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Tidying up loose ends

Stopped clock provisions come under scrutiny again.

THERE IS MUCH SCOPE FOR THE DEVELOPMENT OF THE LAW IN THIS AREA.

At the end of 2016, the Supreme Court in *Lee v Whangarei District Council* [2016] 1 NZLR 401 held that homeowners who had applied for assessors' reports stopped the clock running for limitation purposes, not just for proceedings in the Weathertight Homes Tribunal but also for actions commenced in the courts.

The Supreme Court's judgment left open the question of whether defendants (such as councils), involved in court proceedings with a homeowner who had a valid assessor's report, could take advantage of the same "stopped clock" to join other parties to claims.

Since *Lee* was decided we have advocated that councils can rely upon the same provision to join parties, citing *Kells v Auckland City Council* HC Auckland CIV 2008-404-1812, 30 May 2008.

We are pleased to advise that the High Court agreed with our assessment in a recent case *Heaney & Bates v Auckland Council* [2018] NZHC 2738.

The homeowners in *Heaney & Bates* sued only the council – yet there were a number of other parties involved in the design and building work. Auckland Council (the council) joined a number of parties to the claim relying on *Lee*.

In *Lee* the dispute was between the homeowner and the council. In *Heaney & Bates* the issue for determination was whether claims for contribution between the council and other design and build parties could survive, when they had been brought more than 10 years after the work had been done but where the homeowner had applied for an assessor's report, within that ten-year period.

The builder brought an application to have the claim against it struck out, based on limitation. The High Court dismissed the builder's application.

At the heart of *Heaney & Bates* was the interpretation of s 37(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) in light of the purpose of the legislation as articulated in *Lee*.

One of the key purposes of the Act is the promotion of speedy, flexible and cost-effective procedures for the assessment and resolution of claims (Section 3 of the Act). The Supreme Court stressed that this included avoiding narrow and arbitrary legal technicalities that might inhibit the resolution of claims.

The High Court emphasised that the joining of additional parties, whether by the homeowners or the council, can be very much to the benefit of the homeowner in the resolution of their claim. It is always helpful to have everyone around the table when liability is being carved up.

We anticipate that there are some other loose ends from *Lee* that will need to be tidied up by the judiciary at some stage. One issue that is brewing is the scenario of a residential building that has a mixture of weathertight and non-weathertight defects and an assessor's report that stops the clock for the weathertightness defects.

Can the homeowner use the "stopped clock" weathertightness defects to piggyback ordinarily time-barred non-weathertightness defects into a court claim? They would not be able to bring such a claim in the Weathertight Homes Tribunal as its jurisdiction is limited to claims for water ingress but claims with a mixture of defects are possible in the courts.

We also anticipate that there will be applications made by those involved in the design and construction of very old leaky houses seeking to argue that the homeowners' delay bars them from bringing a claim in the courts.

There continues to be uncertainty in light of *Lee* and there is much scope for the development of the law in this area. Watch this space. **LG**