

## **UNDERMINING THE TEN-YEAR LONGSTOP**

It is trite to say that the way in which time curtails the causes of action available to a claimant in respect of discovered defects in building construction has given rise to much litigation and the utilisation of much judicial resource over the years.

The six-year period set out in s4 Limitation Act 1950, within which a cause of action in tort and contract must be brought, has seen the evolution of the concept of reasonable discoverability as a means to extend the time limit, and at the forefront of the evolution of such concepts have been building cases both here and overseas.

In an effort to recreate some certainty for participants in the building and construction industry, s91 of the Building Act 1991 introduced the so-called "longstop" which effectively requires claimants to commence their causes of actions within ten years of the construction.

The Weathertight Homes Resolution Services Act 2002 undermines the ten-year longstop.

Under the WHRS Act, the home owner/claimant will be eligible to make an application to the Weathertight Homes Resolution Service if the dwelling house was built, or underwent alterations giving rise to any claim within the period of ten years immediately preceding the date of the application. Documentary evidence of the date must be supplied. There is no fee to apply, provided it appears that the claim meets, or is capable of meeting, the eligibility criteria set out in the WHRS Act 2002. The Service then provides a free assessment report.

Section 55 WHRS Act states:

For the purposes of the Limitation Act 1950, and any other provision that imposes a limitation period, the making of an application under section 9(1) is deemed to be the filing of proceedings in a Court.

According to the government website, [www.weathertightness.govt.nz](http://www.weathertightness.govt.nz), it is not possible to say how long it will take to have a claim resolved. The Service has a substantial backlog of applications to be processed. There is a limited pool of qualified assessors; the current team of 44 faces of heavy workload.

If it appears that the claim is, or is capable of being, eligible a case manager and a claim number will be allocated. The case manager will arrange for an assessor to inspect the home. The time required to do an assessment varies depending on factors like the size of the property, its location, and the extent of the damage. The assessor prepares a written report.

The issue for the prospective defendant builders, architects, engineers and sub-trades (and their insurers) is: when do we get notified of the claim? Although the application takes effect as if it were the filing of a proceeding in a Court for the purposes of the Limitation Act, the parties who may be responsible for any damages to be sought are not at that stage made aware of the claim. The absence of lawyers in the process may see an absence of the "hold liable" correspondence one would expect in litigation.

Once the assessor's report has been completed and a copy given to the claimant, the claimant has ten working days to make a submission on it. The report and any submissions are then sent to the WHRS evaluation panel and a decision is made as to whether the claim is eligible. This process, too, quite understandable, take time. Once evaluated and the eligibility of the claim determined, the claimant may decide to move into the voluntary mediation process or opt for compulsory adjudication.

As part of the claimant's submissions on the report, the claimant may ask for further parties to be included in the claim. This adds to the duration of the process. The parties against whom the claim is to be made are only notified of their involvement once the assessor's report has been critiqued by the claimant, assessed by the evaluation panel and a decision made by the claimant as to the next phase of the process.

Furthermore, a claimant may transfer from the WHRS processes into litigation at any stage with the filing of the WHRS application, having preserved the causes of action available at law (in terms of the time bar).

All of this poses difficulties for anyone involved in construction and for insurers assessing the residual risk attaching to a project after the ten years since construction/works has elapsed. It may not be safe to assume that the risk has passed. (The disposal of documents is but one practical issue for industry participants.) the timetable created by the WHRS Act means that the ten-year period is no longer the longstop. There needs to be an additional and uncertain time period allowed in which the WHRS assessor's report may be completed, evaluated by the WHRS evaluation panel, and then considered and acted upon by the claimant. As with litigation (see *Cromwell Plumbing Drainage and Services Ltd v De Geest Brothers Construction Ltd* (1995) 9 PRNZ 218), there is then the possibility of bringing other parties into the claim by seeking contribution as a third party.

Thus the otherwise laudable provisions of the WHRS Act to subvert the certainty provided to those in the building and construction sector by the Building Act's longstop with the effect that those advising that sector should, at the very least, advise their clients to hold on to their documents for a bit longer yet.

Affected persons, whether homeowner, builder, architect, engineer, developer, should contact [Rob Coltman](#)

For more government information see: [www.weathertightness.govt.nz](http://www.weathertightness.govt.nz)