IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002481
[2015] NZHC 2098

BETWEEN	AUCKLAND COUNCIL First Plaintiff
AND	JAMES HARDIE NEW ZEALAND Second Plaintiff
AND	WEATHERTIGHT HOMES TRIBUNAL First Defendant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Second Defendant
AND	BODY CORPORATE 19500 Third Defendant
AND	GEFEI LIANG & OTHERS Fourth Defendants

Hearing:	11 - 12 February 2015
Appearances:	S C Price, J K Wilson & N Fong for First Plaintiff H J H Glennie & C M M Herbert for Second Plaintiff No appearance by or for First Defendant J Foster & M G Conway for Second Defendants T J Rainey & J P Wood for Third & Fourth Defendants
Judgment:	1 September 2015

JUDGMENT OF KEANE J

This judgment was delivered by me on 1 September 2015 at 3pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Minter Ellison Rudd Watts, Auckland
Chapman Tripp, Auckland
Crown Law, Wellington
Rainey Law, Auckland

[1] Oteha Valley Estate is an 18 unit residential complex at John Jennings Drive, Albany, which was built between 1998 – 2000. It comprises nine separate two unit dwellings, each standing two storeys high. Defects in the design and construction have resulted in water ingress and damage. The present cost of repair is $2.84M.

[2] The issue on this judicial review is whether 15 of the 18 owners of the units are time barred from pursuing a multi-unit complex claim they brought as a body corporate on 9 November 2012, under the Weathertight Homes Resolution Services Act 2006.

[3] The code compliance certificate for the complex was issued on 3 May 2000 and thus the 10 year long stop period applying to any civil claim relating to the complex, imposed by the Building Act 2004, required that any claim be brought by 3 May 2010.[1] That 10 year period also governs the eligibility of multi-unit claims under the 2006 Act.[2]

[4] There had been 15 prior individual claims under the Weathertight Homes Resolution Services Act 2002. But five had been extinguished on sale of units, three had been withdrawn, and one deemed ineligible under the 2002 Act. Two owners had never claimed. As at 9 November 2012, only three extant 2002 Act claims remained. Two were terminated that day in order to join the new claim. The third remained an individual claim.

[5] If this multi-unit complex claim had been brought between 1 April 2007, the transition date on which the 2006 Act came into force, and 3 May 2010, the end of the long stop period, there could be no issue, on the submissions I received, as to its validity. None of the claimants would have been time barred and there was no suggestion that those owners whose units had been subject to extinguished or withdrawn 2002 Act claims were barred on that account. The sole issue was whether they were time barred.

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1 Building Act 2004, s 393; Building Act 1991, s 91(2).
2 Weathertight Homes Resolution Services Act 2006, s 16.

[6] The issue therefore, as at 9 April 2012, was whether the 15 owners, otherwise time barred, were entitled, like those with extant 2002 Act claims, which had been neither mediated nor adjudicated, to rely on s 141 of the 2006 Act. It allows those with such extant 2002 Act claims to be part of or to join in a new multi-unit complex claim on the deemed basis that their new claim was brought on the date they brought their 2002 Act claim.

[7] On 13 December 2012 the Chief Executive of the Ministry of Business Innovation and Employment, acting by a delegate, a senior eligibility adviser, held that the new claim was eligible for resolution under the 2006 Act on that deemed basis. The Chief Executive deemed the new claim to have been brought, not on 9 November 2012, but on 24 December 2003, the date of the earlier of the two 2002 Act claims withdrawn when the multi-unit claim was lodged.

[8] On 13 December 2014, in a procedural ruling, the Tribunal agreed with that administrative decision and declined the Auckland City's application to have removed from the multi-unit complex claim, then for adjudication, the 15 owners who were time barred unless able to rely on s 141.

[9] On this review the Council contends that s 141 only benefits those claimants able to invoke it directly. It is a transitional provision to preserve existing eligible claims. It cannot confer new substantive rights or, retrospectively, deny the Council or any other possible respondent of an accrued limitation defence. That is the primary issue on this review.

[10] There are two preliminary issues, the first of which is whether the Council was entitled, before the Tribunal, to seek an order removing the 15 owners affected from the claim then eligible to be adjudicated. The body corporate contends that this amounts to a collateral challenge to the Chief Executive's eligibility decision. I will deal with that issue first in order.

[11] The other preliminary issue, which is more immediate, is whether James Hardie New Zealand should be joined, as it applies to be, as a second plaintiff. Joinder is not opposed by the Council or by the Chief Executive. It is opposed by

the body corporate and the individual unit holders. Despite that I heard submissions from JHNZ and, having done so, must now confirm its formal status.

