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if not".

The Court considered that Woodhouse J had wrongly relied on the recent Supreme Court decision in *Marlborough District Council v Altimarloch Joint Venture* as a precedent. The Court held that Altimarloch was not the correct authority as it dealt specifically with negligent misstatements.

The Court stated that the assessment is a factual one and that it is "necessary to do fairness between the parties". On that basis, the Court of Appeal held that it would not be fair to measure the loss in this case on the basis of diminution in value. There were a number of factors that supported a cost of repair approach, including: that the Johnsons could not have lived in the house for any length of time in its unrepaired state; that the house was bought as a family home after a long search by the Johnsons to find a suitable home; and that there was not a great deal of difference in any event between the two measures of loss.

The Court of Appeal did not address Woodhouse J's primary point that the principle behind the measure of damages in tort and contract is different because the nature of the wrong to the plaintiff is different. Nonetheless, the Court of Appeal has adopted a practical approach to the measure of damages in leaky building cases and established that the contractual measure of damages is the "normal measure" to be applied.

Contributory negligence

In the High Court, Woodhouse J, after examining the evidence, found that the plaintiffs had willingly taken a risk and that they were indifferent as to that risk. He found that "the plaintiffs were in substantial measure the authors of their own misfortune". Based on the homeowners' high level of fault Woodhouse J held that it was appropriate to reduce the damages otherwise recoverable by 70%.

A reduction at that level contrasts with several previous cases where the Courts have only reduced the damages otherwise recoverable by relatively low amounts despite a high level of fault on the homeowner's part.

On appeal, the Court of Appeal found that Woodhouse J had made errors in his factual findings. In particular, the Judge had made an assumption that the code compliance certificate did not apply to the re-clad of the property, when in fact, it did. Further, the Court found that the Judge should not have drawn the inference that the Johnson's lawyer must have advised them to obtain a building report before purchasing the property. As a result, the Court considered it was necessary to look at the matter afresh. This was because some aspects, on which the Judge relied, had no "causal potency".

After examining the evidence the Court of Appeal agreed with Woodhouse J's finding that there was causative negligence on the part of the Johnsons. The Court was satisfied that Mr and Mrs Johnson were alert to the risks and that while the Johnsons were not certain that this was a leaky home, they were aware that it was a possibility and chose to gamble against that possibility. The Court of Appeal concluded that while the fault of the plaintiffs was high, a reduction of 40% was more appropriate in the circumstances.

Conclusion

This decision will see a hasty return to the default position that the contractual measure of damages will normally be applied in leaky building cases. It also provides an indication that even where the homeowner's contributory negligence is high, the parties involved in the construction of the house are still likely to bear the majority of the responsibility for damages.

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