[12] I consider it right to join JHNZ as a second plaintiff. Its submission supported that of the Council, and did not enlarge the scope of the hearing. It was independently helpful. Furthermore, if I uphold the two decisions under review, it will be a prime target before the Tribunal. It should have corresponding standing on this review.

Eligibility and limitation issue

[13] I do not consider that there is any merit in the body corporate's first argument, the effect of which is that the Tribunal lacked jurisdiction to remove the 15 owners, who were potentially time barred, because the Chief Executive had already decided their eligibility by holding that the claim as a whole was eligible for resolution.

[14] The first phase of any claim under the 2006 Act is administrative. To initiate a claim the owner of a dwellinghouse must apply to the Chief Executive for an assessor's report;[3] and, in the case of a claim made on behalf of the owners of dwellinghouses in a multi-unit complex, that claim is initiated under s 19 and requires that the owners of at least 75 per cent of the dwellings concur.[4]

[15] Once a report is to hand the Chief Executive has then to assess whether the claim made meets the eligibility criteria.[5] In the case of a multi-unit complex claim, the criteria applying are set out in s 16:[6]

> The criteria are that the claimant is the representative of the owners of the dwellinghouses in the multi-unit complex to which the claim relates; and –
>
> (a) The complex was built (or alterations giving rise to the claim were made to it) before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought; and

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3 Weathertight Homes Resolution Services Act 2006, ss 9, 32(1).
4 Section 19.
5 Sections 10, 48(1).
6 See also s 13.

(b) Water has penetrated the complex because of some aspect of its design, construction, or alteration, or of materials used in its construction or alternation; and

(c) The penetration of water has caused damage to the complex.

[16] In the decision the Chief Executive then took on 18 December 2012 to deem the application to have been made on 24 December 2003 instead of 9 November 2012, the Chief Executive invoked s 141 administratively, without saying so explicitly and without giving any reason why.

[17] As a result the body corporate became entitled to apply for adjudication to the Tribunal, as it did on 23 January 2014, by bringing a representative claim against the Council. The Tribunal then became obliged under s 72 to determine liability as between claimant and respondent, and as between any respondents; and under s 73, became entitled to deploy wide semi-inquisitorial powers.

[18] More pertinently still, the Tribunal had immediate power to terminate the proceedings if it considered they should not have been commenced,[7] to consolidate proceedings,[8] to join parties,[9] and to remove them.[10] That final power was the one the Tribunal was entitled to invoke in this case. Section 112(1) says:

> The Tribunal may, on the application of any party or on its own initiate, order that a person be struck out as a party to adjudication proceedings if the Tribunal considers it fair and appropriate in all the circumstances to do so.

[19] There is only one apparent explicit constraint on the exercise of that power. Under s 57(2) the Tribunal must comply with the principles of natural justice, as to which there is no issue on this review. Otherwise s 112 conferred on the Tribunal a general discretion.

[20] The fact that the Chief Executive had decided that the claim was eligible, on the basis of the assessor's report, a screening decision taken administratively, could not constrain the Tribunal, under s 112, from removing any party if it thought that to

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7 Section 109.
8 Section 110.
9 Section111.
10 Section 112.

be fair and appropriate, especially if there were any issue as to whether that party was time barred under s 37, to which I will come shortly.

[21] On this application that issue was of the first importance. It went not just to the scale and scope of the application. It went to its legitimacy. In issue was whether the claim was brought by 18 eligible owners or three. And if it were the latter, the claim failed the 75 per cent concurrence requirement. That had to be decided by the Tribunal.

Tribunal decision

[22] In issue before the Tribunal, and the primary issue on this review, was whether the 15 owners who joined in the 9 November 2012 application, without the benefit of an extant 2002 Act claim, were time barred as a result of s 393 of the Building Act 2004.

[23] Section 37 of the 2006 Act, which is entitled "Application of Limitation Act 2010 to Applications for Assessor's Report, etc" says this:

> For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under s 32(1) has effect as it were the filing of proceedings in a Court.

[24] As is apparent from s 37, the Limitation Act 2010 is not the only source of limitation periods applying to the applications made under the 2006 Act. Limitation periods imposed by other enactments, like s 393 of the Building Act 2004, also apply

[25] Section 37, furthermore, confirms that such limitation periods are to be calculated on the premise that the application for an assessor's report is the equivalent of a civil filing; and in this case, manifestly, the date on which the present claim was filed, 9 November 2012, was well beyond the date on which the 10 year long stop period concluded, 3 May 2010.

[26] Section 37(1) is not absolute. Section 37(2) makes s 37(1) subject to s 141 and a number of other sections not in issue, and thus what the Tribunal member had to resolve was whether, despite s 37(1), s 141 gave the 15 possibly time barred

owners the benefit of the deemed earlier claim date. In holding that s 141 had that effect the Tribunal said this in paras [43] – [45] of its decision:

> … The clear intention of the 2006 Act is to encourage a whole of complex approach when dealing with claims for multi-unit complexes. A claim under s 19 is considered to be one claim, not a series of separate claims. It would not be either consistent with the wording of s [141] or within the purposes of the Act to confine the words "new claim" in s 141(4) to the only part of the new claim that related to Unit Q.
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> Therefore I conclude that all of the unit holders that form part of the representative claim filed pursuant to s 19 of the Act are protected by the provisions of s 141(4). In other words the joint effect of ss 141 and 37 is that the date the owners of Unit Q filed their claim under the 2002 Act is the date that stops the clock running for limitation purposes for the representative multi-unit claim filed under the 2006 Act.
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> Applying the whole of complex approach, the effect of s 141 is that the date deemed for the whole of the new claim (because the claimants argue representative claims are applied for in solidum) is 24 December 2003, being the date Unit Q applied for its assessment under the 2002 Act.

Principles of interpretation

[27] In assessing for myself what purpose s 141 serves and with what effect I begin, as I must, under s 5(1) of the Interpretation Act 1991, with the text of s 141, set against the light of its purpose, alive to the policy of the 2006 Act and its history.[11]

[28] Secondly, I must take into account that, as s 4(i) of the 2006 Act confirms, s 141 is a transitional provision lying amongst those prescribing how 2002 Act claims, extant at the transition date, are to be resolved under Part 1 of the 2006 Act. As Lord Keith said in *R v Secretary of State for Social Security,* such provisions "facilitate … change from one statutory regime to another" and do not ordinarily authorise "innovation by widening the ambit of the substantive legislation".[12]

[29] Thirdly, I must be conscious that s 7 of the Interpretation Act 1999 declares that "an enactment does not have retrospective effect". A statute is retrospective, the

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[11] *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] 3 NZLR 767 at [22] – [24]; *Osborne v Auckland Council & Weathertight Homes Tribunal* [2014] 1 NZLR 766 (SC).

[12] *R v Secretary of State for Social Security* [1991] 1 WLR 198 at 202.

Court of Appeal has held, "if it takes away or impairs a vested right acquired under existing law".[13] An accrued limitation defence is a "substantive right":[14]

> An accrued right to plead a time bar, which is acquired after the lapse of a statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable.

[30] It follows that where there are two competing interpretations of equal weight the s 7 presumption is to apply.[15] But, as the Court of Appeal said in *Prouse v Commissioner of Inland Revenue* "the ultimate question is one of the construction of the statute."[16] I must be conscious, furthermore, that there are cases in which limitation has not been the decisive consideration under the 2006 Act.[17]

[31] Finally, while I must be conscious that the Tribunal itself has held that s 141 has the more limited effect that the Council contends for,[18] that is the issue that I must resolve for myself.

Section 141

[32] Section 141 lies under Part 2 of the 2006 Act, which governs "repeal, consequential amendments, and transitional provisions". It lies within the transitional provisions in subparts 2 – 6, governing "claims under former Act that are not disposed of before transition date". The claims in that category, as s 128 defines them, are those:

> claims under the former Act that, before the transition date, are not withdrawn, terminated, or otherwise disposed of (for example, through resolution by a settlement agreement, or by an adjudicator's determination).

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13 *The Board of Management of the Bank of New Zealand Officers' Provident Association v McDonald* CA244/01, 23 April 2002 at [30].

14 *Yew Bond Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC).

15 *Kumandan v Real Estate Agents Authority* [2012] NZHC 3555 at [60], [61].

16 *Prouse v Commissioner of Inland Revenue* CA239/93, 20 June 1994; (1994) 16 NZTC 11,249; (1994) 18 TRNZ 828.

17 *Kels v Auckland City Council* HC Auckland CIV-2008-404-1812, 30 May 2008; *Auckland City Council v Chief Executive MBIE* [2013] NZHC 912; *Body Corporate 85978 v Wellington City Council* [2013] NZHC 2852.

18 *Body Corporate 180379 v Auckland Council* HC Auckland TRI-2011-100-015, Procedural Order 6, at [10] – [11].

[33] Section 141 itself lies within subpart 4, which governs claims under the 2002 Act, which had been held to be eligible, but were not "in mediation or adjudication, before transition date"; the claims defined more exactly in s 134.

[34] Under subpart 4 a claimant with a s 134 claim has a choice. That claimant can under s 138 apply to have that individual claim adjudicated by the Tribunal; and then, under s 138(2) the Tribunal must consolidate it with others from the multi-unit complex, unless that is inappropriate. One of the three extant claims on 9 November 2012 application lies within that category.

[35] Section 141 allows a qualifying claimant to choose instead, as two claimants did here, to be part of or join in a "new claim in respect of same dwellinghouse, etc, in multi-unit unit complex"; and s 141 says this:

> The claim may, if it relates to a dwellinghouse, common areas, or both, in a multi-unit complex, be withdrawn, at the claimant's discretion and without complying with section 67, for the purpose only of enabling the claimant, as soon as is practicable, to be part of, or to join, a new claim brought in respect of the dwellinghouse, common areas, or both under section 19, 20 or 21.

[36] Section 141(1) grants to such a claimant a discretion to withdraw their extant 2002 Act claim "without complying with s 67 for the purpose only of enabling the complainant, as soon as is practicable, to be part of or to join" a new claim. It is clear equally what that the "new claim" is. It is "a new claim brought in respect of the dwellinghouse, common areas, or both under section 19, 20 or 21". In the case of a s 19 claim, moreover, the owners of at least 75 per cent of the dwellinghouses in the complex must concur. That is inherent.

[37] Section 141(1) does not itself answer the further question whether that "new claim" must be independently eligible under s 16 and thus brought within time, according to s 37, not just globally but as to each of the owners who concur in the claim. In this case that is obviously significant. If the Council is right, 75 per cent of the owners are time barred and incapable of concurring.

[38] Section 141(2), however, begins to spell that out. It says, "If the claimant is part of, or joins, a new claim of the kind referred to in subsection (1), Part 1 applies to the new claim." Of itself, s 141(2) may appear to serve no purpose. A claim

brought under s 19 lies within Part 1 anyway. But s 141(2) does not stand alone. Section 141(3) says "Subsection (2) is subject to subsections (4) and (5)" and s 141(4) is explicit as to the relationship between the withdrawn claim and the new claim as to the limitation. It says this:

> If, within 1 year after the claim is withdrawn to enable a new claim of the kind referred to in subsection (1) to be brought, a claim of that kind is brought, section 37 applies to the new claim as if it were brought when the claim was brought.

[39] Section 141(4), I consider, is plain on its face. It deems the new claim to have been brought on the date on which the withdrawn claim was commenced. Moreover, s 141(5) may widen the class of claimants able to invoke s 141 when it says, despite s 128, that s 141(4) applies "whether the claim concerned was withdrawn before, on or after the transition date."

[40] Section 141(6) is less easy to understand, when it says "This section overrides section 135, and does not limit the application to the claim of section 67." Section 135 prescribes how Part 1 is to apply to subpart 4 claims, but may more naturally govern those claims which s 138 recognises may still be pursued individually.

[41] Section 141 was introduced, after the Select Committee report, which says nothing about it, as a result of a supplementary order paper. [19] Be that as it may, subs (6) it does not detract from my interpretation of s 141(4).

Conclusions

[42] The effect of s 141, as I find it to be, is consistent with the purposes of the 2006 Act, as defined in s 3, to provide "access to speedy, flexible and cost-effective procedures for the assessment and resolution of claims" and to provide a measure of "financial assistance … to facilitate repair". It is consistent equally with the whole of complex approach inherent in the Act, which has proved decisive in other cases where limitation has been in issue.

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[19] House of Representatives Supplementary Order Paper No 83, 7 December 2006.

[43] I see no reason, furthermore, to question what I consider to be the plain effect of s 141 because it is a transitional provision. It is intended to enable those with extant eligible claims under the 2002 Act to have the advantages of the 2006 Act; advantages that would be denied those in multi-unit complexes if other owners were denied the ability to claim. Those other owners may benefit by ceasing to be time barred, but that windfall is justified by the policy of the 2006 Act.

[44] Section 141 itself, furthermore, requires any multi-unit complex claim to be brought within one year of an extant 2002 Act claim being withdrawn. That limitation ensures that any prejudice to respondents, already on notice as a result of the extant claim, will not be undue. Ultimately, however, the language of s 141 itself has to be decisive.

[45] I decline therefore the Council's application for review, now joined by JHNZ by leave. On the principle that costs follow the event, the Chief Executive, and the body corporate and related owners, are entitled to awards of costs, and disbursements as fixed.

[46] If the awards to be made cannot be agreed with the Registrar, counsel for those I have held to be entitled to an award are to file and serve memoranda within 15 working days of the date of this decision, and those liable to meet those awards are to file and serve any reply within the succeeding 10 working days.

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P.J. Keane J